

**United Nations  
Commission on  
International  
Trade Law**

**YEARBOOK**

Volume VII: 1976



**UNITED NATIONS**  
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# NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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## INTRODUCTION

This is the seventh volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup>

The present volume consists of three parts. Part One completes the presentation of documents relating to the Commission's report on the work of its eighth session, such as that concerning action by the General Assembly, which was not available when the manuscript of the sixth volume was prepared. Part One also includes the Commission's report on the work of its ninth session, held in New York from 12 April to 7 May 1976.

Part Two reproduces documents considered by the Commission at its ninth session.

Part Three contains a bibliography of recent writings related to the Commission's work, prepared by the Secretariat, and a check list of UNCITRAL documents.

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<sup>1</sup> The volumes published to date are referred to respectively as follows: *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as UNCITRAL Yearbook), *Volume I: 1968-1970* (United Nations publication, Sales No. E.71.V.1); *Volume II: 1971* (United Nations publication, Sales No. E.72.V.4); *Volume III: 1972* (United Nations publication, Sales No. E.73.V.6); *Volume IV: 1973* (United Nations publication, Sales No. E.74.V.3); *Volume V: 1974* (United Nations publication, Sales No. E.75.V.2) and *Volume VI: 1975* (United Nations publication, Sales No. E.76.V.5).

## I. THE EIGHTH SESSION (1975); COMMENTS AND ACTION WITH RESPECT TO THE COMMISSION'S REPORT

A. United Nations Conference on Trade and Development (UNCTAD):  
extract from the report of the Trade and Development Board (10  
March-2 October 1975)\*

F. *Progressive development of the law of international trade: eighth annual report  
of the United Nations Commission on International Trade Law*

226. At its 438th meeting, on 12 August 1975, the Board took note with  
appreciation of the report of the United Nations Commission on International  
Trade Law (UNCITRAL) on the work of its eighth session.<sup>87</sup>

\* Official Records of the General Assembly, Thirtieth Session, Supplement No. 15  
(A/10015/Rev.1).

<sup>87</sup> Official Records of the General Assembly, Thirtieth Session, Supplement No. 17  
(A/10017).

### B. General Assembly: report of the Sixth Committee (A/10420)\*

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#### I. INTRODUCTION

1. At its 2353rd plenary meeting, on 19 September  
1975, the General Assembly decided to include the  
item entitled "Report of the United Nations Commis-  
sion on International Trade Law on the work of its  
eighth session"<sup>1</sup> in the agenda of its thirtieth session  
and allocated it to the Sixth Committee for considera-  
tion and report.

2. The Sixth Committee considered this item at its  
1527th and 1529th to 1533rd meetings, from 30 Sep-

tember to 7 October, and at its 1574th and 1575th  
meetings, on 25 and 26 November 1975.

3. At the 1527th meeting, on 30 September,  
Mr. Roland Loewe (Austria), Chairman of the United  
Nations Commission on International Trade Law  
(UNCITRAL) at its eighth session, introduced the re-  
port of UNCITRAL on the work of that session (A/  
10017).<sup>2</sup> The Sixth Committee also had before it a

\* 12 December 1975. *Official Records of the General As-  
sembly, Thirtieth Session, Annexes*, agenda item 110.

<sup>1</sup> *Official Records of the General Assembly, Thirtieth Session,  
Supplement No. 17 (A/10017); UNCITRAL Yearbook, Vol. VI:  
1975, part one, II, A.*

<sup>2</sup> This presentation was pursuant to a decision by the Sixth  
Committee at its 1096th meeting, on 13 December 1968 (see:  
*Official Records of the General Assembly, Twenty-third Ses-  
sion, Annexes*, agenda item 88, document A/7408, para. 3).  
At its 1527th meeting, the Sixth Committee decided, after being  
advised of the financial implications by its Secretary, to have  
reproduced in extenso this statement by the Chairman of the

note by the Secretary-General (A/C.6/L.1016), setting forth the comments on the report of UNCITRAL by the Trade and Development Board of the United Nations Conference on Trade and Development.

4. At the 1575th meeting, on 26 November, the Rapporteur of the Sixth Committee raised the question whether the Committee wished to include in its report to the General Assembly on this item a summary of the main trends that emerged during the debate on the report of UNCITRAL. After referring to General Assembly resolution 2292 (XXII) of 8 December 1967 concerning publications and documentation of the United Nations, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Sixth Committee decided that, in view of the nature of the subject-matter, the report on agenda item 110 should include a summary of the main trends of opinion that were expressed during the debate.

## II. PROPOSAL

5. At the 1574th meeting, on 25 November, the representative of Egypt introduced a draft resolution (A/C.6/L.1021) on behalf of Afghanistan, Algeria, Argentina, Bulgaria, Czechoslovakia, Dahomey, Democratic Yemen, Egypt, Gabon, Greece, Guyana, Hungary, India, Iran, Jordan, Lesotho, Mali, Mexico, the Philippines, Romania, Senegal, the Syrian Arab Republic, Yugoslavia and Zaire, later joined by Ghana and Nigeria (for the text, see para. 44 below).

## III. DEBATE

6. The main trends of opinion expressed in the Sixth Committee on the report of UNCITRAL on the work of its eighth session are summarized in sections A to J below. Sections A and B deal with general observations on the role and functions of UNCITRAL and on its working methods. The succeeding sections are concerned with the specific topics discussed at the eighth session of UNCITRAL and are set out under the following headings: international sale of goods (sect. C), international payments (sect. D), international legislation on shipping (sect. E), international commercial arbitration (sect. F), multinational enterprises (sect. G), liability for damage caused by products intended for or involved in international trade (sect. H), training and assistance in the field of international trade law (sect. I) and future work (sect. J).

### A. General observations

7. Many representatives stressed the importance of the work of UNCITRAL, since the unification, harmonization and progressive development of international trade law would serve to promote the development of equitable commercial and economic relations between developing and developed countries and between countries with different social and economic systems. Several representatives noted that the establishment of uniform rules and practices for international trade that were universally acceptable and the removal

of obstacles of a legal nature were certain to contribute to the growth of international trade.

8. Most representatives commended UNCITRAL and its Working Groups on the progress of their work since the seventh session of UNCITRAL. It was generally observed that the work of drafting new uniform rules, which were to be applicable world-wide, entailed great technical complexity since full account had to be taken of the different social, economic and legal systems of the world and of existing international trade practices.

9. Representatives of developing countries stated that it was essential that UNCITRAL continue to promote international trade through the development of uniform laws that reflect the need of those countries for a fair and equitable share in the benefits of such trade. Several representatives noted that UNCITRAL in its future work should take account of the General Assembly resolutions regarding the establishment of a new economic order.

### B. Working methods of the United Nations Commission on International Trade Law

10. Most representatives commented favourably on the flexible working methods utilized by UNCITRAL since its inception. It was urged to continue its fruitful collaboration with other United Nations bodies, as well as intergovernmental organizations and international and regional non-governmental organizations which were engaged in work on topics of concern to UNCITRAL. Specific reference was made to the background studies and drafts prepared by the Secretariat of UNCITRAL, in consultation with interested international organizations and commercial institutions wherever appropriate, and to the use of Working Groups in which the expertise of representatives on UNCITRAL was effectively utilized.

11. With regard to the programme of work of UNCITRAL, many representatives expressed their support for the order of priorities and the target dates for the completion of work on specific subjects that had been set by UNCITRAL.

12. Several representatives expressed agreement with the procedure of UNCITRAL to transmit draft legal texts prepared by its Working Groups to Governments and to interested international organizations for comments, prior to the time UNCITRAL considered such texts. It was stressed that this procedure ensured that the uniform rules approved by UNCITRAL would find wide acceptance.

13. Several representatives expressed their support for the practice of UNCITRAL and its Working Groups to proceed by consensus. It was stated that the process of reaching decisions by consensus ensured that the uniform laws derived from the work of UNCITRAL would be acceptable to all States.

14. There was general agreement that it was the task of UNCITRAL to review periodically its work programme and to establish its own working methods.

### C. International sale of goods

15. Representatives stressed the importance of unified rules governing the international sale of goods and

expressed their satisfaction with the progress achieved by the Working Group on the International Sale of Goods in revising the Uniform Law on the International Sale of Goods (ULIS) annexed to the Hague Convention of 1964. There was general approval of the decision by the Working Group to structure the revised ULIS in the form of a draft convention on the international sale of goods rather than a uniform law annexed to a convention, in order to minimize possible reservations.

16. It was noted that, upon completion of its work on the draft convention on the international sale of goods, the Working Group would commence consideration of uniform rules on the formation and validity of contracts for the international sale of goods. Most representatives suggested that the Working Group should draft a separate convention on the formation and validity of international sales contracts rather than expand the scope of the draft convention on the international sale of goods to cover these matters. Some representatives expressed the view that adoption of the convention on the international sale of goods and of the convention on the formation and validity of contracts for the international sale of goods should be considered by the same conference of plenipotentiaries.

17. Most representatives who spoke on the subject approved the decision of UNCITRAL to establish a study group to explore the practical need for developing general conditions of sale and standard contracts applicable to a wide range of commodities. Some representatives noted their reservations regarding the utility of continued work by UNCITRAL in this area.

18. Several representatives stressed the necessity of ascertaining that the various international conventions and general conditions of sale being developed by UNCITRAL in the field of the international sale of goods were fully complementary to and in harmony with each other.

#### D. International payments

19. Many representatives noted with satisfaction the progress made by the Working Group on International Negotiable Instruments in its work of drafting a uniform law on international bills of exchange and international promissory notes. They stressed the importance of continued close collaboration by the Working Group with banking and trade institutions and with international organizations active in this field.

20. Several representatives expressed their support for the continuation of work by the Working Group and the Secretariat aimed at determining the feasibility of preparing uniform rules applicable to international cheques.

21. Many representatives commented favourably on the collaboration between UNCITRAL and the International Chamber of Commerce, particularly with regard to documentary credits and contract guarantees.

22. Several representatives noted that UNCITRAL at its eighth session had considered the topic of security interests in goods on the basis of a study prepared by a consultant to the Secretariat. These representatives approved the decision by UNCITRAL to request the

Secretary-General to complete the "Study on security interests" by including the law of additional countries, in particular of the socialist States of Eastern Europe.

#### E. International legislation on shipping

23. All representatives stressed the importance of the work of UNCITRAL in revising the existing rules governing the liability of carriers of goods by sea and supported the replacement of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed in Brussels in 1924 and the Protocol of 1968 to amend that Convention by a new international convention that would take fully into account the technological developments in maritime transport and the interests of developing countries. They commended the Working Group on International Legislation on Shipping on the completion of the draft convention on the carriage of goods by sea.

24. It was noted that the draft convention on the carriage of goods by sea had been circulated to Governments and to interested international organizations and the hope was expressed that a large number of them would submit their comments prior to the time UNCITRAL commenced consideration of the draft convention.

25. There was general agreement with the decision made by UNCITRAL to devote the major part of its ninth session in 1976 to a detailed, article-by-article examination of the draft convention on the carriage of goods by sea, with a view toward submitting the final text to a conference of plenipotentiaries for adoption as expeditiously as possible.

#### F. International commercial arbitration

26. Many representatives commented favourably on the undertaking by UNCITRAL to formulate a preliminary draft set of Arbitration Rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules). It was noted that arbitration was of increasing importance as a means for settling disputes arising from international trade transactions.

27. Several representatives spoke in favour of the position taken by most members of UNCITRAL at its eighth session to the effect that the UNCITRAL Arbitration Rules should not extend to cover arbitrations administered by arbitral institutions. On the other hand, there was also support for the view that the rules should contain provisions dealing with such "administered" arbitration.

28. A number of representatives made observations regarding various provisions in the preliminary draft set of Arbitration Rules that was before UNCITRAL at its eighth session and suggested possible modifications to be incorporated in the revised version of these rules.

#### G. Multinational enterprises

29. Many representatives noted that UNCITRAL had an important role to play in the international legal regulation of the activities of multinational enterprises. It was also stated that the problems posed by multinational enterprises were primarily of an economic nature

and that UNCITRAL was therefore not the proper forum to consider these problems.

30. Most representatives who spoke on this subject welcomed the decision of UNCITRAL to maintain on its agenda the question of multinational enterprises, without at present adopting a definite work programme, and to inform the Commission on Transnational Corporations, established by the Economic and Social Council, of the readiness of UNCITRAL to undertake work of a legal nature on any issues that may be referred to it. These representatives stressed the need for close collaboration between UNCITRAL and the Commission on Transnational Corporations.

31. Some representatives expressed the view that UNCITRAL might itself initiate consideration of certain legal problems connected with the existence and activities of multinational enterprises, such as a definition of the term "multinational enterprises", or the protection of the rights of States over their natural resources.

#### H. *Liability for damage caused by products intended for or involved in international trade*

32. Many representatives supported the decision by UNCITRAL to continue its work on this subject with a view towards determining the practicability of developing uniform rules that would be applied world-wide. It was noted that the endeavours of UNCITRAL reflected the growing concern for the protection of consumers and were likely to assist in the development of national legislation in this field.

33. Some representatives expressed reservations regarding the development of global rules in the area of liability for damages caused by products and stated that only efforts at unification on the regional level held out prospects for success.

#### I. *Training and assistance in the field of international trade law*

34. All representatives who spoke on the subject stressed the importance of the programme of training and assistance of UNCITRAL in the field of international trade law. There was general agreement that the symposium on the teaching of international trade law held in connexion with the eighth session of UNCITRAL had been successful, and the representatives expressed their support for the decision by UNCITRAL to hold another such symposium in 1977 in connexion with its tenth session.

35. Representatives expressed their appreciation to the Governments that had made voluntary contributions to meet the travel and subsistence expenses of participants from developing countries at the symposium and expressed the hope that similar voluntary contributions would be made in order to facilitate the holding of the 1977 symposium on international trade law.

36. Several representatives expressed their gratitude to the Governments that had offered fellowships to young lawyers from developing countries for academic and practical training in international trade law.

#### J. *Future work*

37. Most representatives expressed their support for the work programme and the order of priorities established by UNCITRAL and commented favourably on its decision not to add any new topics to its work programme at this time.

38. There was general agreement with the agenda and arrangements for the ninth session of UNCITRAL. Some representatives noted that it should not extend the length of its future meetings and should continue to make the most expeditious use of the time available for its sessions.

39. Several representatives noted that in its future work UNCITRAL should take account of the General Assembly resolutions regarding a new international economic order.

40. One representative stated that UNCITRAL should consider the development of uniform rules governing the investment of capital in developing countries and the transfer of technology from developed countries to developing countries. It was also suggested that UNCITRAL should endeavour to draft uniform rules on the formation and validity of contracts in general, with a view towards the eventual development of a code of international trade law.

#### IV. VOTING

41. At its 1575th meeting, on 26 November, the Sixth Committee proceeded to take action on the draft resolution before it (A/C.6/L.1021). The representative of the United States of America moved for a separate vote on operative paragraph 8 of the draft resolution. The motion was rejected by 67 votes to 24, with 12 abstentions.

42. The Committee adopted draft resolution A/C.6/L.1021 by a recorded vote of 98 to none, with 4 abstentions. The voting was as follows:

In favour: Afghanistan, Algeria, Argentina, Australia, Austria, Bahrain, Bangladesh, Belgium, Bolivia, Botswana, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chad, Chile, China, Colombia, Congo, Cuba, Czechoslovakia, Democratic Yemen, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Gabon, German Democratic Republic, Ghana, Greece, Guatemala, Guyana, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Kuwait, Laos, Lesotho, Libyan Arab Republic, Madagascar, Malaysia, Mali, Mexico, Mongolia, Mozambique, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, Spain, Sri Lanka, Sudan, Sweden, Syrian Arab Republic, Thailand, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia, Zaïre, Zambia.

Against: None.

Abstaining: Germany, Federal Republic of, Swaziland,<sup>8</sup> United Kingdom of Great Britain and Northern Ireland, United States of America.

43. Statements in explanation of vote after the vote were made by the representatives of the United States of America, Germany, Federal Republic of, Paraguay, Swaziland, the Netherlands, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland, Canada, Belgium, Chile and Turkey.

<sup>8</sup> At the conclusion of the vote, the representative of Swaziland stated that he had intended to vote in favour of the draft resolution.

## RECOMMENDATION OF THE SIXTH COMMITTEE

44. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

### *Report of the United Nations Commission on International Trade Law*

[The draft resolution was adopted by the General Assembly as resolution 3494 (XXX), reproduced below in section C.]

## C. General Assembly resolution 3494 (XXX) of 15 December 1975

### 3494 (XXX). REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

#### *The General Assembly,*

*Having considered* the report of the United Nations Commission on International Trade Law on the work of its eighth session,<sup>1</sup>

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law and defined the object and terms of reference of the Commission, and its previous resolutions concerning the reports of the Commission on the work of its annual sessions,

*Recalling also* its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, 3281 (XXIX) of 12 December 1974 and 3362 (S-VII) of 16 September 1975,

*Reaffirming its conviction* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic co-operation among all States on a basis of equality and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

*Having regard* for the need to take into account the different legal systems in harmonizing the rules of international trade law,

*Bearing in mind* that the Trade and Development Board of the United Nations Conference on Trade and Development, at its fifteenth session, took note with appreciation<sup>2</sup> of the report of the United Nations Commission on International Trade Law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its eighth session;

2. *Commends* the United Nations Commission on International Trade Law for the progress made in its work and for its efforts to enhance the efficiency of its working methods;

3. *Notes with satisfaction* that a draft convention on the carriage of goods by sea has been prepared by a working group of the United Nations Commission on

International Trade Law and that this draft convention has been transmitted to Governments and interested international organizations for their comments;

4. *Further notes with satisfaction* that work on uniform rules governing the international sale of goods is nearing completion and that in the near future a draft convention on the international sale of goods will be transmitted to Governments and interested international organizations for their comments;

5. *Approves* the decision of the United Nations Commission on International Trade Law to maintain on its agenda the item concerning multinational enterprises and to keep that subject under review pending the identification by the Commission on Transnational Corporations of specific legal issues that would be susceptible of action by the United Nations Commission on International Trade Law;

6. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the international symposium on the teaching of international trade law, held in connexion with its eighth session;

7. *Recommends* that the United Nations Commission on International Trade Law should:

(a) Continue in its work to pay special attention to the topics to which it had decided to give priority, namely, the international sale of goods, international payments, international commercial arbitration and international legislation on shipping;

(b) Continue to consider the advisability of preparing uniform rules governing the liability for damage caused by products intended for or involved in international trade, in accordance with the decisions thereon adopted by the Commission at its eighth session;

(c) Continue its work on training and assistance in the field of international trade law, taking into account the special interests of the developing countries;

(d) Maintain close collaboration with the United Nations Conference on Trade and Development and continue to collaborate with international organizations active in the field of international trade law;

(e) Maintain liaison with the Commission on Transnational Corporations with regard to the consideration of legal problems that would be susceptible of action by it;

(f) Continue to give special consideration to the interests of developing countries and to bear in mind the special problems of land-locked countries;

<sup>1</sup> Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017); UNCITRAL Yearbook, Vol. VI: 1975, part one, II, A.

<sup>2</sup> Ibid., Supplement No. 15 (A/10015/Rev.1), part three, para. 226.

## II. THE NINTH SESSION (1976)

### A. Report of the United Nations Commission on International Trade Law on the work of its ninth session (New York, 12 April-7 May 1976) (A/31/17)\*

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#### INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's ninth session, held at United Nations Headquarters in New York from 12 April to 7 May 1976.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted

\* Official Records of the General Assembly, Thirty-first Session, Supplement No. 17.

to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

#### CHAPTER I. ORGANIZATION OF THE SESSION

##### A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its ninth session on 12 April 1976. The session was opened by the Secretary-General.



### B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 November 1970 and 12 December 1973, are the following States:<sup>1</sup> Argentina, Australia,\* Austria,\* Barbados, Belgium, Brazil, Bulgaria, Chile,\* Cyprus, Czechoslovakia, Egypt,\* France,\* Gabon, Germany (Federal Republic of), Ghana,\* Greece, Guyana,\* Hungary, India, Japan,\* Kenya, Mexico, Nepal,\* Nigeria,\* Norway,\* Philippines, Poland,\* Sierra Leone, Singapore,\* Somalia,\* Syrian Arab Republic, Union of Soviet Socialist Republics,\* United Kingdom of Great Britain and Northern Ireland,\* United Republic of Tanzania,\* United States of America and Zaire.

5. With the exception of Cyprus, Guyana and Somalia, all members of the Commission were represented at the session.

6. The following United Nations organs, specialized agencies, intergovernmental organizations and international non-governmental organizations were represented by observers:

(a) *United Nations organs*

United Nations Conference on Trade and Development.

(b) *Specialized agencies*

Inter-Governmental Maritime Consultative Organization; International Monetary Fund; the World Bank.

(c) *Intergovernmental organizations*

Council for Mutual Economic Assistance; Council of Europe; East African Community; Hague Conference on Private International Law; League of Arab States.

(d) *International non-governmental organizations*

Inter-American Commercial Arbitration Commission; International Chamber of Commerce; International Chamber of Shipping; International Council for Commercial Arbitration; International Law Association; International Maritime Committee; International Shipowners Association; International Union of Marine Insurance.

### C. Election of officers

7. The Commission elected the following officers by acclamation:<sup>2</sup>

<sup>1</sup> Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly, by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session elected 14 members to serve for a full term of six years, ending on 31 December 1976, and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also selected seven additional members. Of these additional members, the terms of three members, selected by the President of the Assembly, by drawing lots, will expire at the end of three years (31 December 1976) and the terms of four members will expire at the end of six years (31 December 1979). The terms of the members marked with an asterisk will expire on 31 December 1976. The terms of the other members will expire on 31 December 1979.

<sup>2</sup> The elections took place at the 173rd and 174th meetings, on 12 April 1976. In accordance with a decision taken by the

Chairman . . . . . Mr. L. H. Khoo (Singapore)  
Vice-Chairman . . . Mr. R. Herber (Federal Republic of Germany)  
Vice-Chairman . . . Mr. E. Mottley (Barbados)  
Vice-Chairman . . . Mr. J. Ruzicka (Czechoslovakia)  
Rapporteur . . . . . Mrs. T. Oyekunle (Nigeria)

### D. Agenda

8. The agenda of the session as adopted by the Commission at its 173rd meeting, on 12 April 1976, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda, tentative schedule of meetings
4. International sale of goods
5. International payments
6. International legislation on shipping
7. International commercial arbitration
8. Ratification of or adherence to conventions concerning international trade law
9. Training and assistance in the field of international trade law
10. Future work
11. Other business
12. Date and place of the tenth session
13. Adoption of the report of the Commission

### E. Establishment of Committees of the Whole

9. The Commission decided to establish two Committees of the Whole (Committee I and Committee II), which would meet simultaneously to consider the following agenda items:

#### Committee I

Item 6. International legislation on shipping: draft Convention on the Carriage of Goods by Sea.

#### Committee II

Item 7. International commercial arbitration: UNCITRAL Arbitration Rules.

10. Committee I met from 12 April to 6 May 1976, and held 31 meetings.<sup>3</sup> Committee II met from 12 to 23 April 1976, and held 19 meetings.<sup>4</sup>

11. At its first meeting, on 12 April, Committee I unanimously elected Mr. M. Chafik (Egypt) as Chairman and Mr. N. Gueiros (Brazil) as Rapporteur. At its first meeting, also on 12 April 1976, Committee II unanimously elected Mr. R. Loewe (Austria) as

Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14; UNCITRAL Yearbook, Vol. I: 1968-1970, part two, I).

<sup>3</sup> Summary records of the meetings of Committee I are contained in A/CN.9/IX/C.1/SR.1 to SR.31.

<sup>4</sup> Summary records of the meetings of Committee II are contained in A/CN.9/IX/C.2/SR.1 to SR.19.



Chairman and at its 6th meeting unanimously elected Mr. I. Szasz (Hungary) as Rapporteur.

12. The Commission considered the report of Committee I at its 178th and 179th meetings, on 7 May, and the report of Committee II at its 175th, 176th and 177th meetings, on 27 and 28 April. The Commission decided to include the reports of Committees I and II in the present report in the form of annexes (annex I and annex II).

#### F. Adoption of the report

13. The Commission adopted the present report at its 179th meeting on 7 May 1976.

### CHAPTER II. INTERNATIONAL SALE OF GOODS

#### A. Uniform rules governing the international sale of goods

##### *Report of the Working Group*

14. The Commission had before it the report of the Working Group on the International Sale of Goods on the work of its seventh session, held at Geneva from 5 to 16 January 1976 (A/CN.9/116).<sup>\*</sup> The report set forth the progress made by the Working Group in implementing the mandate entrusted to it at the Commission's second session by which the Working Group was directed, *inter alia*, to ascertain which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render such text capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications.<sup>5</sup>

15. As the report of the Working Group indicates, the Group completed its consideration of pending questions with respect to articles 57 to 69 of the draft Convention on the International Sale of Goods and certain other articles in which unresolved questions had remained. The Group thereafter considered the text of the draft Convention in second reading.

16. The Commission noted with satisfaction that, upon the completion of the second reading, the Working Group had approved the text of a draft Convention on the International Sale of Goods, thereby completing the mandate given to it by the Commission in respect of the revision of ULIS. The Commission also noted that the Working Group had not reached consensus on the text of article 7, paragraph 2, and article 11, placed within square brackets, and that in respect of certain other articles, representatives of members of the Working Group had reserved their position with a view to raising the issue at the tenth session of the Commission when the draft Convention would be considered. The

text adopted by the Working Group is set forth in annex I to its report.

17. The Commission further noted that the Working Group had not considered draft provisions concerning implementation, declarations and reservations or final clauses for the draft Convention and had requested the Secretariat to prepare such draft provisions for consideration by the Commission at its tenth session.

18. The Working Group reported that it had before it a draft commentary on the text of the draft Convention on the International Sale of Goods (A/CN.9/WG.2/WP.22) as it appeared in annex I of the report of the Working Group on the work of its sixth session (A/CN.9/100),<sup>\*</sup> and that it had requested the Secretariat to revise the draft commentary in the light of its deliberations and conclusions. The commentary is set forth in annex II to the Working Group's report.

19. The Commission agreed with the view of the Working Group that a commentary accompanying the draft Convention would be desirable in that it would make the preparatory work and the policy underlying the formulations in the draft Convention, as adopted by the Working Group, more readily available.

##### *Consideration of the report by the Commission<sup>6</sup>*

20. The Commission noted that, in accordance with the decision taken by it at its eighth session, the draft Convention, accompanied by a commentary, had been sent to Governments and interested international organizations for their comments and that an analysis of the comments would be prepared for consideration by the Commission at its tenth session.

21. The Commission decided to consider the draft Convention at its tenth session, in the light of comments received from Governments and interested international organizations.

#### B. Formation and validity of contracts for the international sale of goods

##### *Introduction*

22. At its second session the Commission decided that the Working Group on the International Sale of Goods should consider which modifications of the Uniform Law on the Formation of Contracts for the International Sale of Goods, annexed to the Hague Convention of 1 July 1964, might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text for this purpose.<sup>7</sup> At its third session, the Commission decided that the Working Group should give priority to the con-

<sup>\*</sup> Reproduced in this volume, part two, I, 1, *infra*.

<sup>5</sup> *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 38, subpara. 3 (a) of the resolution contained therein (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, II); *ibid.*, *Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 92, subpara. 1 (c) of the resolution contained therein (UNCITRAL Yearbook, Vol. II: 1971, part one, II). The 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and the annexed Uniform Law (ULIS) appears in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I (United Nations publication, Sales No. E.71.V.3), chap. I, 1.

<sup>\*</sup> Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, I, 1.

<sup>6</sup> The Commission considered this subject at its 173rd meeting, on 12 April 1976, and a summary record of this meeting is contained in A/CN.9/SR.173.

<sup>7</sup> *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 38, subpara. 3 (a) of the resolution contained therein (UNCITRAL Yearbook, Vol. I: 1968-1970 part two, II). The 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods and the annexed Uniform Law appears in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I (United Nations publication, Sales No. E.71.V.3), chap. I, 1.

sideration of ULIS and take up the formation of contracts only upon the completion of that task.<sup>8</sup>

23. At its seventh session, the Commission considered the request of the International Institute for the Unification of Private Law (UNIDROIT) that it include in its programme of work the consideration of the "draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods", approved by the Governing Council of the Institute in 1972. At that session, the view was expressed that it might be desirable to deal with the rules on formation and on validity in a single instrument, and that thought should be given to the advisability of formulating rules governing the formation and validity of contracts in general, to the extent that they were relevant to international trade.<sup>9</sup>

#### *Report of the Working Group*

24. The report stated that the Working Group was of the unanimous view that, at its next session, it should begin work on uniform rules governing the formation of contracts and should make an attempt to formulate such rules on a broader basis than the international sale of goods. If, in the course of its work, it should prove that the principles underlying contracts of sale and other types of contract could not be treated in the same text, the Group would direct its work towards contracts of sale only. The Working Group was further of the view that it should consider whether some or all of the rules on validity could appropriately be combined with rules on formation. The Working Group decided to place these conclusions before the Commission at its ninth session so as to obtain its views thereon.

#### *Consideration of the report by the Commission<sup>10</sup>*

25. The Commission concentrated its discussion on three major questions:

(a) Whether the proposed convention on the international sale of goods and the rules to be adopted in respect of the formation and validity of contracts for the international sale of goods should be incorporated in a single convention or whether the rules on the formation and validity of contracts for the international sale of goods should be the subject-matter of a separate convention;

(b) Whether, if it were decided to prepare two conventions, the two conventions should be submitted to one conference of plenipotentiaries or whether they should be submitted to separate conferences of plenipotentiaries;

(c) Whether the rules on formation and validity of contracts should be prepared for a wide range of contracts used in international trade or whether they should be prepared only for the international sale of goods.

26. In respect of the first two questions, it was noted that it would be easier for those using the rules

<sup>8</sup> Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 72 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, III).

<sup>9</sup> Ibid., Twenty-ninth Session, Supplement No. 17 (A/9617) paras. 91 to 93 (UNCITRAL Yearbook, Vol. V: 1974, part one, II, A).

<sup>10</sup> The Commission considered this subject at its 173rd meeting, on 12 April 1976, and a summary record of this meeting is contained in A/CN.9/SR.173.

being prepared by the Commission if there was a single text. It was also noted that the preparation of a single text or, at a minimum, the consideration of the two texts at the same conference of plenipotentiaries, would facilitate the preparation of texts which were identical in approach and in the use of terminology. On the other hand, it was noted that the preparation of the rules on formation and validity would take time and that it would be undesirable to await the completion of this task before the convening of a conference of plenipotentiaries to consider the draft Convention on the International Sale of Goods. It was also suggested that it would be more difficult to secure the ratification by a large number of States of a single text which combined the rules on formation and validity with the rules on the international sale of goods. Furthermore, it was noted that the consideration of the draft Convention on the International Sale of Goods would be by itself a full agenda for a conference of plenipotentiaries and that it would be difficult for such a conference to give full attention also to the problems of formation and validity.

27. As to the third question, the Commission was of the view that the Working Group should restrict its work to the preparation of rules on the formation of contracts for the international sale of goods so as to complete its task in the shortest possible time, but that the Working Group had discretion as to whether to include some rules in respect of the validity of such contracts. The Commission requested the Working Group to report its conclusions in this respect to the Commission at the tenth session.

#### *Decision of the Commission*

28. The Commission, at its 173rd meeting, on 12 April 1976, adopted unanimously the following decision:

#### *The United Nations Commission on International Trade Law*

1. Takes note with appreciation of the report of the Working Group on the International Sale of Goods on the work of its seventh session;

2. Congratulates the Working Group on the expeditious and successful completion of the task entrusted to it in respect of the revision of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964;

3. Decides:

(a) To consider the draft Convention on the International Sale of Goods at its tenth session;

(b) To defer until its tenth session the question whether the rules on formation and validity of contracts should be set forth in the same convention containing the rules on the international sale of goods or in a separate convention, and whether, if there are separate conventions, they should be considered at the same conference of plenipotentiaries;

(c) To instruct the Working Group on the International Sale of Goods to confine its work on the formation and validity of contracts to contracts of the international sale of goods.

## CHAPTER III. INTERNATIONAL PAYMENTS

*Negotiable instruments*

29. The Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its fourth session, held at New York from 2 to 12 February 1976 (A/CN.9/117).<sup>\*</sup> The report sets forth the progress made by the Working Group in preparing a final draft Uniform Law on International Bills of Exchange and International Promissory Notes.

30. As indicated in the report, the Working Group at its fourth session considered articles 79 to 86 and articles 1 to 11 of the draft Uniform Law on International Bills of Exchange and International Promissory Notes prepared by the Secretary-General in response to a decision by the Commission.<sup>11</sup> The proposed uniform law will establish uniform rules applicable to international negotiable instruments (bills of exchange or promissory notes) for optional use in international payments.

31. The report sets forth the deliberations and conclusions of the Working Group with respect to limitation of actions, lost instruments, the sphere of application of the proposed uniform law, formal requirements of the instrument and interpretation of formal requirements.

*Consideration of the report by the Commission<sup>12</sup>*

32. The Commission noted with satisfaction that the Working Group had completed its first reading of the draft uniform law. In accordance with its general policy of considering the substance of the work carried out by working groups only upon completion of that work, the Commission took note of the report of the Working Group on International Negotiable Instruments.

*Decision of the Commission*

33. The Commission, at its 173rd meeting, on 12 April 1976, adopted unanimously the following decision:

*The United Nations Commission on International Trade Law*

1. *Takes note with appreciation* of the report of the Working Group on International Negotiable Instruments on the work of its fourth session;

2. *Requests* the Working Group to continue its work under the terms of reference set forth by the Commission in the decision adopted in respect of negotiable instruments at its fifth session and to complete that work expeditiously;

3. *Requests* the Secretary-General to carry out, in accordance with the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the in-

quiries regarding the use of cheques for settling international payments, in consultation with the Commission's Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

CHAPTER IV. INTERNATIONAL LEGISLATION  
ON SHIPPING*A. Introduction*

34. By a resolution adopted at its second session in February 1971, the Working Group on International Shipping Legislation of the United Nations Conference on Trade and Development (UNCTAD) recommended that the Commission should undertake the examination of the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading (the Brussels Convention of 1924) and in the Protocol to Amend that Convention (the Brussels Protocol of 1968), with a view to revising and amplifying these rules or, if appropriate, preparing a new international convention for adoption under the auspices of the United Nations.

35. The Commission, at its fourth session, decided to examine the rules governing the responsibility of ocean carriers for cargo<sup>13</sup> along the lines indicated in the above-mentioned resolution on bills of lading adopted by the UNCTAD Working Group (TD/B/C.4/86, annex I).

36. To carry out this programme of work, the Commission established a Working Group on International Legislation on Shipping consisting of 21 members of the Commission. The Working Group held eight sessions and submitted to the eighth session of the Commission the text of a draft Convention on the Carriage of Goods by Sea.<sup>14</sup> At its seventh session, the Commission requested the Secretary-General to transmit the final text of the draft Convention, upon its adoption by the Working Group on International Legislation on Shipping, to Governments and interested international organizations for their comments and to prepare an analysis of such comments for consideration by the Commission at its present session.

<sup>13</sup> *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, paras. 10-23 (UNCITRAL Yearbook, Vol. II: 1971, part one, II, A). For the Commission's other action on the subject of international legislation on shipping, see *ibid.*, *Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 114-133 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, II, A); *ibid.*, *Twenty-fifth Session, Supplement No. 17 (A/8017)*, paras. 157-166 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, III, A); *ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, paras. 44-51 (UNCITRAL Yearbook, Vol. III: 1972, part one, II, A); *ibid.*, *Twenty-eighth Session, Supplement No. 17 (A/9017)*, paras. 46-61 (UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A); *ibid.*, *Twenty-ninth Session, Supplement No. 17 (A/9617)*, paras. 38-53 (UNCITRAL Yearbook, Vol. V: 1974, part one, II, A); and *ibid.*, *Thirtieth Session, Supplement No. 17 (A/10017)*, paras. 64-77 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, A).

<sup>14</sup> At its 179th meeting on 7 May 1976, the Commission noted that its Working Group on International Legislation on Shipping had thus fulfilled its mandate, and decided therefore to dissolve that Working Group.

<sup>\*</sup> Reproduced in this volume, part two, II, 1, *infra*.

<sup>11</sup> *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 35 (UNCITRAL Yearbook, Vol. II: 1971, part one, II, A). The draft uniform law and commentary are set forth in A/CN.9/WG.IV/WP.2.

<sup>12</sup> The Commission considered this subject at its 173rd meeting, and a summary record of this meeting is contained in A/CN.9/SR.173.

37. The Commission had before it the following documents:

- (i) A/C.9/109:\* comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea. This document also reproduces the text of the draft Convention (pp. 4 to 19).
- (ii) A/CN.9/110:\* analysis of the comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea.
- (iii) A/CN.9/115:\* draft provisions concerning implementation, reservations and other final clauses for the draft Convention on the Carriage of Goods by Sea. These draft provisions had been prepared by the Secretariat in response to a request made to it by the Working Group on International Legislation on Shipping at the Group's eighth session. The Working Group had not considered these draft provisions.
- (iv) A/CN.9/115/Add.1: the 1975 table 1 and table 2 of Lloyd's Register of Shipping.
- (v) A/CN.9/105:\*\* report of the Working Group on International Legislation on Shipping on the work of its eighth session.
- (vi) Documents of the United Nations Conference on Trade and Development:
  - TD/B/C.4/ISL/19: bills of lading — comments on a draft convention on the carriage of goods by sea prepared by the UNCITRAL Working Group on International Legislation on Shipping — report by the UNCTAD secretariat;
  - TD/B/C.4/ISL/19/Suppl.1 and Suppl.2: bills of lading — draft convention on the carriage of goods by sea; background comments prepared by the UNCTAD secretariat;
  - TD/B/C.4/ISL/21: report of the UNCTAD Working Group on International Shipping Legislation on the first part of its fifth session.

38. The Commission established a Committee of the Whole I to consider the draft Convention on the Carriage of Goods by Sea as adopted by the Working Group on International Legislation on Shipping, and to report back to it. Committee I met from 12 April to 6 May and held 31 meetings. The report of Committee I to the Commission is set forth in annex I to the present report.

#### B. Consideration of the report of Committee of the Whole I

39. The Commission considered the report of Committee I at its 178th and 179th meetings on 7 May 1976.<sup>15</sup>

\* Reproduced in this volume, part two, IV, *infra*.

\*\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 3.

<sup>15</sup> Summary records of those meetings are contained in A/CN.9/SR.178 and 179.

40. The view was expressed that the possibility of replacing in the text of the draft Convention, wherever appropriate, the future imperative "shall" by the present indicative "is" in the English language version, should be brought to the attention of the international conference of plenipotentiaries that will be convened to conclude a Convention on the Carriage of Goods by Sea.

41. After deliberation, the Commission approved the text of the draft Convention on the Carriage of Goods by Sea proposed by Committee I, subject to the following changes:

(a) In paragraphs 1 and 2 of article 8, where the phrase "loss, damage or delay" appeared for the first time, that phrase was changed to read "loss, damage or delay in delivery";

(b) In the first sentence of article 15, paragraph 2, a comma was added between the words "this article" and the words "shall state";

(c) In paragraph 1 of article 20, the bracketed phrase "for damages" and the foot-note attached thereto were deleted;

(d) In paragraph 2 of article 20, the words "to run" following the words "period commences" were deleted;

(e) In paragraph 3 of article 20, the words "begins to run" were replaced by the word "commences";

(f) In paragraph 4 of article 20, the words "the running of" were deleted;

(g) The following foot-note "8" was added to paragraph 1 of article 21, following the word "State": "A considerable number of delegations favoured the addition of the word 'Contracting' before the word 'State'";

(h) In paragraph 5 of article 21, a comma was added between the word "parties" and the words "after a claim"; and

(i) In paragraph 1 of article 22, the phrase "under a contract of carriage" was replaced by the phrase "relating to carriage of goods under this Convention".

42. In regard to the draft provisions concerning implementation, reservations, and other final clauses for the draft Convention on the Carriage of Goods by Sea (A/CN.9/115), the Commission decided that these draft provisions, as modified by the Secretariat in conformity with the proposals adopted by Committee I, should be circulated, together with the draft Convention, to Governments and interested international organizations for comments and proposals.

43. The Commission was unanimous in its view that the General Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft articles approved by the Commission, a Convention on the Carriage of Goods by Sea. The Commission took note of the preference expressed by the UNCTAD Working Group on International Shipping Legislation that the international conference of plenipotentiaries should take place during 1977 or during the early part of 1978. A statement on the financial implications of such a conference was made by the representative of the Secretary-General.

*Decision of the Commission*

44. At its 179th meeting, on 7 May 1976, the Commission adopted the following decision:

*The United Nations Commission on International Trade Law,*

Recalling the decision taken at its fourth session to examine, in response to a resolution by the Working Group on International Shipping Legislation established by the United Nations Conference on Trade and Development, the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading (the Brussels Convention of 1924) and in the Protocol to Amend that Convention (the Brussels Protocol of 1968), with a view to revising and amplifying these Rules and if appropriate, to preparing a new international convention for adoption under the auspices of the United Nations,

Considering that international trade is an important factor in the promotion of friendly relations among States and that the adoption of a convention on the carriage of goods by sea, establishing a balanced allocation of risks between the cargo owner and the carrier, would contribute to the development of world trade,

1. Approves the text of the draft Convention on the Carriage of Goods by Sea as set forth in paragraph 45 of its report on the work of the ninth session;

## 2. Requests the Secretary-General:

(a) To circulate the draft Convention, together with draft provisions concerning implementation, reservations and other final clauses to be prepared by the Secretary-General, to Governments and interested international organizations for comments and proposals;

(b) To transmit the draft Convention and the draft provisions concerning implementation, reservations and other final clauses to the Working Group on International Shipping Legislation established by the United Nations Conference on Trade and Development for comments and proposals;

(c) To prepare an analytical compilation of the comments and proposals received from Governments, the Working Group on International Shipping Legislation and interested international organizations, and to submit this analytical compilation to the conference of plenipotentiaries which the General Assembly may wish to convene;

3. Recommends that the General Assembly should convene an international conference of plenipotentiaries, as early as practicable, to conclude, on the basis of the draft Convention approved by the Commission, a Convention on the Carriage of Goods by Sea.

## C. Text of the draft Convention on the Carriage of Goods by Sea

45. The draft Convention on the Carriage of Goods by Sea, as adopted by the Commission, read as follows:

## DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

## PART I. GENERAL PROVISIONS

## Article 1. Definitions

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and any other person to whom such performance has been entrusted.

3. "Consignee" means the person entitled to take delivery of the goods.

4. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

5. "Contract of carriage" means a contract whereby the carrier against payment of freight undertakes to carry goods by sea from one port to another.

6. "Bill of lading" means a document which evidences a contract of carriage and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

7. "Writing" includes, *inter alia*, telegram and telex.

## Article 2. Scope of application

1. The provisions of this Convention shall be applicable to all contracts of carriage between ports in two different States, if:

(a) The port of loading as provided for in the contract of carriage is located in a Contracting State, or

(b) The port of discharge as provided for in the contract of carriage is located in a Contracting State, or

(c) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

(d) The bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

(e) The bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading not being the charterer.

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention shall apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article shall apply.

## Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

## PART II. LIABILITY OF THE CARRIER

*Article 4. Period of responsibility*

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time he has taken over the goods until the time he has delivered the goods:

(a) By handing over the goods to the consignee; or

(b) In cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

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

3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants or the agents, respectively of the carrier or the consignee.

*Article 5. Basis of liability*

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 occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article.

4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents.

5. With respect to live animals, the carrier shall not be liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier shall not be liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of loss, damage or delay in delivery not attributable thereto.

*Article 6. Limits of liability*

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) units of account per package or other shipping unit or (...) units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [...] the freight [payable for the goods delayed] [payable under the contract of carriage].

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

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

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

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

3. Unit of account means ...<sup>2</sup>

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

*Alternative article 6. Limits of liability<sup>3</sup>*

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) units of account per kilogram of gross weight of the goods lost, damaged or delayed.

2. Unit of account means ...<sup>4</sup>

3. By agreement between the carrier and the shipper, a limit of liability exceeding that provided for in paragraph 1 may be fixed.

*Article 7. Application to non-contractual claims*

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

<sup>1</sup> The question as to whether the limit should be the freight or a multiple of the freight is to be determined at the conference of plenipotentiaries which will consider the draft Convention.

<sup>2</sup> The unit of account is to be determined at the conference of plenipotentiaries which will consider the draft Convention.

<sup>3</sup> If the liability for delay in delivery were to be subject under this alternative text to a special limit of liability, paragraph 1 of this alternative text may be supplemented by paragraphs 1 (b) and 1 (c) of the basic text for article 6 set forth above. If this be done, paragraph 1 of the alternative text would need drafting changes.

<sup>4</sup> The unit of account is to be determined at the conference of plenipotentiaries which will consider the draft Convention.



3. The aggregate of the amounts recoverable from the carrier, and any persons referred to in paragraph 2 of this article, shall not exceed the limits of liability provided for in this Convention.

*Article 8. Loss of right to limit liability*

1. The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result, which was an act or omission of:

- (a) The carrier himself, or
- (b) An employee of the carrier other than the master and members of the crew, while exercising, within the scope of his employment, supervisory authority in respect of that part of the carriage during which such act or omission occurred, or
- (c) An employee of the carrier, including the master or any member of the crew, while handling or caring for the goods within the scope of his employment.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

*Article 9. Deck cargo*

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

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

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier shall, notwithstanding the provisions of paragraph 1 of article 5, be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, and the extent of his liability shall be determined in accordance with the provisions of article 6 or 8, as the case may be.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8.

*Article 10. Liability of the carrier and actual carrier*

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The carrier shall, in relation to the carriage performed by the actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

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

him. The provisions of paragraphs 2 and 3 of articles 7 and of paragraph 2 of article 8 shall apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier shall nevertheless remain bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability shall be joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

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

*Article 11. Through carriage*

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a named person other than the carrier, the contract may also provide that the carrier shall not be liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence shall rest upon the carrier.

2. The actual carrier shall be responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III. LIABILITY OF THE SHIPPER

*Article 12. General rule*

The shipper shall not be liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor shall any servant or agent of the shipper be liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

*Article 13. Special rules on dangerous goods*

1. The shipper shall mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

(a) The shipper shall be liable to the carrier and any actual carrier for all loss resulting from the shipment of such goods, and

(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or

property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

#### PART IV. TRANSPORT DOCUMENTS

##### Article 14. Issue of bill of lading

1. When the goods are received in the charge of the carrier or the actual carrier, the carrier shall, on demand of the shipper, issue to the shipper a bill of lading.

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

##### Article 15. Contents of bill of lading

1. The bill of lading shall set forth among other things the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage;

(h) The number of originals of the bill of lading, if more than one;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf;

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him;

(l) The statement referred to in paragraph 3 of article 23; and

(m) The statement, if applicable, that the goods shall or may be carried on deck.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the legal

character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 6 of article 1.

##### Article 16. Bills of lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other persons issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other persons shall insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. When the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) The bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, shall be *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

##### Article 17. Guarantees by the shipper<sup>5</sup>

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss resulting from inaccuracies in such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent conditions of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on

<sup>5</sup> A number of delegations were of the view that article 17 should consist of para. 1 only and that paras. 2, 3 and 4 should be deleted.



his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in the latter case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued.

#### Article 18. Documents other than bills of lading

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

### PART V. CLAIMS AND ACTIONS

#### Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than the day after the day when the goods were handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article shall apply correspondingly if notice in writing has not been given within 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods has at the time they were handed over to the consignee been the subject of joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 consecutive days after the day when the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall also have effect as if given to such actual carrier.

#### Article 20. Limitation of actions

1. Any action relating to carriage of goods under this Convention is time-barred if legal or arbitral proceedings have not been initiated within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part of the goods or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the period of limitation commences shall not be included in the period.

4. The person against whom a claim is made may at any time during the limitation period extend the period by a declaration in writing to the claimant. The declaration may be renewed.

5. An action for indemnity by a person held liable may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the State where proceedings are initiated. However, the time allowed shall not be less than 90 days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

#### Article 21. Jurisdiction

1. In a legal proceeding relating to carriage of goods under this Convention the plaintiff, at his option, may bring an action in a court which, according to the law of the State<sup>6</sup> where the court is situated, is competent and within the jurisdiction of which is situated one of the following places or ports:

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

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

(c) The port of loading or the port of discharge; or

(d) Any additional place designated for that purpose in the contract of carriage.

2. (a) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel or any other vessel of the same ownership may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

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

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (a) Where an action has been brought before a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

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

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

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

#### Article 22. Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute

<sup>6</sup> A considerable number of delegations favoured the addition of the word "Contracting" before the word "State".

that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

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

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

(iii) The port of loading or the port of discharge; or

(b) Any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

6. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.

#### PART VI. SUPPLEMENTARY PROVISIONS

##### Article 23. Contractual stipulations

1. Any stipulation of the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the State where proceedings are initiated.

##### Article 24. General average

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

##### Article 25. Other conventions

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

3. No liability shall arise under the provisions of this Convention for any loss of, or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

#### CHAPTER V. INTERNATIONAL COMMERCIAL ARBITRATION

##### A. Introduction

46. At its sixth session, the Commission, *inter alia*, requested the Secretary-General:

"In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission of Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade."<sup>16</sup>

47. At its eighth session, the Commission had before it a report of the Secretary-General which set forth a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97),\* observations submitted by the Government of Norway and by interested national and international organizations and institutions (A/CN.9/97/Add.1, 3 and 4),\* and a document setting forth suggested modifications to the preliminary draft rules resulting from

<sup>16</sup> Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 85 (UNCITRAL Yearbook, Vol. IV: 1973, part one, II).

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, III.

discussions by the Fifth International Arbitration Congress, held at New Delhi, from 7 to 10 January 1975 (A/CN.9/97/Add.2).\*

48. The Commission discussed the preliminary draft arbitration rules at its eighth session. In so doing, it concentrated on the basic concepts underlying the draft and on the major issues dealt with in the individual articles thereof.<sup>17</sup> At that session, the Commission requested the Secretary-General to prepare a revised draft of these Rules, taking into account the observations made on the preliminary draft in the course of its eighth session, and to submit the revised draft Arbitration Rules to the Commission at its ninth session.<sup>18</sup>

49. At the present session, the Commission had before it a report of the Secretary-General containing a revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/112).\*\*<sup>19</sup> It also had before it a report of the Secretary-General containing a commentary on the UNCITRAL Arbitration Rules (A/CN.9/112/Add.1),\*\* a working paper prepared by the Secretariat containing alternative draft provisions for the draft UNCITRAL Arbitration Rules (A/CN.9/113),\*\* and a note by the Secretariat on the feasibility of a schedule of fees for arbitrators (A/CN.9/114).\*\*

50. The Commission established Committee of the Whole II to consider the revised draft Arbitration Rules and to report back to it. Committee II met from 12 to 23 April 1976 and held 19 meetings. The report of Committee II to the Commission is set forth in annex II to the present report.

#### B. Consideration of the report of Committee of the Whole II

51. The Commission considered the report of Committee II at its 175th to 177th meetings,<sup>20</sup> on 27 and 28 April 1976.

52. After deliberation, the Commission decided to amend paragraph 2 of article 1, which had been approved by the Committee, in order to make it clear that the Rules were subject to those provisions of law applicable to the arbitration from which the parties cannot derogate. The Commission also decided to make a drafting change in the text of paragraph 1 of article 13 and to amend article 14 so as to include article 11 as one of the articles to which reference was made in article 14.

53. After deliberation, the Commission approved the text of the UNCITRAL Arbitration Rules and of

a model arbitration clause proposed by Committee II, subject to the following changes:

(a) Paragraph 2 of article 1 which read: "These Rules are subject to the law applicable to the arbitration", was changed so as to read as follows: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail";

(b) In paragraph 1 of article 13, the phrase "pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9" was replaced by the phrase "pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced";

(c) The opening phrase in article 14, which had read "If under article 12 or article 13..." was changed to read "If under articles 11 to 13..."

54. The Commission considered the suggestion that a commentary on the UNCITRAL Arbitration Rules should be prepared. After extensive discussion, the Commission was of the view that the advantages of a commentary did not outweigh the possible disadvantages and therefore decided not to retain the suggestion.

55. The Commission considered the suggestion that, in its decision adopting the Rules, reference should be made to the Final Act of the Conference on Security and Co-operation in Europe, signed at Helsinki on 1 August 1975. In that Final Act, the participating States, *inter alia*, recommended "where appropriate, to organizations, enterprises and firms in their countries, to include arbitration clauses in commercial contracts... and that the provisions on arbitration should provide for arbitration under a mutually acceptable set of arbitration rules...". The Commission did not retain this suggestion on the ground that the Final Act was a regional agreement signed by States from Europe and North America only and was but one of many international agreements which had recognized the value of arbitration to settle disputes arising out of international trade.

#### Decision of the Commission

56. The Commission at its 177th meeting, on 28 April 1976, unanimously adopted the following decision:

#### *The United Nations Commission on International Trade Law,*

*Having regard* to the fact that arbitration has proved to be a valuable method for settling disputes arising out of various types of contracts in the field of international commerce,

*Being convinced* that the establishment of rules for *ad hoc* arbitration that are acceptable to those engaged in trade in countries with different legal, social and economic systems would significantly contribute to the development of harmonious economic relations between peoples,

*Having prepared* the UNCITRAL Arbitration Rules after full consultation with arbitral institutions and centres of international commercial arbitration,

\*\* Reproduced in this volume, part two, III, *infra*.

<sup>17</sup> A summary of the Commission's deliberations is set forth in annex I to the report of the Commission on the work of its eighth session (*Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017)*).

<sup>18</sup> *Ibid.*, para. 83.

<sup>19</sup> The initial version and the revised draft of the UNCITRAL Arbitration Rules were prepared by the secretariat of the Commission in consultation with Professor Pieter Saunders of the Erasmus University of Rotterdam (Netherlands) with the co-operation of a consultative group established by the International Council for Commercial Arbitration.

<sup>20</sup> Summary records of these meetings are contained in A/CN.9/SR.175-177.

1. *Adopts* the UNCITRAL Arbitration Rules as set out in paragraph 57 of its report on the work of its ninth session;

2. *Invites* the General Assembly to recommend the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the UNCITRAL Arbitration Rules in commercial contracts;

3. *Requests* the Secretary-General to arrange for the widest possible distribution of the UNCITRAL Arbitration Rules.

### C. Text of UNCITRAL Arbitration Rules

57. The UNCITRAL Arbitration Rules, as adopted by the Commission, are as follows:

#### UNCITRAL ARBITRATION RULES

##### SECTION I. INTRODUCTORY RULES

###### SCOPE OF APPLICATION

###### Article 1

1. Where the parties to a contract have agreed in writing\* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

###### NOTICE, CALCULATION OF PERIODS OF TIME

###### Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

#### \* Model Arbitration Clause.

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

*Note—Parties may wish to consider adding:*

- (a) The appointing authority shall be... (name of institution or person);
- (b) The number of arbitrators shall be... (one or three);
- (c) The place of arbitration shall be... (town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be....

#### NOTICE OF ARBITRATION

##### Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

- (a) A demand that the dispute be referred to arbitration;
- (b) The names and addresses of the parties;
- (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
- (d) A reference to the contract out of or in relation to which the dispute arises;
- (e) The general nature of the claim and an indication of the amount involved, if any;
- (f) The relief or remedy sought;
- (g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

- (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
- (b) The notification of the appointment of an arbitrator referred to in article 7;
- (c) The statement of claim referred to in article 18.

#### REPRESENTATION AND ASSISTANCE

##### Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

#### SECTION II. COMPOSITION OF THE ARBITRAL TRIBUNAL

##### NUMBER OF ARBITRATORS

###### Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

##### APPOINTMENT OF ARBITRATORS (ARTICLES 6 TO 8)

###### Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:

- (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
- (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

#### Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within 30 days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

#### Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

### CHALLENGE OF ARBITRATORS (ARTICLES 9 TO 12)

#### Article 9

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstance to the parties unless they have already been informed by him of these circumstances.

#### Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

#### Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

#### Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

### REPLACEMENT OF AN ARBITRATOR

#### Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and

replacement of an arbitrator as provided in the preceding articles shall apply.

#### REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

##### Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

#### SECTION III. ARBITRAL PROCEEDINGS

##### GENERAL PROVISIONS

##### Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

##### PLACE OF ARBITRATION

##### Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

##### LANGUAGE

##### Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

##### STATEMENT OF CLAIM

##### Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

##### STATEMENT OF DEFENCE

##### Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

##### AMENDMENTS TO THE CLAIM OR DEFENCE

##### Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

##### PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

##### Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the



contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

#### FURTHER WRITTEN STATEMENTS

##### Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

#### PERIODS OF TIME

##### Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

#### EVIDENCE AND HEARINGS (ARTICLES 24 AND 25)

##### Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

##### Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

#### INTERIM MEASURES OF PROTECTION

##### Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

#### EXPERTS

##### Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

#### DEFAULT

##### Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

#### CLOSURE OF HEARINGS

##### Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion

or upon application of a party, to reopen the hearings at any time before the award is made.

#### WAIVER OF RULES

##### Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

#### SECTION IV. THE AWARD

##### DECISIONS

##### Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

##### FORM AND EFFECT OF THE AWARD

##### Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

##### APPLICABLE LAW, *amiable compositeur*

##### Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

##### SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

##### Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either

issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

##### INTERPRETATION OF THE AWARD

##### Article 35

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

##### CORRECTION OF THE AWARD

##### Article 36

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

##### ADDITIONAL AWARD

##### Article 37

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

##### COSTS (ARTICLES 38 TO 40)

##### Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;



(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

#### Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

#### Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

#### DEPOSIT OF COSTS

#### Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

#### CHAPTER VI. RATIFICATION OF OR ADHERENCE TO CONVENTIONS CONCERNING INTERNATIONAL TRADE LAW<sup>21</sup>

58. The Commission, at its seventh session, decided to maintain on its agenda the question of the ratification of or adherence to conventions concerning international trade law and to re-examine the question at its ninth session with special reference to the state of ratification then obtaining in respect of the Convention on the Limitation Period in the International Sale of Goods. At the present session, the Commission had before it a note by the Secretary-General concerning the state of signatures and of ratifications relating to that Convention (A/CN.9/118). The Commission, after deliberation, decided to re-examine this question at a future session.

#### CHAPTER VII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW<sup>22</sup>

59. The Commission had before it a note by the Secretary-General (A/CN.9/111) setting forth the action taken by the Secretariat to implement the Commission's decision on training and assistance in the field of international trade law taken at its eighth session.<sup>23</sup>

##### A. Fellowships for training in international trade law

60. The Commission expressed its appreciation to the Government of Belgium for its fellowship programme under which two recipients from developing countries received academic and practical training in international trade law at the University of Louvain in 1975. The Commission also noted with satisfaction that the Government of Belgium had decided to renew its offer of fellowships for 1976.

##### B. Seminars of the United Nations Institute for Training and Research

61. The Commission took note with satisfaction of the fact that the United Nations Institute for Training

<sup>21</sup> The Commission considered this subject at its 177th meeting, on 28 April 1976. A summary record of this meeting is contained in A/CN.9/SR.177.

<sup>22</sup> *Idem*.

<sup>23</sup> *Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 113; UNCITRAL Yearbook, Vol. V: 1974, part one, II, A.*

and Research (UNITAR) had included the subject of international trade law in the curriculum of its regional training and refresher course for members of the Economic Commission for Western Asia, held at Doha, Qatar, from 19 to 31 January 1976, and expressed the hope that it would be possible to work out similar arrangements with UNITAR in the future.

### C. Second UNCITRAL symposium

62. In selecting a theme for the second UNCITRAL symposium on international trade law to be held in connexion with the tenth session of the Commission, the Commission considered three suggestions put before it by the Secretariat, namely, "Transport and financing documents used in international trade", "Carriage of goods by sea", and "International sale of goods".<sup>24</sup> There was general agreement that the first theme mentioned above would bring to bear on the symposium a very practical approach to the subject of international trade law which would enhance the symposium's value to participants from developing countries and to others in the governmental, research and academic fields. Accordingly, the Commission decided that the second UNCITRAL symposium on international trade law should be devoted to transport and financing documents used in international trade. The view was expressed that each of the other suggested themes might best be discussed at some future symposium following the final adoption of a convention on the international sale of goods and on the carriage of goods by sea.

63. The Commission also decided that part of the programme of the symposium should be devoted to a discussion of the UNCITRAL Arbitration Rules adopted by the Commission at the present session.

64. The Commission noted with appreciation the voluntary contributions or pledges already made by Austria, Finland, the Federal Republic of Germany, Greece, Norway and Sweden towards meeting the cost of participation in the symposium of nationals of developing countries, and expressed the hope that more voluntary contributions would be forthcoming from Governments and from private sources.

## CHAPTER VIII. FUTURE WORK<sup>25</sup>

### A. Future work programme of the Commission

65. The Commission noted that it had completed, or soon would complete, work on many of the priority items included in its programme of work and that it was therefore desirable to review, in the near future, its long-term work programme. In the Commission's view, the establishment of a long-term programme would enable the Secretariat to begin the necessary preparatory work in respect of items which the Commission might wish to take up.

66. In this connexion, the Commission instructed the Secretariat to submit, at its eleventh session, its views and suggestions in respect of the long-term programme of work of the Commission and, where appropriate, to consult with international organizations and trade institutions as to its contents.

<sup>24</sup> A/CN.9/111, paras. 17, 18 and 20.

<sup>25</sup> See foot-note 21 above.

### B. Membership of the Working Group on the International Sale of Goods

67. The Commission decided to extend the mandate of Czechoslovakia as a member of the Working Group on the International Sale of Goods.

### C. Dates and places of sessions of the Commission and its Working Groups

68. The Commission had before it a letter addressed to the Chairman by the representative of Austria inviting the Commission, on behalf of the Federal Government of Austria, to hold its tenth session in 1977 in Vienna (A/CN.9/124). The Commission noted that, under General Assembly resolution 2609 (XXIV) of 16 December 1969, United Nations bodies may hold sessions away from their established headquarters when a Government, issuing an invitation for a session to be held within its territory, has agreed to defray the actual additional costs directly or indirectly involved. During discussion of this item, the representative of Austria on the Commission confirmed that his Government would defray such extra costs as may be directly or indirectly attributable to shifting the tenth session from Geneva to Vienna. The Commission expressed its appreciation to the Government of Austria for the invitation and decided to hold its tenth session in Vienna from 23 May to 17 June 1977.

69. The Commission decided that the agenda of the tenth session would include consideration of the draft Convention on the International Sale of Goods. It was also decided to establish at that session a Committee of the Whole that would meet for five to eight days to consider, *inter alia*, the subjects of security interests in goods and of liability for damage caused by products intended for or involved in international trade.

70. The Commission approved the scheduling of the eighth session of the Working Group on the International Sale of Goods for the period from 4 January to 14 January 1977 in New York. As for the Working Group on International Negotiable Instruments, the Commission decided that that Group should meet in Geneva at a date to be set by the Secretary of the Commission after consultation with representatives on the Working Group.

## CHAPTER IX. OTHER BUSINESS<sup>26</sup>

### A. General Assembly resolution 3494 (XXX) of 15 December 1975 on the report of the United Nations Commission on International Trade Law on the work of its eighth session

71. The Commission took note of this resolution. In particular, attention was directed to paragraph 8, in which the General Assembly "calls upon the United Nations Commission on International Trade Law to take account of the relevant provisions of the resolutions of the sixth and seventh special sessions of the General Assembly that lay down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of those resolutions". The Commis-

<sup>26</sup> See foot-note 21 above.

sion had before it a note by the Secretary-General on the "Relevant provisions of the resolutions of the sixth and seventh special sessions of the General Assembly" (A/CN.9/122).

*B. Report of the Secretary-General on current activities of other international organizations*

72. The Commission took note of this report (A/CN.9/119).\*

*C. Multinational enterprises*

73. The Commission, at its eighth session, decided to maintain this item on its agenda with a view to giving favourable consideration to any request for action on specific legal issues which the Commission on Transnational Corporations might address to the Commission.<sup>27</sup> The Commission was informed that no formal communication had yet been received from the Commission on Transnational Corporations. The Commission requested the Secretariat to keep it informed of any developments in the work programme of other United Nations bodies in the field of multinational enterprises which may be of interest to it.

*D. Attendance by observers*

74. The Commission noted that at the present session, as at previous sessions, and at sessions of its Working Groups, several Governments that were not members of the Commission had expressed the wish to attend sessions of the Commission and its Working Groups as observers. The Commission was of the unanimous view that it would be desirable if these Governments were permitted to attend sessions in that capacity. The Commission therefore agreed that it should recommend to the General Assembly that it include in its resolution on the report of the Commission on the work of its ninth session an operative paragraph whereby the Commission would be expressly authorized to permit States not members of the Commission to attend sessions of the Commission as observers, where the States concerned so requested. The Commission, at its 177th meeting, on 28 April 1976, adopted unanimously the following decision:

*The United Nations Commission on International Trade Law,*

*Noting* that Governments that are not member States of the Commission have expressed the wish to attend sessions of the Commission and of its Working Groups as observers,

*Being of the opinion* that it is in the interest of the Commission's work that Governments that are not members of the Commission be given the opportunity to participate in the work of the Commission as observers,

*Recommends* to the General Assembly that it should authorize the Commission to permit States not members of the Commission to attend sessions of the Commission and its Working Groups as observers, where the States concerned so request.

*E. Date for termination of membership of the Commission*

75. The Commission considered the difficulties encountered by its Working Groups resulting from the fact that under General Assembly resolution 2205 (XXI), establishing the Commission, the term of office of member States of the Commission expires on 31 December of the year in question. The Commission noted that its Working Groups usually met during the months of January and February and that, therefore, every three years, the Working Groups have met after the term of office of one or more of its members had expired but prior to the annual session of the Commission at which new members of the Working Groups could be appointed in replacement of the outgoing members. It was the general view that it would be more conducive to the work of the Commission if the term of office of a member State of the Commission began on the first day of the regular annual session of the Commission following such State's election and terminated on the last day prior to the beginning of the next regular annual session of the Commission following their election.<sup>28</sup>

*Decision of the Commission*

76. The Commission, at its 177th meeting, on 28 April 1976, unanimously adopted the following decision:

*The United Nations Commission on International Trade Law,*

*Noting* that under General Assembly resolutions 2205 (XXI) of 17 December 1966 and 3108 (XXVIII) of 12 December 1973 the term of office of a State elected to the Commission begins on the first of January following its election and expires on 31 December three or six years later, as the case may be,

*Having regard* to the fact that much of the substantive work of the Commission is carried out in its Working Groups and that these Working Groups usually meet during the months of January or February before they can be reconstituted by the Commission following the election of new Member States of the Commission by the General Assembly,

*Recommends* that the General Assembly should:

(a) Extend the term of office of the States currently members of the Commission whose term is due to expire on 31 December 1976 to the last day prior to the regular annual session of the Commission in 1977 and to extend the term of office of the States currently members of the Commission whose term is due to expire on 31 December 1979 to the last day prior to the regular annual session of the Commission in 1980, and

(b) Decide that henceforth new members of the Commission shall take office on the first day of the regular annual session of the Commission following their election and that their terms shall expire on

\* Reproduced in this volume, part two, VI, *infra*.

<sup>27</sup> *Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 94.*

<sup>28</sup> The term of office of a member of the Commission would remain six annual cycles of the Commission's work, although the actual term of office of a State might be one or two months more or less than six years, depending on the dates of the regular annual sessions of the Commission.

the last day before the opening of the seventh regular annual session of the Commission following their election.

## ANNEX I

### Report of the Committee of the Whole I relating to the draft Convention on the Carriage of Goods by Sea

#### I. INTRODUCTION

1. The Committee of the Whole I was established by the Commission at its ninth session to consider the text of the draft Convention on the Carriage of Goods by Sea adopted by the Commission's Working Group on International Legislation on Shipping. This text is set forth in the annex to A/CN.9/105.\* Section II of this report summarizes article by article the main points that arose during the deliberations of the Committee in respect of the draft Convention. At the beginning of the summary of discussions on each article of the draft Convention, the text of that article as it appeared in the annex to A/CN.9/105\* is reproduced.

2. In the course of its deliberations, the Committee established a Working Group and several *ad hoc* Drafting Groups for the purpose of redrafting particular articles or paragraphs of articles.

3. The text of each article of the draft Convention as approved by the Committee, unless identical with the text adopted by the Working Group, is set forth in section II of this report at the conclusion of the summary of the discussion on that article.

#### II. CONSIDERATION BY THE COMMITTEE OF THE WHOLE I OF THE DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

##### Title of the draft Convention

##### "Draft Convention on the Carriage of Goods by Sea"

1. The Committee considered a proposal that the present title of the draft Convention should be modified. The proposal was supported on the ground that the draft Convention did not regulate all legal issues which may arise out of a contract for the carriage of goods by sea. After deliberation, the Committee decided to retain the present title.

#### ARTICLE 1

##### Article 1, paragraphs 1 and 2

##### "PART I. GENERAL PROVISIONS

##### "Article 1. Definitions

"1. 'Carrier' or 'contracting carrier' means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper.

"2. 'Actual carrier' means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods."

2. The Committee considered the following proposals:

(a) That paragraphs 1 and 2 of article 1 should be deleted, and the following two paragraphs substituted as paragraphs 1 and 2 of article 1:

"1. 'Carrier' means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper, whether the carriage is in fact performed by the carrier or by an actual carrier.

"2. 'Actual carrier' means any person to whom the carrier has entrusted the performance of all or part of the contract for carriage of goods."

(b) That the term "actual carrier" be defined as "the owner of the ship carrying the goods".

(c) That the following definition of "actual carrier" be adopted. "Actual carrier" means any person to whom the performance of the carriage of the goods or part thereof has been entrusted by the carrier and any other person to whom such performance has subsequently been entrusted."

3. In support of the proposal noted at paragraph 1 (a) above, it was observed that the proposed new paragraphs 1 and 2 were simpler in form than the existing paragraphs 1 and 2. The proposed new paragraphs would create a greater degree of uniformity between the definitions of these terms in the draft Convention and the definitions contained in article 1, paragraph 1 (a) and (b), of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974.\*

4. It was noted, however, that the term "contracting carrier", which was defined by that existing paragraph 1, but not by the proposed new paragraph 1, appeared in several succeeding provisions of the draft Convention. If the proposed new paragraph 1 were to be adopted, all provisions in which the term "contracting carrier" appeared would need to be reconsidered both as to their substance and their drafting.

5. In support of the proposed definition of "actual carrier" noted at paragraph 1 (b) above, it was observed that the present definition of "actual carrier" would not cover the situation where an actual carrier to whom the contracting carrier had entrusted the performance of all or part of the carriage of goods in turn entrusted the performance of the carriage to another carrier. This last carrier performing the carriage would not fall within the existing definition of "actual carrier" because the performance of the carriage had not been entrusted to him by the contracting carrier. Under the proposed definition, however, such last carrier would be an "actual carrier". On the other hand, it was noted that while the existing definition might not be satisfactory, the proposed definition would also be inappropriate in certain circumstances. For instance, where a carrier entrusted with the performance of the carriage, either by the contracting carrier, or by a carrier to whom the contracting carrier in turn had entrusted the performance of the carriage, carried the goods on a ship which he had chartered by demise, the person who should be covered by the definition of "actual carrier" was the demise charterer and not the owner of the ship.

6. In support of the proposed definition noted in paragraph 1 (c) above, it was observed that it was an extension of the existing definition of "actual carrier", and that any carrier to whom performance of the carriage had been entrusted fell within the proposed definition. On the other hand, it was observed that this proposed definition raised the question as to whether it was desirable to extend the scope of application of the draft Convention to contracts of carriage other than those between a shipper and carrier. An entrusting of the performance of the carriage by a shipper to a carrier was the result of a contract between them, and it was appropriate to make the Convention applicable to that contract so as to regulate carrier liability. The entrusting of the performance of the carriage by a contracting carrier to an on-carrier did not always result in a contract being created between the shipper and the on-carrier. It might therefore be inappropriate to regulate the liability of such an on-carrier to the shipper under the draft Convention.

7. After deliberation, the Committee decided to adopt the following text:

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 3.

\* This Convention will hereinafter be referred to as the Athens Convention of 1974.

## PART I. GENERAL PROVISIONS

*Article 1. Definitions*

"In this Convention:

"1. 'Carrier' means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

"2. 'Actual carrier' means any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and any other person to whom such performance has been entrusted.

*"Article 1, paragraph 3*

"3. 'Consignee' means the person entitled to take delivery of the goods by virtue of the contract of carriage; it

8. The Committee considered a proposal that the definition of "consignee" contained in the present paragraph 3 should be deleted and replaced by the following new definition:

"3. 'Consignee' means the person entitled to take delivery of the goods by virtue of the contract of carriage; it is the person whose name is indicated in the bill of lading when the bill of lading is made out to a named person, the person who presents the bill of lading on arrival when the bill of lading is made out to bearer, and the last endorsee when the bill of lading is made out to order."

9. The Committee considered the proposed definition under the following heads:

(a) Whether the definition of the term "consignee" contained in the first sentence of the proposed new paragraph 3, restricting the scope of that term to the person entitled to take delivery by virtue of the contract of carriage, should be adopted; and

(b) Whether the definition of the term "consignee" contained in the second sentence of the proposed new paragraph 3, i.e. that the consignee was the person whose name was indicated in the bill of lading, or the person presenting a bill of lading made out to bearer, or the last endorsee on a bill of lading made out to order, should be adopted.

10. In support of restricting the definition of "consignee" in the manner indicated in paragraph 9 (a) above, it was observed that the present definition of "consignee" was too wide in that it included within its scope any person entitled to take delivery under the applicable national law e.g. a sheriff acting under a writ of execution. However, it was noted in reply that the present definition was unlikely in practice to create difficulties as to the meaning of "consignee", and that further clarification of that term was therefore unnecessary. It was also observed that the proposed restrictive definition might create difficulties in certain jurisdictions in which, when a consignee was named in a bill of lading, his right to obtain delivery did not arise from the contract of carriage.

11. There was general agreement that the further definition of "consignee" contained in the second sentence of the proposed definition, and referred to in paragraph 9 (b) above, was unnecessary.

12. After deliberation, the Committee decided to retain the existing text of this paragraph.

*"Article 1, paragraph 4*

"4. 'Goods' means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if supplied by the shipper."

13. The Committee considered the following proposals relating to this paragraph:

(a) That the statement in the definition that "goods" included live animals should be deleted.

(b) That passenger luggage should be expressly excluded in the definition from the scope of the term "goods".

(c) That all forms of packaging should not be included as "goods" in the definition.

(d) That the words "if supplied by the shipper" appearing at the end of the paragraph should be deleted.

14. In support of the proposal noted in paragraph 13 (a) above, it was observed that since article 5, paragraph 5, made it clear that the carrier was liable for loss or damage to live animals, it was unnecessary to specify in the definition that "goods" included live animals. It was suggested on the other hand that, since under the Brussels Convention of 1924<sup>b</sup> live animals were expressly excluded from the definition of "goods" contained in that Convention, and thereby loss or damage to live animals fell outside the scope of that Convention, it was desirable to emphasize in the definition that live animals fell within the scope of "goods" for the purposes of the draft Convention. After deliberation, the Committee decided to retain the existing reference to live animals in the definition.

15. In support of the proposal noted in paragraph 13 (b) above, it was observed that, since the liability of the carrier for passenger luggage was already regulated by the Athens Convention of 1974 it was desirable to exclude passenger luggage from the scope of the definition of "goods". It was noted in reply that the Athens Convention of 1974 only regulated carrier liability when a contract had been made for the carriage of a passenger and his luggage. If, therefore, passenger luggage was excluded from the definition, a contract concluded solely for the carriage of passenger luggage would fall outside the scope of both the Athens Convention of 1974 and the draft Convention. After deliberation, the Committee decided to exclude liability for passenger luggage from the scope of the convention, not by modifying the definition of "goods", but by the addition of a new paragraph 3 to article 25.

16. In support of the proposal noted in paragraph 13 (c) above, it was observed that the inclusion of all forms of packaging as "goods", which resulted in the imposition of a liability on the carrier for loss of or damage to all forms of packaging, was contrary to commercial practice; the liability of the carrier should be restricted to durable packaging having a commercial value. It was stated in reply that the inclusion of packaging as "goods" was useful; packaging was often of considerable value, and the carrier should therefore be liable for loss of or damage to packaging. If the packaging was of no value, the carrier would be under no liability, since the claimant would not be able to prove that he had suffered loss. Further, the exclusion of packaging from "goods" would result in carrier liability for damage to packaging being governed by the applicable national law. If the packaging and its contents were both damaged at the same time, two régimes of carrier liability would be applicable, one to the packaging and the other to the contents of the packaging. After deliberation, the Committee decided to retain in its current form the inclusion of packaging as "goods" in the definition.

17. In support of the proposal noted in paragraph 13 (d) above, it was observed that the words "if supplied by the shipper" were unnecessary; for if the article of transport or packaging was not supplied by the shipper, he would not suffer loss and would therefore have no right of action. It was noted, on the other hand, that since an article of transport might be supplied by a third party, such as a freight forwarder, the deletion of these words would create a liability of the carrier to a third party in such cases. It was also noted that, if these words were deleted, the weight of the article of transport might be considered as forming part of the weight of the goods; this would affect the monetary limit of liability

<sup>b</sup> International Convention for Unification of Certain Rules relating to Bills of Lading, Brussels, 25 August 1924. This Convention will hereinafter be referred to as the Brussels Convention of 1924.

where such limit was determined by reference to the weight of the goods. After deliberation the Committee decided to retain the words "if supplied by the shipper".

18. The Committee adopted the following text:

"4. 'Goods' include live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if supplied by the shipper.

"Article 1, paragraph 5

"5. 'Contract of carriage' means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered."

19. The Committee considered the following proposals:

(a) That the paragraph should be supplemented by the addition of the following words: "By virtue of this contract, the consignee may exercise the rights of the shipper and be subject to his obligations."

(b) That "contract of carriage" should be defined as a contract in writing.

(c) That the word "port" appearing in the definition should be replaced by the word "place", or by the phrase "port or place".

(d) That the word "specified" in the definition should be deleted, or be replaced in the English text by another appropriate word.

(e) That the words "where the goods are to be delivered" appearing at the end of the definition should be deleted.

20. In support of the proposal noted in paragraph 19 (a) above, it was observed that the addition to article 1, paragraph 5 of the words set forth in paragraph 19 (a) would serve to clarify the rights of a consignee. Such rights would currently be determined by the applicable national law, which might be difficult to ascertain, or uncertain. In reply, it was noted that the draft Convention was not an appropriate instrument for defining the rights of the consignee. It was also noted that the definition of a consignee's rights raised complex issues, and that a consignee's rights and obligations need not, as implied in the proposal under consideration, be identical with those of the shipper. After deliberation, the Committee decided not to add the proposed wording to the definition.

21. In support of the proposal noted in paragraph 19 (b) above, it was observed that most contracts of carriage of goods by sea were in writing, and that therefore "contract of carriage" should be defined as a contract in writing. It was observed, however, that the adoption of this proposal would restrict the scope of application of the Convention to written contracts. In the ocean carriage of goods in certain regions, it was the practice not to enter into written contracts, and such ocean carriage would, if this proposal were adopted, not be regulated by the draft Convention. It was also noted that the use of modern methods of data processing might result in the making of contracts of carriage which were not in writing. After deliberation, the Committee decided that a requirement that the contract of carriage be in writing should not be added to the definition.

22. In support of the proposal noted in paragraph 19 (c) above, it was observed that if the word "port" were retained as defining the terminal points of a carriage of goods to which the draft Convention applied, the Convention might not apply to the sea-leg of a carriage which originated or terminated elsewhere than at a port, e.g. inland. In reply, it was noted that the draft Convention did not regulate multimodal transport, and that an attempt to cover the sea-leg of a multimodal carriage of goods in the draft Convention might create difficulties in the preparation of a future convention regulating multimodal transport. The adoption of this pro-

posal might also lead to the application of the Convention to inland transport, and create conflicts with national law regulating inland transport, or with other transport conventions. After deliberation, the Committee decided to retain the word "port" in the definition.

23. In support of the proposal noted in paragraph 19 (d) above, it was observed that the term "specified goods" appearing in the English text might be interpreted to mean goods specifically listed in a bill of lading or other transport document. If that interpretation were adopted, a carrier could avoid the application of the Convention to a carriage of goods by not issuing a transport document listing the goods. After deliberation, the Committee decided to delete the word "specified".

24. In regard to the proposal noted in paragraph 19 (e) above, there was general agreement that the words "where the goods are to be delivered" appearing at the end of the definition should be deleted.

25. After deliberation, the Committee adopted the following text:

"5. 'Contract of carriage' means a contract whereby the carrier against payment of freight undertakes to carry goods by sea from one port to another.

"Article 1, paragraph 6

"6. 'Bill of lading' means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking."

26. After deliberation, the Committee decided to retain this definition.

27. It was proposed that the following additions should be made to article 1:

(a) That a new paragraph 7 be added to the article, reading as follows:

"7. 'In writing' includes telegram and telex."

(b) That the following paragraph should be added as a new paragraph 3, and the existing paragraphs 3 to 6 be re-numbered as paragraphs 4 to 7:

"3. In this Convention, 'shipper' means any person by whom or in whose name a contract for carriage by sea has been concluded with a carrier."

28. In support of the addition of the new paragraph 7 set forth in paragraph 27 (a) above, it was observed that the term "in writing" was used in several articles of the draft Convention, and therefore needed clarification. On the other hand, it was suggested that such a clarification should not be made by the proposed addition to article 1, but that the term should be clarified when appropriate within those articles in which the term appeared. After deliberating, the Committee decided to include a definition of "writing", and adopted the following text:

"7. 'Writing' includes, *inter alia*, telegram and telex."

29. In support of the addition of the new paragraph 3 set forth in paragraph 27 (b) above, it was observed that the definitions contained therein clarified the identity of the shipper, which was sometimes uncertain. It was noted, however, that the definition might create difficulties in certain cases. Thus, when the contract of carriage was concluded by the consignee, the consignee would, under the proposed definition, be the shipper. Again, a buyer under a F.O.B. contract who concluded the contract of carriage would under the proposed definition be the shipper. After deliberation, the Committee decided not to adopt this proposal.



## ARTICLE 2

## Article 2, paragraph 1

*"Article 2. Scope of application"*

1. The provisions of this Convention shall be applicable to all contracts for carriage of goods by sea between ports in two different States, if:

"(a) The port of loading as provided for in the contract of carriage is located in a Contracting State, or

"(b) The port of discharge as provided for in the contract of carriage is located in a Contracting State, or

"(c) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

"(d) The bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

"(e) The bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract."

1. The Committee considered the following proposals:

(a) That the existing introductory words of this paragraph should be deleted, and be replaced by the following:

"The provisions of this Convention shall be applicable to all contracts of carriage of goods in so far as such contracts relate to or involve the carriage of goods by sea between two different States, if:"

(b) That subparagraph (d) of this paragraph should be deleted.

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the proposed new introductory words would ensure that the draft Convention applied to the sea-leg of a multimodal carriage of goods. In reply, it was stated that the draft Convention should not attempt to resolve difficulties which arose from multimodal transport, since such difficulties could be appropriately resolved only by a future convention dealing with multimodal transport. After deliberation, the Committee decided to retain the existing introductory words of this paragraph.

3. In support of the proposal noted in paragraph 1 (b) above, it was observed that the issuance of a bill of lading or other document evidencing a contract of carriage in a Contracting State did not create a sufficiently close connexion between the draft Convention and the contract of carriage to justify the application of the Convention to the contract of carriage evidenced by such bill of lading or other document. In reply, it was observed that it was desirable to give a very wide scope of application to the Convention, and that paragraph 1 (d) of article 2 served to widen the scope of application. After deliberation, the Committee decided to retain paragraph 1 (d) of article 2.

4. After deliberation, the Committee decided to retain the existing text of this paragraph.

## Article 2, paragraph 2

"2. The provisions of paragraph 1 of this article are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person."

5. The Committee considered the following proposals:

(a) That this paragraph should be deleted.

(b) That this paragraph should be retained, with the substitution of the words "the provisions of this Convention" for the words "the provisions of paragraph 1 of this article".

(c) That the words "the actual carrier" should be added after the words "the carrier".

6. In support of the proposal noted in paragraph 5 (a) above, it was observed that the object sought to be achieved by paragraph 2 of article 2 i.e. the application of the provisions of paragraph 1 of article 2 without regard to the factors set out in paragraph 2 of article 2, was already ensured by the introductory words of paragraph 1 of article 2. On the other hand, it was observed that it had been decided in certain jurisdictions that the applicability of the draft Convention depended on national rules of the conflict of laws, and that these rules took into account the factors set out in paragraph 2 of article 2. Paragraph 2 was therefore intended to ensure that the draft Convention was given the scope of application provided in paragraph 1 irrespective of national rules of the conflict of laws.

7. It was also observed that it was desirable to ensure the application, not merely of the provisions of paragraph 1 of article 1, but of the provisions of the entire draft Convention, irrespective of national rules of the conflict of laws, and that the amendment noted in paragraph 5 (b) above to paragraph 2 of article 2 would secure this result. After deliberation, the Committee decided to adopt this amendment to paragraph 2 of article 2.

8. In support of the proposal noted in paragraph 5 (c) above, it was observed that the term "carrier" as defined in the draft Convention did not include an "actual carrier", and that the nationality of the actual carrier should also be irrelevant to the application of the draft Convention. After deliberation the Committee decided to add to the paragraph the words "actual carrier" after the words "the carrier".

9. After deliberation, the Committee adopted the following text:

"2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person."

## Article 2, paragraph 3

"3. A Contracting State may also apply, by its national legislation, the rules of this Convention to domestic carriage."

10. The Committee considered a proposal that this paragraph should be deleted.

11. In support of the proposal to delete this paragraph, it was observed that the paragraph was unnecessary because a Contracting State would in any event have the power conferred by it. In reply, it was observed that the Federal Government of a Federal State might not have such a power unless it was expressly conferred by a clause such as this paragraph, and that its retention might therefore serve a useful purpose. After deliberation, the Committee decided to retain the text of the paragraph in the draft Convention, but to remove the text from article 2 and place it among the final clauses of the draft Convention.

## Article 2, paragraph 4

"4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading."

12. The Committee considered the following proposals.

(a) That the term "charter-party" should be defined.

(b) That the phrase "not being contracts of carriage" should be added at the end of the first sentence of this paragraph.

(c) That the words "holder of the bill of lading" appearing at the end of the second sentence of the paragraph should be replaced by the words "third-party holder in good faith".

(d) That the words "not being the charterer" should be added at the end of the second sentence of this paragraph.

(e) That the words "or quantity contracts" should be added at the end of the first sentence of the paragraph, and that the words "or quantity contract" should be added after the word "charter-party" in the second sentence of the paragraph.

13. In support of the proposal noted in paragraph 12 (a) above, it was observed that while, under the introductory words of paragraph 1 of article 2 of the draft Convention was applicable to all contracts of carriage of goods by sea, under paragraph 4 of article 2 it was not applicable to charter-parties. It was therefore necessary to clarify the scope of application of the draft Convention by defining the term charter-party. Such a definition was also made necessary by the fact that in certain jurisdictions the term charter-party did not have a settled meaning. It was also observed that the exclusion of the application of the Brussels Convention of 1924 to charter-parties under article 5 of that Convention had created difficulties by reason of the absence in that Convention of a definition of a charter-party. It was further observed that, in the absence of a definition of "charter-party", carriers might seek to avoid the application of the draft Convention by issuing transport documents in the form of charter-parties.

14. In reply, it was observed that the term "charter-party" had a well-established meaning in maritime law, and therefore did not need definition. It was further observed that it was intended to exclude from the scope of application of the draft Convention all charter-parties; since there was more than one form of charter-party, it would be necessary to formulate a comprehensive definition of charter-party, which was a difficult task. It was also observed that in many jurisdictions there had been no difficulty in ascertaining the meaning of the term "charter-party" for the purposes of the Brussels Convention of 1924 even though that Convention did not define the term, and that carriers had not sought to avoid the application of that Convention by labelling their contracts of carriage as "charter-parties".

15. After deliberation, the Committee decided that the term "charter-party" should not be defined.

16. In support of the proposal noted in paragraph 12 (b) above, it was observed that the addition of the proposed words would resolve uncertainties as to the scope of application of the draft Convention in certain jurisdictions. After deliberation, the Committee did not adopt this proposal.

17. In support of the proposals noted in paragraphs 12 (c) and 12 (d) above, it was noted that the term "holder of the bill of lading" could be interpreted as covering the charterer or his agents holding a bill of lading pursuant to a charter-party. The text should therefore be modified to preclude such an interpretation. There was general agreement that such a modification was desirable. However, in regard to the proposal noted in paragraph 12 (c) above, it was observed that its adoption might create difficulty in that the meaning of "holding in good faith" was not clear. After deliberation, the Committee decided to add the words "not being the charterer" at the end of the paragraph.

18. In support of the proposal noted in paragraph 12 (e) above, it was noted that quantity contracts were akin to charter-parties, and should therefore, like charter-parties, be excluded from the scope of application of the draft Convention. On the other hand, it was stated that the term "quantity contract" had no settled meaning in maritime law, and that the inclusion of that term would create uncertainty as to the scope of application of the draft Convention. After deliberation, the Committee decided not to adopt this proposal.

19. After deliberation, the Committee adopted the following text:

"4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer."

#### *Proposed additions to article 2*

20. The Committee considered the following proposals:

(a) That the following paragraph should be added as a new paragraph 5 of article 2:

"5. Notwithstanding the preceding provisions of this article, where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract of carriage is issued and a statement to that effect is endorsed on such document and signed by the shipper."

(b) That the following paragraph should be added as a new paragraph 5 of article 2:

"5. If a contract provides for future carriage of a certain quantity of goods in successive shipments during an agreed period of time, each of the shipments made shall nevertheless, for the purpose of this Convention, be deemed to be governed by a separate contract of carriage. However, where a shipment is made under a charter-party, the provisions of paragraph 4 of this article shall apply."

21. In support of the proposal set forth in paragraph 20 (a) above, it was observed that it was in the interests of both shippers and carriers to permit them to exclude by agreement the application of the draft Convention to the carriage of certain special types of cargo. If it were not possible to exclude the application of the draft Convention, it would be very difficult for shippers to find carriers willing to carry such cargo on suitable terms. Since under the proposed new paragraph the parties were permitted to exclude the application of the draft Convention only when no bill of lading had been issued, and since a shipper always had a right under the draft Convention to obtain from a carrier a bill of lading, the carrier would not be able to misuse this paragraph in order to prevent the application of the draft Convention. In reply, it was stated that the shipper may not always be in a sufficiently strong bargaining position to demand a bill of lading, and that the power given under the proposed new paragraph to exclude the application of the draft Convention might therefore be abused by carriers. After deliberation, the Committee decided not to adopt this proposal.

22. In support of the proposal set forth in paragraph 20 (b) above, it was observed that the proposal was intended to cover the so-called "frame" contracts which provided for the delivery of a very large quantity of goods in successive shipments over an agreed period of time. Under the current definition of "contract of carriage" in article 1, paragraph 5, the view might be taken that such "frame" contracts fell within that definition and were subject to the draft Convention. However, it was desirable to exclude such contracts, which were concluded by parties in an equal bargaining position, from the scope of application of the draft Convention, while maintaining the applicability of the draft Convention to each shipment made pursuant to the "frame" contract, provided such shipment was not under a charter-party. It was observed, on the other hand, that the provisions on the scope of application of the draft Convention already secured the result sought to be obtained through the proposed text. After deliberation, the Committee decided to adopt the following text:

"5. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention shall apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article shall apply."



## ARTICLE 3

*"Article 3. Interpretation of the Convention"*

"In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity."

1. The Committee considered the following proposals:

(a) That this article should be deleted.

(b) That this article should be deleted, but that its substance should be reproduced in the preamble to the draft Convention.

2. In support of the proposal to delete this article, it was observed that the rule contained in it was self-evident. It was also observed that in certain jurisdictions there would be difficulty in including the article in legislation implementing the draft Convention. In support of the proposal to delete the article but reproduce its substance in the preamble, it was observed that the paragraph only stated a desired objective, and this would be appropriately mentioned in a preamble. In reply, it was observed that retention of the article in the body of the Convention would help the courts in certain jurisdictions to interpret and apply the draft Convention without having regard only to national legal rules. It was also observed that an identical provision appeared as article 7 of the Convention on the Limitation period in the International Sale of Goods.<sup>c</sup> After deliberation, the Committee decided to retain this article.

## ARTICLE 4

*Article 4, paragraphs 1 and 2**"PART II. LIABILITY OF THE CARRIER"**"Article 4. Period of responsibility"*

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

"2. For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

"(a) By handing over the goods to the consignee; or

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

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

1. The Committee considered the following proposals:

(a) That the words "at the port of loading, during the carriage and at the port of discharge." appearing at the end of paragraph 1 should be deleted.

(b) That the following language should be added to paragraph 1:

"For the purpose of this article 'port of loading' or 'port of discharge' shall include a terminal adjacent thereto used by the carrier when performing the carriage of goods from or to such port even if the terminal is situated outside the port area."

(c) That the following language should be added to paragraph 2 after subparagraph (c) of that paragraph:

"Where the goods are handed over to the consignee outside the port of discharge, delivery shall be deemed to have taken place at the port of discharge as provided in subparagraph (a)."

<sup>c</sup> A/CONF.63/15.

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the deletion of the language specified in paragraph 1 (a) above would clarify the points of time at which the responsibility of the carrier began and ended. If that language were retained, it might be necessary to decide in certain cases what were the exact geographic limits of ports of loading and ports of discharge in order to determine whether carrier responsibility had begun or whether it had ended. The deletion of that language also eliminated a potential contradiction between paragraph 1 and paragraph 2 of article 2 as to the period of responsibility. Under paragraph 1, that period appeared to begin at the port of loading and to end at the port of discharge, while under paragraph 2 it appeared to begin from the time the carrier took over the goods and to end when he delivered the goods. On the other hand, it was observed that the deletion of that language might lead to an undesirable extension of the scope of application of the draft Convention when a carrier had taken over the goods inland, or had delivered them inland. For in such cases the introductory words of paragraph 2 might, in the absence of the words proposed to be deleted in paragraph 1, be interpreted as meaning that carrier responsibility for the inland stages of the transport was regulated by the draft Convention, and thus create conflicts between the draft Convention and the provisions of national law or other transport conventions applicable to inland transport. After deliberation, the Committee decided not to adopt this proposal.

3. In support of the proposal noted in paragraph 1 (b) above, it was noted that the existing language of paragraph 1 of article 4 making the period of responsibility commence at the port of loading and terminate at the port of discharge might be too restrictive. Since carriers often used terminals adjacent to such ports when performing the carriage of goods from or to such ports, it was reasonable to apply the draft Convention to determine carrier liability during the period when the goods were in the charge of the carrier at such terminals. It was noted in reply that in some cases it might be difficult to determine whether a terminal was or was not adjacent to a port, and that this would create uncertainty as to the scope of application of the draft Convention. After deliberation, the Committee decided not to adopt this proposal.

4. In support of the proposal noted in paragraph 1 (c) above, it was observed that it was intended to prevent a conflict on the issue of carrier liability between the rules of the draft Convention and the rules of national law or other transport conventions during the stage of inland transport when the goods were delivered to a consignee inland. On the other hand, it was stated that the proposal created a fictional place of delivery, and that a solution formulated in terms of a fiction was undesirable. After deliberation, the Committee decided not to adopt this proposal.

5. The Committee adopted the following text:

*"PART II. LIABILITY OF THE CARRIER"**"Article 4. Period of responsibility"*

"1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

"2. For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time he has taken over the goods until the time he has delivered the goods:

"(a) By handing over the goods to the consignee; or

"(b) In cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

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

## Article 4, paragraph 3

"3. In the provisions of paragraphs 1 and 2 of this article, reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee."

6. The Committee decided to delete the words "or other persons acting pursuant to the instructions" as being unnecessary, since such persons would be either servants or agents.

7. After deliberation, the Committee adopted the following text:

"3. In paragraphs 1 and 2 of this article, references to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants or the agents, respectively, of the carrier or the consignee."

## ARTICLE 5

## Article 5, paragraph 1

*"Article 5. General rules"*

"1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

1. The Committee considered the following proposals:

(a) That the words "or the ship" should be added after the words "The carrier" appearing at the beginning of this paragraph.

(b) That the words "or proves that even if these persons had taken all such measures, such occurrence and consequences could not have been avoided" should be added at the end of this paragraph.

(c) That after the proposed additional words, set forth in subparagraph (b) above, the following words should be added: "or proves that under the circumstances no measures at all could be taken."

(d) That the words "The carrier should be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery ..." at the commencement of the paragraph should be deleted, and be replaced by the words "The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery ...".

2. In support of the proposal set forth in paragraph 1 (a) above, it was observed that the addition of the proposed language would help to preserve the action *in rem* against the ship which was available in certain jurisdictions. It was also stated that the proposed language appeared in the provision as to liability contained in article 4 of the Brussels Convention of 1924, and should therefore be retained in this paragraph. In reply, it was observed that the proposed language appeared in article 4 of the Brussels Convention of 1924 in the context of *excluding* the liability of the ship. While the words created no difficulty in that context, they would create a difficulty if used in the context of *imposing* liability on the ship, since actions *in rem* against the ship were unknown in many jurisdictions. It was also noted that the right to arrest a ship in respect of a maritime claim, which was often ancillary to an action *in rem*, was already appropriately regulated by and available under the International Convention relating to the Arrest of Sea-Going Ships, Brussels, 1952. After deliberation, the Committee decided not to accept this proposal.

3. In support of the proposals noted in paragraphs 1 (b) and 1 (c) above, it was observed that they were designed to extend the scope of the defence available to the carrier under

paragraph 1 of article 5. It was observed that under the present language defining the scope of the defence, the carrier might not be exonerated even where he proved that the circumstances causing the loss or damage were such that the carrier had no time or opportunity to take any measures whatever to prevent loss or damage. On the other hand, it was observed that the existing language provided a defence to the carrier in such circumstances since, if no measures could be taken by the carrier, then no measures could reasonably be required of the carrier. After deliberation, the Committee decided not to accept these proposals.

4. In support of the proposal set forth in paragraph 1 (d) above, it was observed that the existing language in the paragraph which it was proposed should be deleted was inelegantly drafted and excessively long. The proposed new language was clearer, and closer to the language used in corresponding provisions in other transport conventions. It was noted, however, that the existing language had been carefully harmonized by the UNCITRAL Working Group in the various language versions, and should therefore be retained. It was also noted that, since the liability under this paragraph differed from that imposed by corresponding provisions in other transport conventions, it was natural that the language of this paragraph should differ from the language in such corresponding provisions. After deliberation, the Committee decided to adopt the following text:

*"Article 5. Basis of liability"*

"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 occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

## Article 5, paragraph 2

"2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon in writing or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case."

5. The Committee considered a proposal that the words "in writing" should be deleted.

6. The Committee was agreed that, since the draft Convention did not, under article 1, paragraph 5, require that a contract of carriage be in writing, it was unnecessary to require in this paragraph that an express agreement as to the period in which delivery was to take place should be in writing. The Committee therefore decided to delete the words "in writing" from the paragraph, and adopted the following text:

"2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case."

## Article 5, paragraph 3

"3. The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article."

7. After deliberation, the Committee decided to retain the text of this paragraph.

## Article 5, paragraph 4

"4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negli-

gence on the part of the carrier, his servants or agents."

8. The Committee considered the following proposals:

- (a) That this paragraph should be deleted;
- (b) That this paragraph should be replaced by the following paragraph:

"In case of fire the carrier shall be liable, unless he proves that the ship had appropriate means of averting it and that, when the fire occurred, he, his servants and agents took all reasonable measures to avert it or to limit its consequences, except where the claimant proves the fault or negligence of the carrier, his agents or servants."

9. In support of the proposal to delete this paragraph, it was observed that there was insufficient justification for creating an exception to the general rule in paragraph 1 that the burden of disproving negligence lay on the carrier. It was the carrier's agents who were present at the scene of the fire and had available to them the evidence as to the cause of the fire and the measures taken to avoid or combat the fire. It would in most cases be impossible for the shipper to prove negligence on the part of the carrier, and the present rule in paragraph 4 was therefore unfair to the claimant. It was also observed that no similar rule placing the burden of proving the carrier's negligence in case of damage caused by fire on the claimant existed in other transport conventions.

10. The Committee did not accept the proposal for deletion of the paragraph for the following reasons: (a) for the claimant, it represented an advance on the current position under the Brussels Convention of 1924 where the carrier was exempt from liability for damage caused by fire unless caused by the actual fault or privity of the carrier; (b) the person who had most reason to fear a fire on board ship was the carrier, since he would suffer heavy loss if the ship itself was damaged; the carrier would therefore always take reasonable precautions to avoid a fire even in the absence of liability to the claimant; (c) although it might be difficult for the claimant to prove the carrier's negligence when the fire originated in the cargo holds and the fire might thus have originated from the cargo itself, it would be relatively easy to prove the carrier's negligence if the fire originated in the engine room or the crew accommodation; (d) paragraph 4 in its present form was the result of a carefully elaborated compromise in the UNCITRAL Working Group on International Legislation on Shipping, which created a balance between all the liability provisions of article 5, and that this compromise should therefore be retained. In this connexion, the Committee noted that the UNCTAD Working Group on International Shipping Legislation had not suggested the deletion of paragraph 4.

11. In support of the proposal to substitute the wording set forth in paragraph 8 (b) above for the existing wording of paragraph 4, it was argued that, while it was necessary to maintain a compromise which created a balance between all the liability provisions in the article, the proposed substitution would result in a fairer compromise. Under the proposed new wording, the burden placed on the carrier could be conveniently discharged by him, while it was nevertheless open to the shipper to make the carrier liable by affirmatively proving the carrier's negligence.

12. There was no consensus in the Committee in favour of the proposed new wording and the Committee, after deliberation, decided to adopt the following text:

"4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents."

#### Article 5, paragraph 5

"5. With respect to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied

with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents."

13. The Committee considered a proposal that this paragraph should be deleted.

14. In support of the proposal to delete this paragraph, it was observed that carrier liability in respect of live animals was adequately covered by the rules of article 5, paragraph 1, and that special provision for such liability was unnecessary. In particular, it was observed that the general defence given to the carrier under article 5, paragraph 1, to a claim in respect of loss of or damage to goods was adequate to meet a claim for loss of or damage to live animals, and that the special defences given under this paragraph were unnecessary.

15. In opposition to deletion it was observed that the carriage of live animals carried with it special risks of loss of or damage to the animals, and that special regulation of carrier liability for such carriage was necessary. It was noted that other transport conventions contained special regulation of carrier liability for such carriage. The view was also expressed that this paragraph was formulated by the UNCITRAL Working Group on International Legislation on Shipping after long deliberation as part of the compromise on the liability provisions within article 5, and should therefore be retained.

16. After deliberation, the Committee decided to adopt the following text:

"5. With respect to live animals, the carrier shall not be liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents."

#### Article 5, paragraph 6

"6. The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea."

17. The Committee considered the following proposals:

- (a) That the paragraph should be deleted and replaced by the following paragraph:

"The carrier shall not be liable, except in general average and salvage, where the loss, damage or delay in delivery resulted from measures to save life or reasonable measures to save property at sea."

- (b) That the existing text should be retained, but that the word "reasonable" qualifying "measures to save property" should be deleted;

- (c) That the words "or to preserve health" should be added immediately after the word "life".

18. In support of the proposal set forth in paragraph 17 (a) above, it was observed that the present wording of this paragraph seemed to free the carrier from his obligation to make a contribution in general average or salvage when the type of loss or damage to the cargo interests for which the carrier was normally obligated to make a contribution in general average or salvage resulted from "measures to save life" or "reasonable measures to save property at sea". This proposal was intended to make it clear that in such a case the carrier remained bound to make the appropriate general average or salvage contribu-

tion. However, the view was expressed that, since the draft Convention in article 24 contained an express provision on general average, a proposal intended to protect rights which might exist against the carrier in respect of general average or salvage contributions should be considered in connexion with that article. The Committee, however, decided to adopt the proposed substitution of the word "or" for the word "and" appearing between "life" and "from" in paragraph 6, since it was not the intention to exclude liability only in the case of an attempt to save both life and property.

19. In support of the proposal noted in paragraph 17 (b) above, it was observed that it would be difficult to determine whether measures taken by a carrier to save property at sea were or were not reasonable; this would create uncertainty as to carrier liability in cases of attempts to save property at sea. Further, since the exclusion of carrier liability was an incentive to carriers to save property at sea, uncertainty as to the limits of the exclusion might have the unfortunate result of dissuading carriers from attempting to save property at sea.

20. On the other hand, it was observed that the saving of property at sea was not as important as the saving of life; while it was important to have an absolute exclusion of liability when a carrier attempted to save life, no such exclusion was required when the carrier attempted to save property. Further, it was necessary to ensure a balancing of interests by the carrier when attempting to save property at sea between the value of the property which might be saved, and the loss that such an attempt might cause to shippers or consignees; the word "reasonable" secured this result. Otherwise, the carrier could without incurring liability, attempt to save property of low value while causing heavy loss to shippers and consignees through the attempt. After consideration of the arguments set forth in paragraphs 19 and 20 above, the Committee decided to retain the word "reasonable".

21. In support of the proposal noted in paragraph 17 (c) above, it was observed that carrier liability should be completely excluded for loss or damage caused by an attempt by a carrier to preserve the health of a person as an incentive to carriers to attempt the preservation of health. In reply, it was noted that if the attempt to preserve health formed part of an attempt to save life, the carrier would be protected under the existing wording of the paragraph. If, however, the attempt to preserve health was made when there was no danger to life, there were insufficient grounds for excluding liability. After deliberation, the Committee decided not to adopt this proposal.

22. The Committee adopted the following text:

"6. The carrier shall not be liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea."

#### Article 5, paragraph 7

"7. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss, damage or delay in delivery the carrier shall be liable only for that portion of the loss, damage or delay in delivery attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss, damage or delay in delivery not attributable thereto."

23. The Committee considered the following proposals:

(a) That this paragraph should be deleted;

(b) That the words "Where fault or negligence ..." appearing at the beginning of the paragraph should be replaced by the words "Where fault or negligence actual or presumed under this article ...";

(c) That the paragraph should be redrafted as follows:

"7. Where damage results from the conjunction of fault or negligence on the part of the carrier, his servants or agents

and an occurrence which he could not avoid, with consequences he could not prevent, the carrier shall be liable only for that portion of the damage attributable to such fault or negligence, if he establishes which portion of the damage is not attributable thereto."

(d) That the word "concurs" should be replaced in the English version by the word "contributes", or the word "combines".

(e) That the words "bears the burden of proving" should be replaced in the English version by the word "proves".

24. In support of the proposal noted in paragraph 23 (a) above it was observed that the rule contained in paragraph 7 of article 5 was inconsistent with the rules applicable under some legal systems in the circumstances covered by the said paragraph 7. For under some legal systems, the liability of the carrier, his servants and agents, and the liability of the other person whose conduct concurred to cause the loss, was joint and several, and liability was not apportioned as was the case under this paragraph. It was also observed that such joint and several liability was convenient for the claimant, since he could recover full compensation from the carrier. Under the rule contained in this paragraph, on the other hand, the claimant would have to sue a person other than the carrier in respect of a portion of the loss, and it might be difficult to obtain jurisdiction over, or recovery from, that other person.

25. The view was expressed, however, that the rule contained in this paragraph was reasonable, since it would be unfair to make the carrier liable for any portion of the loss, damage or delay in delivery proved by the carrier not to be attributable to his fault or negligence. It was also observed that the rule contained in this paragraph was also contained in other Conventions, e.g. article 17, paragraph 5, of the CMR Convention, and article 4 of the International Convention for the Unification of Certain Rules of Law relating to Collisions between Vessels, Brussels, 1910. After deliberation, the Committee decided to retain the substance of this paragraph.

26. In support of the proposal noted in paragraph 23 (b) above, it was observed that its purpose was to clarify that the rule contained in the paragraph applied not only when fault or negligence of the carrier was affirmatively proved, but also when such fault or negligence was presumed under paragraph 1 of article 5. On the other hand, it was stated that such clarification was unnecessary. After deliberation, the Committee decided not to adopt this proposal.

27. The Committee considered the proposal noted in paragraph 23 (c) above, but, after deliberation, did not adopt it.

28. After deliberation, the Committee decided to adopt the two drafting proposals set forth in paragraphs 23 (d) and 23 (e) above, and adopted the following text:

"7. Where fault or neglect on the part of the carrier, his servants or agents, combines with another cause to produce loss, damage or delay in delivery the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of loss, damage or delay in delivery not attributable thereto."

#### Proposed addition to article 5

29. The Committee considered a proposal to add the paragraph set forth below to article 5 as a new paragraph 4, and to renumber the existing paragraphs 4 to 7 as 5 to 8. The proposed paragraph was to be placed within square brackets to indicate that it had not been finally adopted by the Commission, but that it was being submitted for consideration to any future Diplomatic Conference which might consider the text of the draft Convention.

["4. Notwithstanding the provisions of paragraph 1, the carrier shall not be liable for loss, damage or expense arising

or resulting from any act, neglect or default of the master, other members of the crew and the pilot in the navigation of the ship."<sup>d</sup>

30. In support of this proposal, it was observed that the proposal only contemplated retention in favour of the carrier of a defence for neglect or default in navigation; the defence available to the carrier under article 4 (2) (a) of the Brussels Convention of 1924 for neglect or default in the management of the ship was not retained. It was observed that the exclusion of a defence for neglect or default in navigation would have adverse consequences for shippers. As a result of the shift in risk allocation thereby created, the carrier would be compelled to take out increased liability insurance to cover his increased liability. This increase in the carrier's costs would be passed on to the shipper in the form of increased freight rates. Since liability insurance was more expensive than cargo insurance, there would not be a corresponding decrease in the costs of shippers resulting from the decrease in the extent of cargo insurance cover taken out by shippers. Further, it was more convenient for shippers to take out cargo insurance directly with insurers of their choice, from whom they could obtain reimbursement directly, rather than obtain insurance indirectly through liability insurance taken out by carriers. Attention was also drawn to resolution 9 (VII) adopted by the UNCTAD Committee on Invisibles and Financing related to Trade at its seventh session which had endorsed "the conclusion ... that maintaining the present system of cargo insurance is essential and cannot be dispensed with, and that any radical shift in risk allocation from cargo insurance to carrier's liability would be particularly detrimental to the interests of developing countries". It was also noted that, since an error in navigation endangered the ship, a carrier would have a strong incentive to prevent default in navigation even though the defence was excluded and he was not liable to the shipper for loss caused by such default. It was further observed that the hazards to navigation arising in the course of ocean voyages had not significantly decreased in recent times, and that the retention of the exception was therefore justified.

31. On the other hand, it was observed that there was no information on the basis of which it could be concluded that transport costs would increase as a result of the change in risk allocation created by the exclusion of the defence. Even if such costs were to increase, it was estimated that the increase would be of a very low order. It was further observed that the view noted above of the UNCTAD Committee on Invisibles and Financing related to International Trade had referred to a "radical" shift from cargo insurance to carrier's liability. In the context of the UNCTAD Secretariat Study (TD/B/C.3/120) to which the resolution referred, by a "radical" shift was meant a shift from a system of fault liability to a system of absolute liability and an insured bill of lading. The change made by the deletion of the defence of default in navigation could not therefore be described as a "radical" shift. It was further observed that modern navigation aids had almost eliminated the hazards to navigation in the course of ocean voyages, and that the defence was therefore an anachronism. The observation was also made that the exclusion of a defence for default in navigation was part of the compromise creating an acceptable balance within the liability provisions of article 5, and that such exclusion should therefore be maintained.

32. After deliberation, the Committee decided not to adopt this proposal.

33. The representative of the USSR stated that he did not accept this decision of the Committee, and reserved his position on the issue of "error in navigation".

<sup>d</sup> This proposal was submitted by the representatives of the Federal Republic of Germany, Japan, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics.

## ARTICLE 6

### "Article 6. Limits of liability

#### "Alternative A

"1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost, damaged or delayed.

#### "Alternative B

"1. (a) the liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost or damaged.

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

"(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

#### "Alternative C

"1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

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

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

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

#### "Alternative D

"1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

variation X: [double] the freight;

variation Y: an amount equivalent to (x-y)\* francs per package or other shipping unit or (x-y) francs per kilo of gross weight of the goods delayed, whichever is the higher.

\* It is assumed that the (x-y) will represent lower limitations on liability than those established under subparagraph 1 (a)."

"(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

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

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

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

*"Alternative E"*

"1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

"(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

"2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable."

*The following paragraphs apply to all alternatives:*

"A franc means a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.

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

1. The Commission considered the following issues in relation to this article:

(a) Whether the monetary limit of carrier liability should be formulated in terms of the single criterion of the weight of the goods, or in terms of the dual criteria of weight and "package or other shipping unit".

(b) Whether the monetary limit of carrier liability for loss, damage or expense resulting from delay in delivery should be formulated in terms of the same criterion used for formulating the limit for loss, damage or expense resulting from conduct of the carrier other than delay in delivery, or in terms of a different criterion.

(c) Whether the "gold franc" should be retained as the unit of account for specifying the monetary limit under the article.

(d) Whether this article should include a provision under which the limit of liability specified in the article could be modified by a declaration by the shipper of the value of the goods.

(e) Whether the article should contain a special provision regulating the monetary limit of liability when a container, pallet or similar article of transport was used to consolidate goods.

*Single criterion or dual criteria*

2. In regard to the issue noted in paragraph 1 (a) above, the view was expressed that formulation of the monetary limit in terms of the single criterion of weight was preferable. That criterion was easy to apply in practice. Further, it had been adopted in other transport conventions i.e. the CIM,<sup>e</sup> CMR<sup>f</sup> and Warsaw<sup>g</sup> Conventions, and its application under those Conventions had not created difficulty. The main objection to the adoption of this criterion was that the application of a monetary limit based on it to cargo of low weight but high value resulted in the claimant receiving insufficient compensation. However, this difficulty could be resolved by:

(a) Insuring the goods to cover their actual value; or

(b) Establishing a minimum monetary amount payable by the carrier, even though the amount payable by the carrier under the normal rule of limitation would fall below such minimum amount. The following proposal was made for establishing such a minimum amount:

"The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to [3] units of account [(30) francs] per kilo of gross weight of the goods lost, damaged or delayed, but the limit shall in no case be less than [1,000] units of account [10,000 francs]."<sup>h</sup>

(c) By adding a provision to the Convention under which, by declaring the value of the goods in a bill of lading or other transport document, the shipper could exclude the monetary limit.

The proposal was also supported on the ground that one of the criteria used for calculating the freight was the weight of the goods, a higher freight being payable for goods of greater weight. Since a low freight was payable for goods of low weight it was not unreasonable that in the case of such goods the monetary limits of the carrier's liability should also be low. The view was also expressed that the term "package or unit" used in article 4 (5) of the Brussels Convention of 1924 had been given different interpretations in different jurisdictions, and that the continued use of this or a similar term would impede the harmonization of the law.

3. On the other hand, it was observed that the adoption of the dual criteria of weight and "package or other shipping unit" was more equitable from the point of view of the claimant. It resulted in the claimant obtaining adequate compensation in the case of cargo of low weight but having high value. Further, with the dual criteria, the claimant had the option of using that criterion which resulted in his receiving higher compensation. The solution of dual criteria had been adopted in article 2 (a) of the Brussels Protocol of 1968<sup>i</sup> as an acceptable compromise, and should be retained.

4. After deliberation, the Committee expressed its preference for a provision formulating the monetary limits of limitation in terms of the dual criteria of weight and package or other shipping unit. However, in view of the fact that there was considerable support in the Committee for the single criterion of

<sup>e</sup> International Convention concerning the Carriage of Goods by Rail, Berne, 25 October 1962. This Convention will hereinafter be referred to as the CIM Convention.

<sup>f</sup> Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956. This Convention will hereafter be referred to as the CMR Convention.

<sup>g</sup> Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929. This Convention will hereinafter be referred to as the Warsaw Convention of 1929.

<sup>h</sup> The figures were inserted in this proposal for illustrative purposes only.

<sup>i</sup> Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968. This Convention will hereinafter be referred to as the Brussels Protocol of 1968.



the weight of the goods, the Committee was of the view that the draft Convention to be submitted to a Conference of Plenipotentiaries should also set forth an alternative provision, under which the limit of liability was formulated in terms of the weight of the goods.

#### *Criterion in the case of delay*

5. In regard to the issue noted in paragraph 1 (b) above, it was observed that there were several considerations supporting the adoption of a different criterion for formulating the monetary limits of carrier liability in the case of delay in delivery, and, in particular, for formulating those limits as a function of the freight payable for the carriage of the goods delayed. It was noted that, in general, loss caused by delay in delivery, as opposed to loss caused by other conduct of the carrier, was not covered by marine cargo insurance. In case of such loss, the shipper or consignee would have to obtain recourse from the carrier, and not from an insurer. It was therefore not unreasonable to adopt a different criterion for the formulation of the limit in the case of delay, and to formulate the limit in terms of a function of the freight. The view was also expressed that one factor taken into account in calculating the amount of the freight was the estimated duration of the carriage. If this duration was prolonged, resulting in delay in delivery, it was reasonable to link the compensation payable by the carrier to the amount of the freight. Attention was also drawn to the fact that article 5, paragraph 3, of the draft Convention permitted a person entitled to the goods to treat them as lost after a delay in delivery of 60 days; compensation after such a delay would therefore be calculated on the basis of a total loss of the goods. It was therefore suggested that, if the delay in delivery was less than 60 days, compensation on a different basis was appropriate. It was further observed that in certain jurisdictions the carrier was currently not liable for delay, and that its imposition cast a new and heavy burden on the carrier. It was therefore fair that his liability should be more limited than for loss or damage caused otherwise than by delay, and a limitation by reference to the freight was reasonable.

6. On the other hand, it was observed that the consequences for the consignee of delay in delivery, and loss of or damage to the goods caused otherwise than by delay in delivery, were identical, that is, he suffered economic loss. The economic loss caused by delay in delivery could be as serious as that caused otherwise than by delay. It was also observed that if loss caused by delay in delivery was not covered by marine insurance and could only be recovered by recourse against the carrier, this was a reason for specifying a limit of liability which would provide a shipper with full compensation; freight, however, would not provide adequate compensation. The view was also expressed that the proposals to limit the compensation payable by the carrier to the freight were linked to the view that freight was a fair measure of the costs incurred by the carrier in transporting the goods, and reflected a policy that the carrier should not be liable beyond the extent of such costs. However, the costs to the shipper resulting from delay in delivery were unrelated to the freight, and from the point of view of the shipper there was no justification for limiting his compensation to the freight.

7. After deliberation, the Committee decided to formulate the monetary limit of liability in case of loss, damage or expense resulting from delay in delivery on the basis of a criterion different from that used for the formulation of the limit in the case of loss of or damage to the goods resulting from the conduct of the carrier other than delay in delivery. The Committee also decided to formulate the monetary limit for delay as a function of the freight.

#### *Unit of account*

8. At the commencement of its deliberations on the issue set forth in paragraph 1 (c) above, the Committee considered a statement from the observer from the International Monetary Fund on the nature of the special drawing right of the Interna-

tional Monetary Fund, and on the possibility of its use as a unit of account for the purposes of article 6 of the draft Convention.

#### 9. The Committee considered the following proposals:

(a) That the "gold franc" should be retained in the draft Convention as a unit of account for the purposes of article 6, but that the question as to what was to be the unit of account should be finally determined at the Diplomatic Conference which would consider the draft Convention.

(b) That the "gold franc" should be replaced by the special drawing right of the International Monetary Fund as the unit of account for the purposes of article 6.

(c) That the solution in article VII of the Montreal Protocol No. 4 to amend the Warsaw Convention,<sup>1</sup> under which States members of the International Monetary Fund accepted the special drawing right as the unit of account, while States not members of the International Monetary Fund accepted a unit of account based on gold, should be adopted for the purposes of article 6.

10. There was wide agreement that gold was not an acceptable basis for a unit of account because of current fluctuations in the price of gold, and because the rates of conversion of gold values into national currencies were often not established. The Committee noted, however, that the replacement of the "gold franc" by the special drawing right of the International Monetary Fund would create difficulties for those States not members of the Fund. In regard to the proposal to adopt the solution contained in article VII of the Montreal Protocol No. 4 to amend the Warsaw Convention, the view was expressed that this solution was not satisfactory as it did not achieve uniformity as to the unit of account.

11. After consideration of the alternative proposals, the Committee decided to delete the "gold franc" as the unit of account for the purposes of article 6, and to leave the determination of the unit of account to the diplomatic conference which would consider the draft Convention.

#### *Declaration of value of goods*

12. In regard to the issue noted in paragraph 1 (d) above, it was observed that the absence of a provision in article 6 under which the monetary limit of liability specified in the article could be modified by a declaration by the shipper of the value of the goods would make the article void in certain jurisdictions as being contrary to public policy. It was stated that article 4 (5) of the Brussels Convention of 1924 contained a provision under which a shipper could exclude the monetary limit of liability by a declaration of value, and that a similar provision should be added to article 6.

13. It was observed, on the other hand, that the proposal noted above was capable of two interpretations:

(a) That by making a declaration of value, the shipper would be empowered to unilaterally exclude the monetary limit of liability specified in the article; or

(b) That the monetary limit of liability would be modified only if the carrier agreed to such a modification subsequent to the declaration of value.

In support of the interpretation set forth in paragraph 13 (a) above, it was observed that the object of the proposal would be rendered nugatory if the carrier were free to refuse to accept a higher monetary limit of liability subsequent to the declaration of value. On the other hand, it was observed that in the case of a declaration of value under Article 4 (5) of the Brussels Convention of 1924, there would in effect be an agreement between shipper and carrier to modify the monetary limits of liability subsequent to a declaration of value. For the

<sup>1</sup> Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol. Done at The Hague on 28 September 1955.



carrier would in most cases stipulate a higher freight rate as a condition for carrying goods whose value was declared. If that higher rate was accepted by the shipper, there would in effect be an agreement by which the monetary limit of liability was waived by the carrier in return for the payment of a higher freight rate by the shipper.

14. The view was also expressed that the addition of a specific provision in article 6 enabling the parties by agreement to modify the monetary limit of liability upon a declaration of value by the shipper was unnecessary and undesirable. Under article 23, paragraph 2, a carrier was free to increase his obligations, and an exclusion of the monetary limit of liability would form an increase of the carrier's obligations. The insertion of a specific provision in article 6 enabling the parties to exclude the monetary limits upon a declaration of value by the shipper might lead to an inference that that was the only permissible method of excluding the monetary limit, whereas other circumstances in which the limit might be validly excluded in terms of article 23, paragraph 2, could be envisaged. On the other hand, it was noted that the interpretation of article 23, paragraph 2, as enabling the exclusion of the monetary limit of liability was not immediately apparent on a reading of that paragraph. It would therefore be useful to insert a specific provision in article 6 enabling the parties to exclude the monetary limit of liability.

15. After deliberation, the Committee decided:

(a) To adopt a provision enabling the shipper and carrier by agreement to exclude the monetary limit of liability specified in article 6; and

(b) To insert this provision in article 6.

#### *Special provisions for unitized cargo*

16. In regard to the issue noted in paragraph 1 (e) above, it was observed that it was undesirable to include in the article special provisions on unitized cargo, such as paragraph 2 of alternative C, paragraph 2 of alternative D and paragraph 2 of alternative E, as such provisions impeded the modernization of container carriage. There was wide agreement, however, that if the double criteria of weight and "package or other shipping unit" were adopted for formulating the monetary limits of liability, it was necessary to make special provision as to the monetary limit of liability in cases of unitized cargo, i.e., where the goods were consolidated in a container, pallet or similar article of transport.

17. The view was also expressed that the language of the provision regulating the monetary limit of liability in cases of unitized cargo in paragraph 2 (a) of alternatives C and D needed clarification in that it was unclear whether an enumeration by the shipper of packages or units contained in an article of transport would determine the monetary limit of liability even though the carrier had not agreed to that enumeration. It was observed, however, that an enumeration, if made by the shipper, would be made pursuant to article 15, paragraph 1 (a), of the draft Convention, and that if the carrier did not agree to the enumeration, he could thereupon enter a reservation under article 16.

18. After deliberation, the Committee decided to include in the article a provision identical with paragraph 2 (a) of alternatives C and D of article 6.

19. The Committee adopted the following text:

#### *"Article 6. Limits of liability"*

"1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) units of account per package or other shipping unit or (...) units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [...] the freight [payable for the goods delayed] [payable under the contract of carriage].

"(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

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

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

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

"3. Unit of account means ....<sup>2</sup>

"4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

#### *"B. Alternative article 6: limits of liability<sup>3</sup>*

"1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) units of account per kilogram of gross weight of the goods lost, damaged or delayed.

"2. Unit of account means ....<sup>4</sup>

"3. By agreement between the carrier and the shipper, a limit of liability exceeding that provided for in paragraph 1 may be fixed."

"1 The question as to whether the limit should be the freight or a multiple of the freight is to be determined at the conference of plenipotentiaries which will consider the draft Convention.

"2 The unit of account is to be determined at the conference of plenipotentiaries which will consider the draft Convention.

"3 If the liability for delay in delivery were to be subject under this alternative text to a special limit of liability, paragraph 1 of this alternative text may be supplemented by paragraphs 1 (b) and 1 (c) of the basic text for article 6 set forth above. If this be done, paragraph 1 of the alternative text would need drafting changes.

"4 The unit of account is to be determined at the conference of plenipotentiaries which will consider the draft convention."

#### *"Article 7. Actions in tort"*

##### *Article 7, paragraph 1*

"1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract or in tort."

1. The Committee considered a proposal that the words "or otherwise" should be added at the end of this paragraph.

2. In support of this proposal, the view was expressed that under certain legal systems and action against a carrier could be founded not merely in contract or tort, but on other bases of liability, e.g. quasi-contract. It was therefore desirable to extend the scope of this paragraph to cover actions founded on such other bases of liability. In this connexion it was also ob-

served that the present title of article 7, referring solely to "Actions in tort", was inappropriate.

3. After deliberation, the Committee decided:

(a) That the words "founded in contract or in tort" appearing at the end of the paragraph in the English version should be replaced by the words "founded in contract, in tort or otherwise", and that the word "*sur la responsabilité contractuelle ou sur la responsabilité extra-contractuelle*" in the French version should be replaced by the words "*sur la responsabilité contractuelle, délictuelle ou autrement*"; and

(b) That the existing title of the article should be replaced by the title "Application to non-contractual claims".

4. The Committee adopted the following text:

*"Article 7. Application to non-contractual claims"*

"1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract, in tort or otherwise."

*Article 7, paragraph 2*

"2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention."

5. The Committee considered a proposal that the words "a servant or agent of the carrier" should be replaced by the words "the servants, the agents or other persons acting pursuant to the instructions of the carrier".

6. In support of this proposal, it was observed that the words "the servants, the agents or other persons acting pursuant to the instructions of the carrier" proposed to be substituted in this paragraph appeared in paragraph 3 of article 4 of the draft Convention. The said paragraph extended the carrier's period of responsibility as defined in paragraphs 1 and 2 of article 4 by including within that period the time during which the goods carried were in the charge not only of the carrier, but of his servants, agents or other persons acting pursuant to his instructions. It was observed that all such persons should be entitled to avail themselves of the defences and limits of liability which the carrier was entitled to invoke under the Convention and that the proposed substitution would achieve this result.

7. After deliberation, the Committee decided not to adopt this proposal on the grounds that:

(a) There was no reason for requiring an exact correspondence between the category of persons through whom the carrier could be in charge of the goods during his period of responsibility, and the category of persons who should be entitled to the same defences and limits of liability as the carrier;

(b) The proposed substitution would result in an undue extension of the category of persons entitled to the same defences and limits of liability as the carrier, to e.g. independent contractors.

8. The Committee decided to retain the existing text of this paragraph.

*Article 7, paragraph 3*

"3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph, shall not exceed the limits of liability provided for in this Convention."

9. After deliberation, the Committee adopted the following text:

"3. The aggregate of the amounts recoverable from the carrier and any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention."

ARTICLE 8

*"Article 8. Loss of right to limit liability"*

"The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

1. The Committee considered the following proposals:

(a) That the article should be modified to provide that, in addition to the cases where the carrier lost the right to limit his liability under the first sentence of the article, he should also lose the right to limit his liability when damage had been caused by the act or omission of a servant or agent of the carrier acting within the scope of his employment done with the intent or recklessness specified in the article;

(b) That the phrase "or recklessly and with knowledge that such damage would probably result" should be deleted;

(c) That the words "loss, damage or delay" should be substituted for the word "damage" wherever the latter word appeared in the article.

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the proposed modification to the article would produce a fairer result for the shipper. Carriers were in most cases not individuals but corporations, and corporations always acted through servants and agents. The result, therefore, of restricting the cases in which a carrier lost his right to limit his liability to cases where acts or omissions of the carrier himself caused damage was that the carrier's limitation of liability would only very rarely be excluded. While under the second sentence of the article the servants or agents of the carrier lost their right to limit liability where they acted with the intention or recklessness specified in the article, it would be very difficult for a shipper to identify which servant or agent of the carrier had caused the damage; obtaining compensation not subject to monetary limitation through an action against a servant or agent of the carrier would therefore be difficult. Further, it was more advantageous for a shipper to sue the carrier rather than his servants or agents, since there was greater certainty that the carrier would have funds to satisfy a judgement rendered against him. The view was also expressed that the proposed modification would harmonize the provisions of the article with the provisions on the carriers' loss of the right to limit his liability of article 29 of the CMR Convention and article 25 of the Warsaw Convention of 1929 as modified by the Hague Protocol of 1955.\*

3. On the other hand, it was observed that there were several considerations which supported the retention of the limited effect of the existing provision of the article on the loss of the right to limit liability. The monetary limit of carrier liability was one of the most important factors taken into account in calculating the rates of carriers' liability insurance. The greater the degree of certainty that the monetary limit established could not be exceeded, the easier it became to calculate insurance rates and to provide lower rates which in turn resulted in lower transport costs. If the proposed modification were accepted, there would be a wide extension of the cases in which the carrier might lose his right to limit his liability, e.g. to cases of theft committed by the carrier's servants or agents. It was also noted that, if the proposed modification were accepted, the carrier would be compelled to take out liability insurance cover against the new risks transferred to him which had previously been

\* Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929. Done at The Hague, 28 September 1955.

borne by the shipper and covered by the cargo insurance of the shipper. Since liability insurance was more expensive than cargo insurance, the change in the incidence of insurance cover would result in an increase in transport costs. It was also noted that the proposed modification might lead to an undesirable increase in litigation, since shippers would often attempt to obtain unlimited compensation from the carrier by seeking to prove acts or omissions of the carrier's servants or agents committed with the intention or recklessness specified in the article. It was further noted that, while the proposed modification might harmonize the provisions of the article with corresponding provisions in some transport conventions, the present provisions of article 8 corresponded to article 13 of the Athens Convention of 1974, while article 24 (2) of the Guatemala Protocol to the Warsaw Convention of 1929 had even more stringent provisions than article 8 in that it established limits of liability which could not be exceeded whatever the circumstances which gave rise to the liability.

4. In response to the view that the loss of the carrier's right to limit his liability would occur very rarely because of the difficulty of proving that corporate carriers had personally performed acts or made omissions, it was proposed that the existing text of the article might be modified by inserting the following language between the first and second sentences of the article:

"For the purposes of this article, 'carrier' shall include any director, manager or other person employed in the management of the carrier's enterprise, who has been given decision-making authority by the carrier, provided that such person has acted within the scope of his authority."

5. In support of the proposal noted in paragraph 1 (b) above, it was observed that the term "recklessness" proposed to be deleted could under certain legal systems be interpreted as having the same meaning as "negligence". Since the liability of the carrier under article 5 was based on negligence, the result in practice might be that the carrier lost the right to limit his liability in every case where he was liable. The words "and with knowledge that such damage would probably result" should be deleted because retention of that phrase would also lead in practice to the loss by the carrier of the right to limit his liability in many cases as it would be very difficult for him to prove that the probability of damage was beyond his knowledge. On the other hand, it was observed that the term "recklessness" had a meaning clearly different from "negligence" and should therefore be retained. The Committee also considered suggestions that the entire phrase proposed to be deleted should be replaced by the terms "gross negligence" or "wilful misconduct".

6. In regard to the proposal noted in paragraph 1 (c) above, there was general agreement that the words "loss, damage or delay" should be substituted for the word "damage" wherever the latter word appeared in the article.

7. After deliberation, the Committee approved the following text, intended as a compromise between the view advocating unbreakable limits of liability under the Convention and the view favouring full liability of carriers without any limit for intentional or reckless actions of their servants and agents:

*"Article 8. Loss of right to limit liability"*

"1. The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result, which was an act or omission of:

"(a) The carrier himself, or

"(b) An employee of the carrier other than the master and members of the crew, while exercising, within the scope of his employment, supervisory authority in respect of that part of the carriage during which such act or omission occurred, or

"(c) An employee of the carrier, including the master or any member of the crew, while handling or caring for the goods within the scope of his employment.

"2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

8. The representatives of the Federal Republic of Germany, Japan and Poland expressed their opposition to the text of article 8 set forth above and reserved their position. The representative of the Federal Republic of Germany noted that the article should specify clearly the servants or agents of the carrier that were referred to in the various provisions of article 8 and stated that the current language of the article could lead to litigation.

ARTICLE 9

*Article 9, paragraph 1*

*"Article 9. Deck cargo"*

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

1. The Committee considered the following proposals:

(a) That the phrase "with the usage of the particular trade" should be deleted;

(b) That the phrase "or with statutory rules or regulations" should be supplemented by a reference to the legal system to which the rules or regulations belonged;

(c) That the paragraph should be modified to require that, in all cases where goods were carried on deck in accordance with this paragraph, the carrier should insert a statement in the bill of lading or other document evidencing the contract of carriage that the goods were being carried on deck.

2. The proposal noted in paragraph 1 (a) above was supported on the ground that the meaning of "usage" was unclear. It would therefore be difficult to establish whether a carrier was or was not entitled to carry goods on deck under a usage. The retention of the phrase was not necessary for the purposes of covering usages relating to the storing of containers, as most bills of lading or other transport documents issued in connexion with container carriage expressly regulated the right to carry containers on deck. The proposal was opposed on the ground that the meaning of "usage" was not unclear in maritime transport, and that there were in fact well settled usages for on-deck carriage in particular trades, such as the timber trade. The right to stow containers on deck was also often regulated solely by usage, and retention of the phrase was of special importance for container carriage. After deliberation, the Committee decided to retain the phrase in question.

3. The proposal noted in paragraph 1 (b) above was supported on the ground that, under the present wording of this paragraph, the legal system by reference to which the statutory rules or regulations were to be ascertained was not specified, and it was therefore impossible in practice to determine whether

<sup>1</sup> Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971.

a carrier was entitled to carry on deck under statutory rules or regulations. It was suggested that the paragraph should specify that the applicable statutory rules or regulations were those of the port of loading, or of the law of the flag of the vessel. In response to this proposal, it was observed that the specification in the paragraph of the applicable statutory rules or regulations did not resolve certain problems. Since the statutory rules and regulations of different ports were not uniform, and since some statutory rules and regulations mandatorily required carriage under deck of certain types of cargo, a carrier who carried goods on deck in accordance with the specified statutory rules or regulations might still be in breach of the law at certain ports.

4. It was suggested that a possible solution to the difficulties noted above would be the deletion of this phrase. It was noted, on the other hand, that if the circumstances under which the right to carry on deck existed were to be restrictively defined by the use of the word "only", then a reference to statutory rules or regulations as a source of entitlement to carry on deck was necessary.

5. After deliberation, the Committee decided not to adopt the proposed modification.

6. The proposal noted in paragraph 1 (c) above was supported on the ground that it would give notice of on-deck carriage to shippers, consignees and third party holders of bills of lading. Such information was relevant, since on-deck carriage might affect the condition of the goods. On the other hand, the view was expressed that a statement that carriage was on deck could not be inserted if the carriage was not under a document evidencing a contract of carriage. After deliberation, the Committee decided not to adopt this proposal.<sup>m</sup>

7. The Committee adopted the following text:

*"Article 9. Deck cargo"*

"1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations."

*Article 9, paragraph 2*

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

8. The Committee considered the following proposals:

(a) That the paragraph should be modified to require that, in all cases where the goods were carried on deck in accordance with paragraph 1, the carrier should insert a statement in the bill of lading or other document evidencing the contract of carriage that the goods were being carried on deck;

(b) That the second sentence of the paragraph should be modified to require that where goods were carried on deck, but no statement to that effect had been inserted in the bill of lading or other document evidencing the contract of carriage, the burden of proving that he was entitled to carry on deck in accordance with any of the other two sources of entitlement for on-deck carriage referred to in paragraph 1, (i.e. usages of the trade, or statutory rules or regulations) should be on the carrier.

9. The proposal noted in paragraph 8 (a) above was considered in connexion with the proposal noted in paragraph 1 (c) above relating to article 9, paragraph 1, and was supported

<sup>m</sup> The proposal was supported by the USSR, which reserved its position on the decision taken by the Committee.

and opposed on the same grounds as the latter proposal. The views expressed in connexion with the latter proposal are noted in paragraph 6 above.

10. The proposal noted in paragraph 8 (b) above was supported on the ground that when the carrier had not given notice to shippers, consignees and third party holders of a bill of lading of the fact of on-deck carriage by the insertion of a statement to that effect in the bill of lading or other document evidencing the contract of carriage, it was reasonable to place on the carrier the burden of proving that he had a right to carry on deck, even when such right did not arise from an agreement with the shipper.

11. After deliberation, the Committee decided to retain the existing text of this paragraph.

*Article 9, paragraph 3*

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, in accordance with the provisions of articles 6 and 8. The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith."

12. The Committee considered the following proposals:

(a) That this paragraph should be deleted and replaced by the following paragraph:

"With respect to authorized on-deck carriage under paragraph 1 of this article, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in such carriage. When the carrier proves that in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay, in delivery resulted from fault or negligence on the part of the carrier, his servants or agents."

(b) That the paragraph should be redrafted:

(i) To clarify the effect of the word "solely"; and

(ii) To clarify that the provisions of articles 6 and 8 regulating the limitation of the carrier's liability were applicable when he had carried goods on deck contrary to the provisions of paragraph 1 of article 9.

13. The proposal noted in paragraph 12 (a) above was supported on the ground that there were special risks inherent in on-deck carriage, such as damage from heavy seas, and that it was reasonable to exclude the carrier's liability when loss or damage resulted from such special risks. The Committee noted that the proposed new paragraph was modelled on article 5, paragraph 5, which provided a defence to the carrier when damage resulted from the special risks inherent in the carriage of live animals. On the other hand, it was observed that the special risks inherent in on-deck carriage were much less serious than those inherent in the carriage of live animals, and that the carrier already had a defence under article 5, paragraph 1, in regard to damage caused by the special risks inherent in on-deck carriage specially mentioned in the course of the deliberations, since they fell within the category of "vis major". After deliberation, the Committee decided not to adopt this proposal.

14. After deliberation, the Committee accepted the proposal noted in paragraph 12 (b) above and retained the present wording of paragraph 3 of article 9, subject to the proposed drafting changes.

15. The Committee adopted the following text:

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where

the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier shall, notwithstanding the provisions of paragraph 1 of article 5, be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, and the extent of his liability shall be determined in accordance with the provisions of article 6 or 8, as the case may be."

#### Article 9, paragraph 4

"4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8."

16. The Committee considered a proposal that this paragraph should be deleted for the reason that loss of the carrier's right to limit his liability was too severe a consequence of a carriage of goods on deck by a carrier contrary to express agreement to carry under deck. The Committee decided to retain the existing text of this paragraph on the ground that loss of the right to limit liability was a justifiable consequence of a breach of such express agreement.

#### ARTICLE 10

##### Article 10, paragraph 1

###### "Article 10. Liability of contracting carrier and actual carrier"

"1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The contracting carrier, shall in relation to the carriage performed by the actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment."

1. The Committee considered this paragraph in connexion with

(a) Proposals intended to clarify the relation of this paragraph to article 11, and

(b) Proposals for the definition of "actual carrier" in article 1, paragraph 2.

2. It was observed that the distinction between the circumstances in which this paragraph applied, and the circumstances in which article 11, paragraph 1, applied, needed clarification. It was noted that article 11, paragraph 1, only applied when, at the time of contracting with the shipper, the contracting carrier specified that he would perform only part of the carriage, and that the remainder of the carriage would be performed by another carrier. Therefore paragraph 1 of article 10 should only apply when, at the time of contracting, the carrier did not specify this, and undertook to perform the entire carriage, but nevertheless entrusted performance of a part of the carriage to another carrier.

3. The view was expressed that the scope of the contracting carrier's responsibility under this paragraph for the acts or omissions of the actual carrier and his servants or agents would depend on the definition of "actual carrier". It was also observed in this connexion that where the contracting carrier had entrusted the performance of the carriage to another carrier, and the latter had in turn entrusted it to yet another carrier, this third carrier would not be an actual carrier for the purpose of paragraph 1.

4. The Committee considered proposals for the definition of "actual carrier" and adopted a definition of "actual carrier". This definition, and an account of the deliberations leading to the adoption of this definition, are set forth in this report in the account of the deliberations of the Committee on article 1 of the draft Convention (see paras. 4-5).

5. Consequent upon the adoption of a new definition of "actual carrier", the Committee decided to retain the existing text of this paragraph subject to such drafting changes as would be necessitated by the new definition of "carrier" and "actual carrier" in article 1 of the draft Convention.

6. The Committee adopted the following text:

###### "Article 10. Liability of the carrier and actual carrier"

"1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The carrier shall, in relation to the carriage performed by the actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment."

##### Article 10, paragraph 2

"2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of the second sentence of article 8 shall apply if an action is brought against a servant or agent of the actual carrier."

7. The Committee considered a proposal that the words "performed by" in this paragraph should be replaced by the words "entrusted to". The proposal was supported on the ground that it created a desirable extension of the category of actual carriers on whom responsibility according to the provisions of this Convention was imposed by paragraph 2. Thus, where successive carriers had been entrusted with the performance of the carriage, it might in certain circumstances be of advantage to the claimant to sue a non-performing actual carrier entrusted with performance, rather than a performing actual carrier. The proposed modification would also enable a claimant to sue an actual carrier entrusted with the performance of the carriage by the contracting carrier, when the actual carrier had failed to perform the carriage at all. The proposal was opposed on the ground that certain provisions of the Convention could not appropriately be made applicable to a non-performing carrier, since they were only relevant in the event of a performance of the carriage.

8. After deliberation, the Committee decided not to adopt the proposed amendment.

9. The Committee adopted the following text:

"2. The actual carrier shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 shall apply if an action is brought against a servant or agent of the actual carrier."

##### Article 10, paragraph 3

"3. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing."

10. The Committee considered a proposal to add the following sentence at the end of the paragraph:

"The carrier shall nevertheless remain bound by the obligations or waivers resulting from such a special agreement."

11. In support of this proposal, it was observed that the additional sentence would clarify that in cases where a contracting carrier had assumed special obligations not imposed by the Convention or had waived rights conferred by it, and then had entrusted performance of the contract of carriage to an actual carrier, the contracting carrier nevertheless remained bound by the special obligations or waivers. On the other

hand, it was stated that this result was already clear under the existing language of the paragraph, and that the proposed addition was therefore unnecessary. It was also stated that the existing language was identical with article 4, paragraph 3, of the Athens Convention of 1974, and should therefore be retained in the interests of uniformity.

12. After deliberation, the Committee decided to adopt the proposed amendment.

13. The Committee adopted the following text:

"3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier shall nevertheless remain bound by the obligations or waivers resulting from such special agreement."<sup>a</sup>

*Article 10, paragraph 4*

"4. Where and to the extent that both the contracting carrier and the actual carrier are liable, their liability shall be joint and several."

14. The Committee considered a proposal that the paragraph should be amended to provide that, where it was not possible to ascertain whether loss, damage or delay had occurred during carriage by the contracting carrier or by the actual carrier, the contracting carrier and the actual carrier should be jointly and severally liable.

15. The proposal was supported on the ground that it was often difficult to ascertain whether loss or damage had occurred during carriage by the contracting carrier or the actual carrier. In such circumstances, it would be of advantage to the claimant to have the option of obtaining compensation from either the contracting carrier or the actual carrier. The proposal was opposed on the ground that it would unfairly extend the liability of actual carriers. The actual carrier had specifically contracted to perform only a part of the carriage, and he should not be made liable for loss or damage that had occurred during the part of the carriage not performed by him.

16. After deliberation, the Committee decided not to adopt the proposal.<sup>b</sup>

17. The Committee adopted the following text:

"4. Where and to the extent that both the carrier and the actual carrier are liable, their liability shall be joint and several."

*Article 10, paragraphs 5 and 6*

"5. The aggregate of the amounts recoverable from the contracting carrier, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

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

18. After deliberation, the Committee adopted the following texts:

"5. The aggregate of the amounts recoverable from the carriers, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

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

<sup>a</sup> The representative of the United Kingdom stated that, in his view, article 10, paragraph 3 of the draft Convention as amended had the same effect as article 4, paragraph 3 of the Athens Convention of 1974.

<sup>b</sup> The proposal which was made by Czechoslovakia, was supported by a number of delegations.

ARTICLE 11

*Article 11, paragraphs 1 and 2*

*"Article 11. Through carriage"*

"1. Where a contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the carriage shall be performed by a person other than the contracting carrier, the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article 10.

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

1. The Committee considered the following proposals:

(a) That paragraphs 1 and 2 be deleted and be replaced by the following paragraph:

"Where a contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a person other than the contracting carrier, the contract may also provide that, notwithstanding the provisions of paragraph 1 of article 10, the contracting carrier shall not be liable for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier during such part of the carriage. The burden of proving that any loss, damage or delay in delivery has been caused by such events, shall rest upon the contracting carrier."

(b) That paragraphs 1 and 2 be deleted and be replaced by the following paragraph:

"Where a contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a named person other than the contracting carrier, the contract may also provide that, notwithstanding the provisions of paragraph 1 of article 10, the contracting carrier shall not be liable for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier during such part of the carriage, provided that, by virtue of assignment by the carrier of his rights against the actual carrier or otherwise, it is possible for the shipper or consignee to institute legal action directly against the actual carrier. The burden of proving that any loss, damage or delay in delivery has been caused by such events, shall rest upon the contracting carrier."

(c) That paragraphs 1 and 2 be deleted.

2. In support of the proposal noted in paragraph 1 (a) above, it was stated that the object of this proposal was both to distinguish clearly the type of contract of carriage regulated by this article from the type of contract of carriage regulated by article 10, and to protect the shipper or consignee adequately in relation to the kind of contract regulated by this article. The type of contract regulated by this article was a contract where a contracting carrier specifically agreed with a shipper to perform only part of the carriage, and to accept liability only for that part of the carriage he had agreed to perform. The remaining part of the carriage was to be performed by an actual carrier, who alone was to be responsible for the part of the carriage performed by him. However, the contracting carrier issued a single bill of lading covering the entire carriage. The advantage to the shipper of an arrangement of this kind was twofold. Firstly, the contracting carrier arranged for the on carriage with the actual carrier, thus relieving the shipper of the need for making arrangements for on carriage. Secondly, documentary credits often required the



presentation under them of a single bill of lading covering the entire carriage. The shipper or consignee was protected by the requirements that notice be given, at the time of contracting, that the contracting carrier would only be responsible for a specified part of the carriage. Further, in order to escape liability for loss or damage occurring while the goods were in the charge of the actual carrier, the contracting carrier had to discharge the burden of proving that the loss or damage occurred while the goods were in charge of the actual carrier.

3. In the course of discussions, the view was expressed that the proposed text did not sufficiently protect the rights of the shipper against the contracting carrier or the actual carrier. Since the shipper was not in a contractual relationship with the actual carrier, he would be left without a remedy in cases where the contracting carrier excluded his liability by proving that the loss or damage occurred while the goods were in the charge of the actual carrier. Furthermore, some actual carriers were enterprises without substantial assets, and the shipper would not be able to recover damages from them; it was therefore desirable to limit the right of the contracting carrier to exclude his liability more narrowly than was the case under this proposal. It was also noted that a through bill of lading would be deprived of its chief value if a contracting carrier were permitted to issue a through bill of lading but to exonerate himself from all liability for loss or damage suffered when the goods were in the hands of an actual carrier. It was proposed that a rule could appropriately be modelled on the provisions of article 30 of the Warsaw Convention of 1929, under which the shipper could recover compensation from the first carrier, the consignee from the last carrier, and under which either shipper or consignee could in any event recover compensation from the carrier who had charge of the goods when loss, damage or delay occurred.

4. The proposal set forth in paragraph 1 (b) above was submitted to the Committee in response to the criticisms noted above of the proposal set forth in paragraph 1 (a) above. Under the second proposal, the contracting carrier could exclude his liability only if it were possible for the shipper or consignee to institute legal action directly against the actual carrier. The shipper or consignee would therefore in every case of loss or damage be able to institute action either against the contracting carrier or the actual carrier. The second proposal was opposed on the grounds that there could be uncertainty as to when it was "possible" for a shipper or consignee to institute legal action directly against an actual carrier. Thus, it was always possible for a shipper to institute an action against an actual carrier, but the action might fail for want of jurisdiction. This uncertainty in the meaning of "possible" could in turn result in uncertainty in the allocation of liability between the contracting carrier and the actual carrier. The view was also expressed that the attempt to obtain for the shipper rights against the actual carrier through the proviso of this proposal was unnecessary, since the shipper clearly had such rights already by virtue of paragraph 2 of article 10. It was further objected that the word "named" in the second line of the proposal might create difficulty in the application of the paragraph. For at the time of contracting, the contracting carrier might not know the identity of the actual carrier, e.g. he might only know that the on carriage would be performed by a conference vessel.

5. In support of the proposal noted in paragraph 1 (c) above; it was observed that article 11 was superfluous, because the particular type of contract of carriage it was intended to regulate did not need special regulation. The obligations of the contracting carrier under this type of contract were to carry the goods for a part of the carriage, and to act as an agent in arranging the remaining part of the carriage. The contracting carrier could therefore properly issue a bill of lading or other transport document only in respect of the carriage which he had undertaken to perform. The actual carrier would in turn issue a separate bill of lading or other

transport document for the carriage performed by him. Opposition to this proposal to delete the article was based on the view, noted in paragraph 2 above, that there was a commercial need for a single through bill of lading covering the entire carriage. It was also observed that if no provision such as that contained in article 11 was made, empowering contracting carriers to exclude their liability for loss or damage occurring during the on carriage, carriers would refuse to issue through bills of lading, thereby causing inconvenience to shippers.

6. After deliberation, the Committee adopted the following text:

*"Article 11. Through carriage"*

"1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a named person other than the carrier, the contract may also provide that the carrier shall not be liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence, shall rest upon the carrier.

"2. The actual carrier shall be responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge."

ARTICLE 12

*"PART III. LIABILITY OF THE SHIPPER"*

*"Article 12. General rule"*

"The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier or by the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents."

1. The Committee considered the following proposals:

(a) That the following paragraph should be added as a new paragraph 2 to the article.

"2. If the goods have not been claimed by the consignee within a reasonable period after notice was given to him of their arrival, the shipper shall upon request by the carrier give the carrier the instruction on the disposal of the goods. If no such instruction has been given by the shipper within a reasonable time, the goods may be sold or otherwise disposed of by the carrier and the shipper shall remain responsible for any loss, damage or expenses, which could not be recovered from the proceeds of the goods."

(b) That the words "his servants or agents" should be added to the article after the word "shipper", and that the words "or delay" should be added after the word "damage".

2. The proposal noted in paragraph 1 (a) above was supported on the ground that failure to claim the goods by the consignee at destination was a frequent source of difficulty for the carrier. Although national laws existed regulating the carrier's rights in these circumstances, it would be preferable to harmonize the national laws by express provision in the Convention. The proposal was opposed on the ground that the differences in the various national laws, or difficulties in the application of national laws, were not serious enough to justify the insertion of express provisions in the Convention. After deliberation the Committee decided not to adopt this proposal.

3. In regard to the proposal noted in paragraph 1 (b) above, the Committee decided not to add the words "or delay" as proposed, since in practice it was rare for the carrier to sustain loss due to the shipper's delay. The Committee, however, decided to add the words "his servants or agents" as



constituting a useful modification of the article, since the article would in consequence also cover the liability of the servants and agents of the shipper.

4. The Committee adopted the following text:

"PART III. LIABILITY OF THE SHIPPER

"Article 12. General rule

"The shipper shall not be liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor shall any servant or agent of the shipper be liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part."

ARTICLE 13

Article 13, paragraph 1

"Article 13. Special rules on dangerous goods

"1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous."

1. The Committee considered the following proposals:

(a) That the words "or the actual carrier" be added after the word "carrier" in each of the two instances the word "carrier" appeared in the paragraph;

(b) That the words "if necessary" should be deleted;

(c) That the words "whenever possible" should be deleted.

2. The proposal noted in paragraph 1 (a) above was supported on the ground that in certain cases the shipper may hand over dangerous goods directly to an actual carrier. In such cases, it was necessary to require the shipper to inform the actual carrier of the nature of the goods, and to indicate to the actual carrier, if necessary, the character of the danger and the precautions to be taken. However, the paragraph in its present form did not require the shipper to give any such information or indication to the actual carrier. There was general agreement that the proposal was useful, and after deliberation it was adopted by the Committee.

3. The proposal to delete the words "if necessary" was supported on the ground that in the case of dangerous goods it was always necessary for the shipper to inform the contracting or actual carrier of the character of the danger and the precautions to be taken. On the other hand, the view was expressed that in some cases the carrier might already know the character of the danger and the precautions to be taken, and that it was then unnecessary for the shipper to indicate this, e.g. in the cases of common explosives and dangerous goods which the carrier had previously transported, and in regard to which he had previously received such indications from the shipper.

4. The Committee noted that the UNCTAD Working Group on International Shipping Legislation had proposed that the paragraph should be redrafted retaining the words "if necessary", but making them qualify only the phrase "the precautions to be taken".

5. After deliberation, the Committee decided to retain the words, but to redraft the paragraph in the manner proposed by the UNCTAD Working Group.

6. The proposal to delete the words "whenever possible" was supported on the grounds that it was almost always possible to mark goods as dangerous. If it was impossible to mark the goods as dangerous, judicial or arbitral tribunals would recognize such impossibility, and would not hold the shipper to be at fault for failure to mark or label. The retention

of these words would create uncertainty as to the shipper's duty to mark or label. The proposal was opposed on the grounds that it was impossible to mark or label certain goods, such as bulk cargo, and that the words "whenever possible" took account of these cases. After deliberation, the Committee decided to delete the words "whenever possible".

7. The Committee also decided to replace the word "hands" appearing in the first sentence of the paragraph with the words "hands over", and to delete this first sentence of paragraph 1 of article 13, and place that sentence in paragraph 2.

8. The Committee adopted the following text:

"Article 13. Special rules on dangerous goods

"1. The shipper shall mark or label in a suitable manner dangerous goods as dangerous."

Article 13, paragraph 2

"2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment."

9. The Committee considered the following proposals:

(a) That the words "or the actual carrier" should be added after the word "carrier" in the two instances where the latter word appeared in the paragraph.

(b) That the words "or precautions to be taken" should be added after the word "character" in the second sentence of the paragraph, and that the word "dangerous" should be added before the word "nature" in the two instances where the latter word appeared in the paragraph.

(c) That the phrase "knowledge of their nature and character" appearing in the first and second sentences of the paragraph should be replaced by the phrase "the information provided for in paragraph 1 of this article".

(d) That the words "directly or indirectly" appearing in the second sentence of this article be deleted.

10. The proposal noted in paragraph 9 (a) above was supported on the ground that:

(a) It was desirable to give, not only the contracting carrier but also the actual carrier, the power under paragraph 2 of the draft convention to unload, destroy or render innocuous dangerous goods under the conditions specified in the first sentence of that paragraph; and

(b) It was desirable to make the shipper liable to the extent defined in the second sentence of paragraph 2 of the draft convention also in the case where dangerous goods were shipped without the actual carrier having knowledge of their nature and character.

11. In regard to the desirability of giving the actual carrier the power described in the first sentence of paragraph 2 of article 13, there was general agreement that:

(a) The actual carrier should be given such a power where goods had been handed over directly to the actual carrier by the shipper, and the shipper had not given the actual carrier the information required under paragraph 1;

(b) The actual carrier should not be given such a power if the shipper had handed over the goods to the contracting carrier, and had given the information required under paragraph 1 to the contracting carrier, but the contracting carrier had not in turn conveyed the information to the actual carrier when the goods were handed over to the latter.

12. In regard to the possible imposition on the shipper, in favour of the actual carrier, of the liability described in

the second sentence of paragraph 2 of article 13 in cases where the goods were shipped without an actual carrier having knowledge of their nature and character, there was general agreement that such a liability should only be imposed in the same instances in which the actual carrier was empowered to unload, destroy or render innocuous the goods, i.e. when the goods were handed over by the shipper directly to the actual carrier, and the shipper had not given the actual carrier the information as required by paragraph 1.

13. The Committee was further agreed that, even in cases where the shipper had not given the information required by paragraph 1 of article 13, it was reasonable both to exclude the power of contracting carriers and actual carriers to unload, destroy or render innocuous dangerous goods, and to exclude the liability of the shipper who had shipped dangerous goods, in each of the following circumstances:

(a) If, at the time the goods were handed over by the shipper to the contracting carrier or actual carrier, such carrier independently had knowledge of the dangerous character of the goods; and

(b) If, where goods were not handed over by the shipper to a contracting carrier or actual carrier but were otherwise taken in charge by a contracting carrier or actual carrier, such carrier, at the time he took charge of the goods, had knowledge of the dangerous character of the goods.

The Committee decided that paragraph 2 should be redrafted to accord with these decisions.

14. The proposals noted in paragraphs 9 (b) and 9 (c) were supported on the ground that the proposed modifications would harmonize the language of paragraph 2 with the corresponding language of paragraph 1. It was observed that, while paragraph 1 obliged the shipper to "inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken", the absence of the information which empowered the carrier under the first sentence of paragraph 2 to unload, destroy or render innocuous the goods, and made the shipper liable under the second sentence of paragraph 2, was defined in paragraph 2 in terms of the goods having been taken in charge by the carrier "without knowledge of their nature and character". There was wide agreement that a harmonization of the language of paragraphs 1 and 2 was desirable.

15. The proposal to delete the words "directly or indirectly" was supported on the grounds that these words were unnecessary, in that their deletion would not alter the meaning of the sentence in which they appeared. After deliberation, the Committee decided to adopt this proposal.

16. The Committee adopted the following text:

"2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character,

"(a) the shipper shall be liable to the carrier and any actual carrier for all loss resulting from the shipment of such goods, and

"(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

"3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character."

#### Article 13, paragraph 3

"3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger

to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any."

17. It was observed that this paragraph might produce an unfair result in the following case: although a shipper gave a carrier to whom he handed over the goods the information required by paragraph 1 of this article, the carrier might nevertheless be negligent in handling the goods, with the result that they became an actual danger to the ship or cargo, and therefore had to be unloaded, destroyed or rendered innocuous. It was unfair to exclude the payment of compensation by the carrier to the shipper in such a case. It was stated, in reply, that such a negligent carrier would have to pay compensation under the liability provisions of article 5.

18. It was also observed that, in giving effect to the modifications to paragraphs 1 and 2 adopted by the Committee, account should be taken in relation to this paragraph of the case where a shipper gave a carrier to whom he handed over the goods the information required by paragraph 1 of this article, but that carrier failed to convey this information to a second carrier to whom he handed over the goods. If as a result of this failure to convey the information the goods became an actual danger to the ship or cargo while in the charge of the second carrier, and therefore had to be unloaded, destroyed or rendered innocuous by such second carrier it was unclear whether the shipper had a right of action against either carrier. It was observed, on the other hand, that the handing over of the goods by the first carrier to the second carrier, without conveying the information, would constitute negligence on the part of the first carrier, and that the first carrier would therefore be liable under the provisions of article 5.

19. After deliberation, the Committee decided to redraft the paragraph in the light of the modifications adopted in relation to paragraphs 1 and 2, to specify in the paragraph that the exclusion of liability under the paragraph was subject to the operation of the liability provisions of article 5 of the Convention, and to renumber it as paragraph 4.

20. The Committee adopted the following text:

"4. If, in cases where the provisions of paragraph 2, subparagraph (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5."

#### ARTICLE 14

##### Article 14, paragraphs 1 and 2

##### "PART IV. TRANSPORT DOCUMENTS

##### "Article 14. Issue of bill of lading

"1. When the goods are received in the charge of the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things the particulars referred to in article 15.

"2. The bill of lading may be signed by a person having authority from the contracting carrier. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the contracting carrier."

1. After deliberation, the Committee adopted the substance of paragraphs 1 and 2 subject to any drafting changes that may be required to harmonize the paragraphs with the language of other articles adopted by the Committee.

2. On the recommendation of the Working Group, the Committee decided to include as a new paragraph 3 material drawn from the original text of article 15, subparagraph 1 (f), i.e. that the signature on the bill of lading "may be in hand-

writing, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means", if not inconsistent with the law of the country where the bill of lading was issued.

3. After deliberation, the Committee adopted the following text:

"PART IV. TRANSPORT DOCUMENTS

"Article 14. Issue of bill of lading

"1. When the goods are received in the charge of the carrier or the actual carrier, the carrier shall, on demand of the shipper, issue to the shipper a bill of lading.

"2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the carrier.

"3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued."

ARTICLE 15

Article 15. paragraph 1 (introductory language)

"Article 15. Contents of bill of lading

"1. The bill of lading shall set forth among other things the following particulars:"

1. After deliberation, the Committee decided to retain the present wording of the introductory language for paragraph 1.

2. The Committee noted that neither the Brussels Convention of 1924 nor article 15, paragraph 1, of the draft convention prohibited the preservation, by means of electronic or automatic data processing systems, of the list of particulars required under that paragraph to be included in bills of lading.

3. One representative noted his reservation in respect of the list of particulars that, under the paragraph, had to appear on a bill of lading and stated that content of bills of lading should be left for determination to commercial practice.

Article 15, paragraph 1, subparagraph (a)

"(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;"

4. The Committee considered the desirability of retaining the requirement in subparagraph (a) that the carrier set forth in the bill of lading both the number of packages or pieces and the weight of the goods, as furnished by the shipper.

5. The view was expressed that carriers should only be required to include in bills of lading either the number of packages or pieces or the weight of the goods. Carriers often could not reasonably check the weight of the goods and, in such cases, would be forced to note on the bill of lading their reservation pursuant to article 16 paragraph 1. A reservation concerning the weight of the goods noted on the bill of lading might render that bill of lading "unclean" for documentary credit purposes.

6. It was stated in reply, however, that both the number and the weight of the goods covered by a bill of lading were important items of information for holders of the bill of lading and for financing banks. It was also stated that, under the Uniforms Customs and Practice for Documentary Credits (1974 version) of the International Chamber of Commerce, a "general unknown" clause would not make a bill of lading "unclean" for the purposes of financing.

7. It was observed that weight was one of the dual criteria adopted by the Committee for the formulation of the monetary limit of carrier liability in article 6. A mandatory statement of the weight of the goods in the bill of lading would be useful in the event that it became necessary to determine the limit of carrier liability for loss of or damage to the goods.

8. After deliberation, the Committee decided to retain subparagraph (a) of paragraph 1.

Article 15, paragraph 1, subparagraph (b)

"(b) The apparent condition of the goods;"

9. The Committee considered the desirability of adding the phrase "or their packaging" at the end of subparagraph (b), in order to clarify that in the case of packaged goods the carrier was only obligated to note the apparent condition of the packaging.

10. The Committee noted that under the definition of "goods" in article 1, paragraph 4, the term "goods" also covered the packaging of the goods, and decided that for this reason addition of the phrase "or their packaging" to the language of subparagraph (b) was not necessary.

11. The suggestion was made that subparagraph (b) should only call for a notation if the goods or their packaging were not in an apparent good condition in view of the fact that article 16, paragraph 2 provided that the goods were presumed to have been in apparent good condition if the apparent condition of the goods was not noted on the bill of lading.

12. The Committee was of the view that subparagraph (b), requiring that the bill of lading should indicate the apparent condition of the goods should be retained in its present wording. In this connexion, the Committee noted that the Brussels Convention of 1924 set forth the same requirement and that this had not caused any problems in practice.

Article 15, paragraph 1, subparagraph (c) to (g)

"(c) The name and principal place of business of the carrier;

"(d) The name of the shipper;

"(e) The consignee if named by the shipper;

"(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

"(g) The port of discharge under the contract of carriage;"

13. After deliberation, the Committee decided to retain the present wording of subparagraphs (c), (d), (e), (f) and (g) of paragraph 1.

Article 15, paragraph 1, subparagraph (h)

"(h) The number of originals of the bill of lading;"

14. The Committee decided to retain subparagraph (h), but to clarify that the number of originals of the bill of lading should be mentioned in the bill of lading only if there was more than one original.

15. The Committee adopted the following text:

"(h) The number of originals of the bill of lading, if more than one;"

Article 15, paragraph 1, subparagraph (i)

"(i) The place of issuance of the bill of lading;"

16. After deliberation, the Committee decided to retain the present wording of subparagraph (i).

Article 15, paragraph 1, subparagraph (j)

"(j) The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any

other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;"

17. The Committee noted that in a number of countries there had not yet been any legislative or judicial pronouncements regarding signature of documents by mechanical or electronic means. It therefore decided to retain the substance of subparagraph (j), but to clarify the meaning of the concluding phrase by redrafting it to read "...if not inconsistent with the law of the country where the bill of lading is issued." The Committee also decided to place the language indicating the permissible methods of signature in a new paragraph 3 of article 14.

18. The Committee adopted the following text:

"(j) The signature of the carrier or a person acting on his behalf;"

*Article 15, paragraph 1, subparagraph (k) and (l)*

"(k) The freight to the extent payable by the consignee or other indication that freight is payable by him; and

"(l) The statement referred to in paragraph 3 of article 23."

19. After deliberation, the Committee decided to retain the present wording of subparagraphs (k) and (l) of paragraph 1.

20. One representative reserved his position in respect of subparagraph (l).

*Consideration of proposed additions to the list of required particulars in article 15, paragraph 1*

(a) *Carriage of the goods on deck*

21. Consideration was given to the desirability of requiring that the bill of lading contain an appropriate indication whenever the carrier was authorized to carry the goods on deck. It was noted that, for economic and financial reasons, knowledge of the fact that the goods would be carried on deck was of great importance for shippers and consignees.

22. It was observed that at the time the carrier took charge of the goods, particularly if the goods were in containers that could be carried either on deck or below deck, he may not yet know whether the goods would be carried on deck.

23. The Committee was of the view that the bill of lading should bear an appropriate notation whenever the carrier was authorized to carry the goods on deck, and decided to amend paragraph 1 accordingly.

24. The Committee adopted the following new subparagraph (m):

"(m) The statement, if applicable, that the goods shall or may be carried on deck."

(b) *Carriage of the goods in containers*

25. The Committee considered a suggestion that article 15, paragraph 1, should require that the bill of lading contain an indication if the goods were to be carried in containers.

26. The Committee did not retain this suggestion, on the grounds that under the definition of "goods" in article 1, paragraph 4, it was clear that the term "goods" also encompassed the container or similar article of transport in which the goods were consolidated.

*Article 15, paragraph 2*

"2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a 'shipped' bill of lading which, in addition to the particulars required under paragraph 1 of this article shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper

shall surrender such document in exchange for the 'shipped' bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a 'shipped' bill of lading if, as amended, such document includes all the information required to be contained in a 'shipped' bill of lading."

27. After deliberation, the Committee decided to retain the present wording of paragraph 2.

*Article 15, paragraph 3*

"3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading."

28. The Committee considered paragraph 3 in connexion with the following issues:

(a) The question whether paragraph 3 should be deleted;

(b) The desirability of selecting from the particulars required under article 15, paragraph 1, the particulars that were necessary for the transport document to be considered as a bill of lading;

(c) The question of sanctions for the omission of one or more particulars required under article 15, paragraph 1.

29. In support of the deletion of paragraph 3, it was stated that the legal validity of a particular transport document as a bill of lading should be left to the applicable national law. Further, the question whether a given transport document was economically acceptable was one of international commercial practice. After deliberation, the Committee decided to retain the substance of paragraph 3, on the ground that it served the useful purpose of clarifying that a bill of lading was not necessarily invalid as such for the sole reason that it did not contain all the particulars required under article 15, paragraph 1.

30. The Committee considered the desirability of identifying among the particulars required under article 15, paragraph 1, those elements that necessarily had to be included in a document for that document to be considered as a bill of lading. It was recalled that this question had been the subject of lengthy discussions in the UNCITRAL Working Group on International Shipping Legislation and that the Working Group had adopted the present wording of paragraph 3, because no consensus had been reached as to what those elements should be. After deliberation, the Committee decided against specifying in paragraph 3 those mandatory elements.

31. The Committee decided to add to paragraph 3 a provision which would clarify that the omission of one or more required particulars in a bill of lading had no effect on the validity of the bill of lading, provided that the document, as to its particulars, fell within the definition of the term "bill of lading" laid down in article 1, paragraph 6, of the draft convention.

32. The Committee considered a proposal to impose as the sanction for omitting from a bill of lading one or more required particulars the removal of the limitation on the liability of carriers provided in article 6. The Committee did not adopt this proposal, on the grounds that such a sanction would be too harsh in that it did not differentiate among the particulars that might have been omitted and that, in any event, the proposal represented a considerable departure from the system of limiting the liability of carriers established under articles 6 and 8.

33. The Committee adopted the following text:

"3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 6 of article 1."

## ARTICLE 16

## Article 16, paragraph 1

*"Article 16. Bills of lading: reservations and evidentiary effect"*

"1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a 'shipped' bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking."

## 1. The Committee considered:

(a) The desirability of retaining the requirement that the carrier "make special note" on the bill of lading of the grounds for knowing or suspecting that certain particulars on the bill of lading did not accurately describe the goods or the absence of reasonable means of checking these particulars; and

(b) The question whether "reasonable means of checking" required that the carrier open sealed containers in order to check on the particulars of the goods therein contained.

2. It was proposed that the requirement in paragraph 1 of article 16, that the carrier "make special note" on the bill of lading of the grounds for knowing or suspecting that certain particulars on the bill of lading did not accurately describe the goods or of the absence of reasonable means of checking these particulars, should be replaced by a provision under which the carrier only had to note his reservation on the bill of lading in such cases, without being obliged to describe the grounds on which the reservation was based. Under a similar proposal, the carrier would be able to note his reservation on the bill of lading and then detail the grounds therefore on a separate document. The following reasons were advanced in support of the above proposals to amend paragraph 1:

(a) The requirement to "make special note" of the grounds for reservations on the bill of lading was contrary to the present practice, would be onerous for carriers and would slow down considerably the process of loading;

(b) The servants and agents of carriers who took charge of the goods lacked both the time and the requisite expertise to describe the reasons for reservations in a legally sufficient manner;

(c) The requirement to describe in detail the grounds for reservations on bills of lading would result in frequent litigation.

3. It was stated in reply, however, that the requirement in paragraph 1 that, for a reservation to have legal effect, the bill of lading must specify the grounds for the reservation, should be retained for the following reasons:

(a) The present text of paragraph 1 was designed to protect consignees and other third parties from frequent, unfounded reservations that could be printed on bills of lading to the effect that the particulars given on the bill could not reasonably be checked;

(b) The requirement could be met in practice by a stamp on the bill of lading setting out in brief the reasons for the reservation;

(c) The requirement served to safeguard the commercial value of bills of lading by ensuring that the goods would be described accurately.

4. After deliberation, the Committee decided to retain the provision in paragraph 1 which required that, for a reservation to be given legal effect, the bill of lading must set forth not only a mention of the reservation but also the grounds for the particular reservation.

5. Consideration was given to a suggestion that paragraph 1 should make it clear that, while a carrier issuing a bill of lading had the right to enter on the bill of lading reservations authorized under that paragraph, a carrier was not obligated to enter such reservations. It was noted that whether paragraph 1 provided that carriers "shall" or "may" make special note of their reservations was of little practical significance in the light of article 16, paragraph 3, which established that, in relation to third parties acting in good faith, carriers were bound by the description of the goods on the bill of lading and could only rely on reservations that were permitted under paragraph 1 of that article and which the carriers had in fact appropriately entered on the bill of lading. The Committee decided to retain in paragraph 1 the requirement that carriers "shall" make special note of reservations, in order to emphasize that carriers should enter all reservations on the bill of lading that were authorized under paragraph 1 of article 16.

6. The Committee considered the desirability of adding a provision to paragraph 1, clarifying that "reasonable means of checking" did not call for the opening of sealed containers. After deliberation, the Committee decided not to add such a provision to paragraph 1, on the grounds that the present text, requiring only *reasonable* means of checking, was adequate to cover the special case of sealed containers, and that a *contrario* argument might result from mentioning specifically in paragraph 1 the case of sealed containers but not other cases, e.g. the frequent case where the weight of the goods could not be checked within a reasonable time.

7. The Committee noted, however, that "reasonable means of checking" did not require that sealed containers be opened so that the particulars of the goods in the containers could be checked.

## 8. The Committee adopted the following text:

*"Article 16. Bills of lading: reservations and evidentiary effect"*

"1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a 'shipped' bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person shall insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking."

## Article 16, paragraph 2

"2. When the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition."

9. After deliberation, the Committee decided to retain the present wording of paragraph 2.

## Article 16, paragraph 3

"3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

"(a) The bill of lading shall be *prima facie* evidence of the taking over or, where a 'shipped' bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

"(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein."

10. The Committee considered a suggestion that the phrase "including any consignee" appearing in subparagraph (b) was unnecessary and should be deleted. The Committee, however, decided to retain this phrase on the ground that in some national legal systems it was doubtful whether a consignee would be considered as a third party transferee of the bill of lading.

11. Consideration was given to the desirability of adding a provision to subparagraph (b) of paragraph 3, restricting the circumstances under which the carrier would be able to rely on a reservation he had noted on the bill of lading based on reasonable grounds for suspecting the accuracy of a particular contained in the bill of lading. It was proposed that the carrier should not be permitted to rely on such a reservation in cases where, by utilizing the available, reasonable means of checking, he could have ascertained that the particular referred to was in fact inaccurate. It was stated that this provision was designed to ensure that carriers always employed the available, reasonable means for checking the goods and thus to accord protection to third parties who would be relying in good faith on the description of the goods in the bill of lading.

12. After deliberation, the Committee decided not to adopt the above-mentioned proposal on the ground that paragraph 1 already required the carrier to utilize all the reasonable means of checking that were available to him and that third parties would have great difficulty in proving what the carrier "ought to have known", had he made use of the reasonable means of checking the goods.

13. The Committee decided to retain the existing wording of paragraph 3.

#### Article 16, paragraph 4

"4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee, shall be *prima facie* evidence that no freight is payable by the consignee. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication."

14. Consideration was given to the question whether paragraph 4, setting forth the legal consequences if the bill of lading did not indicate that freight would be payable by the consignee upon the delivery of the goods, should be retained.

15. The view was expressed that paragraph 4 should be deleted, since it was usual to provide in contracts for the carriage of goods by sea that the freight or part of the freight was payable only when the transport of the goods was completed. According to another view, paragraph 4 should be retained on the grounds that it accorded necessary protection to consignees and other third parties from the imposition of freight charges payable by them without this having been indicated on the bill of lading.

16. After deliberation, the Committee was agreed that the substance of paragraph 4 of article 16 should be retained.

17. The Committee considered a proposal to extend the scope of paragraph 4 to cover also the legal consequences if the bill of lading did not indicate that demurrage incurred at the port of loading shall be payable by the consignee. It was stated that demurrage should be treated in the same manner as freight charges and that consignees therefore should only be liable for the payment of demurrage if the bill of lading contained an indication to this effect.

18. According to another view, paragraph 4 should not be expanded to cover demurrage, because such modification of the paragraph would lead to delay in the issuance of bills of lading as carriers would not issue them until they ascertained

whether demurrage had or had not been incurred at the port of loading.

19. After deliberation, the Committee decided to extend the scope of paragraph 4 so as to cover the legal consequences of a failure to note on the bill of lading that either freight or demurrage was payable by the consignee.

20. The Committee adopted the following text:

"4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, shall be *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication."

#### ARTICLE 17

##### Article 17, paragraph 1

###### "Article 17. Guarantees by the shipper

"1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper."

1. The Committee adopted the text of this article, subject to the replacement of the words "inaccuracies of such particulars" appearing in the second sentence by the words "inaccuracies in such particulars", and subject to drafting changes required to harmonize its language with the language adopted in other articles.

2. The Committee adopted the following text:

###### "Article 17. Guarantees by the shipper

"1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss resulting from inaccuracies in such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper."

##### Article 17, paragraphs 2, 3 and 4

"2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

"3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the



reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

"4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued."

3. The Committee considered a proposal that paragraphs 2, 3 and 4 be deleted.

4. The deletion of these paragraphs was supported for the following reasons:

(a) The retention of these paragraphs would result in an increase in the number of unclean bills of lading issued by carriers. Under the present law a carrier could, in reliance on a letter of guarantee given by the shipper, omit a reservation from a bill of lading if there was a minor discrepancy between the goods and the particulars relating to the goods supplied by the shipper. If, however, uncertainty was created as to the validity of letters of guarantee, the carrier would always enter a reservation in such cases. The bill of lading would then not be accepted by a bank under a documentary letter of credit.

(b) The issue of a clean bill of lading by the carrier in return for a letter of guarantee given by the shipper was an arrangement always initiated by the shipper for the shipper's benefit. Where the issue of a clean bill of lading in these circumstances constituted a fraud, the party mainly responsible for, and profiting from, the fraud would be the shipper. However, by invalidating the letter of guarantee in the case of fraud the shipper would be placed in a better position than the carrier.

(c) In seeking to regulate arrangements between shippers and carriers concerning the issue of clean bills of lading by carriers, the Convention would exceed its proper scope. Such arrangements were always subject to the applicable national law, which would control possible abuses resulting from such arrangements. It was noted in this connexion that a number of national laws in fact regulated such arrangements.

(d) Paragraphs 2, 3 and 4 of the draft Convention would in some measure confer international recognition on a practice which was capable of abuse, and would conflict with the provisions of national laws which currently checked possible abuses.

5. The retention of these paragraphs was supported on the following grounds:

(a) The provisions of paragraph 2 only invalidated clean bills of lading issued in reliance on letters of guarantee when the carrier, by omitting a reservation, intended to defraud a third party. To the limited extent that they interfered with current law and practice, the provisions were desirable.

(b) Some national laws already had provisions similar to those contained in paragraphs 2, 3 and 4. Such provisions had not resulted in carriers frequently issuing unclean bills of lading. The fear expressed that the provisions in these paragraphs would result in an increase in the number of unclean bills of lading being issued was therefore unfounded.

(c) Other provisions of the draft Convention regulated relations between carrier and shipper. There was therefore no good reason for the view that regulation of arrangements between the shipper and the carrier for the issue of clean bills of lading fell outside the scope of the draft Convention.

(d) Leaving the issue to be regulated by the applicable national law would not resolve the difficulty frequently encountered as to which national law was applicable. Further, the provisions of national laws appeared to differ, and it was

therefore desirable to unify them through provisions in the Convention.

6. After deliberation, the Committee decided to retain these paragraphs.<sup>p</sup>

7. The Committee adopted the following texts:

"2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

"3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in the latter case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

"4. In the case of intended fraud referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued."

#### ARTICLE 18

##### "Article 18. Documents other than bills of lading

"When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

1. The Committee considered the following proposals:

(a) That the existing text of the article should be replaced by the following:

"When a carrier issues a document other than a bill of lading to evidence a contract of carriage and *receipt or acceptance of the goods*, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

(b) That the existing text of the article should be replaced by the following:

"When a carrier issues a document other than a bill of lading *by request of the shipper*, such document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

(c) That the article should be supplemented by provisions regulating the following issues in relation to documents other than bills of lading:

- (i) The obligation of the carrier to deliver at the port of destination;
- (ii) The retention by the shipper of a right of disposal of the goods before they have reached the port of destination;
- (iii) The effect of a reference in the document to other conditions governing the carriage of the goods.

2. The proposal noted in paragraph 1 (a) above was supported on the ground that the conclusion of a contract of

<sup>p</sup> Delegations supporting the deletion of these paragraphs formed a sizable minority within the Committee. The delegations of Japan and a number of other delegations reserved their position in respect of article 17, paras. 2, 3 and 4.



carriage frequently occurred prior to the time the carrier took over the goods which were the subject of that contract. The issuance of a document other than a bill of lading evidencing a contract of carriage should therefore not be treated, as it was under the present article, as evidence of the taking over of the goods as described in the document. The proposed text, on the other hand, only made a document *prima facie* evidence of the taking over of the goods as described in the document by the carrier when the carrier had issued a document to evidence both the contract of carriage, and receipt or acceptance of the goods.

3. The retention of the present text was supported on the ground that in many cases the conclusion of the contract and the taking over of the goods by the carrier occurred at the same time. If the carrier had not taken over the goods when the document evidencing the contract was issued, it was open to the carrier under the present text to prove that in fact he had not taken over the goods as described in the document, since the present text only created a rebuttable presumption. Furthermore, the proposed text treated a document evidencing receipt or acceptance of the goods as *prima facie* evidence of the taking over of the goods as therein described. Since receipt or acceptance amounted to taking over, the creation of a presumption as to taking over was unnecessary if the document itself evidenced receipt or acceptance.

4. In regard to the proposal noted in paragraph 1 (b) above, it was noted that the proposed text restricted the operation of the presumption of taking over to the case where the document evidencing the contract of carriage had been issued "by request of the shipper". There was wide agreement that such a restriction was undesirable, as such documents were frequently issued by carriers independently of requests by shippers.

5. The proposal noted at paragraph 1 (c) above was supported on the ground that there was an increased use of documents other than bills of lading evidencing contracts of ocean carriage, and that regulation in the draft convention of some of the principal rights and obligations of carrier and shipper under such documents was desirable. The proposal was opposed on the ground that adequate regulation of such rights and obligations would require detailed provisions, and that such detailed provisions fell outside the proper scope of the convention.

6. After deliberation, the Committee did not adopt any of the proposals noted in paragraph 1, and retained the existing text of the article.

#### ARTICLE 19

##### Article 19, paragraph 1

#### "PART V. CLAIMS AND ACTIONS"

##### "Article 19. Notice of loss, damage or delay"

"1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any."

1. The Committee considered the following proposals:

(a) That the word "specifying" should be deleted and replaced by the word "or".

(b) That the words "or such other person authorized to receive the goods" be added immediately after the word "consignee" in each of the two instances that the word appeared in the paragraph.

(c) That the words "or his servants or agents" should be added after the word "carrier".

(d) That the words "or in case of such notice being given orally, unless a written confirmation is given to the car-

rier within 24 hours after the oral notice," be added before the words "such handing over shall be".

(e) That the words "in writing" should be deleted.

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the inclusion of the word "specifying" resulted in an obligation on the consignee to give, in addition to notice of loss or damage, a detailed description of the general nature of the loss or damage. Since this obligation placed an unnecessary burden on the consignee, it would be preferable to delete "specifying", and make the giving of such a detailed description optional. There was general agreement, however, that the specification of the general nature of the loss or damage was not too heavy a burden for the consignee, and was necessary to give the carrier notice of the nature of a possible claim against him. After deliberation, the Committee did not adopt this proposal.

3. In support of the proposal noted in paragraph 1 (b) above, it was observed that consignees would frequently receive delivery of goods through persons authorized to receive the goods on their behalf. It was therefore desirable to empower such other persons to give notice of loss or damage when goods were received by them. The proposal was opposed on the ground that the proposed addition would result in a requirement that, in order to avoid the operation of the presumption created by the second part of the paragraph, the person authorized to receive the goods must give notice not later than the time he received the goods. Such a requirement would be unfair to the consignee, since in many cases the consignee alone could detect the loss or damage and specify its general nature. It was also stated that, since under article 4, paragraph 3, "consignee" included the servants, agents, or other persons acting pursuant to the instructions of the consignee, the proposed addition was unnecessary. After deliberation, the Committee decided not to adopt this proposal.

4. In support of the proposal noted in paragraph 1 (c) above, it was observed that it would be of advantage to the consignee if he were empowered to give notice either to the carrier or to his servants or agents. The proposal was opposed on the ground that it would create great practical difficulty for the carrier if notice could be given to any of his servants or agents. It was noted, in this connexion, that the applicable law and practice would specify that notice could validly be given to the carrier through certain categories of servants or agents. After deliberation, the Committee decided not to adopt this proposal.

5. It was stated in support of the proposal noted in paragraph 1 (d) above, that although for the sake of certainty an immediate, written notice of loss or damage was preferable, written notice by the consignee within 24 hours after the goods were handed over to him would be acceptable provided the consignee was required to give immediately an oral notice of the loss or damage. The proposal was opposed on the ground that requiring immediate oral notice would lead to uncertainty and litigation since, frequently, consignees would allege and carriers would deny that immediate oral notice of the loss or damage had been given. It was noted that article 19, paragraph 1, was not a time-bar and only included a rebuttable presumption as to the apparent condition of the goods upon their delivery. After deliberation, the Committee decided not to adopt this proposal.

6. The proposal to delete the words "in writing" was supported on the ground that the consignee could see whether loss or damage had been caused to the goods only after they had been handed over to him. It was therefore difficult for him to give notice in writing of loss or damage, specifying the general nature of the loss or damage, not later than the time the goods were handed over to him, as required by the paragraph. The proposal was opposed on the ground that a notice in writing was clear evidence both of the fact that notice was given, and of the general nature of the loss or damage of which notice was given. On the other hand, both the giving of an

oral notice, and the terms of such a notice, could be easily disputed. In the course of the discussions on the above proposal it was suggested that the difficulties noted above arising out of the existing text and the proposed modification might be resolved by retaining the requirement that notice be given in writing, but permitting the consignee to give such notice not later than 24 hours after the goods were handed over to him. The Committee decided to adopt this suggestion, and to modify the text of the paragraph accordingly.<sup>1</sup>

7. The Committee adopted the following text:

"PART V. CLAIMS AND ACTIONS

"Article 19. Notice of loss, damage or delay

"1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than the day after the day when the goods were handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition."

Article 19, paragraph 2

"2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day."

8. The Committee considered a proposal that the period of 10 days specified in the paragraph should be extended to 15 days, on the ground that a 10-day period might be insufficient to give notice where the loss or damage was not apparent. On the other hand, the view was expressed that a 10-day period was sufficient. After deliberation, the Committee decided to modify the paragraph by replacing the 10-day period by a 15-day period.

9. The Committee also decided to harmonize the phrase "completion of delivery" used in this paragraph, and the phrase "handed over" used in paragraphs 1 and 5 of article 19.

10. The Committee adopted the following text:

"2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article shall apply correspondingly if notice in writing has not been given within 15 consecutive days after the day when the goods were handed over to the consignee."

Article 19, paragraph 3

"3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection."

11. After deliberation, the Committee retained the substance of this paragraph, subject to certain drafting changes, and adopted the following text:

"3. If the state of the goods has at the time they were handed over to the consignee been the subject of joint survey or inspection by the parties notice in writing need not be given of loss or damage ascertained during such survey or inspection."

Article 19, paragraph 4

"4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods."

12. After deliberation, the Committee retained the existing wording of this paragraph.

Article 19, paragraph 5

"5. No compensation shall be payable for delay in de-

livery unless a notice has been given in writing to the carrier within 21 days from the time that the goods were handed over to the consignee."

13. The Committee considered a proposal to add the words "or otherwise delivered in accordance with paragraph 2 of article 4" at the end of this paragraph. In support of this proposal, it was noted that under paragraph 2 of article 4 the carrier ceased to be in charge of the goods not only when he had delivered the goods by handing them over to the consignee (article 4 (2) (a)), but also when he had delivered them in the manner specified in article 4 (2) (b) or 4 (2) (c). It was therefore appropriate that the 21-day period for giving notice should commence when delivery had been made in any of the three ways specified in article 4 (2). The proposal was opposed on the ground that it was only the consignee who, after the goods had been handed over to him, would be in a position to decide if there had been delay. After deliberation, the Committee decided not to adopt that proposal.

14. The Committee accepted a proposal to add the word "consecutive" after the figure "21", and adopted the following text:

"5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 consecutive days after the day when the goods were handed over to the consignee."

Article 19, paragraph 6

"6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the contracting carrier."

15. The Committee considered a proposal that the paragraph should be modified to include a provision that a notice given under article 19 to a contracting carrier should have the same effect as if it had been given to an actual carrier who had delivered the goods. After deliberation the Committee adopted that proposal.

16. The Committee adopted the following text:

"6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall also have effect as if given to such actual carrier."

ARTICLE 20

Article 20, paragraph 1 (introductory language)

"Article 20. Limitation of actions

"1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within [one year] [two years];"

1. Consideration of the introductory language of paragraph 1 was focused on the following issues:

(a) The length of the limitation period provided under this article; and

(b) The desirable scope of this article as to the types of actions and claimants covered.

2. After deliberation, the Committee decided that the period of limitation provided for under this article should be two years.

3. Regarding the desirable scope of article 20, it was proposed that its scope should be extended to cover all actions for damages relating to carriage under the convention, including not only actions by shippers or consignees against carriers but also actions by carriers against shippers or consignees. It was noted that the same limitation period should be applicable to all actions arising under the convention and that, e.g. under

<sup>1</sup>The representative of Japan reserved his position on article 19, para. 1, and maintained his preference for its formulation noted in para. 1 (d) above.

article 12 or 13, actions by carriers against shippers were foreseen.

4. According to another view, the scope of article 20 should be restricted to actions against carriers for loss of or damage to cargo and the limitation period for other types of actions arising under contracts of carriage covered by the convention should be left to the applicable national law for determination.

5. After considering this question, the Committee decided that article 20, dealing with the limitation period under the draft convention, should apply to all actions for damages relating to carriage under the draft convention, including actions by carriers against shippers or consignees.

6. The Committee was agreed that the introductory language of paragraph 1 should form a separate paragraph establishing the period of limitation under the draft convention and that subparagraphs (a) and (b) of the present paragraph 1 should constitute paragraph 2 dealing with the commencement of the running of the limitation period. It was noted that a similar arrangement had been adopted in article 16 of the Athens Convention of 1974.

7. The Committee adopted the following text as paragraph 1 of this article:

*"Article 20*

"1. Any action [for damages]<sup>1</sup> relating to carriage of goods under this Convention is time-barred if legal or arbitral proceedings have not been initiated within a period of two years.

"<sup>1</sup>The Working Group suggests that these words may be deleted."

*Article 20, paragraph 1, subparagraphs (a) and (b)*

"(a) In the case of partial loss of or of damage to the goods, or delay, from the last day on which the carrier has delivered any of the goods covered by the contract;

"(b) In all other cases, from the ninetieth day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made."

8. After deliberation, the Committee decided to retain the substance of subparagraph (a), but to clarify its application in cases where there were successive, partial deliveries of goods under a contract of carriage covered by the draft convention. It was noted that subparagraph (a) was designed to establish the limitation period for all actions arising from circumstances where full or partial delivery of the goods had been affected under the contract of carriage.

9. It was agreed that subparagraph (b) established the limitation period for all actions arising from circumstances where there had not been any delivery of the goods under the contract of carriage. The following proposals were, however, submitted in order to modify the provisions of subparagraph (b):

- (i) To clarify that the goods could be taken over from the shipper by the carrier or by an actual carrier;
- (ii) To provide that if the carrier fails to take over the goods, the period of limitation commences "the day after the last day when the shipper could have required the carrier to take them over in accordance with the contract of carriage";
- (iii) To provide that for all actions covered by subparagraph (b), i.e. whether or not the carrier took over the goods, the period of limitation runs "from the last day on which the goods should have been delivered".

10. There was general agreement that the provision in subparagraph (b), under which in certain cases the commencement of the limitation period depended upon "the time the contract was made", was unsatisfactory since the time at which the

contract of carriage was concluded had no necessary bearing on the time at which the contract of carriage was to be performed and claims under the contract were likely to arise.

11. Consideration was given to the case where a carrier failed to deliver the goods for an extended period without, however, incurring any liability for "delay in delivery" under article 5, paragraph 2, because he was taking all reasonable steps to accomplish delivery, e.g., the case of ships stranded in the Suez Canal for several years when the canal was closed. It was noted that under the present wording of subparagraph (b), and under the proposals mentioned at paragraph 9 above to modify subparagraph (b) except the last one, the consignee would, in such a case, be forced to treat the goods as lost pursuant to article 5, paragraph 3, and claim their total loss, even if the consignee knew that the goods were not lost and that they were not perishable. Otherwise, if the consignee had failed to claim for total loss and if the goods were then delivered to him in a damaged condition after two years, he would be time-barred from asserting a claim. To resolve this problem, it was proposed that subparagraph (b) should provide that, in respect of actions falling within the ambit of that subparagraph, the period of limitation should run "from the last day on which the goods should have been delivered".

12. It was stated in reply that the provisions of article 5, paragraph 3, permitting goods to be treated as lost after 60 days of non-delivery, together with the two-year period of limitation provided for in article 20, were sufficient to protect claimants.

13. After deliberation, the Committee decided that, in substance, subparagraph (b) should state that in respect of actions to which it was applicable the period of limitation ran "from the last day on which the goods should have been delivered".

*Proposed addition to paragraph 1*

14. The Committee considered the desirability of adding a special provision dealing specifically with the commencement of the period of limitation for actions against shippers or consignees under the convention. It was suggested that the limitation period for actions against shippers or consignees should run from the "scheduled date of delivery".

15. It was stated in reply that such a special provision was unnecessary, since the general rules in subparagraph (a) and (b) of paragraph 1 provided an adequate starting point for the limitation period applicable to claims against shippers or consignees. It was further stated that the proposed term "scheduled date of delivery" was vague and that not all contracts of carriage specified a "scheduled date of delivery".

16. After deliberation, the Committee decided not to add to this article a special rule on the commencement of the limitation period for actions against shippers or consignees under the convention.

17. The Committee combined the substance of subparagraphs (a) and (b) into a single paragraph and adopted the following text as paragraph 2 of this article:

"2. The limitation period commences to run on the day on which the carrier has delivered the goods or part of the goods or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered."

*Article 20, paragraph 2*

"2. The day on which the period of limitation begins to run shall not be included in the period."

18. The Committee considered but did not retain a suggestion to modify the wording of this paragraph to correspond to the wording of article 28 of the Convention on the Limitation Period in the International Sale of Goods. The Committee was agreed that it was not necessary to introduce complex provisions on the calculation of the period of limitation into the draft convention.

19. The Committee retained the text of this paragraph but renumbered it as paragraph 3.

*Article 20, paragraph 3*

"3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing."

20. After deliberation, the Committee decided to retain the substance of this paragraph.

21. It was agreed, however, that the paragraph should be redrafted, taking into account the expanded scope of article 20 covering all actions for damages relating to carriage under the convention, and the wording of article 22, paragraph 2, of the Convention on the Limitation Period in the International Sale of Goods.

22. The Committee adopted the following text as paragraph 4 of this article.

"4. The person against whom a claim is made may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The declaration may be renewed."

*Article 20, paragraph 4*

"4. The provisions of paragraphs 1, 2 and 3 of this article shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier."

23. After deliberation, the Committee decided to delete paragraph 4 as unnecessary, in the light of the expansion of the scope of article 20.

*Article 20, paragraph 5*

"5. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than ninety days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

24. After deliberation, the Committee decided to retain the substance of paragraph 5, but to re-examine its wording in the light of the expanded scope of article 20 and of possible conflict between other international agreements and the provisions of this paragraph.

25. The Committee adopted the following text:

"5. An action for indemnity by a person held liable may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the State where proceedings are initiated. However, the time allowed shall not be less than 90 days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

*Proposed addition to article 20*

26. Consideration was given to the desirability of adding a paragraph to article 20 that would provide that, subject to the provisions of this article, the *lex fori* governed the extension of the limitation period in case of fraud or *force majeure*, the interruption of the running of the limitation period, and the calculation of the limitation period.

27. It was stated that the proposed paragraph was designed to limit the cases where the law of the jurisdiction where the proceedings were instituted could be utilized to extend the two-year period of limitation established under article 20.

28. After deliberation, the Committee decided against the inclusion of the proposed paragraph since the grounds for extending, interrupting or suspending the limitation period differed widely in the various national legal systems. It was also noted

that in a number of national legal systems prescription (limitation) of claims was considered as part of the substantive law and not of the procedural law.

## ARTICLE 21

*"Article 21. Jurisdiction"*

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

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

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

"(c) The port of loading; or

"(d) The port of discharge; or

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

"2. (a) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

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

"3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 of this article. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

"4. (a) Where an action has been brought before a court competent under paragraphs 1 and 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

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

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

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

*Article as a whole*

1. The Committee considered a proposal that the entire article be deleted.

2. The deletion of the article was supported on the following grounds:

(a) Paragraph 1 of the article gave a plaintiff the right to bring an action, at his option, in any one of several jurisdictions. Although this right was given to any plaintiff, whether shipper or carrier, actions seeking to enforce rights conferred by the Convention would in practice be instituted by shippers. An advantage was therefore given to shippers which was not

given to carriers, and this resulted in an imbalance in the Convention.

(b) Most systems of national law empowered a plaintiff to institute an action at any of the places specified in paragraphs 1 (a), 1 (b), 1 (d) and 1 (e). It was therefore unnecessary to give a plaintiff such a right through specific provision in the Convention.

(c) The several jurisdictions made available to a plaintiff to institute an action might in certain cases create hardship for carriers. For instance, where in a single incident cargo belonging to different shippers was damaged, each cargo owner might institute his action in a different jurisdiction.

(d) The right to bring an action, at his option, in any one of the several jurisdictions specified in the paragraph was given to a plaintiff even in cases where the parties had earlier agreed on a single exclusive jurisdiction. This derogated from the generally accepted principle that agreements entered into by parties should be respected by them.

(e) The article did not unify the rules as to the competent jurisdiction for a plaintiff, since it gave him the right to institute an action in any one of several jurisdictions.

(f) The article was unnecessary for the purpose of protecting shippers since carriers did not in practice impose on shippers clauses conferring exclusive jurisdiction on fora which were only convenient to carriers.

3. The retention of the article was supported on the following grounds:

(a) Bills of lading and other documents evidencing contracts of ocean carriage were often contracts of adhesion which a shipper was compelled to accept because of the superior bargaining position of the carrier. They often contained clauses conferring exclusive jurisdiction in respect of actions arising out of contracts of carriage on a forum which was only convenient to the carrier. Since it was in practice very difficult for the shipper to institute an action at such a forum, these clauses had the effect of protecting the carrier from possible actions against him. Article 21 was therefore necessary to ensure for the shipper a convenient forum in which he might bring an action.

(b) The provisions of the article constituted an acceptable compromise in protecting both the interests of plaintiffs to whom a convenient forum was made available under paragraphs 1 and 2, and the interests of defendants, who, by reason of paragraph 2, could not be sued in a forum other than the ones specified in paragraphs 1 and 2.

(c) The provisions of paragraph 1 were not unbalanced in that they made available one of several fora to any plaintiff, whether he be carrier or shipper.

4. In the course of the deliberations, a proposal was also made that the article be modified so as to make available to a plaintiff at his option the several jurisdictions specified in paragraph 1 only when there had been no exclusive jurisdiction previously agreed upon between the parties.

5. After deliberation, the Committee decided to retain the article.

#### *Article 21, paragraph 1*

6. The Committee considered the following proposals:

(a) That the introductory language to the paragraph should be modified to provide that, when an action is brought in a Contracting State, the particular court within that State in which the action may be brought should be determined by the procedural law of that State.

(b) That the word "contracting" appearing before the word "State" should be deleted.

(c) That the existing wording of subparagraph (b) should be replaced by the following:

"(b) The place where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State".

7. The proposal noted in paragraph 6 (a) above was supported on the ground that, where an action was brought in a Contracting State within whose territory one of the places described in subparagraphs (a) to (e) was situated, the introductory language of paragraph 1 of article 21 did not specify the particular court in which such action might be brought. There was wide agreement that the determination of such court should be left to the procedural law of the Contracting State concerned, and that the introductory language should be modified to reflect this view.

8. (a) The proposal noted in paragraph 6 (b) above was supported on the ground that the retention of the word "contracting" might result in the courts of non-Contracting States refusing to assume jurisdiction in respect of actions in cases where they would assume jurisdiction if the word were deleted. It was noted that bills of lading and other documents evidencing contracts of carriage would frequently provide that the convention was to govern the contract. If an action was brought in a non-Contracting State on a contract containing such a provision, the courts of a non-Contracting State would apply article 21 as part of the applicable law chosen by the parties to govern the contract, and might deny jurisdiction because an action could under article 21 only be brought in a Contracting State. It was observed that such a denial of jurisdiction might seriously limit the application of the convention in the period immediately following its coming into force, when several States would still not be parties to it.

(b) The proposal was opposed on the grounds that the deletion of the word "contracting" would not result in the courts of non-Contracting States assuming jurisdiction in cases where they would otherwise refuse to assume jurisdiction. The courts of non-Contracting States would decide whether or not to assume jurisdiction on the basis of their own laws of jurisdiction without regard to the content of the new Convention. Nor would such courts regard the adoption of the Convention as the applicable law in the contract of carriage as conclusive in deciding whether or not to assume jurisdiction. In particular, States who were parties to the Brussels Convention of 1924 and not parties to the new Convention would apply the Brussels Convention of 1924 where the latter was applicable.

9. After deliberation, the Committee decided to delete the word "contracting".

10. In support of the proposal noted in paragraph 6 (c) above, it was observed that under the existing wording of subparagraph (b) of paragraph 1 of article 21, a defendant could be sued at a place where he had a branch or agency through which he had concluded a contract of carriage. However, he may not be able adequately to defend the action at a place where he only had a branch or agency. The proposed new wording would eliminate the bringing of actions at such places, and would also harmonize subparagraph (b) of paragraph 1 with article 17, paragraph 1 (d), of the Athens Convention of 1974. The proposal was opposed on the ground that, if a defendant had concluded a contract of carriage with a plaintiff through a branch or agency, it was not unfair to permit the plaintiff to bring an action at the place where the branch or agency was situated. After deliberation, the Committee did not adopt this proposal.

#### *Article 21, paragraph 2*

11. The Committee considered the following proposals:

(a) That this paragraph should be deleted, and that the following paragraph should be added as the last paragraph of this article:

"The provisions of this article shall not prevent the application of international conventions which establish special jurisdictions for claims arising out of the contract for carriage by sea."

(b) That the first sentence of the paragraph should be replaced by the following sentence:

"Notwithstanding the preceding provisions of this article, an action may be brought before the courts of a Contracting State in any of whose ports the carrying vessel or any vessel of the same ownership may have been legally arrested in accordance with the applicable law of that State."

12. The proposal noted in paragraph 11 (a) above was supported on the following grounds:

- (i) The provisions of this paragraph conflicted with article 7 of the Brussels Convention of 1952 relating to the Arrest of Seagoing Ships.<sup>1</sup> In particular, the second sentence of subparagraph (a) of this paragraph providing, subject to certain conditions, for the removal of an action at the petition of the defendant, was inconsistent with the provisions of the Brussels Convention of 1952. This conflict would make it difficult for States parties to the Brussels Convention of 1952 to become parties to the present convention.
- (ii) The rules contained in this paragraph were inconsistent with the fundamental principle of law and policy that foreign State-owned vessels were in all circumstances immune from jurisdiction. The paragraph was therefore unacceptable, and would make it very difficult for some States to become parties to the convention. The representative of the USSR made a statement that, if paragraph 2 of article 21 was retained, it would be absolutely necessary to supplement this paragraph by a clear and unambiguous provision on its inapplicability with regard to State-owned vessels which under international law should enjoy immunity from foreign jurisdiction. In the opinion of the representative of the USSR, the absence of such a supplementary provision could create serious obstacles for the adopting of the convention under consideration.
- (iii) The removal of an action at the petition of a defendant provided for in the second sentence of the paragraph could not be given effect under the procedural laws of many States. That sentence would therefore be inoperative.
- (iv) The deletion of this paragraph would reduce the number of jurisdictions in which a plaintiff might, at his option, bring an action arising out of a contract of carriage. To that extent, the deletion would promote uniformity as to the competent jurisdictions available to a plaintiff and reduce "forum shopping".

13. The proposal was opposed on the following grounds:

- (i) The provisions of this paragraph did not conflict with article 7 of the Brussels Convention of 1952 relating to the Arrest of Seagoing Ships. Paragraph 3 of article 7 of that Convention provided for the case where parties had agreed to submit the dispute in respect of which the arrest had been made to the jurisdiction of a particular court other than the one in which the arrest had been made and permitted the claimant in such a case to institute proceedings in the agreed jurisdiction. Since paragraph 3 of article 23 of the draft convention required that the bill of lading or the document evidencing the contract of carriage contain a statement that the carriage was subject to the provisions of the Convention, the parties would by that statement have agreed to submit their disputes to the jurisdictions specified in article 21 of the draft convention. The jurisdictions specified in article 21 would therefore be agreed jurisdictions within the meaning of paragraph 3 of article 7 of the Brussels Convention of 1952.

<sup>1</sup> International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952.

- (ii) The paragraph only contemplated that a ship may be "legally arrested in accordance with the applicable law" of the State in which the arrest took place. A foreign State-owned vessel would therefore not be arrested by virtue of the provisions of this paragraph in a jurisdiction which recognized the principle of the absolute immunity from arrest of foreign State-owned vessels. Furthermore, it was undesirable to specify in an international convention that foreign State-owned vessels were absolutely immune from arrest, because under the law of some States foreign State-owned vessels engaged in purely commercial activities were not immune from arrest.

- (iii) The arrest of a ship was regarded by cargo owners in some States as the only effective method of enforcing a claim against a foreign carrier. This paragraph therefore embodied a useful compromise by protecting the existing right of arrest in such State, while not creating a right of arrest in States which became parties to the Convention.
- (iv) Retention of the defendant's right to remove the action to a jurisdiction specified in paragraph 1 of the article was desirable because the arrest might be made in a jurisdiction having no connexion with the contract of carriage out of which the claimant's action arose. It would be unfair to require the defendant to defend the action in such a jurisdiction.

14. After deliberation, the Committee decided to retain paragraph 2 of article 21, and not to add the proposed new paragraph.

15. The representative of the USSR stated that he could not support the decision referred to in paragraph 14 above, for the reasons set forth in paragraph 12 (ii) above.

16. The proposal noted in paragraph 11 (b) above was supported on the ground that it created a desirable extension of the scope of arrest in States which already recognized a right of arrest. It was also observed that this extension was not inconsistent with the provisions of the Brussels Convention of 1952 relating to the Arrest of Seagoing Ships. After deliberation, the Committee decided to adopt this proposal.

#### *Article 21, paragraphs 3 and 4*

17. After deliberation, the Committee decided to adopt the text of these paragraphs, subject to the substitution of "paragraph 1 or 2" for "paragraphs 1 and 2" in each of the paragraphs.

#### *Article 21, paragraph 5*

18. After deliberation, the Committee decided to retain this paragraph in its existing wording.

19. Following the deliberations set forth in paragraphs 1 to 18 above, the Committee adopted the following text for article 21:

#### *"Article 21. Jurisdiction*

"1. In a legal proceeding relating to carriage of goods under this Convention the plaintiff, at his option, may bring an action in a court 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 or ports:

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

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

"(c) The port of loading or the port of discharge; or

"(d) Any additional place designated for that purpose in the contract of carriage.



"2. (a) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel or any other vessel of the same ownership may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

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

"3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

"4. (a) Where an action has been brought before a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

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

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

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

#### ARTICLE 22

##### "Article 22. Arbitration

"1. Subject to the rules of this article, parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration.

"2. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

"(a) A place in a State within whose territory is situated

"(i) The port of loading or the port of discharge; or

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

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

"(b) Any other place designated in the arbitration clause or agreement.

"3. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

"4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

"5. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen."

##### Article as a whole

1. The Committee considered a proposal that the entire article should be deleted.

2. The deletion of this article was supported on the following grounds:

(a) The well-established practice in commercial arbitration was to determine the place of arbitration by agreement of the parties to the arbitration agreement. The provisions of this article, however, were inconsistent with that practice since a plaintiff could institute arbitration proceedings at any one of the places specified in paragraph 2 (a) even though that was not the agreed place of arbitration. These provisions were also inconsistent with the principle that agreements entered into by parties should be respected by them.

(b) The article would defeat the efforts made by many international bodies to promote arbitration as a means of dispute settlement. The uncertainty as to the place of arbitration resulting from the many optional places at which a plaintiff could institute arbitration proceedings would discourage resort to arbitration.

3. The retention of the article was supported on the following grounds:

(a) The article was a necessary corollary to the protection given to the plaintiff by article 21 of the Convention. If article 21 were retained but article 22 deleted, clauses conferring exclusive jurisdiction on courts only convenient to the defendant, imposed on the plaintiff by the superior bargaining power of the defendant, would be replaced by clauses similarly imposed stipulating that all disputes were to be settled by arbitration at a place only convenient to the defendant.

(b) The article was only directed to preventing possible abuse of arbitration in a limited area, and would not have adverse consequences on the efforts to promote arbitration in general as a method of dispute settlement.

4. The Committee also considered a proposal that, as an alternative to the deletion of this article, it should be redrafted to provide that the options as to the place of arbitration would only be open to a plaintiff if there was no place of arbitration agreed upon between the parties.

5. After deliberation, the Committee decided to retain this article.\*

##### Article 22, paragraph 1

6. The Committee considered a proposal that the paragraph be amended by the addition of the words "evidenced in writing" to read as follows:

"1. Subject to the rules of this article, parties may provide by agreement evidenced in writing that any dispute that may arise under a contract of carriage shall be referred to arbitration."

7. This proposal was supported on the ground that an arbitration agreement had the important consequence of ousting the jurisdiction of courts. It was therefore desirable to require clear evidence of such an agreement. There was wide agreement that the proposal was useful, and the Committee, after deliberation, decided to adopt it.

##### Article 22, paragraph 1 bis

8. The Committee considered a proposal to add the following new paragraph to the article as paragraph 1 bis:

"Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier

\* A significant minority of delegations expressed their reservation concerning the present formulation of article 22 and favoured deletion of the article.



may not invoke such provision [for the purpose of referring disputes arising under the bill of lading to arbitration] as against a holder having acquired the bill of lading in good faith."

9. It was noted that this proposal was in accord with a suggestion made by the UNCTAD Working Group on International Shipping Legislation that a paragraph to this effect should be added to the draft convention. There was general agreement that the proposed new paragraph was desirable, and the Committee, after deliberation, decided to adopt it with such drafting changes as may be needed.

#### *Article 22, paragraph 2*

10. The Committee considered a proposal that this paragraph should be modified by providing that the options given to the plaintiff as to the place for instituting arbitration proceedings should only be available if the parties had not previously agreed on the place of arbitration. The proposal was supported on the ground that this would give effect to the autonomy of will of the parties, which was generally given effect in arbitration proceedings. The proposal was opposed on the ground that it would permit a defendant in a superior bargaining position to impose on a plaintiff a place of arbitration only convenient to the defendant. After deliberation, the Committee decided not to adopt this proposal.

#### *Article 22, paragraph 3*

11. After deliberation, the Committee decided to retain this paragraph.

#### *Article 22, paragraph 4*

12. The Committee considered a proposal that this paragraph should be deleted on the ground that the Convention should not interfere with an agreement by the parties, prior to the arising of a dispute, as to the procedure for arbitration. The proposal was opposed on the ground that the retention of this paragraph was necessary to give effect to paragraphs 2 and 3 of the article. After deliberation, the Committee decided to retain this paragraph.

#### *Article 22, paragraph 5*

13. After deliberation, the Committee decided to retain this paragraph.

14. Following the deliberations set forth in paragraphs 1 to 13 above, the Committee adopted the following text for article 22:

#### *"Article 22. Arbitration*

"1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise under a contract of carriage shall be referred to arbitration.

"2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

"3. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

"(a) A place in a State within whose territory is situated

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

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

"(iii) The port of loading or the port of discharge; or

"(b) Any place designated for that purpose in the arbitration clause or agreement.

"4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

"5. The provisions of paragraphs 3 and 4 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

"6. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen."

#### ARTICLE 23

#### *Article 23, paragraph 1*

#### *"PART VI. DEROGATIONS FROM THE CONVENTION*

#### *"Article 23. Contractual stipulations*

"1. Any stipulation of the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, shall be null and void."

1. The Committee considered a proposal to delete in this paragraph any reference to "any other document evidencing the contract of carriage". In support of the proposal it was stated that such deletion was justified by the different legal nature of such contracts when compared with a bill of lading.

2. The Committee, after deliberation, decided not to retain this proposal and adopted paragraph 1 in its present wording.

#### *Article 23, paragraph 2*

"2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention."

3. The Committee adopted paragraph 2 in its present wording.

#### *Article 23, paragraph 3*

"3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee."

4. The Committee considered the following proposals:

(a) That the paragraph should be deleted;

(b) That the paragraph be supplemented by a provision establishing clearly that the convention applied to a bill of lading or other document evidencing the contract of carriage even if the bill of lading or other document did not contain the statement that the carriage was subject to the provisions of the convention;

(c) That the words "which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee" should be deleted.

5. In support of the proposal mentioned in paragraph 4 (a) above, it was argued that the provision in paragraph 3 was superfluous and the requirement of an express statement went against the present trend of simplification of trade documents. The proposal for deletion was opposed on the ground that the requirement of a paramount clause was found in other transport conventions and was useful in certain cases when

the convention was applicable by virtue of article 2, for instance where the port of loading was in a contracting State and where a suit for cargo damages was brought in the port of destination of a non-contracting State. In such cases the paramount clause would ensure the application of the convention.

6. The Committee, after deliberation, decided not to retain the proposal for deletion of the paragraph.

7. As regards the proposal mentioned in paragraph 4 (b) above, the Committee was of the view that the suggested addition was superfluous in view of the fact that, under article 2 of the convention, the convention would apply even if there were no express reference in the bill of lading or other document evidencing the contract of carriage that the carriage was subject to the convention. The Committee did not therefore retain this proposal.

8. As regards the proposal mentioned in paragraph 4 (c) above, the Committee was of the view that the words "which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee" should be retained since they contained a useful direction to the courts that were seized of a case under the convention.

9. The Committee, after deliberation, adopted paragraph 3 in its present wording.

#### *Article 23, paragraph 4*

"4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as result of the omission of the statement referred to in the preceding paragraph, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the court seized of the case."

10. The Committee considered a proposal that this paragraph be deleted on the ground that its provisions were of little practical utility and were unclear. Since there was no support for this proposal, the Committee decided not to retain it and adopted paragraph 4 in its present wording.

#### ARTICLE 24

##### *"Article 24. General average"*

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average."

1. The Committee considered the following proposals:

(a) That the article should be redrafted to ensure that it did not override rule D of the York-Antwerp Rules;

(b) That the second sentence of the article should be redrafted to the effect that the cargo interest would not be entitled to recover from the carrier a contribution to general average made as a result of an error in navigation;

(c) That article 24 should be deleted;

(d) That the present text of article 24 should be replaced by the following text:

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average."

"With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may refuse contribution 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. In the course of the discussions, it was noted that rule D of the York-Antwerp Rules as revised in Hamburg in 1974 stated that "Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies or defences which may be open against that party for such fault". It was stated that the over-all effect of article 24 was that if the carrier was liable under the provisions of the Convention he was required to contribute in general average and that the right to counter-claim in respect of general average was governed by the provisions of the convention as if such counter-claim were a claim arising from loss of or damage to the goods. However, there were cases where it was doubtful whether the carrier was liable; if the carrier was not liable under the convention, an action for recovery of the contribution would fail since the action was not one for damages under the convention.

3. There was general agreement that the proposed text, set forth in paragraph 1 (d) above, was acceptable and the Committee agreed with the substance of that proposal. After deliberation, the Committee adopted the following text of article 24:

##### *"Article 24. General average"*

"1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average."

"2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid."

#### ARTICLE 25

##### *Article 25, paragraph 1*

##### *"Article 25. Other conventions"*

"1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of sea-going ships."

1. The Committee did not retain the proposal that this paragraph be deleted and adopted the paragraph in its present wording.

##### *Article 25, paragraph 2*

"2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

"(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

"(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions."

2. The Committee considered the proposal that the Brussels Convention on Civil Liability in the Field of Maritime Carriage of Nuclear Material of 1971 be added to the conventions referred to in subparagraph 2 (a). The Committee did not retain this proposal on the ground that paragraph 2 was essentially concerned with the nature and type of liability covered by the Paris or Vienna Conventions.

*Proposal for a new paragraph 3*

3. The Committee considered the following proposal:

"No liability shall arise under the provisions of this Convention for any loss or damage for which the carrier is liable under the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974."

4. There was general agreement that the convention should specify that it did not apply to the carriage of passenger luggage by sea. The suggestion was made that this could appropriately be done by amending the definition of goods in paragraph 4 of article 1 of the draft convention. The Committee did not retain this suggestion on the ground that it was not the nature of the goods, i.e. passenger luggage, that excluded the application of the convention but the fact that these goods were carried under a contract of carriage by sea of a passenger or of a passenger and his luggage. The Committee, after deliberation, adopted the following new paragraph 3:

"3. No liability shall arise under the provisions of this Convention for any loss of, or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea."

*Draft provisions concerning implementation, reservations and other final clauses*

1. The Committee had before it draft provisions concerning implementation, reservations and other final clauses for the convention on the carriage of goods by sea, prepared by the Secretariat (A/CN.9/115).<sup>\*</sup> The Committee did not take any decision on these draft provisions on the ground that they could best be considered at the conference of plenipotentiaries that will be convened to adopt the convention on the carriage of goods by sea.

2. The Committee recommended that the Commission request the Secretariat to prepare draft provisions concerning implementation, reservations and other final clauses for the convention on the carriage of goods by sea, on the basis of the draft texts in A/CN.9/115<sup>\*</sup> and the suggestions discussed at paragraphs 3 to 13, below. The Committee understood that the Secretariat would send the text of the convention, together with the draft provisions on final clauses to be prepared by the Secretariat, to Governments and interested international organizations for comments so that Governments would have the opportunity of commenting on the draft provisions on final clauses. The comments of Governments would be placed before the conference of plenipotentiaries.

3. It was noted that the draft final clauses to be prepared by the Secretariat should include a provision to the effect that a Contracting State may also apply, by its national legislation, the rules of the Convention to domestic carriage.

4. Suggestions by representatives in respect of the final clauses concerned the provisions on the implementation and entry into force of the convention and the addition of an article dealing with the special questions arising from intermodal transport.

*(a) Implementation*

5. The representative of a State with a federal system of government (United States) expressed the view that the "federal state clause" in paragraph 1 of the draft article on im-

plementation<sup>†</sup> was unnecessary. The representative of another federated State (Australia) observed that paragraph 1 would cause difficulties under the constitution of his country.

6. It was noted that the expanded scope of the draft convention might give rise to certain problems of application in States with a federal system of government.

*(b) Entry into force*

7. The Secretariat was requested to add to the alternatives presented in A/CN.9/115<sup>\*</sup> on the entry into force of the draft convention an alternative C focusing on the volume of goods shipped by ratifying States. It was stated that an alternative on the entry into force of the draft convention based on the volume of cargo carried was desirable in that it would reflect that the draft convention was concerned not only with the interests of ship-owners, but also with the interests of shippers.

8. It was observed, however, that it would be difficult to obtain statistics as to the volume of cargo connected with a particular State and that a provision on entry into force based solely on the tonnage of goods shipped from a State would give undue emphasis to shipments of bulk cargo of relatively low value. The suggestion was made that a factor to be considered was the value of the goods shipped.

9. The Secretariat was also requested to add to the alternatives presented in document A/CN.9/115<sup>\*</sup> on the entry into force of the draft convention an alternative D focusing only on the number of States ratifying the draft convention. It was observed that the number of required ratifications would have to be set high enough to ensure that the draft convention would only enter into force when ratified by States representing a significant percentage of commercial shipping in the world.

10. The Committee considered a suggestion that alternative A on entry into force in A/CN.9/115,<sup>\*</sup> modelled on article 49 (1) of the Convention on the Code of Conduct for Liner Conferences, Geneva, 1974,<sup>‡</sup> should be deleted since that Convention was only designed to regulate the interests of shipowners in relations among themselves and the draft convention was intended to take fully into account also the interests of shippers. After deliberation, the Committee decided that both of the alternatives in A/CN.9/115<sup>\*</sup> on entry into force, together with the alternatives mentioned at paragraphs 7 and 9 above, should be presented for final decision to the conference of plenipotentiaries that will be considering the adoption of the convention on the carriage of goods by sea.

11. Reference was made to the difficulties that might arise if the draft convention entered into force while a significant

<sup>\*</sup> Reproduced in this volume, part two, IV, 4, *infra*.

<sup>†</sup> Paragraph 1 of the draft provision on implementation of the draft convention reads as follows:

"1. If a Contracting State has two or more territorial units in which [according to its constitution,] 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 shall 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."

<sup>‡</sup> Article 49 (1) of the Convention on the Code of Conduct for Liner Conferences, Geneva, 1974, reads as follows:

"(1) The present Convention shall enter into force six months after the date on which not less than 24 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with article 48. For the purpose of the present article the tonnage shall be deemed to be that contained in Lloyd's Register of Shipping, *Statistical Tables 1973* table 2 'World fleets—analysis by principal types', in respect of general cargo (including passenger/cargo) ships and container (fully cellular) ships, exclusive of the United States reserve fleet and the American and Canadian Great Lakes fleets."

<sup>\*</sup> Reproduced in this volume, part two, IV, 4, *infra*.

number of States remained bound by the Brussels Convention of 1924 or the Brussels Protocol of 1968. It was suggested that a State ratifying the draft convention should be required to renounce formally the Brussels Convention of 1924 and the Brussels Protocol of 1968. It was also suggested that simultaneous renunciation of these conventions should not be required.

(c) *Suggested addition to the final clauses of article on multimodal transport*

12. The Committee took note of certain suggestions to add a new article to the draft provisions concerning implementation, reservations and other final clauses set forth in A/CN.9/115,\* in order to avoid possible conflict between the draft convention and a future international convention on international intermodal transport. With this object, draft articles were presented by the representatives of Australia, the Federal Republic of Germany and Norway. The new article proposed by the representative of Australia was, in addition, designed to ensure that the draft convention applied to the sea-leg of a contract for multimodal transport in the absence of an international convention on multimodal transport superseding the draft convention.

13. The texts of the new articles proposed by these representatives read as follows:

(a) Australia:

"1. Subject to paragraph 3 hereof, the provisions of this Convention shall apply to all contracts for the carriage of goods performance of which requires that the goods be carried by sea between two different States, but shall so apply only to the extent of such sea-carriage.

"2. This Convention shall apply to such sea-carriage as if that sea-carriage were a contract for carriage of goods by sea between ports in two different States within the meaning of article 2, paragraph 1, of this Convention.

"3. The operation of this article may be superseded, in relation to any particular type of contract for the carriage of goods, by the entry into force of any subsequent Convention, if it is one regulating that type of contract and if it contains a provision for the supersession of this Convention."

(b) Federal Republic of Germany:

"The provisions of this Convention shall not apply to carriage of goods by sea in connexion with a multimodal transport of goods provided that the operator of such transport is liable for the whole transport under an international convention on multimodal transport of goods concluded under the auspices of the United Nations or any of its specialized agencies or under international law giving effect thereto."

(c) Norway:

"Nothing in this Convention shall prevent the application of an international convention relating to contracts for carriage of goods by two or more modes of transport concluded under the auspices of the United Nations or any of its specialized agencies."

## ANNEX II

### Report of the Committee of the Whole II relating to the UNCITRAL Arbitration Rules

#### I. INTRODUCTION

1. The Committee of the Whole II was established by the Commission to consider the revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) contained in

\* Reproduced in this volume, part two, IV, 4, *infra*.

document A/CN.9/112.\* Section II of this report summarizes article by article the main points that arose during the deliberations of the Committee in respect of these draft rules. At the beginning of the summary of discussions on each article of the draft rules, the text of that article as it appeared in A/CN.9/112\* is reproduced.

2. In the course of its deliberations, the Committee established a number of *ad hoc* drafting groups for the purpose of redrafting particular articles or paragraphs of articles.

3. The text of the UNCITRAL Arbitration Rules as approved by the Committee is set forth in section III of this report.<sup>a</sup>

4. The text of a draft decision adopted by the Committee for submission to the Commission is set forth in section IV of this report.<sup>b</sup>

5. The Committee adopted this report at its 19th meeting, on 23 April 1976.

#### II. CONSIDERATION BY THE COMMITTEE OF THE REVISED DRAFT SET OF ARBITRATION RULES FOR OPTIONAL USE IN *ad hoc* ARBITRATION RELATING TO INTERNATIONAL TRADE (UNCITRAL ARBITRATION RULES)

##### *Title of the arbitration rules*

"Revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules)".

6. The Committee was of the view that the title should be modified in order to reflect more accurately various possible future uses. The Committee therefore decided that the title of the rules should read "UNCITRAL Arbitration Rules".

##### *Articles 1 and 2*

###### *"Article 1"*

"1. These Rules shall apply when the parties to a contract, by an agreement in writing which expressly refers to the UNCITRAL Arbitration Rules, have agreed that disputes arising out of that contract shall be settled in accordance with these Rules.

"2. 'Parties' mean physical or legal persons, including legal persons of public law.

"3. 'Agreement in writing' means an arbitration clause in a contract or a separate arbitration agreement, including an agreement contained in an exchange of letters, signed by the parties, or in an exchange of telegrams or telexes.

"4. 'Disputes arising out of that contract' includes disputes, existing or future, that arise out of, or relate to, a contract concluded between the parties or its breach, termination or invalidity."

###### *"Article 2"*

"The parties may at any time agree in writing to modify any provision of these Rules, including any time-limits established by or pursuant to these Rules."

7. The discussion on these articles was centred on the following proposals:

##### (a) That article 1, paragraph 1, and article 2 be combined;

\* Reproduced in this volume, part two, III, 1, *infra*.

<sup>a</sup> Sect. III of the report setting forth the text of the UNCITRAL Arbitration Rules as approved by the Committee is not reproduced. The changes made by the Commission to the text of the UNCITRAL Arbitration Rules as approved by the Committee are noted in chap. V, paras. 52 and 53 of the present report, and the text of the UNCITRAL Arbitration Rules as adopted by the Commission is set forth in chap. V, para. 57.

<sup>b</sup> Part IV of the report setting forth the text of the draft decision adopted by the Committee is not reproduced. The decision adopted by the Commission is set forth in chap. V, para. 56, of the present report.

(b) That the requirement of an "agreement in writing" in article 1, paragraph 1, and article 2 be removed and that consequently article 1, paragraph 3, should be deleted;

(c) That article 1, paragraph 2, defining "parties" be deleted; and

(d) That article 1, paragraph 4, defining "disputes arising out of that contract" be deleted.

8. The Committee was agreed that article 1, paragraph 1, and article 2 should be combined in order to make it clear that, when agreeing to settle their disputes under the UNCITRAL Arbitration Rules, the parties could agree to modify any provision in these Rules.

9. Consideration was given to the desirability of eliminating the requirement that agreements to arbitrate under the UNCITRAL Arbitration Rules and agreements by parties to modify these Rules be made in writing. According to one view, this question should be left to the applicable national law. According to another view, retention of the writing requirement was desirable in the interest of certainty as to the applicability and any agreed upon modification of the UNCITRAL Rules. It was also noted that the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the national arbitration law in most countries, required that agreements to submit disputes to arbitration be in writing.

10. After deliberation, the Committee decided to retain the requirement that agreements to arbitrate under the UNCITRAL Arbitration Rules and agreements to modify these Rules be in writing. However, the Committee deleted article 1, paragraph 3, which defined the phrase "agreement in writing", leaving to the applicable national law the determination of whether the writing requirement was met in a particular case.

11. There was general agreement to delete article 1, paragraph 2, which defined the term "parties" so as to include "legal persons of public law". The Committee was agreed that the question whether a "legal person of public law" could enter into an agreement to submit disputes to arbitration under the UNCITRAL Arbitration Rules was a matter that should be left to the applicable national law.

12. The Committee considered the relationship between the Rules and the provisions of the national law applicable to the arbitration. It was agreed that the inclusion only in selected articles of the Rules of a proviso that the particular article was subject to the national law applicable to the arbitration would give rise to arguments *a contrario* in respect of other articles which did not set forth such a proviso. The Committee therefore decided to add to article 1 a general reference to the effect that all provisions in these Rules were subject to the national law applicable to the arbitration.

13. The Committee considered a proposal to delete as unnecessary article 1, paragraph 4, which defined the phrase "disputes arising out of that contract". Since the definition of this phrase was only intended to clarify the types of dispute that were covered by the agreement to arbitrate under the UNCITRAL Arbitration Rules, it was decided to modify article 1, paragraph 1, so as to accomplish this directly and to delete article 1, paragraph 4.

#### Article 3, paragraph 1

"1. For the purposes of these Rules a notice, notification, communication or proposal by one party to the other party is deemed to have been received on the day on which it is delivered at the habitual residence or place of business of the other party, or if that party has no such residence or place of business, at his last known residence or place of business."

14. The discussion of article 3, paragraph 1, concerned primarily the time and manner of accomplishing "delivery" of a notice or other communication to a party.

15. The Committee considered the suggestion that this paragraph should contain a provision establishing a presumption of

delivery after the passage of a certain period of time. This suggestion was not adopted on the grounds that presumptions of delivery should be left to the applicable national law.

16. The proposal that "delivery" be deemed effective when accomplished in accordance with the national law applicable at the place of delivery was considered but not retained, since senders of communications would then have the burden of knowing the applicable national law at each locality where a communication may have to be effected during the course of the arbitral proceedings.

17. The Committee decided to retain the suggestion to clarify the circumstances and method for delivering a communication at the "last known residence or place of business" of a party.

18. One representative noted that article 3, paragraph 1, did not prevent reliance by a party on the provisions of the applicable national law concerning communications.

#### Article 3, paragraph 2

"2. For the purposes of calculating a period of time prescribed under these Rules, such period shall begin to run on the day on which a notice, notification, communication or proposal is received, and that day shall be counted as the first day of such period. If the last day of such period is an official holiday or non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

19. There was general agreement on the substance of article 3, paragraph 2.

20. The Committee decided, however, that the day on which a notice or other communication was received should not be counted in the calculation of a period of time prescribed under the UNCITRAL Arbitration Rules. It was observed that this modification was in conformity with the provisions on this point in most national laws and in the 1974 Convention on the Limitation Period in the International Sale of Goods.

21. The Committee considered but did not retain the suggestion that the periods of time referred to in these Rules should be expressed in terms of weeks or months, rather than in terms of days.

#### Article 4

"1. The party initiating recourse to arbitration (hereinafter called the 'claimant') shall give the other party (hereinafter called the 'respondent') notice that an arbitration clause, or a separate arbitration agreement concluded by them is invoked.

"2. Arbitral proceedings shall be deemed to commence on the date on which such notice (hereinafter called 'notice of arbitration') is delivered at the habitual residence or place of business of the respondent or, if he has no such residence or place of business of the respondent, at his last known residence or place of business.

"3. The notice of arbitration shall include, but need not be limited to the following:

"(a) The names and addresses of the parties;

"(b) A reference to the arbitration clause or agreement that is invoked;

"(c) A reference to the contract out of or in relation to which the dispute arises;

"(d) The general nature of the claim and an indication of the amount involved, if any;

"(e) The relief or remedy sought;

"(f) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon."

22. The consideration of article 4 was focused on the question whether the provisions of article 4, dealing with the notice of arbitration, and of article 17, dealing with the statement of claim, should be combined. It was stated in support that this would have the effect of speeding up the arbitral proceedings.

23. Although, after deliberation, the Committee decided not to amalgamate articles 4 and 17, it approved the suggestion that claimants be permitted at their option to attach to the notice of arbitration their statement of claim, and thus meet their obligation under article 17 of the Rules.

24. The Committee retained the suggestion that, in the interest of speeding up the arbitral proceedings, a claimant should also be given the option of including in the notice of arbitration the name of the arbitrator he appointed pursuant to article 8, paragraph 1, or proposed pursuant to article 7, paragraph 2.

#### Article 5

"A party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party. This communication is deemed to have been given where the notice of arbitration, the statement of claim, the statement of defence, or a counter-claim is submitted on behalf of a party by a counsel or agent."

25. There was general agreement that the phrase "counsel or agent" gave rise to problems of translation and would be construed differently in various legal systems. The question was also raised whether the word "represented" appearing in the first sentence of article 5 would be viewed as excluding the possibility that a party be "assisted" by a non-lawyer in the preparation or presentation of his case. The Committee decided that, in substance, the first sentence of article 5 should be based on article VI (8) of the 1966 ECAFE Rules for International Commercial Arbitration, which read as follows: "The parties shall have the right to be represented or assisted at the hearing by persons of their choice."

26. After deliberation, the Committee did not retain the suggestion either to delete the second sentence of article 5 or to require that a person purporting to act on behalf of a party present a power of attorney from that party.

#### Article 6

"If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."

27. The Committee considered the suggestion that, if the parties failed to agree on the number of arbitrators, article 6 should provide that in such a case the arbitral tribunal would consist of a sole arbitrator, since arbitral proceedings before a sole arbitrator were speedier and less expensive.

28. The Committee, after deliberation, decided to retain article 6 in its present wording on the grounds that arbitral tribunals established *ad hoc* to hear international commercial disputes were customarily composed of three arbitrators.

29. Three representatives expressed their reservation and noted their preference for the constitution of a tribunal composed of one arbitrator in the case of failure of the parties to agree on the number of arbitrators.

#### Article 7, paragraph 1

"1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties."

30. The Committee considered the principle set forth in article 7, paragraph 1, that the sole arbitrator should not be of the nationality of one of the parties since it fostered the appearance of impartiality and independence on the part of the sole arbitrator. In this connexion, it was suggested that the requirement of different nationality should only apply to the appointment of a sole arbitrator by an appointing authority.

31. After consideration, the Committee decided to introduce an element of flexibility by replacing article 7, paragraph 1, with a provision to the effect that the appointment of a sole arbitrator shall be made having regard to such considerations as were likely to secure the appointment of a sole arbitrator who would be impartial and independent, taking into account as well the advisability of appointing an arbitrator of a different nationality than that of the parties.

#### Article 7, paragraphs 2 and 3

"2. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator. The parties shall endeavour to reach agreement on the choice of the sole arbitrator within 30 days after the receipt by the respondent of the claimant's proposal.

"3. If on the expiration of this period of time the parties have not reached agreement on the choice of the sole arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the sole arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall, by telegram or telex, propose to the respondent the names of one or more institutions or persons, one of whom would serve as the appointing authority. The parties shall endeavour to reach agreement on the choice of the appointing authority within 15 days after the receipt by the respondent of the claimant's proposal."

32. The discussion of article 7, paragraphs 2 and 3, was based primarily on a proposal to simplify the procedure for the appointment of a sole arbitrator. There was general agreement that the provisions of the appointment of a sole arbitrator, whether by agreement of the parties or by an appointing authority, should be simplified.

33. The Committee decided that the claimant and the respondent were to be placed on an equal footing in regard to the appointment of the sole arbitrator, so that either party would be empowered to initiate the process of appointment by proposing the name of a person to serve as the sole arbitrator or to request the appropriate appointing authority to make the appointment.

34. The Committee considered whether the method by which one party communicated to the other party proposals as to the choice of a sole arbitrator or of an appointing authority should be regulated in the Rules. The Committee, after considering whether to require that such communication be in writing, decided to refrain from specifying in the Rules the methods of communicating the above proposals.

35. The suggestion was made that, in order to accelerate the process of appointing a sole arbitrator, the parties should be given only 30 days from the date the respondent received the notice of arbitration to agree on the choice of a sole arbitrator. After deliberation, the Committee decided not to retain this suggestion but to provide that the parties be given 30 days after the receipt by a party of the initial proposal as to the choice of a sole arbitrator within which to agree on the identity of the sole arbitrator.

36. There was general agreement that the provisions of article 7, paragraph 3, concerning the cases where the parties failed to agree on the choice of the sole arbitrator within the prescribed period and where they had not previously agreed on an appointing authority, should be simplified. The Committee was agreed that article 7, paragraphs 2 and 3, of the Rules should be restructured along the following lines:

(a) Any party may propose to the other party the name of a person who would serve as the sole arbitrator or the name of an appointing authority which would make such appointment;



(b) Within 30 days from the receipt of the proposal by the other party the parties may agree either on the choice of the sole arbitrator or on the appointing authority;

(c) If the parties fail to reach agreement within the prescribed 30 days, then resort will be had to the designating authority referred to in article 7, paragraph 4, of the Rules.

37. It was also discussed whether not only institutions like chambers of commerce but also individuals may be nominated as an appointing authority. Most of the delegates supported the idea that the Rules should not contain any definition of the appointing authority thus leaving its selection to the free discretion of the parties in each particular case.

#### *Article 7, paragraph 4*

"4. If on the expiration of this period of time the parties have not reached agreement on the designation of the appointing authority, the claimant shall apply for such designation to:

"(a) The Secretary-General of the Permanent Court of Arbitration at The Hague, or,

"(b) [Here add an appropriate organ or body to be established under United Nations auspices.]

"The authority mentioned under (a) and (b) may require from either party such information as it deems necessary to fulfill its function. It shall communicate to both parties the name of the appointing authority designated by it."

38. The Committee considered the suggestion that a United Nations body should be established that would either appoint the sole arbitrator or would designate an appointing authority to perform this function in cases where the parties failed to agree both on the choice of the sole arbitrator and the choice of an appointing authority. After deliberation, the Committee was agreed that it would suffice if the Rules provided that the Secretary-General of the Permanent Court of Arbitration at The Hague could be requested by a party to designate an appointing authority in such a case. The view was expressed that resort to the Secretary-General of the Permanent Court of Arbitration would only occur in rare instances and that there was therefore no need for the creation of a special United Nations body for this purpose.

39. The Committee was advised that the Secretary-General of the Permanent Court of Arbitration would not be prepared to assume the task of appointing a sole arbitrator directly. It therefore decided not to retain the suggestion that under article 7, paragraph 4, the designating authority should appoint arbitrators directly.

40. The Committee discussed certain administrative aspects of addressing a request to the Secretary-General of the Permanent Court of Arbitration, such as the costs involved and the language in which the request and supporting documentation was to be submitted. The Committee was of the view that no special provisions were necessary in this respect. The Secretary of the Commission reported that he had received a communication from the Secretary-General of the Permanent Court of Arbitration at The Hague stating that no fees would be charged for this service and that only reimbursement of expenses would be required.

41. The Committee, after deliberation, decided to delete from article 7, paragraph 4, the two sentences at the end of the paragraph, since their provisions were considered obvious and unnecessary. The Committee was also agreed that, as a consequence of its decision in respect of article 7, paragraphs 2 and 3 (cf. paras. 34 and 38), claimants and respondents were to have an equal right to invoke the provisions of article 7, paragraph 4.

#### *Article 7, paragraph 5*

"5. The claimant shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out

of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract."

42. The Committee noted that article 7, paragraph 5, was applicable in respect of all appointing authorities called upon to appoint sole arbitrators, regardless of whether the appointing authority was agreed on by the parties or designated pursuant to article 7, paragraph 4, of these Rules.

43. There was general agreement that the provision was useful since the documentation thus obtained by the appointing authority facilitated the appointment by that authority of a sole arbitrator who was well qualified to hear the particular dispute.

#### *Article 7, paragraph 6*

"6. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:

"The appointing authority shall communicate to both parties an identical list containing at least three names;

"Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

"After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties.

"If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

"The appointing authority may require from either party such information as it deems necessary to fulfil its function."

44. The Committee considered whether the list-procedure for the appointment of an arbitrator by an appointing authority envisaged under article 7, paragraph 6, should be retained.

45. According to one view, the list-procedure was considered useful since it preserved an involvement by the parties in the appointment of the arbitrator by an appointing authority. According to another view, the list-procedure was too complex to be imposed mandatorily on appointing authorities and a system leaving appointing authorities free to select the method of appointment was preferable.

46. After deliberation, the Committee decided that article 7, paragraph 6, should provide that appointing authorities should use the list-procedure, unless the parties otherwise agreed or the appointing authority determined that the list-procedure was not appropriate for the case.

#### *Article 8, paragraph 1*

"1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the president of the arbitral tribunal."

47. The Committee was agreed that this paragraph, dealing with the composition of a three-member arbitral tribunal, should be retained in its present form.

#### *Article 8, paragraph 2*

"2. The presiding arbitrator shall be of a nationality other than the nationality of the parties."

48. The substance of this paragraph was considered by the Committee when it discussed the similar provision in article 7, paragraph 1, concerning the sole arbitrator. The Committee was agreed that the decision taken in respect of article 7, paragraph 1, should be reflected in the text of article 8, paragraph 2.

*Article 8, paragraph 3*

"3. If within 15 days after the receipt of the claimant's notification of the appointment of an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, the claimant shall.

"(a) If the parties have previously designated an appointing authority, request that authority to appoint the second arbitrator;

"(b) If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, apply for such designation to either of the authorities mentioned in article 7, paragraph 4.

"The appointing authority may exercise its discretion in appointing the second arbitrator."

49. There was general agreement with the substance of this paragraph. The Committee was agreed, however, that claimants and respondents should be treated equally in article 8, paragraph 3, and that no restrictions should be placed on the methods to be used by a party to communicate to the other party the name of the arbitrator he appointed.

*Article 8, paragraph 4*

"4. If within 15 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator. The parties shall endeavour to reach agreement on the choice of the presiding arbitrator within 30 days after the receipt by the respondent of the claimant's proposal."

50. The Committee considered the period of time within which the two arbitrators appointed pursuant to article 8, paragraphs 1 to 3, were to agree on the choice of the presiding arbitrator. It was agreed that this choice was extremely important and the Committee considered it therefore justified to extend the time-period from 15 to 30 days in order to permit communication and discussion between the arbitrators.

51. The Committee considered a proposal to modify article 8, paragraph 4, to the effect that if the two arbitrators failed to agree on the choice of the presiding arbitrator within the prescribed period of 30 days, the appointment of the presiding arbitrator would be made by an appointing authority without requiring the parties to try again to agree on the choice of the presiding arbitrator. It was stated that such a requirement would unduly delay the proceedings. After deliberation, the Committee decided not to retain this proposal.

52. One representative noted that under the national law in his country there had to be an "umpire" rather than a presiding arbitrator.

*Article 8, paragraph 5*

"5. If on the expiration of this period of time the parties have not agreed on the choice of the presiding arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the presiding arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall, by telegram or telex, propose to the respondent the names of one or more institutions or persons, one of whom would serve as the appointing authority. The parties shall endeavour to reach agreement on the choice of the appointing authority within 15 days after the receipt by the respondent of the claimant's proposal."

53. The substance of this paragraph was considered by the Committee when it discussed the similar provisions in

article 7, paragraph 3, concerning the appointment of the sole arbitrator. The Committee was agreed that the decisions taken in respect of article 7, paragraph 3, should be reflected in the text of article 8, paragraph 5.

*Article 8, paragraph 6*

"6. If on the expiration of this period of time, the parties have not reached agreement on the designation of the appointing authority, the claimant shall apply to either of the authorities mentioned in article 7, paragraph 4, for the designation of an appointing authority. The authority applied to may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it. The appointing authority may require from either party such information as it deems necessary to fulfil its function."

54. The substance of this paragraph was considered by the Committee when it discussed the similar provisions in article 7, paragraph 4, concerning the appointment of the sole arbitrator. The Committee was agreed that the decisions taken in respect of article 7, paragraph 4, should be reflected in the text of article 8, paragraph 6.

*Article 8, paragraph 7*

"7. The claimant shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract."

55. The substance of this paragraph was considered by the Committee when it discussed the identical provisions in article 7, paragraph 5. The Committee was agreed that the decision taken in respect of article 7, paragraph 5, applied equally to article 8, paragraph 7.

*Article 8, paragraph 8*

"8. The appointing authority shall appoint the presiding arbitrator in accordance with the provisions of article 7, paragraph 6."

56. Since this paragraph is merely a cross-reference to article 7, paragraph 6, the decisions taken by the Committee in respect of article 7, paragraph 6, apply equally to article 8, paragraph 8.

*Article 9, paragraph 1*

"1. Either party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator, irrespective of whether such arbitrator was:

"Originally proposed or appointed by him, or

"Appointed by the other party or an appointing authority, or

"Chosen by both parties or by the other arbitrators,

"if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

57. The Committee considered and decided to retain the suggestion that a party should be permitted to challenge the arbitrator appointed by him only for reasons of which he had no knowledge at the time the appointment was made.

58. It was agreed that the text of article 9, paragraph 1, should be simplified.

*Article 9, paragraph 2*

"2. The circumstances mentioned in paragraph 1 of this article include any financial or personal interest of an arbitrator in the outcome of the arbitration or a family tie or any past or present commercial tie of an arbitrator with a party or with a party's counsel or agent."

59. The Committee considered the question of the decision of this paragraph. It was stated that article 9, paragraph 2,

should be deleted since the general rule on grounds for challenge contained in article 9, paragraph 1, was sufficient.

60. After deliberation, the Committee decided to delete article 9, paragraph 2.

#### *Article 9, paragraph 3*

"3. A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

61. The Committee considered article 9, paragraph 3, and decided to retain the paragraph in its present wording.

#### *Article 10, paragraph 1*

"1. The challenge of an arbitrator shall be made within 30 days after his appointment has been communicated to the challenging party or within 30 days after the circumstances mentioned in article 9 became known to that party."

62. The Committee considered the time-limit within which an arbitrator could be challenged. It was agreed that challenges should be made expeditiously and that for this reason the period within which a party could challenge an arbitrator should be shortened to 15 days.

#### *Article 10, paragraph 2*

"2. The challenge shall be notified to the other party and to the arbitrator who is challenged. The notification shall be in writing and shall state the reasons for the challenge."

63. The Committee decided to retain this paragraph, subject to the modification that the challenge must be notified to all members of a three-member arbitral tribunal and not only to the arbitrator who was being challenged.

#### *Article 10, paragraph 3*

"3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed or chosen pursuant to the procedures applicable to the appointment or choice of an arbitrator as provided in article 7 or 8."

64. It was agreed to retain the substance of this paragraph.

65. The Committee noted that agreement by the other party to the challenge or to withdrawal by the challenged arbitrator from his office did not necessarily imply an acceptance or acknowledgement that the reasons for the challenge were valid. The Committee was also agreed that article 10, paragraph 3, should be modified in order to make it clear that when a challenged arbitrator vacated his office in one of the two ways covered by article 10, paragraph 3, the appointment process would recommence at the beginning of the procedure under article 7 or 8 for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

#### *Article 11*

"1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

"(a) When the initial appointment was made by an appointing authority, by that authority;

"(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

"(c) In all other cases, by the appointing authority to be designated in accordance with the provisions of article 7 or 8.

"2. If, in the cases mentioned under subparagraphs (a), (b) and (c) of paragraph 1, the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge."

66. The Committee considered and decided to retain the substance of paragraphs 1 and 2 of article 11.

67. It was noted during the discussion that under the national law of some States challenges of arbitrators were decided initially by the arbitral tribunal and finally by the competent court.

#### *Article 12, paragraph 1*

"1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8."

68. The Committee adopted this provision without modifications.

#### *Article 12, paragraph 2*

"2. In the event that an arbitrator is incapacitated or fails to act, the procedure in respect of the challenge and replacement of an arbitrator as provided in articles 10 and 11 shall apply."

69. After deliberation, the Committee decided to retain the substance of this paragraph.

70. It was noted, however, that the word "incapacitated" was unduly ambiguous in that it was not clear whether both physical incapacity, such as a serious illness, and legal incapacity, such as minority or insanity on the part of an arbitrator, were covered. The Committee was agreed that this word should be replaced by an objective statement establishing that article 12, paragraph 2, extended to all circumstances that made it legally or physically impossible for an arbitrator to perform his functions.

#### *Article 12, paragraph 3*

"3. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal."

71. There was general agreement that this paragraph should constitute a separate article and should extend to the replacement of arbitrators under both article 11 and article 12 of the Rules.

72. The view was expressed that the Rules should provide that, unless the parties agreed otherwise, all hearings would be repeated if any arbitrator was replaced. According to another view, such a provision was undesirable since it would delay the proceedings and increase the costs of arbitration.

73. The Committee also considered a suggestion that hearings held previously should be repeated mandatorily only where the sole arbitrator was replaced, and that in all other cases the question whether prior hearings should be repeated should be left to the discretion of the arbitral tribunal.

74. After deliberation, the Committee decided to retain the provision that hearings held previously were to be repeated if the sole or presiding arbitrator was replaced and that such hearings would be repeated at the discretion of the arbitral tribunal if any other arbitrator was replaced.

## Article 13

"Where, in connexion with the appointment of arbitrators, the names of one or more persons are proposed by the parties or by an appointing authority, their full names, addresses and their nationality shall be furnished, together with, as far as possible, a description of their qualifications for appointment as arbitrator."

75. After deliberation, the Committee decided to retain the substance of this article but to place it immediately after article 8 in the Rules.

## Article 14, paragraph 1

"1. Subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate, provided that the parties are treated with equality and with fairness."

76. It was agreed that the concept of "fairness" concerning the treatment of the parties by the arbitrators required amplification. The Committee decided that an explanatory clause should be added to article 14, paragraph 1, to the effect that the arbitrators had to grant each party full opportunity to present his case and to participate in every stage of the arbitral proceedings.

77. It was suggested that article 14 should contain a provision empowering the arbitrators to delegate to the appointing authority or to the Secretary of the arbitral tribunal the administrative and secretariat tasks that arose during the course of arbitral proceedings. The Committee decided not to retain this suggestion on the ground that such a provision was unnecessary because of the discretion granted to the arbitrators under article 14, paragraph 1, to "conduct the arbitration in such manner as they consider appropriate". It was noted that the Rules do not preclude such delegation.

## Article 14, paragraph 2

"2. If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitrators shall decide whether to hold such hearings or whether the proceedings shall be conducted solely on the basis of documents and other written materials."

78. The Committee considered the question of the circumstances under which the arbitrators were to hold hearings during the course of the arbitral proceedings.

79. It was suggested that as a general rule the arbitrators should hold hearings unless both parties requested that no hearings be held. The suggestion was also made that, in the absence of a request for hearings by both parties, the arbitrators should have discretion to decide whether to hold hearings. The Committee decided to retain the compromise solution contained in article 14, paragraph 2, and to specify that either party could request at any stage of the arbitral proceedings that hearings be held.

## Article 14, paragraph 3

"3. All documents or information supplied to the arbitrators by one party shall at the same time be communicated by that party to the other party."

80. The Committee considered the suggestion that this paragraph should provide that any information supplied to the arbitrators by a party could only be acted upon by them if it was shown to have also been communicated to the other party. This suggestion was not adopted on the grounds that it would create serious problems in practice for arbitrators. The Committee decided to retain article 14, paragraph 3, in its present wording.

## Article 15, paragraph 1

"1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators."

81. The Committee considered the desirability of adding to this paragraph a provision describing one or more of the factors that the arbitrators had to take into account when deciding upon the place of arbitration in cases where the parties failed to make this choice.

82. The view was expressed that article 15, paragraph 1, should advise the arbitrators that in selecting the place of arbitration they should pay regard to the requirements of the particular arbitration. According to another view, however, such a provision would be too restrictive, since the arbitrators also had to consider, *inter alia*, their own convenience and, even more importantly, the costs involved.

83. The Committee decided to add wording to article 15, paragraph 1, which would indicate that, when called upon to select the place of arbitration, the arbitrators should have regard to the particular circumstances of the arbitration.

## Article 15, paragraph 2

"2. The arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties. They may hear witnesses and hold interim meetings for consultation among themselves at any place they deem appropriate, having regard to the exigencies of the arbitration."

84. After considering drafting suggestions, the Committee decided to retain the substance of article 15, paragraph 2.

## Article 15, paragraph 3

"3. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection."

85. After deliberation, the Committee decided to retain article 15, paragraph 3, in its present wording.

## Article 15, paragraph 4

"4. The award shall be made at the place of arbitration."

86. The Committee considered whether the present wording of the paragraph required that arbitral awards be decided upon, written and signed by all the members of the arbitral tribunal at the place of arbitration. It was noted that often in arbitral practice the arbitrators departed from the place of arbitration upon the conclusion of their deliberations and then wrote and signed the award at localities other than the place of arbitration.

87. The Committee noted that article 15, paragraph 4, was intended to ensure compliance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for that reason closely followed its language. In order to foster the recognition and enforcement of arbitral awards under that Convention, the Committee decided to retain in substance the present text of article 15, paragraph 4.

88. The Committee did not adopt a suggestion that article 15, paragraph 4, be incorporated in article 27 of these Rules, which dealt with the form and effect of arbitral awards. It was noted that the place of arbitration was important also in respect of matters other than the form and effect of arbitral awards, such as the determination of the applicable procedural law governing the conduct of the arbitral proceedings.

## Article 16, paragraphs 1 and 2

"1. Subject to an agreement by the parties, the arbitrators shall promptly after their appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence and any further written statements and, if oral hearings should take place, to the language or languages to be used in such hearings."

"2. Arbitrators may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitrators."

89. The Committee, after deliberation, decided to retain article 16 in its present wording.

90. It was noted that in cases where the arbitrators selected the language or languages to be used in the arbitral proceedings, the arbitrators could consult with the parties before reaching their decision.

#### *Article 17, paragraph 1*

"1. Within a period of time to be determined by the arbitrators, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto."

91. The Committee, after deliberation, retained the substance of this paragraph. However, as a result of its decision taken in regard to article 4, the Committee decided to modify article 17, paragraph 1, to the effect that no statement of claim would have to be submitted under article 17 if a claimant had annexed such a statement to his notice of arbitration.

#### *Article 17, paragraph 2*

"2. The statement of claim shall include the following particulars:

- "(a) The names and addresses of the parties;
- "(b) A statement of the facts supporting the claim;
- "(c) The points at issue;
- "(d) The relief or remedy sought.

"The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents he will submit."

92. The discussion of this paragraph centred on the question whether the claimant should be required to include in his statement of claim a full statement of the facts he relied on for his claim and a summary of the evidence supporting these facts. It was argued that such a requirement would speed up the arbitral proceedings by permitting early discovery of the evidence the other party intended to adduce. According to another view, however, such a requirement would be impractical and serve no useful purpose, since it was only after the exchange of the statement of claim and the statement of defence that the parties could realistically decide upon the evidence that they would be relying on to support their respective positions.

93. The Committee decided against the imposition of a rule mandating that the claimant include in his statement of claim a summary of the evidence on which he intended to rely to support his claim. It was agreed, however, to add a paragraph to article 20, specifically authorizing the arbitrators to demand from the parties a summary of the evidence supporting the facts set forth by that party in his statement of claim or statement of defence.

94. The Committee did not retain a suggestion that the claimant should be required, under article 17, paragraph 2, to annex to the statement of claim the documents or a list of the documents on which he relied. The Committee was however agreed that the claimant should be permitted, at his option, to include a reference "to the documents or other evidence" which he intended to present.

#### *Article 17, paragraph 3*

"3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered, provided the respondent is given the opportunity to exercise his right of defence in respect of the change."

95. The Committee considered the desirability of retaining this paragraph. According to one view, the claimant should be given the right to supplement or alter his claim without requiring the permission of the arbitrators. According to another view, the provision requiring that the claimant obtain the permission of the arbitrators before being permitted to amend his claim served a useful purpose, since it prevented the claimant from delaying the arbitral proceedings by repeatedly amending his claim.

96. It was agreed to restructure article 17, paragraph 3, so that it would in general terms authorize a claimant to supplement or alter his claim, but would also provide that a claim could not be amended if the amended claim fell outside the scope of the arbitration clause or separate arbitration agreement or if the arbitrators determined that the particular amendment was inappropriate.

97. One representative noted his reservation regarding the provisions of article 17, paragraph 3, and expressed his preference for a system which did not permit a claimant to supplement or alter his claim.

#### *Article 18, paragraph 1*

"1. Within a period of time to be determined by the arbitrators, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators."

98. After considering whether to include in this paragraph a minimum period that the arbitrators were to grant to the respondent for the communication of his statement of defence, the Committee decided to retain this paragraph in its present wording.

#### *Article 18, paragraph 2*

"2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 17, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents he will submit."

99. The Committee was agreed to retain the substance of this paragraph. However, consequent upon the decision taken concerning article 17, paragraph 2 (see para. 94 above), the Committee decided to modify article 18, paragraph 2, so as to permit the respondent to make a reference in his statement of defence to the "documents or other evidence" that he intended to submit.

#### *Article 18, paragraph 3*

"3. In his statement of defence the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off."

100. The Committee considered the question whether the respondent should be permitted to assert a counter-claim or set-off subsequent to the time when he communicated his statement of defence.

101. The view was expressed that counter-claims and claims relied on as set-offs should only be considered by arbitral tribunals if they were raised in the statement of defence and that, therefore, paragraph 3 should be retained in its present wording. In order to accord to respondents the flexibility enjoyed by claimants to amend their claims under article 17, paragraph 3, it was suggested on the other hand, that article 18, paragraph 3, should provide that a counter-claim or set-off could be raised in the statement of defence "or at a

later stage in the arbitral proceedings if the arbitrators decided that the delay was justified under the circumstances".

102. After consideration of this question the Committee decided to modify article 18, paragraph 3, so that a respondent would be permitted to assert a counter-claim or set-off subsequent to the time when he communicated his statement of defence, provided that the arbitrators found that the delay in raising the counter-claim or set-off was justified.

#### Article 18, paragraph 4

"4. The provisions of article 17, paragraphs 2 and 3, shall apply to a counter-claim and a claim relied on for the purpose of a set-off."

103. The Committee considered the desirability of permitting respondents to amend or supplement their statements of defence.

104. According to one view, respondents should be permitted to amend their statements of defence, with the permission of the arbitrators, in the same way and under the same conditions as claimants were permitted under article 17, paragraph 3, to amend their statements of claim. According to another view, respondents should not be given this right because of the likelihood that it would be used to delay the proceedings and to increase the costs of arbitration.

105. After deliberation, the Committee was agreed that since claimants had the right to amend their statement of claim, respondents should be given the right to amend their statement of defence. The Committee also decided to include the provisions on the right to amend or supplement claims and defences in a new article 18 *bis* and, consequently, to delete article 17, paragraph 3, and to retain in article 18, paragraph 4, only a cross-reference to article 17, paragraph 2.

106. One representative noted his reservation and expressed his preference for not permitting any amendment of claims or defences.

#### Article 19, paragraphs 1 and 2

"1. The arbitrators shall have the power to rule on objections that they have no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

"2. The arbitrators shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 19, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

107. After deliberation, the Committee decided to retain the present wording of article 19, paragraphs 1 and 2.

#### Article 19, paragraph 3

"3. A plea that the arbitrators do not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. If such a plea is raised at a later stage, the arbitrators may nevertheless admit the plea, provided the delay in raising it is justified under the circumstances."

108. The Committee considered the suggestion that the second sentence in this paragraph, dealing with the raising of a plea alleging lack of jurisdiction of the arbitrators later than in the statement of defence, was unnecessary and should be deleted. It was noted that the substance of this sentence was already contained in new article 18 *bis*, which permits modification of the defence, and article 14, paragraph 1, which gives to the arbitrators the discretion to "conduct the arbitration in such manner as they consider appropriate".

109. The Committee was agreed that the second sentence of article 19, paragraph 3, be deleted.

#### Article 19, paragraph 4

"4. The arbitrators may rule on such a plea as a preliminary question, or they may proceed with the arbitration and rule on it in their final award."

110. The Committee considered the suggestion that arbitrators should be required to rule on pleas alleging their lack of jurisdiction as preliminary questions. It was stated that adoption of the suggestion would result in substantial savings to the parties in cases where the arbitrators upheld pleas as to their jurisdiction. It was observed, in reply, that the flexibility granted to the arbitrators under the present wording of article 19, paragraph 4, was preferable, since it corresponded to provisions on this point in international conventions and many national laws.

111. The Committee, after deliberation, decided to retain the flexibility granted to the arbitrators under article 19, paragraph 4, to rule on pleas as to their jurisdiction either as a preliminary question or in their final award, but that the paragraph should specify that as a general rule the arbitrators should rule on such pleas as preliminary questions.

#### Article 20, paragraph 1

"1. The arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods of time for communicating such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements."

112. The Committee decided to retain the first sentence of this paragraph in its present wording but to delete the second sentence dealing with the exchange of pleadings between the parties (*réplique* and *duplique*) in addition to the exchange of the statements of claim and defence. There was general agreement that the arbitrators should have the discretion to admit such further pleadings upon a request from only one party and that therefore the second sentence of article 20, paragraph 1, should be deleted.

#### Article 20, paragraph 2

"2. If in the statement of defence a counter-claim is raised, the arbitrators shall afford the claimant an opportunity to present a written reply of such claim."

113. The Committee was agreed that article 18 already covered the matter dealt with in article 20, paragraph 2, and that therefore this paragraph should be deleted.

#### Article 20, paragraph 3

"3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period of time as the arbitrators shall determine."

114. The Committee considered a suggestion that this paragraph should be deleted since under the general provision of article 14, paragraph 1, the arbitrators were already authorized to require that the parties furnish documents or other evidence during the course of the arbitral proceedings.

115. The Committee, after deliberation, was of the opinion that article 20, paragraph 3, was useful and that its substance should therefore be retained. The Committee decided, however, that since paragraph 3 concerned the right of the arbitrators to demand that the parties furnish documents or other evidence, while paragraph 1 of this article concerned their right to demand further written pleadings from the parties, paragraph 3 of article 20 should be placed in a separate article that would appear immediately following article 20.



116. The Committee was agreed that the new article should be supplemented by:

(a) A paragraph stating the general principle that each party had the burden of proving the facts on which he relied in his claim or in his defence;

(b) A paragraph making it clear that the arbitrators could require from each party a summary of the documents and other evidence which that party intended to present in support of his claim or defence.

117. The Committee further decided that the substance of article 21 should be added to article 20 as a separate paragraph, so that article 20 would consist of the first sentence of the present paragraph 1 of article 20 and of the substance of the present article 21.

118. The Committee agreed that in order to prevent surprise at hearings the arbitral tribunal may require delivery in advance to the other party and to the arbitral tribunal of a summary of the documents and other evidence which a party intends to present.

#### Article 21

"The periods of time fixed by the arbitrators for the communication of written statements should not exceed 45 days, and in the case of the statement of claim, 15 days. However, the arbitrators may extend the time-limits if they conclude that an extension is justified."

119. After considering the desirability of shortening the maximum period of time that the arbitrators should normally grant to the parties for the communication of written statements from 45 days to 30 days, the Committee decided to retain the 45-day period.

120. The Committee was agreed that this article should not contain any special provision concerning the communication of the statement of claim.

#### Article 22, paragraph 1

"1. In the event of an oral hearing, the arbitrators shall give the parties adequate advance notice of the date, time and place thereof."

121. After deliberation, the Committee decided to retain the present wording of this paragraph.

#### Article 22, paragraph 2

"2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitrators and to the other party the names and addresses of the witnesses he intends to present and the language in which such witnesses will give their testimony."

122. Consideration was given to a proposal to add to this paragraph a provision that would require that a party, at least 15 days before a hearing, communicate to the arbitrators and to the other party not only the names and addresses of the witnesses that party intended to present at the hearing but also the subjects concerning which the witnesses would be asked to testify.

123. The Committee was of the view that such information prior to a hearing as to the subjects on which witnesses would be testifying at the hearing was useful in that it permitted the arbitrators and the other party to properly prepare for the hearing and it therefore adopted this suggestion.

#### Article 22, paragraph 3

"3. The arbitrators shall make arrangements for the interpretation of oral statements made at a hearing and for a verbatim record of the hearing if either is deemed necessary by the arbitrators under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the arbitrators at least 15 days before the hearing."

124. The Committee considered the suggestion that this paragraph should be deleted on the ground that its subject-matter was already adequately dealt with by the provisions of article 16 on the language to be used in the arbitral proceedings and of article 14, paragraph 1, on the discretion granted to the arbitrators as to the conduct of the arbitration.

125. There was general agreement that the provisions of article 22, paragraph 3, were useful, because the important matters covered by it, i.e. arrangements by the arbitrators for translation services and for the maintaining of an official record, were not mentioned specifically in the Rules anywhere else. The Committee therefore decided to retain the substance of article 22, paragraph 3. Although the Committee changed the words "verbatim record" to "record", it was agreed that verbatim records were not thereby precluded.

#### Article 22, paragraph 4

"4. Hearings shall be held *in camera* unless the parties agree otherwise. With the consent of the parties, the arbitrators may permit persons other than the parties and their counsel or agent to be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated."

126. There was general agreement that the second sentence in this paragraph, providing that with the consent of the parties the arbitrators could permit persons other than the parties or persons connected with one of the parties to be present at a hearing, should be deleted since its content was subsumed in the more general rule found in the first sentence, which established that hearings would be held *in camera* unless the parties agreed otherwise.

127. Consideration was given to the question whether witnesses should be excluded from a hearing during the testimony of other witnesses. It was noted that in some legal systems witnesses were permitted to be present only when testifying, while in other legal systems witnesses, particularly expert witnesses, were not formally excluded. The Committee decided to retain the third sentence of article 22, paragraph 4, which provided that the arbitrators could require that witnesses not be present during the testimony of other witnesses.

128. The Committee also considered the manner in which witnesses could be examined at a hearing. It was agreed that the arbitrators should have full discretion to decide upon the manner in which witnesses were to be examined and that therefore the substance of the last sentence in article 22, paragraph 4, should be retained.

#### Article 22, paragraph 5

"5. Evidence of witnesses may also be presented in the form of written statements signed by them."

129. The Committee considered a suggestion advocating the deletion of this paragraph on the ground that in some legal systems evidence of witnesses had to be presented by those witnesses in person. After deliberation, the Committee decided to retain article 22, paragraph 5, because the presentation of evidence by written statements of witnesses may sometimes be advantageous.

#### Article 22, paragraph 6

"6. The arbitrators shall determine the admissibility, relevance and materiality of the evidence offered."

130. The Committee decided to retain the substance of this paragraph. The Committee also decided to clarify that the arbitrators had complete discretion to decide on the weight they would give to the evidence offered, in addition to the discretion they had to determine the admissibility, relevance and materiality of such evidence.

*Article 23, paragraphs 1 and 2*

"1. At the request of either party, the arbitrators may take any interim measures they deem necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

"2. Such interim measures may be established in the form of an interim award. The arbitrators shall be entitled to require security for the costs of such measures."

131. After deliberation, the Committee decided to retain paragraphs 1 and 2 of article 23 in their present wording.

*Article 23, paragraph 3*

"3. A request for interim measures may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration agreement, or as a waiver of that agreement."

132. After considering drafting suggestions concerning the wording of this paragraph, the Committee was agreed to retain the substance of article 23, paragraph 3, and to combine its provisions into a single sentence.

*Article 24, paragraphs 1, 2 and 3*

"1. The arbitrators may appoint one or more experts to report to them, in writing, on specific issues to be determined by the arbitrators. A copy of the expert's terms of reference, established by the arbitrators, shall be communicated to the parties.

"2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitrators for decision.

"3. Upon receipt of the expert's report, the arbitrators shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report."

133. After deliberation, the Committee decided to retain the present wording of paragraphs 1, 2 and 3 of article 24.

*Article 24, paragraph 4*

"4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties and their counsel or agent shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 22 shall be applicable to such proceedings."

134. Consideration was given to the desirability of retaining the second sentence of this paragraph, authorizing either party to present expert witnesses. The Committee was of the view that this sentence should be maintained, since it served to inform the parties of their right to present experts as witnesses without, however, inferring that the parties could present expert witnesses only at those hearings at which experts appointed by the arbitrators were testifying.

135. As a result of its decision in article 5 of the Rules to eliminate reference to the "counsel or agent" of the parties, the Committee deleted this phrase from the first sentence of article 24, paragraph 4. With this modification, the Committee retained the provisions of article 24, paragraph 4.

*Article 25, paragraph 1*

"1. If the claimant, within the period of time determined by the arbitrators under article 17, fails to communicate his statement of claim, the arbitrators may afford the claimant

a further period of time to communicate his statement of claim. If, within such further period of time, he fails to communicate his statement of claim without showing sufficient cause for such failure, the arbitrators shall issue an order for the discontinuance of the arbitral proceedings."

136. There was general agreement that the language of this paragraph should be modified to indicate more clearly that the sanction envisaged in the second sentence of this paragraph for failure to communicate the statement of claim was the termination of the arbitral proceedings. It was noted that such termination would not be based on the merits of the dispute and that therefore the claimant was not barred from commencing new arbitral proceedings.

137. The Committee was of the view that the costs of an arbitration that was terminated by reason of the claimant's failure to submit his statement of claim should in principle be borne by the claimant and that article 33 dealing with the determination and apportionment of the costs of arbitration should be amended to cover the termination of arbitral proceedings pursuant to article 25, paragraph 1.

*Article 25, paragraph 2*

"2. If the respondent, within the period of time determined by the arbitrators under article 18, fails to communicate his statement of defence without showing sufficient cause for such failure, the arbitrators may proceed with the arbitration."

138. The Committee was agreed that respondents should be accorded the same right to an extension of the time for the communication of the statement of defence as was accorded to claimants under article 25, paragraph 1, for the communication of the statement of claim.

139. The Committee decided to combine into one paragraph the provisions of paragraphs 1 and 2 of article 25, in order to ensure that claimants and respondents would have the same opportunity to obtain an extension of the period initially fixed by the arbitrators for the communication, respectively, of the statement of claim or the statement of defence.

*Article 25, paragraph 3*

"3. If one of the parties fails to appear at a hearing duly called under these Rules, without showing sufficient cause for such failure, the arbitrators shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties."

140. The Committee was of the view that the rule of construction set forth in this paragraph was unnecessary and should not be retained. It was emphasized that the sanction for such non-appearance lay in the authorization granted to the arbitrators "to proceed with the arbitration".

141. Subject to this deletion, the Committee was agreed to retain the substance of article 25, paragraph 3.

*Article 25, paragraph 4*

"4. If one of the parties, after having been duly notified, fails without showing sufficient cause, to submit documentary evidence when an award is to be made solely on the basis of documents and other written materials, the arbitrators may make the award on the evidence before them."

142. After considering drafting suggestions concerning the wording of this paragraph, the Committee decided to retain the substance of article 25, paragraph 4.

*Article 26*

"A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object."

143. The Committee considered the desirability of adding to article 26 the concept of constructive waiver by a party who "should have known" that a requirement under the Rules has not been complied with.

144. The view was expressed that such an addition would be useful in order to avoid the difficulty of proving the time when a party first "knew" that a provision of the Rules was violated. It was noted that a number of other sets of procedural rules intended for international commercial arbitration contained provisions on constructive waiver.

145. According to another view, article 26 should not be extended to cover constructive waiver by a party who "should have known" that the Rules were being violated, since the parties were assumed to know the Rules under which they had agreed to arbitrate.

146. After deliberation, the Committee decided to retain the present wording of article 26, and not to add a provision dealing with constructive waiver. The Committee was of the view that the article served a useful purpose in that it was designed to protect the validity of the arbitral proceedings or of the ensuing award against allegations of minor violations of the procedures established in the Rules.

147. It was suggested that, since article 26 on waiver applied to all provisions in the UNCITRAL Arbitration Rules, it should be placed in the part of the Rules entitled Section I: Introductory Rules. After deliberation, the Committee decided to keep article 26 where it now appeared in the Rules, since in practice it would be invoked primarily in connexion with violations of provisions in the Rules that occurred during the conduct of the arbitral proceedings.

*Proposed additions to section III: arbitral proceedings*

*(a) Termination of hearings*

148. The Committee considered the desirability of adding an article 25 *bis* to section III of the Rules on the termination of hearings. It was suggested that such an article should provide that after giving sufficient notice to the parties, the arbitrators were empowered to declare that hearings and the taking of evidence were closed, while retaining the right to reopen the hearings if they considered it necessary due to exceptional circumstances. It was observed that articles 33 and 34 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission, 1969, could be used as a model.

149. It was noted that the proposed article 25 *bis* would ensure that no party could unreasonably delay the arbitral proceedings by repeated requests for hearings and the taking of further evidence. It was also noted that the provisions in article 25 *bis*, authorizing the arbitrators to reopen the hearings if they considered it necessary under exceptional circumstances, were designed to prevent a party from successfully asserting that he could not present his case and that therefore under article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards the award should not be enforced.

150. After deliberation, the Committee decided to retain the suggestion to add an article on the termination of hearings.

*(b) Decisions of the arbitrators on procedural questions*

151. The Committee considered a proposal to add to section III of the Rules an article dealing with the degree of consensus required among the members of an arbitral tribunal for the taking of decisions on procedural matters. It was agreed that, as a general rule, all decisions by the arbitrators, including decisions on procedural questions, should be made by at least the majority of arbitrators.

152. It was suggested that a separate article on decision-making by the arbitrators on procedural questions should provide that the presiding arbitrator could decide procedural

questions in cases where no decision by majority could be reached.

153. After deliberation, the Committee decided not to add a separate article to section III dealing with decision-making by the arbitrators on procedural questions. The Committee, however, decided to add a new article to section IV of the Rules, designed to regulate all decision-making by the arbitrators, including any decisions on procedural questions.

*Article 27, paragraph 1*

"1. In addition to making a final award, the arbitrators shall be entitled to make interim, interlocutory, or partial awards."

154. After deliberation, the Committee decided to retain the present wording of article 27, paragraph 1.

*Article 27, paragraph 2*

"2. An award shall be binding upon the parties. An award shall be made in writing and shall state the reasons upon which it is based, unless both parties have expressly agreed that no reasons are to be given."

155. Consideration was given to whether it should be required by the Rules that an arbitral award state the reasons upon which it was based. It was noted that in some legal systems usually no such reasons were given in arbitral awards, while in other legal systems an arbitral award had to include the reasons upon which it was based.

156. The view was expressed that, in order to ensure its enforceability, an award should include reasons and that therefore the option given to the parties under article 27, paragraph 2, to agree that no reasons be given should be deleted. However, according to another view, the present wording of article 27, paragraph 2, requiring that an award state the reasons upon which it is based unless the parties expressly agreed to the contrary, should be retained.

157. The Committee decided to restructure article 27, paragraph 2, to the effect that arbitrators would not be required to include in the award itself the reasons upon which it was based, but could elect to give these reasons in a statement accompanying, but not forming part of, the award. It was also agreed that the parties could agree, expressly or by implication (e.g. when they selected as the place of arbitration a country under whose national law reasons were not generally given in arbitral awards), that the arbitrators need not give the reasons for their award.

*Article 27, paragraph 3*

"3. When there are three arbitrators, an award shall be made by a majority of the arbitrators."

158. Consideration was given to the desirability of dealing with the eventuality that the three members of an arbitral tribunal were unable to agree on an award by majority.

159. The view was expressed that in such a case the decision of the presiding arbitrator should govern. It was noted in this connexion that the arbitration rules established by International Chamber of Commerce had contained such a provision for many years without causing any problems in practice.

160. It was observed, in reply, that a rule providing that in the case of deadlock among the arbitrators on the award the decision of the presiding arbitrator would govern, was subject to abuse by presiding arbitrators who might make extreme awards. It was also noted that requiring that awards be made by a majority of the arbitrators would force them to continue their deliberations, when they were initially deadlocked, and was likely to lead to a compromise award that a majority of the arbitrators could accept.

161. After deliberation, the Committee retained the substance of paragraph 3, which required that awards be made

by a majority of the arbitrators. The Committee, however, decided that this rule should form paragraph 1 of a new article in section IV on decisions, and that paragraph 2 of that new article should provide that on procedural questions, if there was no majority, the presiding arbitrator could decide on his own subject to review, if any, by the arbitral tribunal.

162. One representative noted his reservation and expressed his preference for the inclusion of a provision dealing specifically with the case where no majority of the arbitrators could agree on an award.

#### Article 27, paragraph 4

"4. An award shall be signed by the arbitrators. When there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the validity of the award. The award shall state the reason for the absence of an arbitrator's signature."

163. There was general agreement that all the arbitrators, including an arbitrator who dissented from the award, should be required to sign the award. It was noted that in some legal systems an arbitral award was enforceable only if it had been signed by all the arbitrators, whereas in some others two signatures were sufficient for this purpose.

164. The Committee observed that the date on which and the place where the award was made were matters of great importance for the enforcement of awards. For this reason, it was agreed that paragraph 4 should provide that an award had to include the date on which and the place where it was made.

165. The Committee considered the desirability of maintaining the provision in the second sentence of paragraph 4, which dealt with the legal effect of the failure of one arbitrator to sign the award. After deliberation, the Committee was agreed that the legal effect of one arbitrator's failure to sign the award should be left to the applicable national law for resolution and that therefore the Rules should be silent on this point. However, the Committee retained the provision requiring that an award state the reason for the absence from the award of one arbitrator's signature.

166. Consideration was also given to the possible addition of a specific provision authorizing the inclusion in the award of an arbitrator's dissenting opinion. A majority of the Committee was of the view that no specific mention should be made of dissenting opinions, thereby in effect permitting but not requiring that a dissenting opinion be included in an arbitral award.

#### Article 27, paragraph 5

"5. The award may only be made public with the consent of both parties."

167. After deliberation, the Committee decided to retain the present wording of this paragraph. It was noted that an arbitral award could become public in certain cases even in the absence of the consent of both parties, e.g. during proceedings for the recognition and enforcement of the award.

#### Article 27, paragraph 6

"6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitrators."

168. Consideration was given to the desirability of providing for a time-limit, commencing on the date the award was made, within which copies of the award must be communicated to the parties.

169. The Committee was of the view that it was not necessary to prescribe a time-limit for the communication of an award to the parties, on the ground that awards should not be invalidated solely because the arbitrators failed to observe this time-limit.

#### Article 27, paragraph 7

"7. If the arbitration law of the country where the award is made requires that the award be filed or registered, the arbitrators shall comply with this requirement within the period of time required by that law."

170. After deliberation, the Committee was agreed to retain the substance of paragraph 7, but to clarify that the arbitrators were obliged to file or register their award only if the arbitration law of the country where the award was made required that such filing or registration be done by the arbitrators.

#### Article 28, paragraph 1

"1. The arbitrators shall apply the law designated by the parties as applicable to the substance of the dispute. Such designation must be contained in an express clause, or unambiguously result from the terms of the contract."

171. There was general agreement that the principle contained in the first sentence of this paragraph, which recognized the freedom of the parties to designate the law applicable to the substance of their dispute, should be retained. It was agreed, however, that the method by which the parties could effect such designation should not be regulated by the UNCITRAL Rules, but should be left to the applicable national law.

172. It was noted that the reference in paragraph 1 to "the law designated by the parties as applicable to the substance of the dispute" was intended as a reference to the internal law of that country not including its rules on conflict of laws or *renvoi*.

#### Article 28, paragraph 2

"2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable."

173. There was general agreement to retain the substance of this paragraph, which provided that if the parties failed to designate the law applicable to the substance of their dispute the arbitrators would select that law through reliance on conflict of laws rules.

174. Consideration was given to the question of the determination of the conflict of laws rules that would be utilized by the arbitral tribunal. After deliberation, the Committee adopted the phrase "the conflict of laws rules which it considers applicable".

#### Article 28, paragraph 3

"3. The arbitrators shall decide *ex aequo et bono* or as *amiables compositeurs* only if the parties have expressly authorized the arbitrators to do so and the arbitration law of the country where the award is to be made permits such arbitration."

175. It was agreed to retain in this paragraph the references to arbitral decisions both *ex aequo et bono* and as *amiables compositeurs*, since these terms had different connotations in the various national legal systems.

176. It was noted that "the law of the country where the award is to be made" was not in all cases also the law governing the arbitral procedure, and that some national laws together with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards appeared to envisage a choice by the parties of the law that was to govern the arbitral proceedings.

177. After deliberation, the Committee was agreed that the arbitral tribunal would decide *ex aequo et bono* or as *amiables compositeurs* only if expressly authorized to do so by the parties and if "the law applicable to the arbitral procedure" permitted such arbitration.

178. One representative noted his reservation and stated his preference for authorizing the arbitral tribunal to decide *ex aequo et bono* or as *amiables compositeurs* only if such arbitration was permitted by the law of the country where the arbitral award was to be enforced.

*Article 28, paragraph 4*

"4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade."

179. The Committee considered a proposal that paragraph 4 should be placed in a separate article entitled "effect of contract". It was also suggested that the provisions of article 28, paragraph 4, obligating the arbitrators to take into account the terms of the contract and the usages of the trade, should not apply to arbitral decisions taken *ex aequo et bono* or as *amiables compositeurs*.

180. After deliberation, the Committee decided that paragraph 4 should remain a paragraph within article 28 and that its provisions should also apply to arbitrations *ex aequo et bono* or as *amiables compositeurs*. One representative noted his reservation and stated that, in his view, especially in *ex aequo et bono* arbitration, the arbitrators (the arbitral tribunal) should not be obliged to follow rigidly the terms of the contract, the literal application of which might be unjust because it gave rise to an excessive burden.

181. Consideration was also given to the desirability of formulating in stricter terms the arbitrators' obligation to observe the provisions of the contract than their obligation to observe the usages of the trade. It was stated that such a distinction would be useful, since it would place greater emphasis on the terms of the contract.

182. After consideration of this issue, the Committee determined that the Rules should provide that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction.

*Article 29, paragraph 1*

"1. If, before the award is made, the parties agree on a settlement of the dispute, of the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award. If, before the award is made, the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason, the arbitrators shall inform the parties of their intention to issue an order for the discontinuance of the proceedings. The arbitrators shall have the power to issue such an order unless a party objects to the discontinuance."

183. After deliberation, the Committee decided to retain the substance of article 29, paragraph 1.

184. There was general agreement that the provisions of paragraph 1 should be placed in two separate paragraphs, the first paragraph to cover settlements agreed on by the parties and the second to cover the cases where the continuance of the arbitral proceedings became unnecessary or impossible.

185. After considering suggestions that article 29 appear earlier in the Rules, the Committee decided to keep this article at its present location in the Rules, for reasons of logical presentation.

*Article 29, paragraph 2*

"2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of arbitration as specified under article 33. Unless otherwise agreed to by the parties, the arbitrators shall apportion the costs between the parties as they consider appropriate."

186. The Committee decided to expand the scope of this paragraph so that it also covered the fixing of the costs of arbitration for arbitral proceedings that were terminated, pursuant to article 25, paragraph 1, by reason of the claimant's failure to submit a statement of claim.

187. The Committee was agreed that the general rules in article 33 on the fixing of the costs of arbitration and their apportionment between the parties should be made applicable to all cases where the proceedings concluded with an order for the termination of the arbitral proceedings (article 25, para. 1, or article 29, para. 1) or with an arbitral award on agreed terms (article 29, para. 1).

*Article 29, paragraph 3*

"3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators shall be communicated by the arbitrators to the parties. Where an arbitral award on agreed terms is made, the provisions of article 27, paragraph 7, shall apply."

188. After deliberation, the Committee was agreed to retain article 29, paragraph 3, in its present wording.

*Article 30, paragraph 1*

"1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitrators give an interpretation of the award. Such interpretation shall be binding on the parties."

189. Consideration was given to the desirability of extending the period of 30 days provided for in this paragraph for the communication of a request that the arbitrators give an interpretation of their award.

190. After deliberation, the Committee decided to retain the 30-day time-limit for the communication of a request for the interpretation of an award, so that the arbitrators would know reasonably quickly that some further action in respect of the award would be requested of them.

*Article 30, paragraph 2*

"2. The interpretation shall be given in writing within 45 days after the receipt of the request, and the provisions of article 27, paragraphs 3 to 7, shall apply."

191. In recognition of the fact that, when given, an interpretation by the arbitral tribunal of its award was necessarily and authoritatively linked to the award, the Committee decided to provide in paragraph 2 that such interpretation formed part of the award. For the same reason, it was agreed that paragraphs 2 to 7 of article 27 on the form and effect of an award should be made applicable to an interpretation of the award.

192. It was agreed that the arbitrators should not be entitled to extra remuneration for issuing an interpretation of their award, since it was the vagueness of their award that gave rise to the request for its interpretation. The Committee was of the view that this result could best be accomplished by adding a provision to this effect to article 33, which dealt with the costs of arbitration.

*Article 31, paragraph 1*

"1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitrators may within 30 days after the communication of the award make such corrections on their own initiative."

193. After considering a suggestion that the 30-day time-limit for the communication of a request for the correction of an award should be eliminated, the Committee decided to retain the present wording of article 31, paragraph 1.

*Article 31, paragraph 2*

"2. Such corrections shall be in writing, and the provisions of article 27, paragraphs 6 and 7, shall apply."

194. It was agreed that, in order to emphasize the immediate connexion between the award and the correction of that award by the arbitral tribunal that had made the award, paragraphs 2 to 7 of article 27 on the form and effect of an award should be made applicable to a correction of the award.

195. There was general agreement that the arbitrators should not be entitled to extra remuneration for having corrected errors in their award, and that article 33 on the costs of arbitration should include a provision to this effect.

*Article 32, paragraph 1*

"1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to make an additional award as to claims presented in the arbitral proceedings but omitted from the award."

196. After deliberation, the Committee decided to retain the substance of article 32, paragraph 1.

*Article 32, paragraph 2*

"2. If the arbitrators consider the request for an additional award to be justified and consider that the omission can be rectified without any further hearing or evidence, they shall complete their award within 60 days after the receipt of the request."

197. Consideration was given to the elimination of the provision that the arbitrators could issue an additional award only if they considered that an additional award rectifying the particular omission did not necessitate any further hearing or evidence.

198. It was noted that under the present wording of paragraph 2, if any further hearings or the taking of evidence was necessary, the party who requested the additional award would be forced to commence new arbitral proceedings. It was also noted that, even if an additional award could be issued although further hearings or evidence were necessary, the arbitrators would still have discretion to decide whether to issue an additional award in a particular case.

199. It was observed in reply, however, that losing parties would endeavour to reopen the arbitral proceedings by means of requests for additional awards, if the requirement were removed that additional awards could be issued only if no further hearings or evidence would be required. The view was also expressed that frequently it was due to the negligence of the party requesting the additional award that the necessary hearings did not take place or the evidence was not received by the arbitral tribunal.

200. After deliberation, the Committee decided to retain in substance the present wording of article 32, paragraph 2.

*Article 32, paragraph 3*

"3. When an additional award is made, the provisions of article 27, paragraph 2 or 7, shall apply."

201. After deliberation, the Committee decided to retain paragraph 3 in its present wording.

202. There was general agreement that the arbitrators should not be entitled to an extra fee for the making of an additional award, since it was an omission in their original award, as a result of their own action, that had to be rectified in the additional award. It was agreed that article 33 on the costs of arbitration should include a provision to this effect.

*Article 33, paragraph 1, introductory part and subparagraph 1 (a)*

"1. The arbitrators shall fix the costs of arbitration in their award. The term 'costs' includes:

"(a) The fee of the arbitrators, to be stated separately and to be fixed by the arbitrators themselves;"

203. There was general agreement that this article should contain a separate paragraph dealing with the costs of arbitration, including the costs of proceedings that ended with an order for the termination of the arbitral proceedings (article 25, para. 1 and article 29, para. 1) or with an arbitral award on agreed terms (article 29, para. 1).

204. It was also agreed that a paragraph should be added to article 33, stating expressly that arbitrators may not charge a fee for the interpretation, correction or completion of their award pursuant to articles 30 to 32 of the Rules.

205. The question was raised whether the items listed as included in the costs of arbitration and set forth in subparagraphs (a) to (f) were the only items that would be considered under the Rules as constituting costs of arbitration. After deliberation, the Committee decided to make it clear that subparagraphs (a) to (f) were intended as an inclusive listing of the types of costs and expenses incurred during an arbitration that would be considered as costs of arbitration for the purposes of the UNCITRAL Arbitration Rules.

206. Consideration was given to the desirability of incorporating in the UNCITRAL Arbitration Rules either a schedule governing the costs of administration and the fees of the arbitrators, or reference to a schedule established by an existing arbitration institution.

207. The view was expressed that a schedule, whether set out in the Rules in full or incorporated by reference, was necessary as it would serve as a guide to the parties and the arbitrators concerning the costs of arbitration. It was also stated that such a schedule would prevent the possibility that some arbitrators would charge unreasonably high fees for their services.

208. It was stated in reply, however, that no schedule of costs and fees of arbitrators should be included in the Rules for the following main reasons:

(a) The Rules were intended to be applied world-wide and the expectations of parties and arbitrators as to costs and fees differ widely in different parts of the world; and

(b) All existing schedules had large ranges between maximum and minimum charges and provided for control over the actual fees charged by reliance on an administering authority.

209. After deliberation, the Committee decided not to include in the Rules either a schedule of costs and fees of arbitrators or reference to such a schedule established by an existing arbitral institution. The Committee decided, however, to add a separate article explaining in detail that arbitrators should fix their fees in reasonable amounts and consider certain factors in that connexion.

210. Under this new article, the fees of the arbitrators must be reasonable in amount, taking into account the particular circumstances of the case. Furthermore, if an appointing authority was agreed upon by the parties or designated pursuant to article 7, paragraph 4, the arbitrators should take into account, to the extent appropriate in the circumstances of the case, any schedule of fees or other customary basis for establishing the fees of arbitrators in international cases that was followed by that authority. The new article also permits a party to request that the arbitrators consult with such appointing authority before fixing their fees.

*Article 33, paragraph 1, subparagraphs (b) and (c)*

"(b) The travel and other expenses incurred by the arbitrators;

"(c) The costs of expert advice and of other assistance required by the arbitrators;"

211. After deliberation, the Committee decided to retain the present wording of subparagraphs (b) and (c).



*Article 33, paragraph 1, subparagraph (d)*

"(d) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;"

212. The Committee considered the desirability of retaining subparagraph (d), which included the travel expenses of witnesses in the costs of arbitration to the extent the arbitrators approved these expenses.

213. It was stated that witnesses were generally presented by one of the parties and that each party decided which and how many witnesses it wanted to present. In order to ensure that no party would call witnesses without regard to the costs involved, the view was expressed that either subparagraph (d) should be deleted or its scope should be limited to the expenses of witnesses who were called by the arbitrators.

214. It was observed in reply, however, that the costs involved in calling witnesses may be considerable and a successful party should be compensated for the expenses incurred in calling the witnesses who were instrumental in establishing the correctness of his position.

215. After deliberation, the Committee decided to retain the substance of subparagraph (d), but to clarify that both the travel and other expenses of witnesses were included in the costs of arbitration only to the extent they were approved by the arbitrators and that under article 33, paragraph 2, the arbitrators could apportion between the parties the costs of arbitration, including the expenses of witnesses.

*Article 33, paragraph 1, subparagraph (e)*

"(e) The compensation for legal assistance of the successful party if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators."

216. Consideration was given to a suggestion that subparagraph (e) should state as a general rule that each party was to bear its own expenses for legal assistance but should authorize the arbitrators to include these expenses in the costs of arbitration in appropriate cases.

217. It was noted that the present wording of subparagraph (e) required that the legal expenses of the successful party be included in the costs of arbitration and was based on the assumption that the successful party would in every case recover his legal expenses. The view was expressed that the arbitrators should be given discretion to decide whether to include the legal expenses of a party in the costs of arbitration.

218. It was stated in reply, however, that the arbitrators enjoyed sufficient flexibility under the present wording of subparagraph (e), since they were free to apportion between the parties the costs of arbitration, including the legal expenses of the successful party, pursuant to the provisions of paragraph 2 of this article.

219. After deliberation, the Committee decided to retain the substance of subparagraph (e), so that if during the arbitral proceedings the successful party had claimed costs for legal assistance, these costs were included in the costs of arbitration to the extent that their amount was deemed reasonable by the arbitrators. The Committee decided, however, to add a new paragraph to article 33, establishing that, as to the legal expenses of the successful party, there was no presumption that these costs shall be borne by the unsuccessful party and that the arbitral tribunal had full discretion to apportion these costs in the light of the circumstances.

*Article 33, paragraph 1, subparagraph (f)*

"(f) Any fees charged by the appointing authority for its services."

220. The Committee decided to retain the substance of subparagraph (f) and to extend its scope to cover any expenses that might be incurred by the Secretary-General of the Per-

manent Court of Arbitration at The Hague when it was requested to designate an appointing authority under article 7, paragraph 4, of the Rules.

*Article 33, paragraph 2*

"2. The costs of arbitration shall in principle be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties if they consider that apportionment is reasonable."

221. Consideration was given to the desirability of deleting from paragraph 2 the general rule that normally the costs of arbitration shall be borne by the unsuccessful party.

222. It was stated that paragraph 2 should be neutral on the question of which party was to bear each of the costs of arbitration, leaving the apportionment of these costs fully to the discretion of the arbitral tribunal. It was stated in reply, however, that the rule that normally the costs of arbitration be borne by the unsuccessful party was fair and correct, and it gave a good indication to the parties of the way in which the costs of arbitration would be apportioned in most cases.

223. After deliberation, the Committee decided to retain the substance of paragraph 2. It was also agreed that a separate paragraph would be added to deal with the apportionment of the legal expenses incurred by the successful party.

*Article 34, paragraph 1*

"1. The arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of the arbitration."

224. The Committee decided to retain the substance of paragraph 1, but to clarify that the deposits that the arbitrators could require from each party were intended to ensure that the fees and expenses of the arbitrators and of experts appointed by the arbitrators would be paid at the conclusion of the arbitral proceedings.

225. Consideration was also given to a proposal permitting an appointing authority to require from the parties a deposit to ensure the payment of its fee and expenses. It was noted that some appointing authorities may charge fees for their services and others may not.

226. After deliberation, the Committee decided not to include in the Rules a provision expressly authorizing an appointing authority to demand a deposit. It was noted, however, that an authority could in any event insist that it will only agree to serve as an appointing authority if its fee for this service is paid in advance.

*Article 34, paragraph 2*

"2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties."

227. After deliberation, the Committee decided to retain the substance of paragraph 2.

228. The Committee was also agreed that a new paragraph should be added to article 34, obligating the arbitrators under certain circumstances to consult with the appointing authority agreed upon by the parties or designated pursuant to article 7, paragraph 4, of the Rules, before fixing the amounts of any required deposits or supplementary deposits. It was noted that this provision corresponded to the possibility under the new article discussed at paragraphs 209-210 above, to require that the arbitrators consult the appointing authority before fixing their fee.

*Article 34, paragraph 3*

"3. If the required deposits are not paid in full within 30 days after the communication of the request, the arbitrators shall notify the parties of the default and give to either party an opportunity to make the required payment."

229. Consideration was given to the consequence of the failure of one or both parties to pay the deposit required by the arbitrators.

230. It was noted that the arbitrators had no power to force the parties to pay the required deposits. It was therefore agreed that the arbitrators should be expressly authorized to order the suspension or termination of the arbitral proceedings if the deposits required by them were not paid in accordance with the provisions of paragraph 3.

*Article 34, paragraph 4*

"4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties."

231. The Committee decided to retain the substance of paragraph 4, and to clarify that it was after the award was made that the accounting by the arbitrators for the deposits they had received was to take place.

*Titles of sections and articles*

232. The Committee decided to retain descriptive headings for sections and articles in the UNCITRAL Arbitration Rules as an aid to the users of the Rules.

*Model arbitration clause*

233. The model arbitration clause as it appeared in A/CN.9/112\* read as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules which the parties declare to be known to them. Judgement upon the award made by the arbitrator(s) may be entered by any court having jurisdiction thereof.

"The parties also agreed that:

"(a) The appointing authority shall be... (name of person or institution);

"(b) The number of arbitrators shall be... (one or three);

"(c) The place of arbitration shall be... (town or country);

"(d) The language(s) to be used in the arbitral proceedings shall be...;

"[(e) Authorization, if considered desirable, for the arbitrators to act *ex aequo et bono* or as *amiables compositeurs*]."

234. There was general agreement to include a model arbitration clause which parties could insert into their contract so

that disputes arising out of their contract would be settled in accordance with the UNCITRAL Arbitration Rules.

235. It was agreed to simplify the present model arbitration clause in the following respects:

(a) To delete the phrase "which the parties declare to be known to them" from the first sentence; and

(b) To delete the second sentence dealing with entry of judgement upon the award.

236. Consideration was also given to the addition of a phrase, clarifying the version of the Rules to which reference was made in the model arbitration clause. It was noted that this question would become of considerable practical importance if in the future the UNCITRAL Arbitration Rules were to be revised. For this reason, the Committee decided to add the phrase "as at present in force" to the end of the first sentence of the model clause in order to make clear that the applicable Rules were those in effect on the date of the agreement to arbitrate.

237. The Committee considered the desirability of retaining as parts of the model clause paragraphs (a) to (d), wherein the parties were given the opportunity, by filling in blanks, to agree on, respectively, the appointing authority, the number of arbitrators, the place of arbitration, and the language to be used. It was stated, on the one hand, that the model arbitration clause should be brief and it would be sufficient to alert the parties by a note to the possibility that they might find it desirable to agree on the matters covered by those paragraphs. It was stated in reply, however, that paragraphs (a) to (d) should be retained in their present form in order to encourage and make it easy for the parties to denote their agreement on matters that would be of great importance during the course of arbitral proceedings.

238. The Committee decided to retain paragraphs (a) to (d) of the model arbitration clause, but to preface them with a note that these were provisions which the parties may wish to consider adding to that clause.

239. After deliberation, the Committee decided to delete paragraph (e) of the model arbitration clause, which reminded the parties that if they wished the arbitral tribunal to decide their disputes *ex aequo et bono* or as *amiables compositeurs*, they had to add to the model arbitration clause an express authorization to this effect.

## ANNEX III

### List of documents before the Commission

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]

\* Reproduced in this volume, part two, III, 1, *infra*.

## B. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Training and assistance in the field of international trade law: note by the Secretary-General .....	A/CN.9/111
Draft convention on the carriage of goods by sea: draft provisions concerning implementation, reservations and other final clauses; Lloyd's Register of Shipping, Statistical Tables, 1975, Table 1 and Table 2: report of the Secretary-General .....	A/CN.9/115/Add.1

<i>Title or description</i>	<i>Document reference</i>
Ratification of or adherence to conventions concerning international trade law: note by the Secretary-General .....	A/CN.9/118
Provisional agenda, annotations thereto and tentative schedule of meetings: note by the Secretary-General .....	A/CN.9/120
Relevant provisions of the resolutions of the sixth and seventh special sessions of the General Assembly: note by the Secretary-General .....	A/CN.9/122
International sale of goods: note by the Secretary-General .....	A/CN.9/123
Date and place of the tenth session: note by the Secretary-General .....	A/CN.9/124

## I. INTERNATIONAL SALE OF GOODS

### 1. Report of the Working Group on the International Sale of Goods on the work of its seventh session (Geneva, 5-16 January 1976) (A/CN.9/116)

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#### INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session held in 1969. The Commission at its 44th meeting on 26 March 1969, requested the Working Group to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the International Sale of Goods might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications.<sup>1</sup>

2. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Philippines, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

3. The Working Group held its seventh session at the Office of the United Nations at Geneva from 5 January to 16 January 1976. All members of the Working Group were represented except Kenya, the Philippines and Sierra Leone.

4. The session was also attended by observers from the following members of the Commission: Argentina, Australia, Federal Republic of Germany, Greece, Norway and Somalia, and by observers from the following international organizations: the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the International Chamber of Commerce (ICC).

5. The Working Group elected the following officers:

Chairman ... Mr. Jorge Barrera-Graf (Mexico)  
Rapporteur ... Mr. Roland Loewe (Austria)

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618) (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A).

Pending the arrival of the Chairman, the Working Group elected Mr. Gyula Eörsi (Hungary) as Acting Chairman. Mr. Eörsi presided over the first two meetings of the Working Group, held on 5 January 1976.

6. The following documents were placed before the Working Group:

(a) Provisional agenda and annotations (A/CN.9/WG.2/WP.24);

(b) Revised text of the draft Convention on the International Sale of Goods as approved or deferred by the Working Group at its first six sessions (A/CN.9/100, annex I);\*

(c) Comments and proposals by Governments relating to the revised text of a uniform law on the international sale of goods (A/CN.9/WG.2/WP.20, reproduced as A/CN.9/100, annex II);\*

(d) Pending questions with respect to the revised text of a uniform law on the international sale of goods: report of the Secretary-General (A/CN.9/WG.2/WP.21 and Add.1 reproduced as A/CN.9/100, annexes III and IV);\*\*

(e) Draft commentary on the draft Convention on the International Sale of Goods: note by the Secretary-General (A/CN.9/WG.2/WP.22);

(f) Comments and proposals by the observer of Norway on the draft Convention on the International Sale of Goods, as approved or deferred by the Working Group at its first six sessions (A/CN.9/WG.2/WP.25);

(g) Hague Convention of 1964 relating to a uniform law on the formation of contracts for the international sale of goods, with annexes (extract from *Register of Texts and Conventions and other Instruments concerning International Trade Law*, vol. I (United Nations Publication, Sales No. E.71.V.3));

(h) Analysis of replies and comments by Governments on the Hague Convention of 1964 relating

\* UNCITRAL Yearbook, Vol. VI: 1975, part two, I, 3.

\*\* *Ibid.*, I, 4 and 5.

to a Uniform Law on the Formation of Contracts for the International Sale of Goods (A/CN.9/31, paras. 144 to 156);\*

(i) Draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods, followed by an explanatory report (UNIDROIT, Etude XVI/B, Doc. 22, U.D.P. 1972, French and English only);

(j) The conditions of substantive validity of contracts of sale, comparative law study prepared on behalf of UNIDROIT by the Max Planck Institut für Ausländisches und Internationales Privatrecht at Hamburg (UNIDROIT Yearbook 1966, pp. 175-410, French only).

7. At the request of some representatives, the Secretariat also placed before the Working Group a copy of notes prepared by it for its own files which set forth observations concerning certain aspects of the draft Convention on the International Sale of Goods as approved or deferred by the Working Group at its first six sessions.

#### I. DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS

8. In the course of its seventh session the Working Group completed its consideration of pending questions with respect to articles 57 to 69 of the draft Convention and in certain other articles in which unresolved questions had remained. The Group thereafter considered the text of the draft Convention in final reading. For this purpose, it set up a Drafting Party composed of the Chairman of the Working Group and the representatives of Austria, the Union of Soviet Socialist Republics and the United States of America. Other members of the Working Group and Observers from other States members of the Commission and from interested international organizations contributed substantially to the work of the Drafting Party. The Drafting Party was requested to formulate draft provisions in respect of certain articles in the light of decisions on substance adopted by the Working Group. The Drafting Party was also requested to ensure that the formulations in the Convention on the Limitation Period in the International Sale of Goods be followed to the largest extent possible whenever there was a similar text in the Convention on the International Sale of Goods. In addition, the Drafting Party was requested to render the English language version in the present tense, to make any necessary changes of style needed to ensure uniformity of expression within the Convention and to ensure that the four language versions of the Convention were consistent with each other.

9. At its sixth session, the Working Group had requested the Secretariat to prepare a draft commentary on the draft Convention based on the reports of the Working Group on the work of its sessions and on the various studies made by representatives and the Secretariat in respect of main issues raised by the uniform law on the international sale of goods. At its seventh session, the Working Group had before it a Note by the Secretary-General, setting forth a draft commentary on the draft Convention on the International Sale of

Goods (A/CN.9/WG.2/WP.22). The draft commentary had been prepared on the text of the draft Convention as it appeared in annex I to the report of the Working Group on the work of its sixth session (A/CN.9/100).<sup>\*</sup> The Group was of the view that a commentary accompanying the draft Convention approved by it at its seventh session would be desirable in that it would make the preparatory work and the policy underlying the formulations in the draft Convention more readily available. For this reason the Group requested the Secretariat to revise the draft commentary in the light of the deliberations and conclusions at its seventh session and decided to submit it to the Commission as annex II to this report.<sup>\*\*</sup> In addition to explanation of the provisions of the draft Convention and the Working Group's reasons for adopting those provisions, the commentary notes in respect of which provisions members of the Working Group expressed reservations. In the opinion of the Working Group, final action on questions in respect of which no consensus could be reached may be taken by the Commission at a future session.

10. The Working Group has approved the text of the draft Convention on the International Sale of Goods by consensus. However, in respect of certain articles representatives of Members of the Working Group have reserved their position with a view to raising the issues in the plenary session of the Commission. Mention of these reservations has been made in the commentary at the appropriate place.

11. In submitting to the Commission the draft Convention on the International Sale of Goods, set forth in annex I to this report,<sup>\*\*</sup> the Working Group has completed the principal part of the mandate entrusted to it by the Commission. The Working Group has not considered provisions relating to implementation of the Convention and final clauses. The Group requested the Secretariat to prepare draft provisions for consideration by the Commission at a future session.

#### II. FORMATION AND VALIDITY OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

12. The Working Group noted that the Commission, at its seventh session, had requested the Group to consider, upon completion of its work on the draft Convention on the International Sale of Goods, the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the "draft law for the unification of certain rules relating to the validity of contracts of international sale of goods", prepared by UNIDROIT, in connexion with its work on uniform rules governing the formation of such contracts. The Working Group also noted that when the Commission, at its seventh session, considered the request of UNIDROIT that it should examine the UNIDROIT draft law on validity of contracts of international sale of goods, the view was expressed that it might be desirable to deal with the rules on formation and on validity in a single instrument and that thought should be given to the advisability of formulating uniform rules gov-

\* UNCITRAL Yearbook, Vol. VI: 1975, part two, I, 2.

\*\* Annexes I and II are separately reproduced below in this chapter of the Yearbook, sections 2 and 3 respectively.

\* *Ibid.*, Vol. I: 1968-1970, part three, I, A, 1.

erning the formation and validity of contracts in general, to the extent that they were relevant to international trade.

13. The Working Group, after deliberation, was of the unanimous view that, at its next session, it should begin work on uniform rules governing the formation of contracts and should make an attempt to formulate such rules on a broader basis than the international sale of goods. If, in the course of its work, it should prove that the principles underlying contracts of sale and other types of contract could not be treated in the same text, the Group would direct its work towards contracts of sale only. The Working Group was further of the view that it should consider whether some or all of the rules on validity could appropriately be combined with rules on formation. The Working Group decided to place these conclusions before the ninth session of the Commission. In this connexion, the Group requested the Secretariat to inform representatives on the Commission of its proposed work programme so as to obtain their views thereon at the ninth session of the Commission.

14. In preparation of its next session, the Working Group requested the Secretariat, to prepare, in consultation with UNIDROIT, one or more studies that would:

(a) Submit to a critical analysis the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods and the UNIDROIT draft law on the validity of contracts of international sale of goods, and

(b) Examine the feasibility and desirability of dealing with both subject-matters in a single instrument.

### III. FUTURE WORK

15. The Working Group gave consideration to the timing of its eighth session. The Group decided to request the Commission to schedule the eighth session to start on Tuesday, 4 January 1977 and to continue until Friday, 14 January 1977 in New York.

## 2. Draft Convention on the International Sale of Goods (A/CN.9/116, annex I)\*

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### Part I. Substantive provisions

#### CHAPTER I. SPHERE OF APPLICATION

##### Article 1

(1) This Convention applies to contracts of sale of goods entered into by parties whose places of business are in different States:

- (a) When the States are Contracting States; or
- (b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded

whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

##### Article 2

This Convention does not apply to sales:

- (a) Of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;
- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

\* 17 March 1976.



*Article 3*

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

*Article 4*

This Convention also applies where it has been chosen as the law of the contract by the parties.

*Article 5*

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

*Article 6*

For the purposes of this Convention:

(a) If a party to a contract of sale of goods has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence;

(c) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

*Article 7*

[(1) This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular this Convention is not, except as otherwise expressly provided therein, concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.]

[(2) This Convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims which relate to industrial or intellectual property or the like.]<sup>1</sup>

## CHAPTER II. GENERAL PROVISIONS

*Article 8*

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is

<sup>1</sup> The Working Group left this paragraph in square brackets to indicate that it was a matter which it considered should be decided by the Commission.

widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

*Article 9*

A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result.

*Article 10*

(1) Notices provided for by this Convention must be made by the means appropriate in the circumstances.

(2) A declaration of avoidance of the contract is effective only if notice is given to the other party.

(3) If a notice of avoidance or any notice required by article 23 is sent by appropriate means within the required time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice.

*[Article 11]*

A contract of sale need not be evidenced by writing and is not subject to any other requirements as to form. It may be proved by means of witnesses.]<sup>2</sup>

*Article 12*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.

*Article 13*

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity.

## CHAPTER III. OBLIGATIONS OF THE SELLER

*Article 14*

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

## SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

*Article 15*

If the seller is not required to deliver the goods at a particular place, delivery is made:

(a) If the contract of sale involves carriage of the goods, by handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding paragraph, the contract relates to

<sup>2</sup> The Working Group left this article in square brackets to indicate that it was a matter which it considered should be decided by the Commission.

- (i) Specific goods, or
- (ii) Unidentified goods to be drawn from a specific stock or to be manufactured or produced,

and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, by placing the goods at the buyer's disposal at that place;

(c) In other cases by placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

#### Article 16

(1) If the seller is required to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is required to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not required to effect insurance in respect of the carriage of the goods, the seller must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

#### Article 17

The seller must deliver the goods:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as stated month or season) is fixed or determinable by agreement or usage, at any time within that period unless circumstances indicate the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

#### Article 18

If the seller is required to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

### SECTION II. CONFORMITY OF THE GOODS

#### Article 19

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circum-

stances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

#### Article 20

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

#### Article 21

If the seller has delivered goods before the date for delivery, up to that date he may deliver any missing part or quantity of the goods or deliver other conforming goods or cure any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided in article 55.

#### Article 22

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at the place of destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

#### Article 23

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller a notice specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such

time-limit is inconsistent with a contractual period of guarantee.

#### Article 24

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### Article 25

The seller must deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### Article 26

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 27 to 33;

(b) Claim damages as provided in articles 55 to 59.

(2) The buyer is not deprived of any right he may have to claim damages even though he resorts to other remedies.

(3) If the buyer resorts to a remedy for breach of contract, the seller is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.

#### Article 27

(1) The buyer may require performance by the seller unless he has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

#### Article 28

The buyer may request performance within an additional period of time of reasonable length. In such a case, the buyer cannot during such period resort to any remedy for breach of contract, unless the seller has declared that he will not comply with the request.

#### Article 29

(1) The seller may cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time, the seller may perform within the time indicated in his request or, if no time is indicated, within a reasonable time. The buyer cannot, during either period of time, resort

to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time or within a reasonable period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

#### Article 30

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the seller has been requested to make delivery under article 28 and has not delivered the goods within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) In respect of late delivery, after he has become aware that delivery has been made; or

(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach or, if the buyer has requested the seller to perform under article 28, after the expiration of the additional period of time or after the seller has declared that he will not comply with the request.

#### Article 31

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of the non-conformity.

#### Article 32

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 27 to 31 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

#### Article 33

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### CHAPTER IV. OBLIGATIONS OF THE BUYER

#### Article 34

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

## SECTION I. PAYMENT OF THE PRICE

*Article 35*

The buyer must take the necessary steps to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee.

*Article 36*

When a contract has been concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

*Article 37*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

*Article 38*

(1) The buyer must pay the price to the seller at the seller's place of business. However, if the payment is to be made against the handing over of the goods or of documents, the price must be paid at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

*Article 39*

(1) The buyer must pay the price when the seller places either the goods or a document controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or document.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer at the place of destination except against payment of the price.

(3) The buyer is not required to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity.

*Article 40*

The buyer must pay the price on the date fixed or determinable by the contract or this Convention without the need for any formalities.

## SECTION II. TAKING DELIVERY

*Article 41*

The buyer's obligation to take delivery consists:

(a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery, and

(b) In taking over the goods.

## SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

*Article 42*

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

(a) Exercise the rights provided in articles 43 to 46;

(b) Claim damages as provided in articles 55 to 59.

(2) The seller is not deprived of any right he may have to claim damages even though he exercises his right to other remedies.

(3) If the seller resorts to a remedy for breach of contract, the buyer is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.

*Article 43*

The seller may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

*Article 44*

The seller may request performance within an additional period of time of reasonable length. In such a case, the seller cannot during such period resort to any remedy for breach of contract, unless the buyer has declared that he will not comply with the request.

*Article 45*

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the buyer has been requested under article 44 to pay the price or to take delivery of the goods and has not paid the price or taken delivery within the additional period of time fixed by the seller in accordance with that article or has declared that he will not comply with the request.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance, within a reasonable time after the seller knew or ought to have known of such breach or, if the seller has requested the buyer to perform under article 44, within a reasonable time after the expiration of the additional period of time or after the buyer has declared that he will not comply with the request.

*Article 46*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in

accordance with any requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may submit a different specification. If the buyer fails to do so, the specification made by the seller is binding.

## CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

### SECTION I. ANTICIPATORY BREACH

#### Article 47

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance. If the other party fails to provide such assurance within a reasonable time after he has received the notice, the party who suspended performance may avoid the contract.

#### Article 48

(1) If, in the case of a contract for delivery of goods by instalments, the failure of one party to perform any of his obligations in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(2) A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of deliveries already made if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract.

#### Article 49

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

### SECTION II. EXEMPTIONS

#### Article 50

(1) If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which occurred without fault on his part. For

this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment.

(2) If the non-performance of the seller is due to non-performance by a subcontractor, the seller is exempt from liability only if he is exempt under the provisions of paragraph (1) of this article and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment existed.

(4) The non-performing party must notify the other party of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knew or ought to have known of the impediment, he is liable for the damage resulting from this failure.

### SECTION III. EFFECTS OF AVOIDANCE

#### Article 51

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damage which may be due. Avoidance does not affect provisions for the settlement of disputes.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they must do so concurrently.

#### Article 52

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act of the buyer; or

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

#### Article 53

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 52 retains all other remedies.

#### Article 54

(1) If the seller is required to refund the price, he must also pay interest thereon, at the rate fixed in accordance with article 58, as from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them;

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

#### SECTION IV. DAMAGES

##### Article 55

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages cannot exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

##### Article 56

(1) If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 57, recover the difference between the contract price and the price in the substitute transaction.

(2) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied.

##### Article 57

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 56, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

(2) In calculating the amount of damages under paragraph (1) of this article, the current price to be taken into account is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

(3) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied.

##### Article 58

If the breach of contract consists of delay in the payment of the price, the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business, plus 1 per cent, but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business.

##### Article 59

The party who relies on a breach of contract must adopt such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

#### SECTION V. PRESERVATION OF THE GOODS

##### Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

##### Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been put at his disposal at the place of destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

##### Article 62

The party who is under an obligation to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

##### Article 63

(1) If there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation and notice of his intention to sell has been given, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 must take reasonable efforts to sell them. To the extent possible he must give notice of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance.



## CHAPTER VI. PASSING OF RISK

*Article 64*

If the risk has passed to the buyer, he must pay the price notwithstanding loss of or damage to the goods, unless the loss or damage is due to an act of the seller.

*Article 65*

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.

(2) It at the time of the conclusion of the contract the goods are already in transit, the risk passes as from the time the goods were handed over to the first carrier. However, the risk of loss of goods sold in transit does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods had been lost or damaged, unless the seller had disclosed such fact to the buyer.

*Article 66*

(1) In cases not covered by article 65 the risk passes to the buyer as from the time when the goods were placed at his disposal and taken over by him.

(2) If the goods have been placed at the disposal of the buyer but they have not been taken over by him or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract. If the contract relates to the sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

*Article 67*

If the seller has committed a fundamental breach of contract, the provisions of articles 65 and 66 do not impair the remedies available to the buyer on account of such breach.

### 3. Commentary on the draft Convention on the International Sale of Goods (A/CN.9/116, annex II)\*

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## Part I. Substantive provisions

## CHAPTER I. SPHERE OF APPLICATION

*Article 1*

(1) This Convention applies to contracts of sale of goods entered into by parties whose places of business are in different States:

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

## PRIOR UNIFORM LAW

Uniform Law on the International Sale of Goods (ULIS), articles 1 and 2.

\* 17 March 1976.

Convention on the Limitation Period in the International Sale of Goods (Prescription Convention), articles 2 and 3.

#### Commentary

1. This article states the general rules for determining whether this convention is applicable to a contract of sale of goods.

#### Basic criterion, paragraph (1)

2. Article 1 (1) states that the basic criterion for the application of this convention to a contract of sale of goods is that the places of business of the parties are in different States.<sup>1</sup>

3. This convention is not concerned with the law governing contracts of sale where the parties have their places of business within one and the same State. Such contracts will normally be governed by the domestic law of that State.

4. By focusing on the sale of goods between parties whose places of business are in different States, the convention will serve its three major purposes:

- (1) To reduce the search for a forum with the most favourable law;
- (2) To reduce the necessity of resorting to rules of private international law;
- (3) To provide a modern law of sales appropriate for transactions of an international character.

#### Additional criteria, subparagraphs (1) (a) and (1) (b)

5. Even though the parties have their places of business in different States, the present convention applies only if:

- (1) The States in which the parties have their places of business are Contracting States; or
- (2) The rules of private international law lead to the application of the law of a Contracting State.

6. If the two States in which the parties have their places of business are Contracting States, the convention applies even if the rules of private international law of the forum would normally designate the law of a third country, such as the law of the State in which the contract was concluded. This result could be defeated only if the litigation took place in a third non-contracting State, and the rules of private international law of that State would apply the law of the forum, i.e., its own law, or the law of a fourth non-contracting State to the contract.

7. Even if one or both of the parties to the contract have their places of business in a State which is not a Contracting State, the convention is applicable if the rules of private international law of the forum lead to the application of the law of a Contracting State. In such a situation the question is then which law of sales of that State shall apply. If the parties to the contract are from different States, the appropriate law of sales is this convention.

8. A further application of this principle is that if two parties from different States have designated the law of a Contracting State as the law of the contract,

<sup>1</sup>If a party has places of business in more than one State, the relevant place of business is determined by article 6 (a).

this convention is applicable even though the parties have not specifically mentioned the convention.

#### Awareness of situation, paragraph (2)

9. Under paragraph (2) the convention does not apply if "the fact that the parties have their places of business in different States . . . does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract". One example of such a situation is where the parties appeared to have their places of business in the same State but one of the parties was acting as the agent for an undisclosed foreign principal. In such a situation paragraph (2) provides that the sale, which appears to be between parties whose places of business are in the same State, is not governed by the convention.

#### Article 2\*

This Convention does not apply to sales:

- (a) Of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;
- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

#### PRIOR UNIFORM LAW

ULIS, article 5.

Prescription Convention, article 4.

#### Commentary

1. Article 2 sets out those sales which are excluded from the application of this convention. The exclusions are of three types: those based on the purpose for which the goods were purchased, those based on the type of transaction and those based on the kinds of goods sold.

#### Exclusion of consumer sales, subparagraph (a)

2. Subparagraph (a) of this article excludes consumer sales from the scope of this convention. A particular sale is outside the scope of this convention if the goods are bought for "personal, family or household use". However, if the goods were purchased by an individual for a commercial purpose, the sale would be governed by this convention. Thus, for example, the following situations are within the convention: the purchase of a camera by a professional photographer for use in his business; the purchase of soap or other toiletries by a business for the personal use of the employees; the purchase of a single automobile by a dealer for resale.

3. The rationale for excluding consumer sales from the convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order

\* Norway expressed a reservation in respect of article 2 (e) and (f).

to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this convention. In addition, most consumer sales are domestic transactions and it was felt that the convention should not apply to the relatively few cases where consumer sales were international transactions, e.g., because the buyer was a tourist with his habitual residence in another country<sup>2</sup> or that the goods were ordered by mail.

4. Even if the goods were purchased for personal, family or household use, the convention applies if "the seller, at the time of the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use". The seller might have no reason to know that the goods were purchased for such use if the quantity of goods purchased, the address to which they were to be sent or other aspects of the transaction were those not normal in a consumer sale.

*Exclusion of sales by auction, subparagraph (b)*

5. Subparagraph (b) of this article excludes sales by auction from the scope of this convention. Sales by auction are often subject to special rules under the applicable national law and it was considered desirable that they remain subject to those rules even though the successful bidder was from a different State.

*Exclusion of sales on execution or otherwise by authority of law, subparagraph (c)*

6. Subparagraph (c) of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are normally governed by special rules in the State under whose authority the execution sale is made. Furthermore, such sales do not constitute a significant part of international trade and may, therefore, safely be regarded as purely domestic transactions.

*Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)*

7. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments or money. Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries are subject to special mandatory rules. Moreover, in some legal systems such commercial paper is not considered to be "goods". Without the exclusion of the sales of such paper, there might have been significant differences in the application of this convention.

8. This subparagraph does not exclude documentary sales of goods from the scope of this convention even though, in some legal systems, such sales may be characterized as sales of commercial paper.

*Exclusion of sales of ships, vessels or aircraft, subparagraph (e)*

9. This subparagraph excludes from the scope of the convention all sales of ships, vessels and aircraft. In some legal systems, there may be a question whether ships, vessels and aircraft are "goods". In most legal systems at least some ships, vessels and aircraft are subject to special registration requirements. The rules

specifying which ones must be registered differ widely. Since the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded in order to make uniform the application of this convention.

*Exclusion of sales of electricity, subparagraph (f)*

10. This subparagraph excludes sales of electricity from the scope of this convention on the ground that in many legal systems electricity is not considered to be goods and, in any case, international sales of electricity present unique problems that are different from those presented by the usual international sale of goods.

*Article 3*

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

*PRIOR UNIFORM LAW*

ULIS, article 6.

Prescription Convention, article 6.

*Commentary*

1. Article 3 deals with two different situations in which the contract includes some act in addition to the supply of goods.

*Sale of goods and supply of labour or other services by the seller, paragraph (1)*

2. This paragraph deals with contracts under which the seller undertakes to supply labour or other services in addition to selling goods. An example of such a contract is where the seller agrees to sell machinery and undertakes to set it up in a plant in working condition or to supervise its installation. In such cases, paragraph (1) provides that if the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, such as in a "turnkey" contract, the contract is not subject to the provisions of this convention.

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether the seller's obligations relating to the sale of goods and those relating to the supply of labour or other services can be considered as two separate contracts (under what is sometimes called the doctrine of "severability" of contracts), will be resolved in accordance with the applicable national law.

*Supply of materials by the buyer, paragraph (2)*

4. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured by the seller to the buyer's order is as much subject to the provisions of this convention as the sale of ready-made goods.

5. However, the concluding phrase in this paragraph "unless the party who orders the goods undertakes

<sup>2</sup> See article 6 (b).

to supply a substantial part of the materials necessary for such manufacture or production", is designed to exclude from the scope of this convention those contracts under which the buyer undertakes to supply the seller (the manufacturer) with a substantial part of the necessary materials from which the goods are to be manufactured or produced. Since such contracts are more akin to contracts for the supply of services or labour than to contracts for sale of goods, they are excluded from the scope of this convention, in line with the basic rule of paragraph (1).

#### Article 4

This Convention also applies where it has been chosen as the law of the contract by the parties.

#### PRIOR UNIFORM LAW

ULIS, article 4.

#### Commentary

1. This article constitutes an invitation to business enterprises to make use of this convention, which has been drafted to meet the problems encountered in international trade, even though the convention would not automatically be applicable under the provisions of article 1. This article might be of particular interest to businesses in a contracting State which deal with firms from both non-contracting States (convention generally not applicable under article 1) and from Contracting States (convention applicable under article 1). By the use of an appropriate clause in their contracts, they will be able to assure themselves that the same law will apply to all of their international contracts of sale of goods. Similarly businesses in non-contracting States which do not have a modern law of sales applicable to international contracts of sale may wish to have this convention apply as the law of the contract. Moreover, it may be desired to have this convention apply to some domestic contracts of sale, especially if the contract in question is part of a series of contracts which includes an international sale of goods.

2. The courts of a Contracting State would be required to enforce such a choice of laws clause in a contract which came before them. It would be a matter of the public policy of the State concerned whether the courts of a non-contracting State would enforce such a clause.

3. The choice of this convention as the law of the contract would govern only the obligations of the seller and the buyer arising from the contract of sale. It would not affect any mandatory provisions of national law which would be applicable.<sup>3</sup>

#### Article 5

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

#### PRIOR UNIFORM LAW

ULIS, article 3.

#### Commentary

1. The non-mandatory character of the convention is explicitly stated in article 5. The parties may exclude

<sup>3</sup> See article 7.

its application entirely by choosing a law other than this convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the convention.

2. The second sentence of ULIS, article 3, providing that "such exclusion may be express or implied" has been eliminated lest the special reference to "implied" exclusion might encourage courts to conclude, on insufficient grounds, that the convention had been wholly excluded.

#### Article 6

For the purposes of this Convention:

(a) If a party to a contract of sale of goods has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence;

(c) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

#### PRIOR UNIFORM LAW

ULIS, articles 1 (2) and (3), 7.

Prescription Convention, article 2 (c), (d), (e).

#### Commentary

1. This article deals with the determination of the relevant "place of business" of a party and with the effect of the nationality of the parties or of the civil or commercial character of the parties or the contract on the application of this convention to a contract.

#### Place of business, subparagraph (a)

2. Subparagraph (a) deals with the situation in which a party to a contract has more than one place of business. The question arises in this convention in respect of two different matters.

3. The first matter is to determine whether this convention applies to the contract. For this convention to apply the contract must have been entered into by parties whose places of business are in different States.<sup>4</sup> Moreover, in most cases those States must be Contracting States.<sup>5</sup> For the purpose of determining whether this convention applies, no problem arises where all the places of business of one party (X) are situated in Contracting States other than the Contracting State in which the other party (Y) has his place of business. Whichever one is designated as the relevant place of business of X, the places of business of X and Y will be in different Contracting States. The problem arises only when one of X's places of business is situated either in the same State as the place of business of Y or in a non-contracting State. In such a case it becomes crucial to determine which of X's different places of business is the relevant place of business within the meaning of article 1.

<sup>4</sup> Article 1 (1). See, however, article 4.

<sup>5</sup> Article 1 (1) (a).

4. The second matter in which it is important to know the relevant place of business is in regard to the seller's obligation under article 15 (c) to deliver the goods to the buyer "at the place where the seller had his place of business at the time of the conclusion of the contract". In this case it may be equally necessary to choose between two places of business within a given State as to choose between places of business in two different States.

5. Subparagraph (a) lays down the criterion for determining the relevant place of business: it is the place of business "which has the closest relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. In determining the place of business which has the "closest relationship", subparagraph (a) states that regard is to be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Factors that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by a head office located in another State, or the foreign origin or final destination of the goods. When these factors are not known to or contemplated by both parties at the time of the conclusion of the contract, they are not to be taken into consideration.

*Habitual residence, subparagraph (b)*

6. Subparagraph (b) deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 2 of this convention. The present provision provides that in this situation, reference is to be made to his habitual residence.

*Nationality of the parties, civil or commercial character of the transaction, subparagraph (c)*

7. Subparagraph (c) provides that neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the applicability of the convention.

8. The question whether this convention is applicable to a contract of sale of goods is determined primarily by whether the relevant "places of business" of the two parties are in different Contracting States. The relevant "place of business" is determined in subparagraph (a) of this article without reference to nationality, place of incorporation, or place of head office of a party. This subparagraph reinforces that rule by making it clear that the nationality of the parties is not to be taken into consideration.

9. In some legal systems the law relating to contracts of sale of goods is different depending on whether the parties or the contract are characterized as civil or commercial. In other legal systems this distinction is not known. In order to avoid differences in interpretation of the scope of application of the convention, this

subparagraph provides that the convention applies regardless of the civil or commercial character of the parties or contract.

*Article 7*

[(1) This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular, this Convention is not, except as otherwise expressly provided therein, concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

[(2) This Convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims which relate to industrial or intellectual property or the like.]\*

*PRIOR UNIFORM LAW*

ULIS, articles 4, 5 (2), 8.

*Commentary*

1. Article 7 limits the scope of the convention, unless elsewhere expressly provided in the convention, to governing the rights and obligations of the seller and the buyer arising from a contract of sale.

*Formation and validity, paragraph (1)*

2. The only article in this convention which deals with formation or validity is article 11, which provides that a contract of sale of goods need not be in writing and is not subject to any other requirements as to form. Article 11 was included because, although it relates to the formation of the contract and may be considered to relate to the validity of the contract, it also relates to the proof of the terms of the contract and was, therefore, considered important for this convention.

3. Among the provisions in the convention which article 7 makes clear do not confer validity is article 36, in respect of the determination of a price which is not fixed or determinable. If the law of a relevant State does not recognize the validity of a contract where the price is neither fixed nor determinable, article 36 does not confer validity.

*Passing of property, paragraph (1)*

4. Paragraph (1) makes it clear that the convention does not govern the passing of property in the goods sold. In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so since rules are provided in the convention for several questions linked, at least in certain legal systems, to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person not accepted by the buyer;<sup>6</sup> the obligation of the buyer to

\* The Working Group left this paragraph in square brackets to indicate that it was a matter which it considered should be decided by the Commission. See also the reservation of Norway to article 25.

<sup>6</sup> Article 25.

pay the price;<sup>7</sup> the passing of the risk of loss or damage to the goods;<sup>8</sup> the obligation to preserve the goods.<sup>9</sup>

## CHAPTER II. GENERAL PROVISIONS

### Article 8

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### PRIOR UNIFORM LAW

ULIS, article 9.

#### Commentary

1. This article describes the extent to which usages and practices between the parties are binding on the parties to the contract.

2. By the combined effect of paragraphs (1) and (2), usages to which the parties have agreed are binding on them. The agreement may be express or it may be implied.

3. In order for there to be an implied agreement that a usage will be binding on the parties, the usage must meet two conditions: it must be one "of which the parties knew or had reason to know" and it must be one "which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". The trade may be restricted to a certain product, region or set of trading partners.

4. The determining factor whether a particular usage is to be considered as having been impliedly made applicable to a given contract will often be whether it was "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". In such a case it may be that the parties will be held to have "had reason to know" of the usage.

5. Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy.<sup>10</sup> Therefore, the provision in ULIS article 9, paragraph 2, that in the event of conflict between an applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, a provision regarded to be in conflict with the constitutional principles of some States and against public policy in others, has been eliminated as unnecessary.

6. This article does not provide any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade

and for which the parties have given no interpretation. In some cases such an expression, provision or form of contract may be considered to be a usage or practice between the parties, in which case this article would be applied.

### Article 9

A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result.

#### PRIOR UNIFORM LAW

ULIS, article 10.

#### Commentary

1. Article 9 defines "fundamental breach".

2. The definition of fundamental breach is important because various remedies of buyer and seller,<sup>11</sup> as well as some aspects of the passing of the risk,<sup>12</sup> rest upon it.

3. The basic criterion for a breach to be fundamental is that "it results in substantial detriment to the [injured] party". The determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.

4. In addition to this basic criterion which looks to the harm to the injured party, a breach is fundamental only if "the party in breach foresaw or had reason to foresee such a result", i.e., the result which did occur. It should be noted that it is not necessary that the party in breach did in fact foresee the result.

### Article 10

(1) Notices provided for by this Convention must be made by the means appropriate in the circumstances.

(2) A declaration of avoidance of the contract is effective only if notice is given to the other party.

(3) If a notice of avoidance or any notice required by article 23 is sent by appropriate means within the required time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice.

#### PRIOR UNIFORM LAW

ULIS, articles 14 and 39, paragraph 3.

#### Commentary

1. Article 10 provides the rules in respect of notices required by this Convention.

*Obligation to use appropriate means, paragraph (1)*

2. Paragraph (1) makes it clear that a party who is required by the convention to send a notice must use the means appropriate in the circumstances. There may be more than one means of communication which is appropriate in the circumstances. In such a case the

<sup>7</sup> Article 39.

<sup>8</sup> Articles 64-67.

<sup>9</sup> Articles 60-63.

<sup>10</sup> Article 5.

<sup>11</sup> See articles 27 (2), 29 (1), 30 (1) (a), 32 (2), 45 (1) (a), 48 (1) and 49.

<sup>12</sup> See article 67.



sender may use the one which is the most convenient for him.

3. A communication is appropriate "in the circumstances" if it is appropriate to the situation of the parties. A means of communication which is appropriate in one set of circumstances may not be appropriate in another set of circumstances. For example, even though a particular form of notice may normally be sent by airmail, in a given case the need for speed may make only electronic communication, telegram, telex, or telephone, a means appropriate "in the circumstances".

*Notice of avoidance, paragraph (2)*

4. Paragraph (2) provides that any declaration of avoidance of a contract under this convention<sup>13</sup> is effective only if notice is given to the other party.

*Risk in transmission, paragraph (3)*

5. Paragraph (3) states that if a party has sent a notice of avoidance of the contract or a notice that the goods do not conform to the contract as required by article 23 by an appropriate means within the required time, "the fact that the notice fails to arrive or fails to arrive within [the required] time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice". Therefore, the risk of the loss or delay in or the defective transmission of the notice falls on the addressee.

6. Paragraph (3) does not apply to the other notices required by this convention<sup>14</sup> and no rule on the risk of transmission is given as to those notices. It should be noted, however, that paragraph (1) requires all notices to be made by the means appropriate in the circumstances.

*[Article 11\*]*

A contract of sale need not be evidenced by writing and is not subject to any other requirements as to form. It may be proved by means of witnesses.]

*PRIOR UNIFORM LAW*

*ULIS, article 15.*

Uniform Law on the Formation of Contracts, article 3.

*Commentary*

1. Article 11 provides that a contract of sale need not be evidenced by writing and is not subject to any other requirements as to form.

2. Even though article 11 could be considered to relate to a matter of formation or validity,<sup>15</sup> the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract led to

\* The Working Group left this article in square brackets to indicate that it was a matter which it considered should be decided by the Commission. The USSR reserved its position in respect of this article.

<sup>13</sup> Articles 30, 45, 47, 48 and 49 provide for a declaration of avoidance of a contract under appropriate circumstances.

<sup>14</sup> Articles 16 (1), 29 (3), 46 (2), 47 (3) notice of suspension only, 50 (4), 63 (1), 63 (2).

<sup>15</sup> The terms of this article are to be found in almost identical words in article 3 of the Uniform Law on the Formation of Contracts for the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

the decision to include it in the present convention. Nevertheless, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract even though the contract itself would be enforceable between the parties.

*Article 12*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.

*PRIOR UNIFORM LAW*

Convention on the International Sale of Goods, The Hague, 1 July 1964, article VII.

*ULIS, article 16.*

*Commentary*

1. This article considers the extent to which a national court is required to enter a judgement for specific performance of an obligation arising under this convention.

2. If the seller does not perform one of his obligations under the contract of sale or the convention, article 27 provides that "the buyer may require performance by the seller". Similarly, article 43 authorizes the seller to "require the buyer to pay the price, take delivery or perform any of his other obligations".

3. The question arises whether the injured party can obtain the aid of a court to enforce the obligation of the party in default to perform the contract. In some legal systems the courts are authorized to order specific performance of an obligation. In other legal systems courts are not authorized to order certain forms of specific performance and those States could not be expected to alter fundamental principles of their judicial procedure in order to bring this convention into force. Therefore, article 12 provides that a court is not bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this convention, e.g., domestic contracts of sale. Therefore, if a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, article 12 does not limit the application of articles 27 or 43. Article 12 limits their application only if a court could not under any circumstances order such a form of specific performance.

4. It should be noted that articles 27 and 43, where not limited by this article, have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party.

## Article 13

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity.

## PRIOR UNIFORM LAW

ULIS, article 17.

Prescription Convention, article 7.

## Commentary

National rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, article 13 emphasizes the importance, in the interpretation and application of the provisions of the convention, of having due regard for the international character of the convention and for the need to promote uniformity.

## CHAPTER III. OBLIGATIONS OF THE SELLER

## Article 14

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

## PRIOR UNIFORM LAW

ULIS, article 18.

## Commentary

Article 14 states the principal obligations of the seller and introduces chapter III of the convention. The principal obligations of the seller are to deliver the goods, to hand over any documents relating thereto and to transfer the property in the goods. The seller must carry out his obligations "as required by the contract and this Convention". Since article 5 of this convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and this convention, the seller must fulfil his obligations as required by the contract.

## SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

## Article 15

If the seller is not required to deliver the goods at a particular place, delivery is made:

(a) If the contract of sale involves carriage of the goods, by handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding paragraph, the contract relates to

(i) Specific goods, or

(ii) Unidentified goods to be drawn from a specific stock or to be manufactured or produced,

and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, by placing the goods at the buyer's disposal at that place;

(c) In other cases by placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

## PRIOR UNIFORM LAW

ULIS, articles 19, paragraph 2, and 23, paragraphs 1 and 2.

## Commentary

1. The seller's primary obligation is to "deliver the goods" as required by the contract and this convention.

2. Article 15 states how and where the seller's obligation to deliver is fulfilled. Article 17 states when the seller is obligated to deliver.

*"The goods" which must be delivered*

3. In order for the seller to deliver "the goods", in the case of specific goods, he must deliver the exact goods called for in the contract. In the case of unidentified goods, he must deliver goods which generally conform to the description of the type of goods called for by the contract. Therefore, if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes. However, the seller has delivered "the goods" if he does the appropriate act called for by subparagraphs (a) to (c) in respect of the specific goods described in the contract or, in the case of unidentified goods, of goods which conform to the generic description in the contract even though they are non-conforming or are not delivered at the time required or by the means of transportation specified. Therefore, the handing over to the carrier of No. 3 grade corn when No. 2 grade was called for or the handing over to the carrier of five tons when 10 tons were called for would constitute delivery of "the goods". Even though "the goods" had been "delivered", the buyer would be able to exercise any rights which he might have because of the seller's failure to "deliver the goods" as required by the contract and this Convention.<sup>16</sup> Among the buyer's rights would be the right to avoid the contract where the failure of the seller amounted to a fundamental breach.<sup>17</sup> Nevertheless, the seller would have "delivered the goods".

*Where the contract of sale involves the carriage of goods, subparagraph (a)*

4. Where the contract of sale involves the carriage of goods, delivery of the goods is effected by handing them over to the first carrier for transmission to the buyer.

5. The contract of sale involves the carriage of goods if the seller is required or authorized to send the goods to the buyer. Both shipment contracts (e.g. CIF, FOB, FOR) and destination contracts (e.g. Ex Ship, Delivered at ...) are contracts of sale which involve carriage of the goods. However, in order to make it clear that, *inter alia*, in a destination contract, delivery is not made by handing the goods over to the

<sup>16</sup> Article 14. Buyer's remedies for seller's breach are set forth in article 26.

<sup>17</sup> Article 30 (a). For the effect of a fundamental breach by seller on the passing of the risk of loss, see article 67.

first carrier, the opening clause of article 15 provides that the specific rules in article 15 (a) to (c) do not apply "if the seller is required to deliver the goods at a particular place".

6. If the goods are to be transported by two or more carriers, delivery of the goods is made by handing them over "to the first carrier for transmission to the buyer". Therefore, if the goods are shipped from an inland point by rail or truck to a port where they are to be loaded aboard a ship, delivery is effected when the goods are handed over to the railroad or trucking firm.

7. The delivery of the goods is effected by handing over the goods to the first carrier, not by handing over the documents to the buyer. Even if the seller never handed over the documents to the buyer as required by the contract, he would have delivered the goods if they had been handed over to the carrier. Of course the seller would be subject to any remedies provided by the contract and this convention for his failure to hand over the documents.

*Goods at or to be manufactured or produced at a particular place, subparagraph (b)*

8. If, at the time of the conclusion of the contract, the parties knew that the goods were at or were to be manufactured or produced at a particular place and the contract does not require or authorize the shipment of the goods, delivery of the goods is effected by placing the goods at the buyer's disposal at the place at which the goods were or were to be manufactured or produced.

9. There are a number of different situations envisaged by this subparagraph. The first is that the goods are specific goods. For example, if the contract was for the sale by one dealer to another dealer of a specific painting which the parties knew was at a particular location, delivery would be effected by the seller placing the painting at the buyer's disposal at that location. The same solution is given if 10 tons of scrap steel are to be drawn from a specific pile of scrap steel or if 100 chairs are to be manufactured in a particular factory.

10. If the goods are already in transit at the time of the conclusion of the contract, the contract of sale is not one which "involves" the carriage of goods under subparagraph (a) of this article but is one which involves goods which are at a particular place and which are therefore subject to this subparagraph. This is true whether the sale is of an entire shipment under a given bill of lading, in which case the goods are specified goods, or whether the sale is of only a part of the goods covered by a given bill of lading. Otherwise, if the contract of sale of goods already in transit were held to "involve the carriage of goods", thereby making it subject to article 15 (a), the seller would never "deliver the goods" because the goods would not be handed over to the carrier "for transmission to the buyer". However, by virtue of article 65 (2) the risk of loss would pass to the buyer at the time the goods were handed over to the first carrier, even though the handing over took place prior to the conclusion of the contract of sale.

11. Both parties must know of the location of the specific goods, of the location of the specific stock from

which the goods to be delivered are to be drawn, or of the place at which the goods are to be manufactured or to be produced. They must have actual knowledge; it does not suffice if one or the other party ought to have had such knowledge but did not. Moreover, they must have this knowledge at the time of the conclusion of the contract.

12. Goods are placed at the disposal of the buyer when the seller has done that which is necessary for the buyer to be able to take possession. Normally, this would include the identification of the goods to be delivered, the completion of any pre-delivery preparation, such as packing, to be done by the seller, and the giving of such notification to the buyer as would be necessary to enable him to take possession.

13. If at the time the contract is concluded the goods are in the possession of a bailee, such as a warehouseman or a carrier, they might be placed at the disposal of the buyer by such means as the seller's instructions to the bailee to hold the goods for the buyer or by the seller handing over to the buyer in appropriate form the documents which control the goods.

*In other cases, subparagraph (c)*

14. In other cases, not covered by subparagraphs (a) and (b), delivery is effected by placing the goods at the buyer's disposal where the seller carried on business at the time of the conclusion of the contract. If the seller had more than one place of business, the place at which delivery is to be made is governed by article 6 (a).

15. Although subparagraph (c) is a residuary rule to cover those situations not discussed in subparagraphs (a) and (b), it does not state a rule for "all other cases". In particular, the contract may provide for delivery to be made at the buyer's place of business or at some other particular place not mentioned in this article. The opening phrase of article 15 recognizes that in all such cases delivery would be made by handing over the goods or by placing them at the buyer's disposal, whichever is appropriate, at the particular place provided in the contract.

*Effect of reservation of title*

16. Delivery is effected under this article and risk of loss passes under article 65 or 66 even though the seller reserves title to the goods or otherwise reserves an interest in the goods if such reservation of title or other interest is for the purpose, *inter alia*, of securing the payment of the price.

#### Article 16

(1) If the seller is required to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is required to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not required to effect insurance in respect of the carriage of the goods, the seller must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

#### PRIOR UNIFORM LAW

ULIS, articles 19, paragraph 3, 54, paragraphs 1 and 2.

#### Commentary

1. Article 16 describes several additional obligations of the seller where the contract of sale involves the carriage of goods.

#### Identification of the goods, paragraph (1)

2. The seller will normally identify the goods to the contract at or before the time of shipment by marking them with the name and address of the buyer, by procuring shipping documents which specify the buyer as the consignee or as the party to be notified on the arrival of the goods, or by some similar method. However, if the seller ships identical goods to several buyers he may fail to take any steps to identify the goods prior to their arrival. This may especially be the case where the sale is of goods such as grains which are shipped in bulk.

3. Failure to identify the goods would not affect either their "delivery" under article 15 (a) or the passage of the risk under article 65 (1)<sup>18</sup> so long as it can be shown that the goods were "handed over to the ... carrier for transmission to the buyer".<sup>19</sup> However, the fact that the goods have not been identified leaves the seller in a position to determine which buyer would suffer the loss where the loss has occurred to only a part of the goods. Moreover, if the goods are not identified, the buyer may not be able to procure the necessary insurance.<sup>20</sup>

4. In order to overcome these difficulties paragraph (1) requires the seller to send the buyer a notice of the consignment which specifies the goods if the goods are not otherwise identified to the contract. If the seller fails to do so, the buyer has available all the usual remedies including the right to require the other party to give notice of the consignment, the right to damages, and potentially the right to avoid the contract.<sup>21</sup>

<sup>18</sup> Article 66 (2) provides that "if the contract relates to the sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer [and therefore the risk does not pass] until they have been clearly identified to the contract". However, article 66 (2) applies only to contracts in which the contract of sale does not involve carriage of the goods.

<sup>19</sup> If the contract is for a portion of a shipment of goods in bulk, the goods have not been handed over to the carrier for transmission to the buyer and, therefore, the risk does not pass on shipment but only after arrival. See para. 5 of the commentary on article 65.

<sup>20</sup> Compare article 16 (3) and paragraphs 6 and 7 of this commentary.

<sup>21</sup> If the failure by the seller to fulfil his obligation to send notice of the consignment constitutes a fundamental breach of the contract, the buyer could avoid the contract, thereby effectively nullifying the passage of the risk. See articles 30 (1) (a) and 67.

#### Contract of carriage, paragraph (2)

5. Certain common trade terms such as CIF and C & F require the seller to arrange for the contract of carriage of the goods while in other cases such as FOB sales, where the seller would not normally be required to do so, the parties on occasion agree that the seller will in fact make the shipping arrangements. Paragraph (2) specifies that in all such cases where "the seller is required to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation".

#### Insurance, paragraph (2)

6. Either the seller or the buyer may be obligated under the contract of sale to procure insurance for loss of the goods during their carriage. This obligation will normally be determined by the trade term used in the contract of sale and is not governed by the passage of the risk of loss. For example, if the price is quoted CIF, the seller must procure the insurance even though the risk of loss passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.<sup>22</sup> If the price is quoted C & F or FOB, in the absence of other indications in the contract, it is the buyer's responsibility to procure any necessary insurance.<sup>23</sup>

7. Paragraph (2) provides that if the seller is not required by the contract to procure the insurance, he must provide the buyer with all available information necessary to enable him to effect such insurance. This is not a general obligation on the seller as he only has to provide such information if the buyer requests it of him. However, in some trades the seller may be required to give such information even without request on the buyer's part by virtue of a usage which becomes part of the contract pursuant to article 8 of the present convention.

#### Article 17\*

The seller must deliver the goods:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

#### PRIOR UNIFORM LAW

ULIS, articles 20, 21 and 22.

#### Commentary

1. Article 17 deals with the time at which the seller must fulfil his contractual obligation to deliver the goods.

2. Since the seller's obligation is to deliver at a certain time, he must hand over the goods to the car-

\* Czechoslovakia reserved its position in relation to the inclusion of "usage" in article 17 (a) and 17 (b).

<sup>22</sup> Article 65 (1).

<sup>23</sup> See, for example, Incoterms 1953.

rier, place the goods at the buyer's disposal at the appropriate place as required by article 15 or do such other act as may constitute delivery under the terms of the contract at or by the time specified. Article 17 does not require that the buyer have taken physical possession on the date on which delivery was due or even have been in a position to take physical possession if, for example, delivery was made by handing over the goods to a carrier.

*Delivery on fixed or determinable date, subparagraph (a)*

3. If the date for delivery is fixed or determinable by reference either to an agreement between the parties or to a usage which is applicable to their contract pursuant to article 8, the seller must deliver on that date.

*Delivery during a period, subparagraph (b)*

4. In international trade it is common for the date of delivery to be fixed in terms of a period of time. This is generally to allow the seller some flexibility in preparing the goods for shipment and in providing for the necessary transportation. Therefore, subparagraph (b) authorizes the seller to deliver goods "at any time within that period".

5. However, it should be noted that in some cases the parties may have modified their original agreement which called for delivery within a period by specifying a particular date for delivery, a date which might fall within or without the period of time originally specified. For instance, if the contract originally called for delivery in July, by subsequent agreement the seller may have agreed to deliver on 15 July. In such case delivery must be made on that date.

6. On occasion the provision in the contract or in an applicable usage that delivery must be within a specified period of time is intended to permit the buyer to arrange for carriage of the goods or to schedule the exact arrival time of the goods in order to fulfil his needs and not overtax his storage or handling capacity as those needs or capacity may be determined subsequent to the conclusion of the contract. Subparagraph (b) states, therefore, that the seller may not choose the exact delivery date if "the circumstances indicate that the buyer is to choose the date".

7. It should be noted that where the buyer is to choose the delivery date, the seller will need notice of that date in time to prepare the goods for shipment and to make any contracts of carriage he may be required to make under the contract of sale. If the buyer does not give such notice in adequate time, the seller would not be liable for his own non-performance to the extent he could prove that it was due to the buyer's fault and not his own.<sup>24</sup>

*Delivery in all other cases, subparagraph (c)*

8. In all other cases not governed by subparagraphs (a) and (b) the seller must deliver the goods within a reasonable time after the conclusion of the contract. What is a reasonable time depends on what constitutes acceptable commercial conduct in the circumstances of the case.

<sup>24</sup> See article 50 (1).

## Article 18

If the seller is required to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

### PRIOR UNIFORM LAW

ULIS, article 50.

### Commentary

1. Article 18 deals with the second obligation of the seller described in article 14, i.e., to hand over to the buyer any documents relating to the goods. The location of this article with the articles dealing with the delivery of the goods emphasizes the close relationship between the handing over of documents and the delivery of the goods.

2. The article does not itself list which documents the seller must hand over to the buyer. In addition to documents of title, such as bills of lading, dock receipts and warehouse receipts, the seller may be required by the contract to hand over certificates of insurance, commercial or consular invoices, certificates of origin, weight or quality and the like.

3. The documents must be handed over at the time and place and in the form required by the contract. Normally, this will require the seller to hand over the documents in such time and in such form as will allow the buyer to take possession of the goods from the carrier when the goods arrive at their destination, bring them through customs into the country of destination and exercise claims against the carrier or insurance company.

4. Article 18 does not limit the right of the seller to withhold the documents until paid by the buyer when the contract calls for payment against documents.<sup>25</sup>

## SECTION II. CONFORMITY OF THE GOODS

### Article 19

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion

<sup>25</sup> Article 39.

of the contract the buyer knew or could not have been unaware of such non-conformity.

#### PRIOR UNIFORM LAW

ULIS, articles 33 and 36.

#### Commentary

1. Article 19 states the extent of the seller's obligation to deliver goods which conform to the contract.

2. This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under the present convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality.<sup>26</sup> It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods.<sup>27</sup>

#### *Seller's obligations as to conformity of the goods, paragraph (1)*

3. Paragraph (1) states the standards by which the seller's obligation to deliver goods which conform to the contract is measured. The first sentence emphasizes that the goods must conform to the quantity, quality and description required by the contract and must be contained or packaged in the manner required by the contract. This provision recognizes that the overriding source for the standard of conformity is the contract between the parties. The remainder of paragraph (1) describes specific aspects of the seller's obligations as to conformity which apply "except where otherwise agreed".

#### *Fit for ordinary purposes, subparagraph (1) (a)*

4. Goods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for all the purposes for which goods of the same description are ordinarily used. The standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description. The scope of the seller's obligation is not determined by whether the seller could expect the buyer himself to use the goods in some one of the ways in which such goods are ordinarily used. In particular, the obligation to furnish goods which are fit for all the purposes for which goods of the contract description are ordinarily used also covers a buyer who has purchased the goods for resale rather than use. For goods to be fit for ordinary purposes, they must be honestly resalable in the ordinary course of business. If the goods available to the seller are fit for only some of the purposes for which such goods are ordinarily used, he must ask the buyer the particular pur-

poses for which these goods are intended so that he can refuse the order if necessary.

5. The seller is not obligated to deliver goods which are fit for some special purpose which is not a purpose "for which goods of the same description are ordinarily used" unless the buyer has "expressly or impliedly made known to the seller at the time of the time of the conclusion of the contract" such intended use.<sup>28</sup> This problem may arise if the buyer intends to use the goods for a purpose for which goods of this kind are sometimes, but not ordinarily used. In the absence of some indication from the buyer that such a particular purpose is intended, the seller would have no reason to attempt to supply goods appropriate for such purpose.

#### *Fit for particular purpose, subparagraph (1) (b)*

6. Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular use to which the goods are to be put. If the buyer expressly or impliedly makes known to the seller such purpose, the seller must deliver goods fit for that purpose.

7. The purpose must be known to the seller by the time of the conclusion of the contract so that the seller can refuse to enter the contract if he is unable to furnish goods adequate for that purpose.

8. The seller is not liable for failing to deliver goods fit for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement". The circumstances may show, for example, that the buyer ordered the goods by brand name or by highly technical specifications. In such a situation it may be held that the buyer had not relied on the seller's skill and judgement in making the purchase.

9. It would also be unreasonable for the buyer to rely on the seller's skill and judgement if the seller did not purport to have any special knowledge in respect of the goods in question.

#### *Sample or model, subparagraph (1) (c)*

10. If the contract is negotiated on the basis of a sample or model, the goods delivered must possess the qualities which are possessed by the goods the seller has held out as the sample or model. Of course, if the seller indicates that the sample or model is different from the goods to be delivered in certain respects, he will not be held to those qualities of the sample or model but to those qualities which he has indicated are possessed by the goods to be delivered.

#### *Packaging, subparagraph (1) (d)*

11. Subparagraph (1) (d) makes it one of the seller's obligations in respect of the conformity of the goods that they "are contained or packaged in the manner usual for such goods". This provision which sets forth

<sup>26</sup> The necessity that the seller hand over or place at the buyer's disposal goods which meet the contract description in order to have "delivered the goods" is discussed in paragraph 3 of the commentary on article 15.

<sup>27</sup> Article 26 (1).

<sup>28</sup> Subpara. 1 (b).



a minimum standard, is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging.

*Buyer's knowledge of the non-conformity, paragraph (2)*

12. The obligations in respect of quality in subparagraphs (1) (a) to (d) are imposed on the seller by this convention because in the usual sale the buyer would legitimately expect the goods to have such qualities even if they were not explicitly stated in the contract. However, if at the time of contracting the buyer knew or could not have been unaware of a non-conformity in respect of one of those qualities, he could not later say that he had expected the goods to conform in that respect.

13. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate.<sup>29</sup>

*Article 20*

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

*PRIOR UNIFORM LAW*

ULIS, article 35.

*Commentary*

1. Article 20 deals with the time at which is to be judged the conformity of the goods to the requirements of the contract and the present convention.

*Basic rule, paragraph (1)*

2. Paragraph (1) contains the basic rule that the seller is liable in accordance with the contract and this convention for any lack of conformity which exists at the time the risk passes even though the lack of conformity becomes apparent only after that date. The rule that the conformity of the goods to the contract is to be measured as of the time risk passes is a necessary implication of the rules on risk of loss or damage.

3. Although the conformity of the goods is measured at the time the risk passes, the buyer may not

know of a non-conformity until much later. This may occur because the non-conformity becomes evident only after the goods have been used. It may also occur because the contract involves the carriage of goods. In such a case the risk passes when the goods are handed over to the first carrier for transmission to the buyer.<sup>30</sup> The buyer, however, will normally not be able to examine the goods until after they have been handed over to him by the carrier at the point of destination, some time after the risk has passed. In either case if the non-conformity existed at the time the risk passed, the seller is liable.

*Example 20A:* A contract called for the sale of "No. 1 quality corn, FOB seller's city". Seller shipped No. 1 corn, but during transit the corn was damaged by water and on arrival the quality was No. 3 rather than No. 1. Buyer has no claim against the Seller for non-conformity of the goods since the goods did conform to the contract when risk of loss passed to the Buyer.

*Example 20B:* If the corn in example 20A had been No. 3 quality when shipped, the Seller would have been liable even though the Buyer did not know of the non-conformity until the corn arrived at the Buyer's port or place of business.

*Damage subsequent to passage of risk, paragraph (2)*

4. Paragraph (2) provides that even after the passage of the risk the seller remains liable for any damage which occurs as a breach of one of his obligations. Although this is most evidently true when the damage occurs because of some positive act on the part of the seller, it is also true when the obligation which has been breached is an express guarantee given by the seller that the goods will retain some particular characteristics for a specified period after the risk of loss has passed. Since article 20 (1) states that conformity of the goods is to be judged at the time risk passes, it was considered necessary to state specifically that the seller was liable for any breach of an express guarantee of quality.

5. It should be noted that article 20 (2) states that the seller is liable "for any lack of conformity" which occurs after the risk has passed rather than "for the consequences of any lack of conformity", which appeared in ULIS article 35, paragraph 2. This makes it clear that the defect or flaw in the goods does not have to have existed at the time the risk passed if the lack of conformity in question is due to a breach of any of the obligations of the seller.

*Article 21*

If the seller has delivered goods before the date for delivery, up to that date he may, deliver any missing part or quantity of the goods or deliver other conforming goods or cure any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided in article 55.

<sup>29</sup> Article 26 (1).

<sup>30</sup> Article 65 (1).

## PRIOR UNIFORM LAW

## ULIS, article 37.

*Commentary*

1. Article 21 deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but the goods delivered do not conform with the contract.<sup>31</sup> It would be possible to say that the decision whether the goods conform to the requirements of the contract shall be made once and for all at the time delivery has been made. However, article 21 provides that the seller may remedy the non-conformity by delivering any missing part or quantity of the goods, by delivering replacement goods which are in conformity with the contract, or by curing any non-conformity in the goods.<sup>32</sup>

2. The seller has the right to cure the non-conformity of the goods under article 21 only until the "date for delivery". After the date for delivery his right to cure is based on article 29. In those international sales which involve carriage of the goods, delivery is effected by handing over the goods to the first carrier.<sup>33</sup> Therefore, in those contracts the date until which the seller may cure any non-conformity of the quantity or quality of the goods under article 21 is the date by which he was required by the contract to hand over the goods to the carrier.

3. The seller's right to cure is also limited by the requirement that his exercise of that right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

*Example 21A:* The contract required the Seller to deliver 100 machine tools by 1 June. He shipped 75 by an appropriate carrier on 1 May which arrived on 15 June. He also shipped an additional 25 machine tools on 30 May which arrived on 15 July. Seller cured the non-conformity by handing over the remaining 25 machine tools to the carrier before the contract date for delivery, 1 June.

*Example 21B:* If the contract in example 21A did not authorize Seller to deliver by two separate shipments, the Seller could cure the original non-conformity as to quantity only if receiving the missing 25 machine tools in a later second shipment did not cause Buyer "unreasonable inconvenience or unreasonable expense".<sup>34</sup>

*Example 21C:* On arrival of the machine tools described in example 21A at the Buyer's place of business on 15 June and 15 July, the tools were found to be defective. It was too late for Seller to cure under article 21 because the date for delivery (1 June) had passed. However, the Seller may have a right to cure under article 29.

<sup>31</sup> The buyer is not required to take delivery of the goods prior to the delivery date: article 33 (1).

<sup>32</sup> In order for the seller to be made aware of any non-conformity so that he can effectively exercise his right to cure, the buyer is required by article 22 to examine the goods within as short a period as is reasonable in the circumstances and by article 23 to give the seller notice of the non-conformity.

<sup>33</sup> Article 15 (a).

<sup>34</sup> For a discussion of the result if the sale was a CIF or other documentary sale see paras. 4 and 5 of the commentary on article 29.

*Example 21D:* The machine tools described in example 21A were handed over to the Buyer by the carrier prior to 1 June, the contractual delivery date. When examined by the Buyer the tools were found to be defective. Although the Seller had the ability to repair the tools prior to the delivery date, he would have had to do the work at the Buyer's place of business. If the Seller's efforts to cure under such circumstances would cause "unreasonable inconvenience or unreasonable expense" to Buyer, the Seller had no right to cure.

*Article 22*

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at the place of destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

## PRIOR UNIFORM LAW

## ULIS, article 38.

*Commentary*

1. Article 22 describes the point of time when the buyer is obligated to examine the goods. This article is prefatory to article 23, which provides that if the buyer fails to notify the seller of lack of conformity of the goods within a reasonable time after he has discovered it or ought to have discovered it, he loses the right to rely on the lack of conformity. The time when the buyer is obligated to examine the goods under article 22 constitutes the time when the buyer "ought to have discovered" the lack of conformity under article 23, unless the non-conformity is one which could not have been discovered by such examination.

2. The examination which this article requires the buyer to make is one which is reasonable in the circumstances. The buyer is normally not required to make an examination which would reveal every possible defect. That which is reasonable in the circumstances will be determined by the individual contract and by usage in the trade and will depend on such factors as the type of goods and the nature of the parties. Because of the international nature of the transaction, the determination of the type and scope of examination required should be made in the light of international usages.

3. Paragraph (1) states the basic rule that the buyer must examine the goods or cause them to be examined "within as short a period as is practicable in the circumstances". Paragraphs (2) and (3) state special applications of this rule for two particular situations.

4. Paragraph (2) provides that if the contract of sale involves the carriage of goods "examination may be deferred until after the goods have arrived at the place of destination". This rule is necessary because, even though delivery is effected and risk of loss passes when the goods are handed over to the first carrier for

transmission to the buyer,<sup>35</sup> the buyer is normally not in a physical position to examine the goods until they arrive at the destination.

5. Paragraph (3) carries this thought one step further. Where the buyer redispaches the goods without a reasonable opportunity for examination by him, "examination of the goods may be deferred until the goods have arrived at the new destination". The typical situation in which the buyer will not have a reasonable opportunity to examine the goods prior to their redispach is where they are packed in such a manner that unpacking them for inspection prior to their arrival at the final destination is impractical. The redispach of the goods may be necessary because the buyer intends to use the goods himself at some place other than the place of destination of the contract of carriage, but more often it will arise because the buyer is a middleman who has resold the goods in quantities at least equal to the quantities in which they are packed.

6. The examination may be deferred until after the goods have arrived at the new destination only if the seller knew or ought to have known at the time the contract was concluded of the possibility of redispach. It is not necessary that the seller knew or ought to have known that the goods would be redispached, only that there was such a possibility.

#### Article 23\*

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller a notice specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

#### PRIOR UNIFORM LAW

##### ULIS, article 39.

Prescription Convention, articles 8 and 10, paragraph 2.

#### Commentary

1. Article 23 states the consequences of the buyer's failure to give notice of non-conformity of the goods to the seller within a reasonable time.

##### *Obligation to give notice, paragraph (1)*

2. Under paragraph (1) the buyer loses his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a specified time. If notice is not given within that time, the buyer cannot claim damages under article 26 (1), require the seller to cure the lack of conformity under arti-

cle 27, avoid the contract under article 30 or declare a reduction of the price under article 31.<sup>36</sup>

3. The buyer must send the notice to the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If the lack of conformity could have been revealed by the examination of the goods under article 22 the buyer ought to have discovered the lack of conformity at the time he examined them or ought to have examined them. If the lack of conformity could not have been revealed by the examination, the buyer must give notice within a reasonable time after he discovered the non-conformity in fact or ought to have discovered it in the light of the ensuing events.

*Example 23A:* The non-conformity in the goods was not such that the Buyer ought to have discovered it in the examination required by article 22. However, the non-conformity was such that it ought to have been discovered once the Buyer began to use the goods. In this case the Buyer must give notice of the non-conformity within a reasonable time after he "ought to have discovered" it by use.

4. The purpose of the notice is to inform the seller what he must do to cure the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Therefore, the notice must not only be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it, but it must specify the nature of the lack of conformity.

##### *Termination of the right to give notice, paragraph (2)*

5. Even though it is important to protect the buyer's right to rely on latent defects which become evident only after a period of time has passed, it is also important to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture.

6. Paragraph (2) recognizes this interest by requiring the buyer to give the seller notice of the non-conformity at the latest two years from the date the goods were actually handed over to him. In addition, under articles 8 and 10 of the Prescription Convention the buyer must commence judicial proceedings against the seller within four years of the date the goods were actually handed over. It should be noted that while the principles which lie behind paragraph (2) of this article and articles 8 and 10 of the Prescription Convention are the same and while the starting points for the running of the two or four year periods are the same, the obligation under paragraph (1) to give notice is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention.

<sup>35</sup> Articles 15 (a) and 65 (1).

\* The Federal Republic of Germany, Hungary and the Union of Soviet Socialist Republics reserved their positions in respect to paragraph (1) of article 23.

<sup>36</sup> For a discussion of failure to give notice in relation to the passing of risk, see paragraph 3 of the commentary on article 67 and example 67B.

7. The overriding principle of the autonomy of the will of the parties recognized by article 5 would allow the parties to derogate from the general obligation to give the notice required by paragraph (2). However, in the absence of a special provision, it would not be clear whether the obligation to give notice within two years was affected by an express guarantee that the goods would retain specified qualities or characteristics for a specified period.<sup>87</sup> Accordingly paragraph (2) provides that this obligation to give notice within two years will not apply if "such time-limit is inconsistent with a contractual period of guarantee". Whether it is, or is not, inconsistent is a matter of interpretation of the guarantee.

**Example 23B:** The contract for the sale of machine tools provides that the machine tools will produce a minimum of 100 units per day for at least three years. Because of the three-year guarantee, this clause is inconsistent with the two-year time-limit in paragraph (1). It would be a matter of interpretation of the guarantee clause whether the notice of failure to produce 100 units per day had to be given within three years or whether Buyer had an additional period after the three years to notify Seller that within the three-year period there was a breach of the guarantee.

**Example 23C:** The contract provides that the machine tools will produce a minimum of 100 units per day for one year. It would be unlikely that this contract calling for a specified performance for one year would be interpreted to affect the two-year time-limit in article 23 (2) within which notice must be given.

**Example 23D:** The contract provides that notice of a failure to produce at least 100 units per day must be given within 90 days of the date of delivery. Such an express clause would be inconsistent with the two-year time-limit in paragraph (2).

#### *Risk in transmission*

8. Article 10 (3) states that if any notice required by article 23 is "sent by appropriate means within the required time, the fact that the notice fails to arrive within [the required] time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice". Therefore, the risk of the loss, delay or inaccurate transmission of the notice required by article 23 falls on the seller.

#### *Article 24*

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### *PRIOR UNIFORM LAW*

##### *ULIS, article 40.*

#### *Commentary*

Article 24 relaxes the notice requirements of articles 22 and 23 where the lack of conformity relates to facts which the seller knew or of which he could not have been unaware and which he did not disclose. The

<sup>87</sup> Article 20 (2) provides that the seller is liable for any lack of conformity of the goods which occurs after the delivery date if that lack of conformity is in breach of an express guarantee.

seller has no reasonable basis for requiring the buyer to notify him of these facts.

#### *Article 25\**

The seller must deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

#### *PRIOR UNIFORM LAW*

##### *ULIS, article 52, paragraph (1).*

#### *Commentary*

##### *Claims of third persons*

1. Article 25 states the obligation of the seller to deliver goods which are free from the right or claim of any third person. Naturally, the seller does not have such an obligation if the buyer agreed to take the goods subject to such right or claim.

2. The seller has breached his obligation not only if the third party's claim is valid, i.e., if the third party has a *right* in or to the goods; the seller has also breached his obligation if a third party makes a *claim* in respect of the goods. The reason for this rule is that once a third party has made a claim in respect of the goods, until the claim is resolved the buyer will face the possibility of litigation with and potential liability to the third party. This is true even though the seller can assert that the third-party claim is not valid or the buyer can assert that, under the appropriate law applicable to his purchase, as a good faith purchaser for value from a merchant he buys free of third-party claims even if that claim is valid, i.e., that *possession vaut titre*. In either case the third party may commence litigation that will be time-consuming and expensive for the buyer and which may have the consequence of delaying the buyer's use or resale of the goods. It is the seller's responsibility to remove this burden from the buyer.

3. This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of the goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous.<sup>88</sup> If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim<sup>89</sup> or the buyer can exercise his rights as set out in article 26.

\*Norway expressed its reservation to this article and proposed the following text to paragraph (2) to article 25:

"(2) Where the goods are subject to a right or claim of a third person based on industrial or intellectual property, the seller is responsible to the buyer only to the extent that such right or claim arises, or is recognized, under the law of the State where the seller has his place of business at the time of the conclusion of the contract."

<sup>88</sup> Cf. article 47 on the right of a party to suspend his performance when he has reasonable grounds to believe that the other party will not perform a substantial part of his obligations.

<sup>89</sup> Although the seller may ultimately free the goods from the third person's claim by successful litigation, this could seldom be accomplished within a reasonable time from the buyer's point of view. When it cannot, the seller must either replace the goods, induce the third person to release the claim as to the goods or provide the buyer with the indemnity adequate to secure him against any potential loss arising out of the claim.

4. Third-party rights and claims to which article 25 is addressed include only rights and claims which relate to property in the goods themselves by way of ownership, security interests in the goods, or the like. Article 25 does not refer to claims by the public authorities that the goods violate health or safety regulations and may not, therefore, be used or distributed.<sup>40</sup> Moreover, article 7 (2) provides that this convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims which relate to industrial or intellectual property or the like.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### Article 26

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in article 27 to 33;

(b) Claim damages as provided in article 55 to 59.

(2) The buyer is not deprived of any right he may have to claim damages even though he resorts to other remedies.

(3) If the buyer resorts to a remedy for breach of contract, the seller is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.

#### PRIOR UNIFORM LAW

ULIS, articles 24, 41, 51, 52 and 55.

#### Commentary

1. Article 26 serves both as an index to the remedies available to the buyer if the seller fails to perform any of his obligations under the contract and this convention and as the source for the buyer's right to claim damages.

2. Article 26 (1) (a) provides that in case of the seller's breach, the buyer may "exercise the rights provided in articles 27 to 33". The substantive conditions under which those rights may be exercised are set forth in the articles cited.

3. In addition, article 26 (1) (b) provides that the buyer may "claim damages as provided in articles 55 to 59" "if the seller fails to perform any of his obligations under the contract of sale and this Convention". In order to claim damages it is not necessary to prove a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfil his obligations. Articles 55 to 59, to which article 26 (1) (b) refers, do not provide the substantive conditions as to whether the claim for damages can be exercised but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the seller. First, all the seller's obligations are brought together in one

<sup>40</sup> If the goods delivered are subject to such restrictions, there may be a breach of the seller's obligations under article 19 (1) (a) or (b).

place without the confusions generated by the complexities of repetitive remedial provisions. This makes it easier to understand what the seller must do, that which is of prime interest to merchants. Second, problems of classification are reduced with a single set of remedies. Third, the need for complex cross referencing is lessened.

5. Paragraph (2) provides that a party who resorts to any remedy available to him under the contract or this convention is not thereby deprived of the right to claim any damages which he may have incurred.

6. Paragraph (3) states that the national provisions of law which provide for applications to courts or arbitral tribunals for periods of grace are not to be applied. Such a provision seems desirable in international commerce.

#### Article 27

(1) The buyer may require performance by the seller unless he has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

#### PRIOR UNIFORM LAW

ULIS, articles 24 to 27, 30, 31, 42, 51 and 52.

#### Commentary

1. Article 27 describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed.

#### General rule, paragraph (1)

2. Paragraph (1) recognizes that after a breach of an obligation by the seller, the buyer's principal concern is often that the seller perform the contract as he originally promised. Legal actions for damages cost money and may take a considerable period of time. Moreover, if the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true if alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.

3. Therefore, paragraph (1) grants the buyer the right to require the seller to perform the contract. The seller must deliver the goods or any missing part, cure any defects or do any other act necessary for the contract to be performed as originally agreed.

4. In addition to the right to require performance of the contract, article 26 (2) ensures that the buyer can recover any damages he may have suffered as a result of the delay in the seller's performance.

5. It may at times be difficult to know whether the buyer has made demand that the seller perform under this article or whether the buyer has voluntarily modified the contract by accepting late performance. The application of paragraphs (4) and 5 can be illustrated as follows:

*Example 27A:* When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller "Your

failure to deliver on 1 July as promised may not be too serious for us but we certainly will need the goods by 15 July." Seller subsequently delivered the goods on 15 July. It is difficult to tell whether Buyer's statement was a demand for performance by 15 July or a modification of the contract delivery date from 1 July to 15 July. If it is interpreted as a demand for performance, Buyer can recover any damages he may have suffered as a result of the late delivery. If Buyer's statement is interpreted as a modification of the delivery date, Buyer could receive no damages for late delivery.

6. In order for the buyer to exercise the right to require performance of the contract, he must not have resorted to a remedy which is inconsistent with that right, e.g. by declaring the contract avoided under article 30 or by declaring a reduction of the price under article 31.

7. The style in which article 27 in particular and section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief.<sup>41</sup> However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 27 (1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

8. Although the buyer has a right to the assistance of a court or arbitral tribunal to enforce the seller's obligation to perform the contract, article 12 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this convention, it is not required to enter such a judgement in a case arising under this convention, even though the buyer had a right to require the seller's performance under article 27. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 27 are met.

9. Subject to the rule in paragraph (2) relating to the delivery of substitute goods, this article does not allow the seller to refuse to perform on the grounds that the non-conformity was not substantial or that performance of the contract would cost the seller more than it would benefit the buyer. The choice is that of the buyer.

#### *Substitute goods, paragraph (2)*

10. If the goods which have been delivered do not conform to the contract, the buyer may want the seller

to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice under article 23 or within a reasonable time thereafter".

11. If the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller. Therefore, article 52 (1) provides that, subject to three exceptions set forth in article 52 (2), "the buyer loses his right to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

#### *Buyer's right to cure*

12. In place of requesting the seller to perform pursuant to this article, the buyer may find it more advantageous to cure the defective performance himself or to have it cured by a third party. Article 59, which requires the party who relies on a breach of contract to mitigate the losses, authorizes such measures to the extent that they are reasonable in the circumstances.

#### *Article 28*

The buyer may request performance within an additional period of time of reasonable length. In such a case, the buyer cannot during such period resort to any remedy for breach of contract, unless the seller has declared that he will not comply with the request.

#### *PRIOR UNIFORM LAW*

ULIS, article 44, paragraph 2.

#### *Commentary*

1. Article 28 states the right of the buyer to request the seller to perform the contract within an additional period of time of reasonable length and specifies one of the consequences of such a request.

2. Article 28 is a companion of article 27 which states the right of the buyer to require performance of the contract by the seller and which anticipates the aid of a court or arbitration tribunal in enforcing that right. If the seller delays performing the contract, the judicial procedure for enforcement may require more time than the buyer can afford to wait. It may consequently be to the buyer's advantage to avoid the contract and make a substitute purchase from a different supplier. However, at that point of time it may not be certain that the seller's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 30 (1) (a).

3. In order to remedy this difficulty, article 28 authorizes the buyer to "request performance [by the seller] within an additional period of time of reasonable length". If the seller does not deliver the goods within that additional period of time or declares that he will not comply with the request, the buyer may avoid the contract under article 30 (1) (b).

4. However, in order to protect the seller who may be preparing to perform the contract as requested by the

<sup>41</sup> United Kingdom: Sale of Goods Act 1893, sect. 52 (in part). "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

United States of America: Uniform Commercial Code, sect. 2-716 (1). "Specific performance may be decreed where the goods are unique or in other proper circumstances."



buyer, perhaps at considerable expense, during the additional period of time of reasonable length the buyer cannot resort to any remedy for breach of contract, unless the seller has declared that he will not comply with the request. Once the additional period of time has expired without performance by the seller, the buyer may not only avoid the contract under article 30 (1) (b) but may resort to any other remedy he may have.

5. If the seller's failure to perform related to part only of the goods, see article 32 and the commentary thereon.

#### Article 29

(1) The seller may cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time, the seller may perform within the time indicated in his request or, if no time is indicated, within a reasonable time. The buyer cannot, during either period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time or within a reasonable period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

#### PRIOR UNIFORM LAW

ULIS, articles 43 and 44, paragraph 1.

#### Commentary

1. Article 29 regulates the right of the seller to cure any failure to perform his obligations under the contract and this convention after the date for delivery. It is a companion article to article 21 which regulates the right of the seller to cure any failure to perform his obligations prior to the date for delivery and to articles 27 and 28 which regulate the buyer's right to require performance. The date for delivery is established in accordance with article 17.

#### General rule, paragraph (1)

2. Paragraph (1) permits the seller to cure any failure to perform his obligations after the date for delivery subject to three conditions: (1) the seller must be able to perform without such delay as will amount to a fundamental breach of contract, (2) the seller must be able to perform without causing the buyer unreasonable inconvenience or unreasonable expense, and (3) seller must perform prior to the time the buyer has declared the contract avoided or has declared the price to be reduced.<sup>42</sup>

<sup>42</sup> If the seller has completed curing the defect, it is too late for the buyer to declare the contract avoided or declare the reduction of the price. If the seller commenced curing the defect and so notified the buyer, such a notice would constitute the notice described in para. (3) of this article. See para. 7 *infra*. Therefore, for a reasonable time after receipt

3. It should be noted that the seller may cure under this article even though the failure to perform amounted to a fundamental breach, so long as that failure was not a delay in performance. For example, even though the delivery of machinery which did not operate might constitute a fundamental breach of contract, the seller could cure the defect by repairing or replacing the machinery. Naturally, the buyer would still have his right to claim damages for any loss caused him by the original breach or by the seller's actions in curing the non-conformity.

4. The seller's right to cure under article 29 (1) is a strong right in that it goes against the terms of the contract. For instance, if the seller has not delivered by the contract delivery date of 1 June but delivers on 15 June, he has cured his failure to deliver but he has not and cannot cure his failure to deliver by 1 June. Nevertheless, article 29 (1) authorizes him to cure in this manner if he can do so before the delay amounts to a fundamental breach.

5. It should be noted that article 29 (1) in conjunction with the rule that a buyer can normally avoid the contract only if there has been a fundamental breach<sup>43</sup> leads to an important change in the rules regarding CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the terms of the contract, buyers have often been able to refuse the documents if there has been some discrepancy, even if that discrepancy was of little practical significance. However, if, for example, a documentary sale called for the presentation of a single bill of lading and the seller presented the buyer with two bills of lading which indicated that the total quantity required by the contract had been shipped, the buyer would not be able to avoid the contract (and, therefore, could not effectively refuse to pay against the documents, unless the presentation of the two bills of lading by the seller "results in substantial detriment to the [buyer] and the [seller] foresaw or had reason to foresee such a result".<sup>44</sup>

#### Notice by the seller, paragraphs (2) and (3)

6. If the seller intends to cure the non-conformity he will normally so notify the buyer. He will also often inquire whether the buyer intends to exercise his remedies of avoiding the contract or declaring the price to be reduced or whether he wishes, or will accept, cure by the seller.

7. Paragraph (2) provides that if the seller sends the buyer such a notice, the buyer must reply within a reasonable time. If the buyer does not reply, the seller may perform and the buyer may not avoid the contract or reduce the price during the period of time the seller indicated in the notice would be necessary to cure the defect or, if no time was stated, during a reasonable

of the notice the buyer could not declare the contract avoided or reduce the price. However, in the absence of a notice to him, the buyer can terminate the seller's right to cure by declaring the contract avoided or the price reduced even though the seller has commenced curing the defect.

<sup>43</sup> Article 30 (1) (a). Article 30 (1) (b) authorizes the buyer to avoid the contract only if there has been a failure of delivery and the seller has been requested to make delivery under article 28. As to when delivery takes place, see article 15 and the commentary thereon.

<sup>44</sup> Article 9.

time. Even if the seller's notice said only that he would perform the contract within a specific period of time or within a reasonable period of time, paragraph (3) provides that the buyer must either declare the contract avoided, declare the price reduced or protest the cure proposed or else he will be bound by the terms of the seller's notice unless he can show that for some reason the seller's notice should not be treated as including a request to the buyer to respond.

### Article 30

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the seller has been requested to make delivery under article 28 and has not delivered the goods within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) In respect of late delivery, after he has become aware that delivery has been made; or

(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach or, if the buyer has requested the seller to perform under article 28, after the expiration of the additional period of time or after the seller has declared that he will not comply with the request.

### PRIOR UNIFORM LAW

ULIS, articles 26, 43, 44, paragraph 2.

### Commentary

1. Article 30 describes the buyer's right to declare the contract avoided. The seller's right to declare the contract avoided is described in article 45.

### Declaration of avoidance

2. The contract is avoided as a result of the seller's breach only if "the buyer... declare[s] the contract avoided". This narrows the rule from that found in articles 26 and 30 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the buyer. Automatic or *ipso facto* avoidance was deleted from the remedial system in the present convention because it led to great uncertainty whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 30 of the present convention the contract is still in force unless the buyer has affirmatively declared its avoidance. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the avoidance of the contract.

3. Article 10 (2) provides that "a declaration of avoidance is effective only if notice is given to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 10 (3).

### Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the buyer may declare the contract avoided is where the failure by the seller to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 9.

### Seller's delay in curing, subparagraph (1) (b)

5. Subparagraph (1) (b) further authorizes the buyer to declare the contract avoided in one restricted case. If the seller has not delivered the goods and the buyer requests him to do so under article 28, the buyer can avoid the contract if the seller "has not delivered the goods within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request".<sup>45</sup>

### Loss or suspension of right to avoid, paragraph (2)

6. Paragraph (2) provides the time-limits within which the buyer must declare the contract avoided in cases when the seller has made delivery or else lose the right to do so. The buyer does not lose his right to declare the contract avoided under this paragraph until all the goods have been delivered.

7. If the fundamental breach on which the buyer relies to declare the contract avoided is the late delivery of the goods, then once the seller has made delivery, subparagraph (2) (a) provides that the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time after he becomes aware that delivery has been made.

8. If the seller has made delivery but there is a fundamental breach of the contract in respect of some obligation other than late delivery, such as the conformity of the goods to the contract, then article 30 (2) (b) provides that the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time after he knew or ought to have known of the breach.<sup>46</sup>

9. Article 30 (2) (b) may also take away the right of the buyer to declare the contract avoided in cases where he has requested the seller to deliver the goods under article 28. If the seller delivers the goods but not within the additional period specified in the request pursuant to article 28, the buyer loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of that additional period.

10. Since the buyer does not lose his right to declare the contract avoided under article (30) (2) until all the goods have been delivered, under this provision all the instalments in an instalment contract must be delivered before the buyer loses the right to declare the contract avoided. However, under article 48 (1) the buyer's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the seller which justifies the declaration of avoidance.

11. In addition to article 30 (2), several other articles provide for the loss or suspension of the right to declare the contract avoided.

12. Article 52 (1) provides that "the buyer loses his right to declare the contract avoided... where it

<sup>45</sup> However, see article 32 (2) and the commentary thereon.

<sup>46</sup> See article 22.

is impossible for him to return the goods substantially in the condition in which he received them" unless the impossibility is excused for one of the three reasons listed in article 52 (2).

13. Article 23 provides that a buyer loses his right to rely on a lack of conformity of the goods, including the right to avoid the contract, if he does not give the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it and at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

14. If the buyer has requested the seller to perform his obligations pursuant to article 28, the buyer may not resort to the remedies for breach, including a declaration of avoidance under article 30 until the expiration of the period fixed by the buyer unless within that period the seller has declared that he will not comply with the request.

15. Similarly, if it is the seller who wishes to cure any defect after the delivery date, the buyer's right to avoid the contract may be suspended for the period of time indicated by the seller as necessary to effect the cure.<sup>47</sup>

#### *Right to avoid prior to the date of delivery*

16. For the buyer's right to avoid the contract prior to the contract date of delivery, see articles 47 (3), 48, 49 and the commentaries thereon.

#### *Effects of avoidance*

17. The effects of avoidance are described in articles 51 to 54. The most significant consequence of avoidance for the buyer is that he is no longer obligated to take delivery and pay for the goods. However, avoidance of the contract does not terminate either the seller's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>48</sup> Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

#### *Article 31*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of the non-conformity.

#### **PRIOR UNIFORM LAW**

##### **ULIS, article 46.**

#### *Commentary*

1. Article 31 states the conditions under which the buyer can declare the price to be reduced where the goods do not conform with the contract.

<sup>47</sup> See para. (7) to the commentary on article 29.

<sup>48</sup> Art. 51 (1).

2. The remedy of reduction of the price must not be confused with the remedy of damages. Although the two remedies lead to the same result in some situations, they are two distinct remedies to be used at the buyer's choice.

3. The remedy of reduction of the price is in effect a partial avoidance of the contract. The price may be reduced for any non-conformity of the goods, whether the non-conformity be of quantity or quality. Moreover, the price can be reduced by the buyer even though he has already paid the price. Article 31 does not depend on the buyer's ability to withhold future sums due.

4. The fact that the remedy of reduction of the price is in effect a partial avoidance of the contract leads to two important consequences. First, even if the seller is excused from paying damages for his failure to perform the contract by virtue of article 50, the buyer may still reduce the price if the goods do not conform with the contract. Second, similar to that which prevails in respect of avoidance, the amount of monetary relief which is granted the buyer is measured in terms of the contract price which need not be paid (or which can be recovered from the seller if already paid), and not in terms of monetary loss which has been caused to the buyer.

5. This basis for calculation is obvious if the seller's non-performance consists of the delivery of less than the agreed upon quantity. These aspects of the rule can be illustrated by the following examples:

*Example 31A:* Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$200 a ton for a total of \$2,000. Seller delivered only 2 tons. Since such an extensive short delivery constituted a fundamental breach, Buyer avoided the contract, took none of the corn and was not obligated to pay the purchase price.

*Example 31B:* Under the same contract as in example 31A, Seller delivered 9 tons. Buyer accepted the 9 tons and reduced the price by 10 per cent, paying \$1,800.

6. The calculation is the same if the non-conformity of the goods delivered relates to their quality rather than to their quantity. This can be illustrated by the following example:

*Example 31C:* Under the same contract as in example 31A, Seller delivered 10 tons of No. 3 corn instead of 10 tons of No. 1 corn as required. At the time of contracting the market price for No. 3 corn was \$150 a ton. If the delivery of No. 3 corn in place of No. 1 corn constituted a fundamental breach of the contract, Buyer could avoid the contract and not pay the contract price. If the delivery of No. 3 corn did not constitute a fundamental breach or if Buyer did not choose to avoid the contract, Buyer could declare the reduction of the price from \$2,000 to \$1,500.

7. Although the principle is simple to apply in a case where, as in example 31C, the non-conformity as to quality is such that the goods delivered have a definite market price which is different from that for the goods which should have been delivered under the contract, it is more difficult to apply to other types of non-conformity as to quality. For instance:

*Example 31D:* Seller contracted to furnish decorative wall panels of a certain design for use by Buyer in an

office building being constructed by Buyer. The wall panels delivered by Seller were of a less attractive design than those ordered. Buyer has the right to "declare the price... reduced in the same proportion as the value of the goods at the time of conclusion of the contract diminished because of the non-conformity".

8. In example 31D there may be no easy means of determining the extent to which the value of the goods was diminished because of the non-conformity, but that does not affect the principle. It should be noted that it is the buyer who makes the determination of the amount by which the price is reduced. However, if the seller disputes the calculation, the matter can finally be settled only by a court or an arbitration tribunal.

9. It should also be noted that the calculation is based on the extent to which the value of the goods "at the time of the conclusion of the contract" has been diminished. The calculation of the reduction of the price does not take into consideration events which occurred after this time as does the calculation of damages under articles 55 to 60. In the case envisaged in example 31D this would normally cause no difficulties because the extent of lost value would probably have been the same at the time of the conclusion of the contract and at the time of the non-conforming delivery. However, if there has been a price change in the goods between the time of the conclusion of the contract and the time of the non-conforming delivery, different results are achieved if the buyer declares the price reduced under this article rather than if the buyer claims damages. These differences are illustrated by the following examples:

*Example 31E:* The facts are the same as in example 31C. Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$200 a ton for a total of \$2,000. Seller delivered 10 tons of No. 3 corn. At the time of contracting the market price for No. 3 corn was \$150 a ton. Therefore, if Buyer declared a reduction of the price, the price would be \$1,500. Buyer would in effect have received monetary relief of \$500.

However, if the market price had fallen in half by the time of delivery of the non-conforming goods so that No. 1 corn sold for \$100 a ton and No. 3 corn sold for \$75 a ton, Buyer's damages under article 55 would have been only \$25 a ton or \$250. In this case it would be more advantageous to Buyer to reduce the price under article 31 than to claim damages under article 55.

*Example 31F:* If the reverse were to happen so that at the time of delivery of the non-conforming goods the market price of No. 1 corn had doubled to \$400 a ton and that of No. 3 corn to \$300 a ton, Buyer's damages under article 55 would be \$100 a ton or \$1,000. In this case it would be more advantageous to Buyer to claim damages under article 55 than to reduce the price under article 31. However, article 26 (2) makes it clear that the Buyer could reduce the price under article 31 and recover the additional loss by means of a claim for damages.

10. It should be noted that the results in examples 31E and 31F are caused by the fact that the remedy of reducing the price acts as a partial avoidance of the contract. The same result occurs in even greater degree

if the buyer totally avoids the contract as is illustrated in the following example:

*Example 31G:* In example 31E it was shown that if the market price for No. 1 corn had dropped in half from \$200 a ton to \$100 a ton and the price of No. 3 corn had dropped from \$150 a ton to \$75 a ton, Buyer could retain the No. 3 corn and either receive \$250 in damages or reduce the price by \$500. If the delivery of No. 3 corn in place of No. 1 corn amounted to a fundamental breach of contract and Buyer avoided the contract pursuant to article 31 (a), he could purchase in replacement 10 tons of No. 1 corn for \$1,000, i.e., for an amount \$1,000 less than the contract price, or purchase No. 3 corn for \$750, i.e., for \$1,250 less than the contract price.

11. Except for example 31D, all of the examples above have assumed a fungible commodity for which substitute goods were freely available thereby making it feasible for the buyer to avoid the contract, providing a ready market price as a means of measuring damages, and precluding any additional damages by way of lost profits or otherwise. If there is not such a ready market for the goods, the problems of evaluation are more difficult and the possibility of additional damages is greater. These factors do not change the means by which article 31 works but they may change the relative advantage to the buyer of one remedy rather than another.

12. Article 26 (2) makes it clear that the buyer can claim damages in addition to declaring the reduction of the price in those cases where, as in example 31F, reducing the price does not give as much monetary relief as would an action for damages.

### Article 32

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 27 to 31 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

### PRIOR UNIFORM LAW

#### ULIS, article 45.

#### Commentary

1. Article 32 states the buyer's remedies when the seller fails to perform only a part of his obligations.

#### *Remedies in respect of the non-conforming part, paragraph (1)*

2. Paragraph (1) provides that if the seller has failed to perform only a part of his obligations under the contract by delivering only a part of the goods or by delivering some goods which do not conform to the contract, the provisions of articles 27 to 31 apply in respect of the quantity which is missing or which does not conform to the contract. In effect, this paragraph provides that the buyer can avoid a part of the contract under article 30 if the non-conformity amounts to a fundamental breach as to the part of the goods in question or if, after buyer's request pursuant to ar-

article 28 that seller perform the contract by delivering the missing quantity or substitute goods, the seller has not delivered the goods within the additional period of time fixed by the buyer. This rule was necessary because in some legal systems a party cannot avoid only a part of the contract. In those legal systems the conditions for determining whether the contract can be avoided at all must be determined by reference to the entire contract. However, under article 32 (1) it is clear that under this convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part.

*Remedies in respect of the entire contract, paragraph (2)*

3. Paragraph (2) provides that the buyer may avoid the entire contract "only if the failure to make delivery completely and in conformity with the contract amounts to a fundamental breach of the [entire] contract". Although this provision reiterates the rule which would otherwise be applied under article 30 (1) (a), it is useful that it be made clear.

4. The use of the word "only" in article 32 (2) also has the effect of negating the implication which might have been thought to flow from article 30 (1) (b) that the entire contract could be avoided on the grounds that the seller failed to deliver a part of the goods within the additional period of time fixed by the buyer in accordance with article 28 even though such failure to deliver did not in itself amount to a fundamental breach of the entire contract.

*Article 33*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

PRIOR UNIFORM LAW

ULIS, articles 29 and 47.

*Commentary*

1. Article 33 deals with two situations where the buyer may refuse to take delivery of goods which have been placed at his disposal.

*Early delivery, paragraph (1)*

2. Article 33 (1) deals with the situation where the goods have been delivered to the buyer before the delivery date fixed. If the buyer were forced to accept these goods, it might cause him inconvenience and expense in storing them longer than anticipated. Furthermore, if the contract links the day payment is due to the day delivery is made, early delivery will force early payment with consequent interest expense. Therefore, the buyer is given the choice of taking delivery of the goods or refusing to take delivery of them when the seller delivers them prior to the delivery date.

3. The buyer's right to take delivery or to refuse to take delivery is exercisable upon the fact of early delivery. It does not depend on whether early delivery causes the buyer extra expense or inconvenience.

4. However, where the buyer does refuse to take delivery of the goods under article 33 (1), according to article 61 (2) he will still be bound to take possession of them on behalf of the seller if the following four conditions are met: (1) the goods have been placed at his disposal at their place of destination, (2) he can take possession without payment of the price, e.g., the contract of sale does not require payment in order for the buyer to take possession of the documents covering the goods, (3) taking possession would not cause the buyer unreasonable inconvenience or unreasonable expense, and (4) neither the seller nor a person authorized to take possession of the goods on his behalf is present at the destination of the goods.

5. If the buyer refuses to take the early delivery, the seller is obligated to redeliver the goods at the time for delivery under the contract.

6. If the buyer does take early delivery of the goods, he may claim from the seller for any damages he may have suffered unless, under the circumstances, the acceptance of early delivery amounts to a modification of the contract.<sup>49</sup>

*Excess quantity, paragraph (2)*

7. Article 32 (2) deals with the situation where an excess quantity of goods has been delivered to the buyer.

8. Unless there are other reasons which justify the buyer's refusal to take delivery, the buyer must accept at least the quantity specified in the contract. In respect of the excess amount, the buyer may either refuse to take delivery or he may take delivery of some or all of it. If the buyer refuses to take delivery of the excess quantity, the seller is liable for any damages suffered by the buyer. If the buyer takes delivery of some or all of the excess quantity he must pay for it at the contract rate.

9. If it is not feasible for the buyer to reject only the excess amount, as where the seller tenders a single bill of lading covering the total shipment in exchange for payment for the entire shipment, the buyer may avoid the contract if the delivery of such an excess quantity constitutes a fundamental breach. If the delivery of the excess quantity does not constitute a fundamental breach or if for commercial reasons the buyer is impelled to take delivery of the shipment, he may claim any damages he has suffered as a result.

CHAPTER IV. OBLIGATIONS OF THE BUYER

*Article 34*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

PRIOR UNIFORM LAW

ULIS, article 56.

*Commentary*

Article 34 states the principal obligations of the buyer and introduces chapter IV of the convention. The principal obligations of the buyer are to pay the price for

<sup>49</sup> Article 33 (1) does not refer to the buyer's right to seek damages. However, the buyer's right to damages is a general right under article 26 (1) (b).

the goods and to take delivery of them. The buyer must carry out his obligations "as required by the contract and this Convention". Since article 5 of the convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the convention the buyer must fulfil his obligations as required by the contract.

## SECTION I. PAYMENT OF THE PRICE

### Article 35

The buyer must take the necessary steps to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee.

#### PRIOR UNIFORM LAW

ULIS, article 69.

#### Commentary

1. Article 35 sets forth the obligation of the buyer to take the steps which are necessary to enable the price to be paid or to procure the issuance of documents which will assure payment.

2. Even if the buyer is to make direct payment to the seller, it may be necessary for him to take several preliminary steps to effect such payment. For example, he may need to procure the necessary foreign currency or obtain official authorization to remit the currency abroad. Article 35 provides that in such cases the buyer must take the necessary steps.

3. Similarly, if the contract provides that payment is to be made or guaranteed by an intermediary such as a bank, article 35 requires the buyer to "take the necessary steps" to procure the documents assuring payment, such as a letter of credit or a banker's guarantee.

4. The buyer's obligation under article 35 is limited to "tak[ing] steps". He does not undertake to pay the price or to procure the issuance of documents assuring payment if, for example, the Government refuses to make available the necessary foreign exchange. Of course, the buyer is obligated to take all the appropriate measures to persuade the Government to make the funds available and cannot rely on a refusal by the Government unless those measures have been taken.

### Article 36\*

When a contract has been concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

#### PRIOR UNIFORM LAW

ULIS, article 57.

#### Commentary

1. Article 36 provides a means for the determination of the price when a contract has been concluded

which does not state a price or expressly or impliedly make provision for its determination.

2. It may happen that the parties do not state the price in their agreement. The buyer may order from a catalogue expecting to pay the seller's current price. Or, if the goods are to be delivered at some time in the future and prices are unstable, the parties may anticipate that the buyer will pay the price current at the time of delivery. There is little difficulty if the agreement between the parties refers to a means of determining the price, such as by reference to the seller's price list, to market quotations, or to the like. This article provides the rule for the determination of the price if the parties have neither stated the price nor expressly or impliedly provided for the means for its determination.

#### Formation and validity of the contract

3. Even though article 36 provides a means for the determination of the price, the absence of an explicit or implicit price term in the contract may indicate that the parties had not completed the process of negotiation. The court or arbitration tribunal must determine in each case whether the absence of a price or of an express or implied means of determining the price indicates that the parties had not yet reached agreement on the existence of a contract.

4. Neither article 36 nor any other provision of this convention governs the question whether a contract is valid if the price is neither determined nor determinable from the terms of the contract itself. This is a matter left to the applicable national law.

5. Article 36 can be applied to determine the price only if the applicable national law recognizes the existence and validity of the contract.<sup>60</sup>

#### Determination of the price

6. In accordance with article 8, the parties are bound by any practices which they have established between themselves. Therefore, if there have been prior dealings between the parties which have established a practice in regard to the price, that practice would be determinative.

7. In the absence of such a practice between the parties, the price is that "generally charged by the seller at the time of the conclusion of the contract". Since a seller may charge several different prices to different purchasers or for sales of different quantities or under different conditions, the relevant price would be that charged under comparable circumstances.

8. If there is no price generally charged by the seller for the sale of goods of the type in question, "the buyer must pay the price generally prevailing at the [time of the conclusion of the contract] for such goods sold under comparable circumstances".

9. Article 36 applies only if there is a price either "generally charged by the seller" or "generally prevailing... for such goods". If no such price exists, this article offers no formula for creating a "reasonable price".

\* The Union of Soviet Socialist Republics expressed a reservation in respect of this article.

<sup>60</sup> Article 7 specifies that this convention is not concerned with the formation of the contract or with its validity.



*Time of calculation of price*

10. The price to be determined by the application of article 36 is that charged at the time of the conclusion of the contract. It is the price which would presumably have been agreed upon by the parties at that time of contracting if they had agreed upon a price at that time.

11. However, this does not preclude a court or arbitration tribunal from applying the formula of article 36 to the prices current at the time of delivery if the court or arbitration tribunal were to find that it was the intention of the parties that the buyer was to pay the price current at that time.

*Article 37*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

## PRIOR UNIFORM LAW

ULIS, article 58.

*Commentary*

1. Article 37 provides that "if the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight".

2. This is a rule of interpretation of the contract which does not raise any questions. If the parties have not expressly or impliedly stipulated otherwise, the buyer does not pay for the weight of the packing materials.

*Article 38*

(1) The buyer must pay the price to the seller at the seller's place of business. However, if payment is to be made against the handing over of the goods or of documents, the price must be paid at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

## PRIOR UNIFORM LAW

ULIS, article 59.

*Commentary*

1. Article 38 provides a rule for the place at which payment of the price is to be made. Because of the importance of the question, the contract will usually contain specific provisions on the mode and place of payment. If such provisions exist, they govern the relationship between the parties.<sup>51</sup> If the contract does not contain such provision, article 38 provides the rules to be applied.

2. It is important that the place of payment be clearly established when the contract is for the international sale of goods. The existence of exchange controls may make it particularly desirable for the buyer to pay the price in his country whereas it may be of equal interest to the seller to be paid in his own country or in a third country where he can freely use the proceeds of the sale.

<sup>51</sup> Article 5.

3. This convention does not govern the extent to which exchange control regulations or other rules of economic public order may modify the obligations of the buyer to pay the seller at a particular time or place or by a particular means. The buyer's obligations to take the steps which are necessary to enable the price to be paid are set forth in article 35. The extent to which the buyer who has fulfilled his obligations under article 35 may be relieved of liability for damages for his failure to pay as agreed because of exchange control regulations or the like is governed by article 50.<sup>52</sup>

*Place of payment, paragraph (1)*

4. Article 38 (1) provides that if the payment is to be made against the handing over of the goods or of documents, the payment must be made at the place where the handing over takes place. This rule will be applied most often in the case of a contract stipulation for payment against documents.<sup>53</sup> The documents may be handed over directly to the buyer, but they are often handed over to a bank which represents the buyer in the transaction. The "handing over" may take place in either the buyer's or the seller's country or even in a third country.

*Example 38A:* The contract of sale between the Seller in State X and the Buyer in State Y called for payment against documents. The documents were to be handed over to the Buyer's bank in State Z for the account of Buyer. Under article 38 (1) the Buyer must pay the price at the Buyer's bank in State Z.

5. If the contract does not call for payment against the handing over of the goods or documents and no other provisions for the place of payment are stipulated in the contract, the buyer must pay the price at the seller's place of business. It should be noted that, according to article 6 (a), if the seller has more than one place of business, the place of business at which payment must be made "is that which has the closest relationship to the contract and its performance".

*Change of seller's place of business, paragraph (2)*

6. If the seller changes his place of business at which the buyer is to make payment subsequent to the conclusion of the contract, the buyer must make payment at the seller's new place of business. However, any increase in expenses incidental to payment must be borne by the seller.

*Article 39\**

(1) The buyer must pay the price when the seller places either the goods or a document controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or document.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer at the place of destination except against payment of the price.

\* Brazil and Japan reserved their position in respect to article 39 (2).

<sup>52</sup> For the extent to which the seller may be relieved of the duty to deliver the goods if the buyer does not pay as agreed, see articles 39 (1), 45 and 47.

<sup>53</sup> The documents referred to in article 38 (1) are those which the seller is required to hand over by virtue of article 18.

(3) The buyer is not required to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity.

#### PRIOR UNIFORM LAW

ULIS, articles 71 and 72.

#### Commentary

1. Article 39 governs the time for the buyer's payment in relation to performance by the seller.

##### *General rule, paragraph (1)*

2. Article 39 (1) recognizes that, in the absence of an agreement, the seller is not required to extend credit to the buyer. Therefore, the general rule stated in paragraph (1) is that the buyer is required to pay the price at the time the seller makes the goods available to the buyer, by placing either the goods or a document controlling their disposition at the buyer's disposal. If the buyer does not pay at that time, the seller may refuse to hand over the goods or document.

##### *Where the contract involves carriage of the goods, paragraph (2)*

3. Paragraph (2) states a specific rule in implementation of paragraph (1) where the contract of sale involves carriage of the goods. In such a case "the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer at the place of destination except against payment of the price". The goods may be so dispatched unless there is a clause in the contract providing otherwise, in particular by providing for credit.

##### *Payment and examination of the goods, paragraph (3)*

4. Paragraph (3) states the general rule that the buyer is not required to pay the price unless he has had an opportunity to examine the goods. It is the seller's obligation to provide a means for the buyer's examination prior to payment and handing over.

5. Where the contract of sale involves carriage of the goods and the seller wishes to exercise his right under article 39 (2) to ship the goods on terms whereby neither the goods nor the documents will be handed over to the buyer prior to payment, the seller must preserve the buyer's right to examine the goods. Since the buyer normally examines the goods at the place of destination,<sup>54</sup> the seller may be required to make special arrangements with the carrier to allow the buyer access to the goods at the destination prior to the time the goods or documents are handed over in order to allow for the buyer's examination.

6. The buyer loses the right to examine the goods prior to payment where "the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity". This convention does not set forth which procedures for delivery or payment are inconsistent with the buyer's right to examine the goods prior to payment. However, the most common example is the agreement that payment of the price is due against the handing over of the documents controlling the disposition of the goods whether or not the goods have

arrived. The quotation of the price on CIF terms contains such an agreement.<sup>55</sup>

7. It should be noted that since the buyer loses the right to examine the goods prior to payment of the price only if the procedures for payment or delivery "agreed upon by the parties" are inconsistent with such right, he does not lose his right to examine the goods prior to payment where the contract provides that he must pay the price against the handing over of the documents after the arrival of the goods. Since payment is to take place after the arrival of the goods, the procedure for payment and delivery are consistent with the right of examination prior to payment. Similarly, the buyer does not lose his right to examine the goods prior to payment where the seller exercises his right under article 39 (2) to dispatch the goods on terms whereby the documents controlling the disposition of the goods will be handed over to the buyer only upon the payment of the price.

8. The buyer's right to examine the goods where the contract of sale involves the carriage of the goods is illustrated by the following examples:

*Example 39A:* The contract of sale quoted the price on CIF terms. Therefore, it was anticipated that payment would be made in the following manner. Seller would draw a bill of exchange on Buyer for the amount of the purchase price. Seller would forward the bill of exchange accompanied by the bill of lading (along with other documents enumerated in the contract) to a collecting bank in the Buyer's city. The contract provided that the bill of lading (and other documents) would be handed over to Buyer by the bank only upon the payment of the bill of exchange. Since this agreed-upon procedure for payment requires payment to be made at the time the bill of exchange is presented, often at a time the goods are still in transit, the means of payment is inconsistent with the Buyer's right to examine the goods prior to payment. Therefore, Buyer did not have such a right in this case.

*Example 39B:* The contract of sale was not on CIF terms and made no other provision for the time or place of payment. Therefore, pursuant to the authority in article 39 (2) Seller took the same actions as in example 39A. Seller drew a bill of exchange on Buyer for the purchase price and forwarded it accompanied by the bill of lading through his bank to a collecting bank in the Buyer's city. Seller gave the collecting bank instructions that it should not hand over the bill of lading to Buyer until Buyer had paid the bill of exchange.

In this example the means of payment, though authorized by articles 39 (2), was not "agreed upon by the parties". Therefore, Buyer does not lose his right to examine the goods prior to paying the price, i.e., prior to paying the bill of exchange. It is the Seller's obligation to assure the Buyer of the possibility of examination prior to payment.

*Example 39C:* The contract of sale provided for payment of the price on presentation of the documents at the point of arrival of the goods but only after the ar-

<sup>54</sup> Article 22 (2).

<sup>55</sup> Incoterms 1953, CIF, provides that the buyer must "accept the documents when tendered by the seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract".

rival of the goods. In this case the procedures for delivery and payment expressly stipulated by the parties are not inconsistent with the right of the Buyer to examine the goods prior to payment even though the price was to be paid against the presentation of the documents.

#### Article 40

The buyer must pay the price on the date fixed or determinable by the contract or this Convention without the need for any formalities.

#### PRIOR UNIFORM LAW

ULIS, article 60.

#### Commentary

Article 40 provides that the buyer is required to pay the price on the date fixed or determinable by the contract or this convention without the need for any formalities. This rule is intended to deny the applicability of the rule in some national legal systems which states that in order for the payment to become due, the seller must make a formal demand for it from the buyer. A date for payment established by usage or by article 39 (1)<sup>56</sup> has the same result as a date for payment established by agreement of the parties.

### SECTION II. TAKING DELIVERY

#### Article 41

The buyer's obligation to take delivery consists:

(a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery, and

(b) In taking over the goods.

#### PRIOR UNIFORM LAW

ULIS, article 65.

#### Commentary

1. Article 41 describes the second obligation of the buyer set out in article 34, i.e., to take delivery of the goods.

2. The buyer's obligation to take delivery consists of two elements. The first element is that he must do "all the acts which could reasonably be expected of him in order to enable the seller to make delivery". For example, if under the contract of sale the buyer is to arrange for the carriage of the goods, he must make the necessary contracts of carriage so as to permit the seller to "[hand] the goods over to the first carrier for transmission to the buyer".<sup>57</sup>

3. The buyer's obligation is limited to doing those "acts which could reasonably be expected of him". He is not obliged "to do all such acts as are necessary to enable the seller to hand over the goods", as was the case under ULIS.

4. The second element of the buyer's obligation to take delivery consists of his "taking over the goods". This aspect of the obligation to take delivery is of importance where the contract calls for the seller to make delivery by placing the goods at the buyer's disposal

at a particular place or at the seller's place of business.<sup>58</sup> In such case the buyer must physically remove the goods from that place.<sup>59</sup>

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

#### Article 42

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) Exercise the rights provided in articles 43 to 46;
- (b) Claim damages as provided in articles 55 to 59.

(2) The seller is not deprived of any right he may have to claim damages even though he exercises his right to other remedies.

(3) If the seller resorts to a remedy for breach of contract, the buyer is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.

#### PRIOR UNIFORM LAW

ULIS, articles 61 to 64, 66 to 68 and 70.

#### Commentary

1. Article 42 serves both as an index to the remedies available to the seller if the buyer fails to perform any of his obligations under the contract and this convention and as the source of the seller's right to claim damages. Article 42 is comparable to article 26 on the remedies available to the buyer.

2. Article 42 (1) (a) provides that in case of the buyer's breach, the seller may "exercise the rights provided in articles 43 to 46". Although the provisions on the remedies available to the seller in articles 43 to 46 are drafted in terms comparable to those available to the buyer in articles 27 to 33, they are less complicated. This is so because the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. Therefore, the seller has no remedies comparable to the following which are available to the buyer: reduction of the price because of non-conformity of the goods (article 31), right to partially exercise his remedies in the case of partial delivery of the goods (article 32), right to refuse to take delivery in case of delivery before the date fixed or of an excess quantity of goods (article 33).

3. Article 42 (1) (b) provides that the seller may "claim damages as provided in articles 55 to 59" "if the buyer fails to perform any of his obligations under the contract of sale and this Convention". In order to claim damages it is not necessary to prove a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the buyer to fulfil his obligations. Articles 55 to 59, to which article 42 (1) (b) refers, do not provide the substantive conditions for the exercise of a claim for damages but

<sup>56</sup> Article 15 (b) and (c).

<sup>59</sup> Cf. the buyer's obligation under article 61 (2) to take possession on behalf of the seller of goods which have been dispatched to and have been put at the disposal of the buyer at the place of destination and of which the buyer has exercised his right to reject.

<sup>56</sup> Article 8.

<sup>57</sup> Article 15 (a). Cf. article 16 (2).

the rules for the calculation of the amount of damages. In particular, article 58 gives a minimum measure of damages where the breach of contract consists of delay in the payment of the price.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the buyer. First, all the buyer's obligations are brought together in one place without confusions generated by the complexities of repetitive remedial provisions. This makes it easier to understand the rules on what the buyer must do, which are the provisions of prime interest to merchants. Second, problems of classification are reduced with a single set of remedies. Third, the need for complex cross-referencing is lessened.

5. Paragraph (2) provides that a party who has resorted to any remedy available to him under the contract or this convention is not thereby deprived of the right to claim any damages which he may have incurred.

6. Paragraph (3) states that the national provisions of law which provide for applications to courts or arbitral tribunals for periods of grace are not to be applied. Such a provision seems desirable in international commerce.

#### Article 43\*

The seller may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

#### PRIOR UNIFORM LAW

ULIS, articles 61, 62 paragraph 1, 70 paragraph 2.

#### Commentary

1. Article 43 describes the seller's right to require the buyer to perform his obligations under the contract and this convention.

##### *Failure to pay the price, paragraph (1)*

2. This article recognizes that the seller's primary concern is that the buyer pay the price at the time it is due. If the buyer does not do so, this article authorizes the seller to require the buyer to pay the price.

3. The seller can act to recover the purchase price under article 43 where the buyer has refused to pay it, although it is unlikely that the seller will sue for the price unless either the buyer has taken delivery of the goods or the goods have been damaged or destroyed after the risk of loss has passed to the buyer.<sup>60</sup> So long as the seller either has not yet delivered the goods<sup>61</sup> or, having delivered the goods by handing them over to the first carrier,<sup>62</sup> the seller has dispatched them to the buyer on terms whereby neither the goods nor the documents controlling their disposition would be handed over to the buyer unless payment was made,<sup>63</sup> the seller would normally refuse delivery, keep the goods and sue for

damages<sup>64</sup> or resell the goods and sue for the difference between the contract price and that obtained by the resale.<sup>65</sup>

##### *Failure to perform other obligations*

4. Article 43 goes on to authorize the seller to require the buyer "to take delivery or to perform any of his other obligations".<sup>66</sup>

5. In some cases the seller may be authorized or required to substitute his own performance for that which the buyer has failed to do. Article 46 provides that in a sale by specification, if the buyer fails to make the specifications required on the date requested or within a reasonable time after receipt of a request from the seller, the seller may make the specifications himself. Similarly, if the buyer is required by the contract to name a vessel on which the goods are to be shipped and fails to do so by the appropriate time, article 59, which requires the party who relies on a breach of contract to mitigate the losses, may authorize the seller to name the vessel so as to minimize the buyer's losses.

6. The style in which article 43 in particular and section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view held in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgment of a court granting the required relief.<sup>67</sup> However, the two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 43 provides that the "seller may require the buyer to pay the price, take delivery or perform any of his other obligations", it anticipates that, if the buyer does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

7. Although the seller has a right to the assistance of a court or arbitral tribunal to enforce the buyer's obligations to pay the price, take delivery and perform any of his other obligations, article 12 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this convention, it is not required to enter such a judgement in a case arising under this convention even though the seller had a right to require the buyer's performance under article 43. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 43 are met.

8. The seller can require performance under this article and also sue for his damages. In particular, where the buyer's non-performance of one of his obligations consists in the delay in the payment of the price, the seller's damages would equal at least the interest calculated in accordance with article 56.

<sup>60</sup> Articles 42 (1) (b), 55 and 57.

<sup>61</sup> Article 56.

<sup>62</sup> The obligation to "take delivery" is specifically mentioned because it is the second of the two obligations of the buyer set forth in article 34. The definition of taking delivery is found in article 41.

<sup>63</sup> See foot-note 1 to paragraph 7 of the commentary on article 27 for examples of this legislative drafting style.

\* The United States reserved its position in respect to this article.

<sup>60</sup> Article 64.

<sup>61</sup> The means by which the seller delivers the goods are set forth in article 15.

<sup>62</sup> Article 15 (a).

<sup>63</sup> Article 39 (2).

*Inconsistent acts by the seller*

9. Article 43 also provides that in order for the seller to exercise the right to require performance of the contract he must not have acted inconsistently with that right e.g. by avoiding the contract under article 45.

*Article 44*

The seller may request performance within an additional period of time of reasonable length. In such a case, the seller cannot during such period resort to any remedy for breach of contract, unless the buyer has declared that he will not comply with the request.

## PRIOR UNIFORM LAW

ULIS, article 66, paragraph 2.

*Commentary*

1. Article 44 states the right of the seller to request the buyer to perform the contract within an additional period of time of reasonable length and specifies one of the consequences of such a request.

2. Article 44 is a companion to article 43 which states the right of the seller to require performance of the contract by the buyer and which anticipates the aid of a court or arbitration tribunal in enforcing that right. If the buyer delays performing the contract, the use of judicial procedures for enforcement may not seem feasible or may require more time than the seller can afford to wait. This may be particularly the case if the buyer's failure to perform consists of delay in procuring the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee, or of securing the permission to import the goods or pay for them in restricted foreign exchange. It may be to the seller's advantage to avoid the contract and make a substitute sale to a different purchaser. However, at that time it may not be certain that the buyer's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 45 (1) (a).

3. In order to remedy this difficulty, article 44 authorizes the seller to "request performance [by the buyer] within an additional period of time of reasonable length". If the buyer does not pay the price or take delivery of the goods, as the case may be, within that additional period of time or declares that he will not comply with the request, the seller may avoid the contract under article 45 (1) (b).

4. However, in order to protect the buyer who may be preparing to perform the contract as requested by the seller, perhaps at considerable expense, during the additional period of time the seller cannot resort to any remedy for breach of contract, unless the buyer has declared that he will not comply with the request. Once the additional period of time has expired without performance by the buyer, the seller may not only avoid the contract under article 45 (1) (b) but may resort to any other remedy he may have.

*Article 45\**

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

\* Brazil expressed a reservation in respect of article 45 (2).

(b) If the buyer has been requested under article 44 to pay the price or to take delivery of the goods and has not paid the price or taken delivery within the additional period of time fixed by the seller in accordance with that article or has declared that he will not comply with the request.

(2) However, in cases where the buyer has paid the price the seller loses his right to declare the contract avoided if he has not done so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance, within a reasonable time after the seller knew or ought to have known of such breach or, if the seller has requested the buyer to perform under article 44 within a reasonable time after the expiration of the additional period of time or after the buyer has declared that he will not comply with the request.

## PRIOR UNIFORM LAW

ULIS, articles 61, paragraph 2, 62, 66, 70.

*Commentary*

1. Article 45 describes the seller's right to declare the contract avoided. The buyer's right to declare the contract avoided is described in article 30.

*Declaration of avoidance*

2. The contract is avoided as a result of the buyer's breach only if "the seller ... declare[s] the contract avoided". This narrows the rule from that found in articles 61 and 62 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the seller. Automatic or *ipso facto* avoidance was deleted from the remedial system in this convention because it led to great uncertainty whether the contract was still in force or whether it was *ipso facto* avoided. Under article 45 of this convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 10 (2) provides that "a declaration of avoidance is effective only if notice is given to the other party". The consequences, which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 10 (3).

*Fundamental breach, subparagraph (1) (a)*

4. The typical situation in which the seller may declare the contract avoided is where the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 9.

*Buyer's delay in curing, subparagraph (1) (b)*

5. Subparagraph (1) (b) allows the seller to avoid the contract when the buyer fails to pay the price or take delivery of the goods within the additional period of time fixed by the seller in accordance with article 44 regardless of whether that failure to perform constituted a fundamental breach of the contract.

*Suspension of right to avoid*

6. If the seller has requested the buyer to perform his obligations pursuant to article 44, the seller may not resort to the remedies for breach of contract, including a declaration of avoidance of the contract under article 45, until the expiration of the period fixed by the seller unless the buyer has declared that he will not comply with the request to perform.

*Loss of right to avoid, paragraph (2)*

7. Paragraph (2) provides the time-limits within which the seller must declare the contract avoided or else lose the right to do so. The seller does not lose his right to declare the contract avoided so long as the total price has not been paid.

8. If the fundamental breach on which the seller relies to declare the contract avoided is the late performance of an obligation, once the price has been paid paragraph (2) (a) provides that the seller loses his right to declare the contract avoided when he becomes aware that the performance has been rendered. Because the seller will most often intend to declare the contract avoided because of the buyer's failure to pay the price, paragraph (2) (a) will normally take effect at the time the seller becomes aware that the price has been paid.

9. On the other hand if the seller intends to avoid the contract for any fundamental breach which does not involve late performance by the buyer, paragraph (2) (b) provides that the seller loses that right if the price has been paid and the seller does not declare the contract avoided within a reasonable time after he knew or ought to have known of the breach.

10. Similarly, if the seller intends to declare the contract avoided on the grounds that he requested performance under article 44 and the buyer did not perform within the additional period of time specified in the request, the seller loses the right to declare the contract avoided if the price has been paid and the seller has not declared the contract avoided within a reasonable time after the expiration of the additional time or within a reasonable time after the buyer has declared that he will not comply with the request.

11. Since the seller does not lose his right to declare the contract avoided under article 45 (2) until the total price is paid, under this provision all the instalments in an instalment contract must be paid before the seller loses the right to declare the contract avoided. However, under article 48 (1) the seller's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the buyer which justifies the declaration of avoidance.

*Right to avoid prior to the date for performance*

12. For the seller's right to avoid prior to the contract date of performance, see articles 47 (3), 48 and 49 and the commentaries thereon.

*Effects of avoidance*

13. The effects of avoidance by the seller are described in articles 51 and 54. The most significant consequence of avoidance for the seller is that he is no longer required to deliver the goods and he may claim their return if they have already been delivered.

14. Avoidance of the contract does not terminate either the buyer's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>68</sup> Such a provision is important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, which usually means arbitration clauses, terminate with the rest of the contract.

*Article 46*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may submit a different specification. If the buyer fails to do so, the specification made by the seller is binding.

PRIOR UNIFORM LAW

ULIS, article 67.

*Commentary*

1. Article 46 describes the seller's rights where the buyer fails to specify some aspect or quality of the goods ordered by the date on which he was obligated to do so.

2. It often occurs that the buyer wishes to contract for the purchase of goods even though at that moment he is as yet undecided about some feature of the goods ordered. For example, on 1 April the buyer might order 1,000 pairs of shoes at a certain price for delivery on or before 1 October. The contract might also state that the buyer must specify the styles and sizes to the seller before 1 September or it might state that the buyer has the right, but not the obligation, to make the specification. The seller may be a merchant who will assemble the quantity to be delivered from inventory or he may be a manufacturer who will, subsequent to the notification, manufacture the goods according to the buyer's specifications.

3. Even in those cases in which the buyer is obligated to make the specification, he may fail to do so by the date required, before 1 September in this example, either through oversight or because he would now prefer not to receive the 1,000 pairs of shoes. If he now desires not to receive the shoes, it will usually be because of changes in business conditions which have reduced his need for the 1,000 pairs of shoes or because the price has declined and he could buy them at a lower price elsewhere.

*Seller's remedies, paragraph (1)*

4. Article 46 rejects any suggestion that the contract is not complete until the buyer has notified the seller of the specification or that the buyer's notification

<sup>68</sup> Article 51 (1).



of the specification is a condition to seller's right to deliver the goods and demand payment of the price.

5. Article 46 (1) authorizes the seller, at his choice, to provide the specification himself or to exercise any other rights he may have under the contract and this convention for the buyer's breach. Of course, the buyer's failure to make the specification would constitute a breach of the contract only if the buyer was obligated to do so, not if he was merely authorized to do so.

6. If the buyer's failure to make the specification constituted a breach of contract, the seller could pursue his remedies for that breach in place of or in addition to making the specification himself under article 46. Therefore, the seller could (1) sue for damages under article 42 (1) (b), (2) if the buyer's failure to make the required specification amounted to a fundamental breach of contract, avoid the contract under article 45 (1) (a) and sue for any damages,<sup>69</sup> or (3) request the buyer to perform his obligation pursuant to article 44. If, pursuant to article 44 the seller requests the buyer to perform within an additional period of time of reasonable length by making the specification and the buyer does not do so within this additional time the seller could avoid the contract under article 45 (1) (b) and sue for any damages even if the buyer's failure to make the specification did not constitute a fundamental breach of contract.

7. If the seller chooses to exercise his right to make the specification himself pursuant to article 46 (1), he may do so immediately upon the passage of the date expressly or impliedly agreed upon in the contract as the date by which the buyer would make the specification. Alternatively, the seller may request the specification from the buyer, in which case the seller must await a reasonable time after the buyer has received the request from the seller before he can make the specification himself.<sup>70</sup>

#### *Notice to the buyer, paragraph (2)*

8. The seller must inform the buyer of the details of the specification which the seller has made pursuant to paragraph (1). He must fix a reasonable period of time during which the buyer may submit a different specification. "If the buyer fails to do so, the specification made by the seller is binding."

### CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

#### SECTION I. ANTICIPATORY BREACH

##### *Article 47\**

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness of the other party or his conduct is preparing to perform or in actually performing the contract gives grounds to con-

\* Brazil reserved its position in respect of article 47 (2) and Mexico reserved its position in respect of article 47 (3).  
<sup>69</sup> Article 51 (1) preserves the right to sue for damages even though the contract has been avoided.

<sup>70</sup> It should be noted that the request for specification here is pursuant to article 46 (1) and not pursuant to article 44 as discussed in para. 6 *supra*.

clude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance. If the other party fails to provide such assurance within a reasonable time after he has received the notice, the party who suspended performance may avoid the contract.

#### PRIOR UNIFORM LAW

##### ULIS, article 73.

#### *Commentary*

1. Article 47 describes the extent to which a party may suspend the performance of his obligations because of the existence of reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

#### *Right to suspend performance, paragraph (1)*

2. Paragraph (1) provides that a party may suspend the performance of his obligations if it is reasonable to do so because after the conclusion of the contract a serious deterioration of the other party's ability or willingness to perform "gives grounds to conclude that the other party will not perform a substantial part of his obligations". The deterioration in ability or willingness must have taken place after the conclusion of the contract. If at the time of the conclusion of the contract a party's ability or willingness to perform was already in doubt, the other party may not later rely on that doubt as a basis for suspending the performance of his own obligations under the contract. This is true even though the other party learned of the circumstances which lead to the doubts only after the conclusion of the contract.<sup>71</sup>

3. The deterioration must have been in the other party's capacity to perform or in his creditworthiness or must be manifested by his conduct in preparing to perform or in actually performing the contract in question. It is not enough that the other party's performance in respect of other contracts raises questions as to his future performance in this contract. However, defective performance in other contracts might contribute to a decision that his current conduct gave "reasonable" grounds to conclude he will not perform a substantial part of his obligations in this contract. Moreover, the buyer's failure to pay his debts on other contracts may indicate a serious deterioration of his creditworthiness.

4. The circumstances which justify suspension may relate to general conditions so long as those general conditions affect the other party's ability to perform. For

<sup>71</sup> There may be a remedy under the applicable national law of contracts for a party who entered into a contract not knowing relevant facts as to the other party's ability to perform.

example, the outbreak of war or the imposition of an export embargo may give reasonable grounds to conclude that the party from that country will not be able to perform his obligations.

5. It should be noted that there must be reasonable grounds to conclude that he will not perform a *substantial* part of his obligations. There is no right to suspend if the other party's performance is apt to be deficient in less than a substantial way. A party who suspends his performance without adequate grounds to conclude that the other party will not perform a substantial part of his obligations would himself be in breach of the contract.

6. These rules are illustrated by the following examples:

*Example 47A:* Buyer fell behind in his payments to Seller in respect of other contracts. Even though the late payments were in respect of other contracts, such late payments might indicate a serious deterioration in Buyer's creditworthiness authorizing Seller to suspend performance.

*Example 47B:* Buyer contracted for precision parts which he intended to use immediately upon delivery. He discovered that, although there had been no deterioration in Seller's ability to manufacture and deliver parts of the quality required, defective deliveries were being made to other buyers with similar needs. These facts alone do not authorize Buyer to suspend his performance. However, if the cause of Seller's defective deliveries to other buyers was the result of using a raw material from a particular source, Seller's conduct in preparing to use the raw material from the same source would give Buyer reasonable grounds to conclude that Seller would deliver defective goods to him also.

7. It should be noted that in certain circumstances the form of the contract may preclude a party from requiring adequate assurances of performance even though the party has reasonable grounds to conclude that the other party will not perform. For example, if payment is to be made by means of a letter of credit, the issuer of the credit is required to pay a draft drawn on it if accompanied by the proper documents even though the buyer has reasonable grounds to believe that the goods are seriously defective. Similarly, it would appear that where the buyer has assumed the risk of payment before inspection of the goods, as in a contract of sale on CIF or similar cash against documents terms, that risk is not to be evaded by a demand for assurance.

8. If the criteria discussed in paragraphs 2 to 4 above are met, the party "may suspend the performance of his obligation". A party who is authorized to suspend performance is freed both from the obligation to render performance to the other party and from the obligation to prepare to perform.<sup>72</sup> He is not obligated to incur additional expenses for which it is reasonable to assume he will never be compensated.

9. If an obligation is suspended for a period of time and then reinstated pursuant to article 47 (3), the date required for performance will be extended for

<sup>72</sup> The conditions under which the party who is authorized to suspend the performance of his obligations may avoid the contract are discussed in paras. 13 and 14 *infra*.

the period of the suspension. This principle is illustrated by the following examples:

*Example 47C:* Under the contract of sale, Seller was required to deliver the goods on 1 July. Because of reasonable doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods. Seller must now deliver the goods by 15 July.

#### *Stoppage in transit, paragraph (2)*

10. Paragraph (2) continues the policy of paragraph (1) in favour of a seller who has already shipped the goods. If the deterioration of the buyer's creditworthiness gives the seller reasonable grounds to conclude that the buyer will not pay for the goods, the seller has the right as against the buyer to order the carrier not to hand over the goods to the buyer even though the buyer holds a document which entitles him to obtain them, e.g., an ocean bill of lading, and even if the goods were originally sold on terms granting the buyer credit after receipt of the goods.

11. The seller loses his right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith.

12. Since this convention governs the rights in the goods only between the buyer and the seller,<sup>73</sup> the question whether the carrier must or is permitted to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question.<sup>74</sup>

#### *Notice, adequate assurances of performance, and avoidance, paragraph (3)*

13. Paragraph (3) provides that the party suspending performance pursuant to paragraph (1) or stopping the goods in transit pursuant to paragraph (2) must immediately notify the other party of that fact. The other party can reinstate the first party's obligation to continue performance by giving the first party adequate assurance that he will perform. For such an assurance to be "adequate", it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performance. If such assurances are not forthcoming within a reasonable period of time after receipt of the notice, the first party may avoid the contract.

*Example 47D:* The contract of sale provided that Buyer would pay for the goods 30 days after their arrival at Buyer's place of business. After the conclusion of the contract Seller received information which gave him reasonable grounds to doubt Buyer's creditworthiness. After he suspended performance and so notified Buyer, Buyer offered either (1) a new payment term so that he would pay against documents, or (2) a letter of credit issued by a reputable bank, or (3) a guarantee by a reputable bank or other such party that

<sup>73</sup> Article 47 (2) expressly states that it relates only to the rights in goods as between the buyer and the seller. This reflects the general principles expressed in article 7.

<sup>74</sup> The rules governing the carrier's obligation to follow the consignor's orders to withhold delivery from the consignee differ between modes of transportation and between various international conventions and national laws.

it would pay if Buyer did not, or (4) a security interest in sufficient goods owned by Buyer to assure Seller of reimbursement. Since any one of these four alternatives would probably give Seller adequate assurances of being paid,<sup>75</sup> Seller would be required to continue performance.

*Example 47E:* The contract of sale called for the delivery of precision parts for Buyer to use in assembling a high technology machine. Seller's failure to deliver goods of the requisite quality on the delivery date would cause great financial loss to Buyer. Although Buyer could have the parts manufactured by other firms, it would take a minimum of six months from the time a contract was signed for any other firm to be able to deliver substitute parts. The contract provided that Buyer was to make periodic advance payments of the purchase price during the period of time Seller was manufacturing the goods.

When Buyer received information giving him reasonable grounds to conclude that Seller would not be able to deliver on time, Buyer notified Seller that he was suspending any performance due the Seller. Seller gave Buyer written assurances that he would deliver goods of the contract quality on time and offered a bank guarantee for financial reimbursement of all payments made under the contract if he failed to meet his obligations.

In this case Seller has not given adequate assurance of performance. Seller's statements that he would perform, unless accompanied by sufficient explanations of the information which caused Buyer to conclude that Seller would not deliver on time, were only a reiteration of his contractual obligation. The offer of a bank guarantee of reimbursement of payments under the contract was not an adequate assurance to a Buyer who needs the goods at the contract date in order to meet his own needs. Therefore, having failed to receive adequate assurances from Seller, Buyer can avoid the contract and purchase the goods elsewhere.

14. Article 51 (1) preserves the right of a party who avoids the contract pursuant to article 47 (3) to claim any damages which may occur from the breach of contract. For example, if the buyer in example 47E purchased substitute goods elsewhere at a higher price, he can recover the difference between his repurchase price and the contract price.<sup>76</sup> If the assurances furnished by the seller were in fact not adequate, these damages can be recovered even though it turns out that at the time performance was due under the original contract the seller could have performed.

#### Article 48

(1) If, in the case of a contract for delivery of goods by instalments, the failure of one party to perform any of his obligations in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

<sup>75</sup> The offer of a security interest would be an adequate assurance only if the national law in question allowed such interests and provided a procedure on default which was adequate to assure the creditor prompt reimbursement of his claim.

<sup>76</sup> Article 56 (1).

(2) A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of deliveries already made if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract.

#### PRIOR UNIFORM LAW

##### ULIS, article 75.

#### Commentary

1. Article 48 describes the right to avoid the contract in respect of past or future deliveries where the contract calls for the delivery of goods by instalments.

2. The contract calls for the delivery by instalments if it requires or authorizes the delivery of goods in separate lots.

#### *Failure to perform in respect of one instalment, paragraph (1)*

3. Paragraph (1) considers the situation where the failure of one party to perform any of his obligations under the contract in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments. In such a case he may declare the contract avoided for the future, provided only that he declares the avoidance of the future performance within a reasonable time of the failure to perform. It should be noted that article 48 (1) permits the avoidance of the contract in respect of future performance of an instalment contract without the necessity of awaiting the possibility that the party in breach will be able to provide adequate assurances of future performance, as is required by article 47 (1) in respect of most other contracts.<sup>77</sup>

4. It should be noted that the test of the right to avoid under article 48 (1) is whether a failure to perform in respect of an instalment gives the other party good reason to fear that there will be a fundamental breach in respect of future instalments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear.

#### *Avoidance of past deliveries, paragraph (2)*

5. In some contracts it will be the case that none of the deliveries can be used for the purpose contemplated by the parties to the contract unless all of the deliveries can be so used. This would be true, for example, of the sale of a large machine which is delivered in segments to be assembled at the buyer's place. Therefore, paragraph (2) provides that a buyer who avoids the contract in respect of future deliveries, may also avoid in respect of deliveries already made "if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract". The declaration of avoidance of past deliveries must take place at the same time as the declaration of avoidance of future deliveries.

<sup>77</sup> For another situation in which a party can avoid the contract as to future performance without awaiting the possibility of the provision of adequate assurances of performance, see article 49.

*Avoidance in instalment contracts under other provisions*

6. There are several fact situations in respect of instalment contracts in which the right to avoid is governed by other provisions of this convention.

7. If the failure by one party in respect of an instalment was so serious that it alone would constitute a fundamental breach of the entire contract, whether or not such failure gave good reason to fear any breach as to future instalments, the other party could avoid the entire contract under article 30 (1) (a) or 45 (1) (a), as the case may be.

8. Similarly, under articles 30 (1) (a) and 32 the buyer could avoid the contract as to a single instalment if the performance of the seller in respect of that instalment was such as to constitute a fundamental breach as to that instalment even though the breach was neither such as to constitute a fundamental breach of the entire contract nor one which gave good reason to fear a fundamental breach in respect of any future instalment.

*Example 48A:* The contract called for the delivery of 1,000 tons of No. 1 grade corn in 10 separate instalments. When the fifth instalment was delivered, it was unfit for human consumption. Even if in the context of the entire contract one such delivery would not constitute a fundamental breach of the entire contract and even if this one defective delivery gave no reason to anticipate any future defective deliveries, the buyer could avoid the contract in respect of the fifth instalment under articles 30 (1) (a) and 32.

*Article 49*

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

PRIOR UNIFORM LAW

ULIS, article 76.

*Commentary*

1. Article 49 provides for the special case where prior to the date for performance it is clear that one of the parties will commit a fundamental breach. In such a case the other party may declare the contract avoided immediately.

2. The future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance.<sup>78</sup>

3. Article 49 should be contrasted with article 47. Under article 47, where the existence of certain enumerated conditions "gives grounds to conclude that [one] party will not perform a substantial part of his obligations", the other party may suspend the performance of his own obligations if it is reasonable to do so. He must notify the first party of the suspension and

<sup>78</sup> Even though the imposition of an embargo or monetary controls which renders future performance impossible justifies the other party's avoidance of the contract under article 49, the non-performing party may be excused from damages by virtue of article 50.

wait for a reasonable period of time for the possibility that adequate assurances of performance will be provided. He may avoid the contract if such assurances are not provided within that period.

4. The difference between the two articles rests on the fact that under article 47 the party who acts to protect himself against the other party's future breach need have only "grounds to conclude" that the other party will breach. Under those circumstances it is necessary that the other party be given the opportunity to give adequate assurances that he will not breach the contract. However, if it is clear that the other party will commit a fundamental breach of the contract in the future, there is no reason to require the procedure envisaged by article 47.

5. A party who intends to declare the contract avoided pursuant to article 49 should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation was not "clear" and, since there was no authorization to avoid the contract, the declaration of avoidance would itself be void. Therefore, the party who attempted to avoid would be in breach of the contract for his own failure to perform. If there is any doubt whether a fundamental breach of contract will occur, the party who intends to declare the contract avoided should, if it is possible, proceed under article 47.<sup>79</sup>

6. Where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 59 may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance.<sup>80</sup>

SECTION II. EXEMPTIONS

*Article 50\**

(1) If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which has occurred without fault on his part. For this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment.

(2) If the non-performance of the seller is due to non-performance by a subcontractor, the seller is exempt from liability only if he is exempt under the provisions of paragraph (1) of this article and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment existed.

(4) The non-performing party must notify the other party of the impediment and its effect on his ability to perform. If he fails to do so within a reason-

\* The United States and the United Kingdom of Great Britain and Northern Ireland expressed reservations in respect of article 50 (3).

<sup>79</sup> Article 47 can be used only if the criteria discussed in paras. 2 to 5 of the commentary on that article are met.

<sup>80</sup> See para. 4 of the commentary on article 59 and examples 59A and 59B.

able time after he knew or ought to have known of the impediment, he is liable for the damage resulting from this failure.

#### PRIOR UNIFORM LAW

##### ULIS, article 74.

#### Commentary

1. Article 50 governs the liability in damages of a party who has not performed one of his obligations where such non-performance was due to an impediment which has occurred without fault on his part.

##### *General rule, paragraph (1)*

2. Paragraph (1) specifies that a party is not liable in damages for not performing one of his obligations "if he proves that [the non-performance] was due to an impediment which occurred without fault on his part". The second sentence goes on to state that "unless the non-performing party proves that he could not reasonably have been expected to take the impediment into account or to avoid or to overcome the impediment", there is deemed to be fault on his part.

3. The impediment to performance must have occurred after the conclusion of the contract in order for the non-performing party to be exonerated by articles 50 (1). However, if at the time of the conclusion of the contract there was an existing impediment to performance, the national law applicable to the formation or the validity of the contract may provide either that no contract was concluded or that it was invalid by reason of the mistake or fraud of the parties.<sup>81</sup>

4. Paragraph (1) combines the requirement that there was an objective impediment to the performance of the obligation and that there was no fault on the part of the non-performing party. Fault will be deemed to exist unless the non-performing party proves: first, that he could not reasonably have been expected to take the impediment into account; second, that he could not avoid the impediment; and third, that he could not overcome the impediment. If he fails to prove any one of the three, fault will be deemed to exist and he will not be exonerated from damages for the non-performance.

5. The most difficult to evaluate of the three points which the non-performing party must prove is that he could not reasonably have been expected to take the impediment into account at the time he undertook the obligation in the contract. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future. Frequently, the parties to the contract have envisaged the possibility of the impediment which did occur. Sometimes they have explicitly stated whether the occurrence of the impeding event would exonerate the non-performing party from the consequences of the non-performance. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even

though certain impediments might arise. In either of these two classes of cases, article 5 of the present convention assures the enforceability of such explicit or implicit contractual stipulations.

6. However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of undertaking the obligation. In the final analysis this determination can only be made by a court or arbitration tribunal on a case-by-case basis.

7. Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of contracting, he must also prove that he could neither have avoided the impediment nor overcome it. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was rendered impossible.

8. Article 50 (1) only exonerates the non-performing party from liability for damages. All of the other remedies are available to the other party, i.e. demand for performance, reduction of the price or avoidance of the contract. However, if the party who is required to overcome an impediment does so by furnishing a commercially reasonable substitute, the other party could not avoid the contract and thereby reject the substitute performance on the grounds that there was a fundamental breach of contract.

*Example 50A:* The contract called for the delivery of specific goods. Prior to the time when the risk of loss would have passed pursuant to article 65 or 66 the goods were destroyed by a fire for which Seller was not responsible. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.

*Example 50B:* The contract called for the delivery of 500 machine tools Ex Ship Liverpool. At the time the tools were being loaded on the ship the crate in which they were packaged was dropped and the tools were destroyed. In such a case the Seller would not only have to bear the loss of the 500 tools but he would also be obligated to ship to the Buyer an additional 500 tools. The difference between this example and example 50A is that in example 50A the Seller cannot provide that which was contracted for whereas under example 50B the Seller can overcome the effect of the destruction of the tools by shipping replacement goods.

*Example 50C:* If the machine tools shipped in replacement of those destroyed in example 50B could not arrive in time, the Seller would be exempted from damages for late delivery.

*Example 50D:* The contract called for the goods to be packed in plastic containers. At the time the packing should have been accomplished, plastic containers were not available for reasons which Seller could not have

<sup>81</sup> See articles 5 to 10 of the Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods, prepared by the International Institute for the Unification of Private Law (UNIDROIT).



avoided. However, if other commercially reasonable packing materials were available, Seller must overcome the impediment by using those materials rather than refuse to deliver the goods. If the Seller used commercially reasonable substitute packing materials, he would not be liable for damages and the Buyer could not avoid the contract but the Buyer could reduce the price under article 31 if the value of the goods had been diminished because of the non-conforming packing materials.

*Example 50E:* The contract called for shipment on a particular vessel. Due to no fault of Buyer or Seller, the schedule for the vessel was revised and it did not call at the port indicated within the shipment period. In this circumstance the party responsible for arranging the carriage of the goods must attempt to overcome the impediment by providing an alternative vessel.

*Non-performance by subcontractor, paragraph (2)*

9. It often happens that the non-performance of the seller is due to the non-performance of one of his subcontractors. Paragraph (2) provides that where this is the case, "the seller is exempt from liability only if he is exempt [himself] under the provisions of paragraph (1) of this article and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him".

*Temporary impediment, paragraph (3)*

10. Paragraph (3) provides that an impediment which prevents a party from performing for only a temporary period of time exempts the non-performing party from liability for damages only for the period during which the impediment existed. Therefore, the date at which the exemption from damages terminates is the contract date for performance or the date on which the impediment was removed, whichever is later in time.

*Example 50F:* The goods were to be delivered on 1 February. On 1 January an impediment arose which precluded the Seller from delivering the goods. The impediment was removed on 1 March. The Seller delivered on 15 March.

The Seller is exempted from any damages which may have occurred because of the delay in delivery up to 1 March, the date on which the impediment was removed. However, since the impediment was removed after the contract date for delivery, the Seller is liable for any damages which occurred as a result of the delay in delivery between 1 March and 15 March.

11. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence<sup>82</sup> and the removal of the impediment reinstates the obligations of both parties under the contract.

*Example 50G:* Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1) until the plant was rebuilt. Seller's plant was rebuilt in

two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and Buyer was obligated to take delivery and to pay the contract price.<sup>83</sup>

*Duty to notify, paragraph (4)*

12. The non-performing party who is exempted from damages by reason of the existence of an impediment to the performance of his obligation must notify the other party of the impediment and its effect on his ability to perform. Failure to give the notice within a reasonable time after the non-performing party knows or ought to have known of the impediment gives rise to damages resulting from the failure to give notice. It should be noted that the damages for which the non-performing party is liable are only those arising out of the failure to give notice and not those arising out of the non-performance.

13. The duty to notify extends not only to the situation in which a party cannot perform at all because of the unforeseen impediment, but also to the situation in which he intends to perform by furnishing a commercially reasonable substitute. Therefore, the seller in example 50D and the party responsible for arranging the carriage of the goods in example 50E must notify the other party of the intended substitute performance. If he does not do so, he will be liable for any damages resulting from the failure to give notice.

### SECTION III. EFFECTS OF AVOIDANCE

#### Article 51

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect provisions for the settlement of disputes.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they must do so concurrently.

#### PRIOR UNIFORM LAW

##### ULIS, article 78.

#### Commentary

1. Article 51 sets forth the consequences which follow from a declaration of avoidance. Articles 52 to 54 give detailed rules for implementing certain aspects of article 51.

##### *Effect of avoidance, paragraph (1)*

2. The primary effect on the avoidance of the contract by one party is that both parties are released from their obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

3. Partial avoidance of the contract under article 32 or 48 releases both parties from their obligations as

<sup>82</sup> See para. 2 of the commentary on article 30 and para. 2 of the commentary on article 45.

<sup>83</sup> Seller would have no right to insist that Buyer take the goods if the delay constituted a fundamental breach of contract even if Buyer had not declared the avoidance of the contract (article 29 (1)).



to the part of the contract which has been avoided and gives rise to restitution under paragraph (2) as to that part.

4. In some legal systems avoidance of the contract eliminates all rights and obligations which arose out of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration, choice of law, choice of forum, and clauses excluding liability or specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

5. Paragraph (1) provides a mechanism to avoid this result by specifying that the avoidance of the contract is "subject to any damages which may be due" and that it "does not affect provisions for the settlement of disputes". It should be noted that article 51 (1) would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law. Article 51 (1) only states that such a provision is not terminated by the avoidance of the contract.

6. The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the avoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this convention. For example, article 61 (1) provides that "if the goods have been received by the buyer, and if he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them" and article 51 (2) permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself<sup>84</sup> or may arise out of the necessities of justice.

#### *Restitution, paragraph (2)*

7. It will often be the case that at the time the contract is avoided, one or both of the parties will have performed all or part of his obligations. Sometimes the parties can agree on a formula for adjusting the price to the deliveries already made. However, it may also occur that one or both parties desires the return of that which he has already supplied or paid under the contract.

8. Paragraph (2) authorizes either party to the contract who has performed in whole or in part to claim the return of whatever he has supplied or paid under the contract. Subject to article 52 (2), the party who makes demand for restitution must also make restitution of that which he has received from the other party. "If both parties are required to make restitution, they must do so concurrently", unless the parties agree otherwise.

9. Paragraph (2) differs from the rule in some countries that only the party who is authorized to avoid the contract can make demand for restitution. Instead, it incorporates the idea that, as regards restitution, the avoidance of the contract undermines the basis on which either party can retain that which he has received from the other party.

<sup>84</sup> Article 5.

10. It should be noted that the right of either party to require restitution as recognized by article 51 may be thwarted by other rules which fall outside the scope of the international sale of goods. If either party is in bankruptcy or other insolvency procedures, it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets. Exchange control laws or other restrictions on the transfer of goods or funds may prevent the transfer of the goods or money to the demanding party in a foreign country. These and other similar legal rules may reduce the value of the claim of restitution. However, they do not affect the validity of the rights between the parties.

11. The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 59 of the party who relies on the breach of the contract to "adopt such measures as are reasonable in the circumstances to mitigate the loss" may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market if such resale would adequately protect the seller at a lower net cost.<sup>85</sup>

#### *Article 52*

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act of the buyer; or

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

#### *PRIOR UNIFORM LAW*

ULIS, article 79.

#### *Commentary*

*Loss of right by buyer to avoid or require substitute goods, paragraph (1)*

1. Article 52 states that "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

<sup>85</sup> Cf. article 63 on the authority of one party who holds goods for the account of the other party to sell the goods for the account of the other party.

2. The rule in paragraph (1) recognizes that the natural consequences of the avoidance of the contract or the delivery of substitute goods is the restitution of that which has already been delivered under the contract. Therefore, if the buyer cannot return the goods, or cannot return them substantially in the condition in which he received them, he loses his right to declare the contract avoided under article 30 or to require the delivery of substitute goods under article 27 (1).

3. It is not necessary that the goods be in the identical condition in which they were received; they need be only in "substantially" the same condition. Although the term "substantially" is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract.<sup>86</sup>

#### *Exceptions, paragraph (2)*

4. Paragraph (2) states three exceptions to the above rule. The buyer should be able to avoid the contract or require substitute goods even though he cannot make restitution of the goods substantially in the condition in which he received them (1) if the impossibility of doing so is not due to his own act, (2) if the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 22 or 23, if part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

5. A fourth exception to the rule stated in article 52 (1) is to be found in article 67 which states that if the seller has committed a fundamental breach of contract, the passage of the risk of loss under article 65 or 66 does not impair the remedies available to the buyer on account of such breach.<sup>87</sup>

#### *Article 53*

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 52 retains all other remedies.

#### PRIOR UNIFORM LAW

ULIS, article 80.

#### *Commentary*

Article 53 makes it clear that the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods because he cannot return the goods substantially in the condition in which he received them does not deprive the buyer of the right to claim damages under article 26 (1) (b), to require that any defects be cured under article 27, or to declare the reduction of the price under article 31.

<sup>86</sup> The buyer can declare the avoidance of the contract under article 30 or require the delivery of substitute goods under article 27 (2) only if the seller is in fundamental breach of the contract.

<sup>87</sup> See para. 2 of the commentary on article 67.

#### *Article 54*

(1) If the seller is required to refund the price, he must also pay interest thereon, at the rate fixed in accordance with article 58, as from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them;

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

#### PRIOR UNIFORM LAW

ULIS, article 81.

#### *Commentary*

1. Article 54 reflects the principle that a party who is required to refund the price or return the goods because the contract has been avoided or because of a request for the delivery of substitute goods must account for any benefit which he has received by virtue of having had possession of the money or goods. Where the obligation arises because of the avoidance of the contract, it is irrelevant which party's failure gave rise to the avoidance of the contract or who demanded restitution.<sup>88</sup>

2. Where the seller is under an obligation to refund the price, he must pay interest from the date of payment to the date of refund at the interest rate fixed by article 58. The obligation to pay interest is automatic because it is assumed that the seller has benefited from being in possession of the purchase price during this period.

3. Where the buyer must return the goods, it is less obvious that he has benefited from having had possession of the goods. Therefore, paragraph (2) specifies that the buyer is liable to the seller for all benefits which he has derived from the goods only if (1) he is under an obligation to return them or (2) it is impossible for him to make restitution of the goods or part of them but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

#### SECTION IV. DAMAGES

#### *Article 55*

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages cannot exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

<sup>88</sup> See article 51 (2) and para. 9 of the commentary thereon.

## PRIOR UNIFORM LAW

## ULIS, article 82.

## Commentary

1. Article 55 introduces the section containing the rules on damages in case of a claim under article 26 (1) (b) or article 42 (1) (b) by setting forth the basic rule for the calculation of those damages. Articles 56 and 57 provide alternative means of calculating the damages in certain situations at the discretion of the injured party while articles 58 and 59 provide supplementary provisions in respect of damages.

## Basic damages

2. Article 55 provides that the injured party may recover as damages "a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach". This makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed. The specific reference to the loss of profit is necessary because in some legal systems the concept of "loss" standing alone does not include loss of profit.

3. Since article 55 is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damage ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in article 55 describing the appropriate method of determining "the loss . . . suffered . . . as a consequence of the breach". The court or arbitration tribunal must calculate that loss in the manner which is best suited to the circumstances. The following paragraphs discuss two common situations which might arise under article 55 and suggest means of calculating "the loss . . . suffered . . . as a consequence of the breach".

4. Where the breach consists of a refusal of the buyer to take delivery and pay for the goods, article 55 would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had made in the performance of the contract.<sup>89</sup> The profit lost because of the buyer's breach includes any contribution to overhead which would have resulted from the performance of the contract.

*Example 55A:* The contract provided for the sale of 100 machine tools for \$50,000 FOB. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of \$45,000 of which \$40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and \$5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated the contract, Seller did not expend the \$40,000 in costs which would have been incurred by reason of the existence of this contract. However, the \$5,000 of overhead which were allocated to this contract were for expenses of the business which were

<sup>89</sup> At his discretion in this situation the seller might choose to proceed under article 56 or 57.

not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of the Buyer's breach the Seller has lost the allocation of \$5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is \$10,000.

	\$
Contract price .....	50,000
Expenses of performance which could be saved .....	40,000
Loss arising out of breach .....	<u>10,000</u>

*Example 55B:* If, prior to Buyer's repudiation of the contract in example 55A, Seller had already incurred \$15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal \$25,000.

*Example 55C:* If the product of the part performance in example 55B could be sold as salvage to a third party for \$5,000, Seller's loss would be reduced to \$20,000.

5. Where the seller delivers and the buyer retains defective goods,<sup>90</sup> the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the value of any production lost during the period the tools could not be used.

6. If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract as measured at the place the seller delivered the goods on the date the buyer declared the contract avoided.<sup>91</sup> Since this formula is intended to restore him to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages. To the amount as calculated above there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach.<sup>92</sup>

*Example 55D:* The contract provided for the sale of 100 tons of grain for a total price of \$50,000 FOB. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to the Buyer of drying the grain was \$1,500. If the grain had been as contracted its value at the place the Seller delivered the goods as determined on the day the Buyer declared the contract

<sup>90</sup> If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract and measure his damages under article 56 or 57.

<sup>91</sup> Article 55 gives no indication of the time and place at which "the loss" to the injured party should be measured. Presumably it should be at the same time and place specified in article 57. See paras. 2 to 7 of the commentary on article 57.

<sup>92</sup> These additional elements of the buyer's damages will often be limited by the requirement of foreseeability discussed in para. 7 *infra*.

avoided would have been \$55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only \$51,000.

	\$
Contract price .....	50,000
Value the grain would have had if as contracted .....	55,000
Value of grain as delivered .....	51,000
	4,000
Extra expenses of drying the grain .....	1,500
	5,500

#### Foreseeability

7. The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can be recovered by the party not in breach "cannot exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract". Should a party at the time of conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

8. In some legal systems the limitation of damages to those "which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract" is not applicable if the non-performance of the contract was due to the fraud of the non-performing party. However, no such rule exists in this convention.

#### Article 56\*

(1) If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 57, recover the difference between the contract price and the price in the substitute transaction.

(2) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied.

#### PRIOR UNIFORM LAW

##### ULIS, article 85.

#### Commentary

1. Article 56 sets forth a means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.

#### Basic formula, paragraph (1)

2. In such a case the injured party may, at his discretion, "recover the difference between the contract price and the price in the substitute transaction", i.e. the price paid for the goods bought in replacement or that obtained in the resale.

\* Austria expressed a reservation in respect of this article.

3. If the contract has been avoided, the formula contained in this article will most often be the one used to calculate the damages owed the injured party since, in most commercial situations, a substitute transaction will have taken place. If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs (such as increased transportation) less any expenses saved as a consequence of the breach.

4. Even if there has been a substitute transaction, the injured party may require that the damages be calculated under article 55 or 57.

5. Article 56 provides that the injured party can rely on the price paid for the goods bought in replacement or that obtained by the resale only if the resale or cover purchase were made "in a reasonable manner and within a reasonable time after avoidance". If the resale or cover purchase were not made in such time and manner, the injured party must rely on article 55 or 57 for the calculation of the damages.

#### Additional damages, paragraph (2)

6. Paragraph (2) recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the formula in paragraph (1). In such a case the additional losses may be recovered under article 56 (2) if those additional losses were foreseeable at the time of the conclusion of the contract, as is required by article 55.

#### Article 57\*

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 56, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

(2) In calculating the amount of damages under paragraph (1) of this article, the current price to be taken into account is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

(3) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied.

#### PRIOR UNIFORM LAW

##### ULIS, article 84.

#### Commentary

1. Article 57 sets forth an alternative means of measuring damages where the contract has been avoided.

#### Basic formula, paragraphs (1) and (2)

2. Where the contract has been avoided, both parties are released from any future performance of their obligations<sup>93</sup> and restitution of that which has already

\* Austria and Ghana expressed reservations in respect of this article.

<sup>93</sup> Article 51 (1).

been delivered may be required.<sup>94</sup> Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price as is provided under article 56.

3. Article 57 permits the use of such a formula even though no resale or repurchase took place in fact or where it is impossible to determine which was the resale or repurchase contract in replacement of the contract which was breached.<sup>95</sup> However, the use of article 57 is not restricted to these situations but may be applied at the option of the injured party any time the contract has been avoided and there is a current price for the goods.

4. The price to be used in the calculation of damages under article 57 is the current price on the date on which the contract was avoided prevailing at the place where delivery of the goods should have been made.

5. The place where delivery should have been made is determined by the application of article 15. In particular, where the contract of sale involves carriage of the goods, delivery is made at the place the goods are handed over to the first carrier for transmission to the buyer whereas in destination contracts delivery is made at the named destination.

6. The "current price" is that for goods of the contract description in the contract amount. Although the concept of a "current price" does not require the existence of official or unofficial market quotations, the lack of such quotations raises the question whether there is a "current price" for the goods.

7. "If there is no such current price" at the place where delivery of the goods should have been made, "the price" [to be used is that] "at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods".

#### *Additional damages, paragraph (3)*

8. Paragraph (3) recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the formulas in paragraphs (1) and (2). In such a case the additional losses may be recovered under article 57 (3) if those additional losses were foreseeable at the time of the conclusion of the contract, as is required by article 55.

*Example 57A:* The contract price was \$50,000 CIF. The Seller avoided the contract because of the Buyer's fundamental breach. The current price on the date on which the contract was avoided for goods of the con-

tract description at the place where the goods were to be handed over to the first carrier was \$45,000. The Seller's damages under article 57 were \$5,000.

*Example 57B:* The contract price was \$50,000 CIF. The Buyer avoided the contract because of the Seller's non-delivery of the goods. The current price on the date on which the contract was avoided for goods of the contract description at the place the goods were to be handed over to the first carrier was \$53,000. Buyer's extra expenses caused by the Seller's breach were \$2,500. The Buyer's damages under article 57 were \$5,500.

#### *Article 58\**

If the breach of contract consists of delay in the payment of the price, the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business, plus 1 per cent, but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business.

#### PRIOR UNIFORM LAW

ULIS, article 83.

#### OTHER UNCITRAL DRAFT CONVENTIONS

Draft uniform law on International Bills of Exchange and International Promissory Notes, articles 67 (A/CN.9/99, paras. 36 to 40).

#### *Commentary*

1. Article 58 states a rule for the calculation of the minimum amount of damages which may be recovered by the seller where the breach of contract consists of the buyer's delay in the payment of the price.<sup>96</sup> In such a case the seller is entitled to recover the higher of (1) the official discount rate in the country where the seller has his place of business plus 1 per cent or (2) the rate applied to unsecured short-term commercial credits in that country.

2. This rule of damages is an exception to the rule expressed in article 55 that the injured party recovers "a sum equal to the loss" in that the seller need not prove that the delay in payment caused him any loss. For the purpose of assessing damages, it is assumed that a party who is not paid at the time the debt is due loses a sum equivalent to the interest he would have had to pay if he had borrowed an amount equal to that which is in arrears. For that reason the interest due is measured in relation to the rate current in the country where the seller has his place of business. Where the seller has places of business in more than one State, article 6 (a) provides that the relevant place of business is the one which has the closest relationship to the contract and its performance.

3. The fact that the buyer will have to pay the official discount rate plus 1 per cent or the rate applied to unsecured short-term credit whichever is higher, assures that the buyer will have little or no incentive to delay payment in order to take advantage of an interest rate which is less than the rate at which he would have

<sup>94</sup> Article 51 (2). If the contract calls for delivery by instalments, article 48 (2) allows avoidance of the contract and a demand for restitution in respect of deliveries already made only "if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract".

<sup>95</sup> If the seller has a finite supply of the goods in question or the buyer has a finite need for such goods, it may be clear that the seller has resold or that the buyer has made a cover purchase, as the case may be. However, if the injured party is constantly in the market for goods of the type in question, it may be difficult or impossible to determine which of the many contracts of purchase or sale was the one in replacement of the contract which was breached. In such a case the use of article 56 may be impossible and article 57 may be particularly useful.

\* Austria and Ghana expressed reservations in respect of this article.

<sup>96</sup> The same rule applies where the seller is under an obligation to refund the price pursuant to article 54 (1).

had to borrow. The existence of the two alternatives also assures that a formula for the calculation of interest will be available in those countries in which there is no official discount rate.

4. The interest rate formula set forth in article 58 is available to the seller "in any event". This makes it clear that pursuant to article 55 the seller can claim any other loss over and above the loss of interest if he can prove the loss was caused him by the delay in paying the price.

#### Article 59

The party who relies on a breach of contract must adopt such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

#### PRIOR UNIFORM LAW

ULIS, article 88.

#### Commentary

1. Article 59 requires a party who relies on a breach of contract to adopt such measures as may be reasonable in the circumstances to mitigate the loss, including the loss of profit, resulting from the breach.

2. Article 59 is one of several articles which states a duty owed by the injured party to the party in breach.<sup>97</sup> In this case the duty owed is the obligation of the injured party to take actions to mitigate the harm he will suffer from the breach so as to mitigate the damages he will claim under article 26 (1) (b) or 42 (1) (b). "If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

3. It will be noted that article 59 applies only to the injured party's obligation to mitigate his own loss. It does not require him to choose the remedy which would be the least expensive to the party in breach or the formula for the calculation of damages under article 55, 56 or 57, which would result in the lowest amount of damages.<sup>98</sup> If two or more remedies or damage formulas are applicable to a breach of the contract, the injured party may choose the one most beneficial to himself. It should be noted, however, that the injured party can require the delivery of substitute goods or, in most cases, declare the avoidance of the contract with the consequential choice of damage formulas only if there has been a fundamental breach of the contract.<sup>99</sup>

4. The duty to mitigate applies to an anticipatory breach of contract under article 49 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach of the contract, the other party

cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise. The use of the procedure set forth in article 47, if applicable, would be a reasonable measure even though it may delay the avoidance of the contract and the cover purchase, resale of the goods or otherwise, beyond the date on which such actions would otherwise have been required.

*Example 59A:* The contract provided that Seller was to deliver 100 machine tools by 1 December at a total price of \$50,000. On 1 July he wrote Buyer and said that because of the rise in prices which would certainly continue for the rest of the year, he would not deliver the tools unless Buyer agreed to pay \$60,000. Buyer replied that he would insist that Seller deliver the tools at the contract price of \$50,000. On 1 July and for a reasonable time thereafter, the price at which Buyer could have contracted with a different seller for delivery on 1 December was \$56,000. On 1 December Buyer made a cover purchase for \$61,000 for delivery on 1 March. Because of the delay in receiving the tools, Buyer suffered additional losses of \$3,000.

In this example buyer is limited to recovering \$6,000 in damages, the extent of the losses he would have suffered if he had made the cover purchase on 1 July or a reasonable time thereafter, rather than \$14,000, the total amount of losses which he suffered by waiting 1 December to make the cover purchase.

*Example 59B:* Promptly after receiving Seller's letter of 1 July, in example 59A, pursuant to article 47 Buyer made demand on Seller for adequate assurances that he would perform the contract as specified on 1 December. Seller failed to furnish the assurances within the reasonable period of time specified by Buyer. Buyer promptly made a cover purchase at the currently prevailing price of \$57,000. In this case Buyer can recover \$7,000 in damages rather than \$6,000 as in example 59A.

#### SECTION V. PRESERVATION OF THE GOODS

#### Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

#### PRIOR UNIFORM LAW

ULIS, article 91.

#### Commentary

If the buyer is in delay in taking delivery of the goods and the seller is in physical possession of the goods or is in a position to control the disposition of the goods which are in the possession of a third person, it is appropriate that the seller be required to take reasonable steps to preserve the goods for the benefit of the buyer. It is also appropriate that the seller "may retain" [the goods] "until he has been reimbursed his reasonable expenses by the buyer", as is provided in article 60.

<sup>97</sup> Under articles 60 to 63 the party in possession of goods has a duty under certain circumstances to preserve these goods and to sell them for the benefit of the party who has breached the contract, even though the risk of loss is on the party in breach.

<sup>98</sup> See para. 9 of the commentary on article 27.

<sup>99</sup> Articles 27 (2), 30 (1), 32, 45 (1), 47 (3), 48 and 49 provide for the delivery of substitute goods or the avoidance of the contract. A party who has avoided the contract can calculate his damage under article 55, 56 or 57 at his option.



*Example 60A:* The contract provided that Buyer was to take delivery of the goods<sup>100</sup> at the Seller's warehouse during the month of October. Seller made delivery on 1 October by placing the goods at Buyer's disposal.<sup>101</sup> On 1 November, the day when Buyer was in breach of his obligation to take delivery and the day on which the risk of loss passed to the Buyer,<sup>102</sup> Seller shifted the goods to a portion of the warehouse which was less appropriate for the storage of such goods. On 15 November Buyer took delivery of the goods at which time the goods were damaged because of the inadequacies of the portion of the warehouse to which they had been shifted. In spite of the fact that the risk of loss had passed to Buyer on 1 November, Seller is liable for the damage to the goods which occurred between 1 November and 15 November by reason of the breach of his obligation to preserve them.

*Example 60B:* The contract called for delivery on CIF terms. Buyer wrongfully dishonoured the bill of exchange when it was presented to him. As a result, the bill of lading and other documents relating to the goods were not handed over to Buyer. Article 60 provides that in this case Seller, who is in a position to control the disposition of the goods through his possession of the bill of lading, is obligated to preserve the goods when they are discharged at the port of destination.<sup>103</sup>

#### Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been put at his disposal at the place of destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

#### PRIOR UNIFORM LAW

ULIS, article 92.

#### Commentary

1. Article 61 sets forth the buyer's obligation to preserve goods which he intends to reject.

2. Paragraph (1) provides that if the goods have been received by the buyer and he intends to reject them, he must take reasonable steps to preserve them. The buyer may retain those goods until he has been reimbursed his reasonable expenses by the seller.

3. Paragraph (2) provides for the same result where goods which have been dispatched to the buyer have been put at his disposal at their place of destination and he exercises his right to reject them.<sup>104</sup> How-

<sup>100</sup> The buyer's obligation to take delivery is set forth in article 41.

<sup>101</sup> See article 15 (b) and 15 (c).

<sup>102</sup> Article 66 (2).

<sup>103</sup> Compare example 61C.

<sup>104</sup> Para. (2) states that the buyer "must take possession of [the goods] on behalf of the seller". Once possession is taken, the obligation to preserve the goods arises out of para. (1).

ever, since the goods are not in the buyer's physical possession at the time he exercises his right to reject them, it is not as clear that he should be required to take possession of them on behalf of the seller. Therefore, paragraph (2) specifies that he need take possession only if "he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense" and only if the seller or a person authorized to take charge of the goods for him is not present at the place of destination.

4. Paragraph (2) is applicable only if goods which have been dispatched to the buyer "have been put at his disposal at the place of destination". Therefore, the buyer is obligated to take possession of the goods only if the goods have physically arrived at the place of destination prior to his rejection of them. He is not obligated to take possession of the goods under paragraph (2) if before the arrival of the goods he rejects the shipping documents because they indicate that the goods do not conform to the contract.

*Example 61A:* After the goods were received by the Buyer he rejected them because of their failure to conform to the contract. The Buyer is required by article 61 (1) to preserve the goods for the Seller.

*Example 61B:* The goods were shipped to the Buyer by railroad. Prior to taking possession, Buyer found on examination of the goods that there was a fundamental breach of the contract in respect of their quality. Even though Buyer has the right to avoid the contract under article 30 (1) (a) by virtue of article 61 (2) he is obligated to take possession of the goods and to preserve them, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense and provided that the Seller or a person authorized to take possession on his behalf is not present at the place of destination.

*Example 61C:* The contract provided for delivery on CIF terms. When the bill of exchange was presented to the Buyer, he dishonoured it because the accompanying documents were not in conformity with the contract of sale. In this example Buyer is not obligated to take possession of the goods for two reasons. If the goods have not arrived and been put at his disposal at the place of destination at the time the Buyer dishonours the bill of exchange, the provisions of article 61 (2) do not apply at all. Even if article 61 (2) were to apply, because the Buyer could take possession of the goods only by paying the bill of exchange, he would not be required by article 61 (2) to take possession and preserve the goods.<sup>105</sup>

#### Article 62

The party who is under an obligation to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

#### PRIOR UNIFORM LAW

ULIS, article 93.

#### Commentary

Article 62 permits a party who is under an obligation to take steps to preserve the goods to discharge his

<sup>105</sup> Compare example 60B.

obligation by depositing them in the warehouse of a third person. The warehouse must be appropriate for the storage of goods of the type in question and the expense of storage must not be unreasonable.

### Article 63

(1) If there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation and notice of his intention to sell has been given, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 must make reasonable efforts to sell them. To the extent possible he must give notice of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance.

#### PRIOR UNIFORM LAW

ULIS, articles 94 and 95.

#### Commentary

1. Article 63 sets forth the right to sell the goods by the party who is under an obligation to preserve them.

#### Right to sell, paragraph (1)

2. Under paragraph (1) the right to sell the goods arises where there has been an unreasonable delay by the other party in taking possession of them or in taking them back or in paying the cost of preservation.

3. The sale may be by "any appropriate means" after "notice of his intention to sell" has been given. The convention does not specify what are appropriate means because conditions vary in different countries. To determine whether the means used are appropriate, reference should be made to the means required for sales under similar circumstances under the law of the country where the sale takes place.

4. The law of the State where the sale under this article takes place including the rules of private international law, will determine whether the sale passes a good title to the purchaser if the party selling the goods has not complied with the requirements of this article.<sup>106</sup>

#### Goods subject to loss, paragraph (2)

5. Under paragraph (2) the party who is under an obligation to preserve the goods must make reasonable efforts to sell them if (1) the goods are subject to loss or rapid deterioration or (2) their preservation would involve unreasonable expense.

6. The most obvious example of goods which must be sold, if possible, because they are subject to loss or rapid deterioration is fresh fruits and vegetables. However, the concept of "loss" is not limited to a physical deterioration or loss of the goods but includes

situations in which the goods threaten to decline rapidly in value because of changes in the market.

7. Paragraph (2) only requires that reasonable efforts be made to sell the goods. This is so because goods which are subject to loss or rapid deterioration may be difficult or impossible to sell. Similarly, the obligation to give notice of the intent to sell exists only to the extent to which such notice is possible. If the goods are rapidly deteriorating, there may not be sufficient time to give notice prior to sale.

8. If the party obligated to sell the goods under this article does not do so, he is liable for any loss or deterioration arising out of his failure to act.

#### Right to reimbursement, paragraph (3)

9. The party selling the goods may reimburse himself from the proceeds of the sale for all reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance. If the party selling the goods has other claims arising out of the contract or its breach, under the applicable national law he may have the right to defer the transmission of the balance until the settlement of those claims.

## CHAPTER VI. PASSING OF RISK

### Article 64

If the risk has passed to the buyer, he must pay the price notwithstanding loss or damage to the goods, unless the loss or damage is due to an act of the seller.

#### PRIOR UNIFORM LAW

ULIS, article 96.

#### Commentary

1. Article 64 introduces the provisions in the convention that regulate the passing of the risk of loss.

2. The question whether the buyer or the seller must bear the risk of loss is one of the most important problems to be solved by the law of sales. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement with its attendant strain on current assets, and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the allocation of the risk has an even sharper impact.

3. Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C & F may specify the moment when the risk of loss passes from the seller to the buyer.<sup>107</sup> Where the contract sets forth rules for the determination of the risk of loss by the use of trade

<sup>107</sup> E.g., Incoterms 1953, FOB, A4 and B2; CIF, A6 and B3; C & F, A4 and B2 provide that the seller bears the risk until the goods pass the ship's rail from which time the risk is borne by the buyer.

The use of such terms in a contract without specific reference to Incoterms or to some other similar definition and without a specific provision in the contract as to the moment when risk passes may nevertheless be sufficient to indicate that moment if the court or arbitral tribunal finds the existence of a usage. See para. 6 of the commentary on article 8.

<sup>106</sup> Article 7.

terms or otherwise, those rules will prevail over the rules set forth in the present convention.<sup>108</sup>

4. Article 64 states the main consequence of the passing of the risk. Once the risk has passed to the buyer, the buyer is obligated to pay for the goods notwithstanding subsequent loss or deterioration of the goods. This is the converse of the rule stated in article 20 that "the seller is liable... for any lack of conformity which exists at the time when the risk passes to the buyer".

5. The buyer's obligation to pay the price where the risk has passed notwithstanding the loss or deterioration of the goods is subject to the qualification that the loss or deterioration not be due "to an act of the seller". The loss or deterioration is due to an act of the seller if it was due to a defect which existed at the time the risk passed even though that defect was hidden.

6. Similarly, the buyer may be exonerated from paying the price if the loss or deterioration was in violation of an express guarantee given by the seller.

#### Article 65

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.

(2) If at the time of the conclusion of the contract the goods are already in transit, the risk passes as from the time the goods were handed over to the first carrier. However, the risk of loss of goods sold in transit does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods had been lost or damaged, unless the seller has disclosed such fact to the buyer.

#### PRIOR UNIFORM LAW

ULIS, articles 19 paragraph 2, 97 paragraph 7, 99 and 100.

#### Commentary

1. Article 65 governs the passage of the risk of loss where the contract of sale involves the carriage of the goods or where the goods are in transit at the time of the sale.<sup>109</sup>

*Where the contract involves carriage of the goods, paragraph (1)*

2. If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk of loss passes when the goods are handed over to the first carrier. The contract of sale involves carriage of the goods if the seller is required or authorized to ship the goods. The goods are handed over to the carrier at the time physical possession is given to the carrier, whether or not they are then on board the vessel which will transport them to the buyer.

3. However, since in a contract Ex Ship the seller's obligation is to hand over the goods to the buyer at a particular destination, i.e. at the port of destination named in the contract, the risk of loss in such a con-

tract passes not under article 65 (1) but under article 66 (1).

4. If the goods are to be transported by two or more carriers, "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer". Therefore, if the goods are shipped from an inland point by rail or truck to a port where they are loaded aboard a ship, the risk of loss passes when the goods are handed over to the railroad or trucking firm.

5. It is important to note that the goods must be handed over to the first carrier "for transmission to the buyer". In some cases goods may be handed over for the purpose of fulfilling a sales contract and still not be handed over for transmission to the buyer. For example, if a seller shipped 10,000 tons of wheat in bulk to fulfill his obligations to deliver 5,000 tons to each of two separate buyers, the goods would not have been handed over "for transmission to the buyer". Therefore, article 65 (1) would not apply and the risk would pass to the buyer under article 66 (1) "when the goods were placed at his disposal and taken over by him", i.e. after the arrival of the goods at the place of destination. This would change the rule in some legal systems that the risk would pass to the two buyers jointly at the time of shipment and that they would share *pro rata* in any loss suffered.

#### Goods in transit, paragraph (2)

6. If the goods were in transit at the time the contract of sale was concluded, the risk of loss is deemed to have passed retroactively at the time the goods were handed over to the first carrier, as in paragraph (1). This rule that the risk of loss passes prior to the making of the contract arises out of purely practical concerns. It would normally be difficult or even impossible to determine at what precise moment in time damage known to have occurred during the carriage of the goods in fact occurred. It is simpler if the risk of loss is deemed to have passed at a time when the condition of the goods was known. In addition, it will usually be more convenient for the buyer, who is in physical possession of the goods at the time the loss or damage is discovered, to make claim against the carrier and the insurance company.

7. This rule of retroactive passage of the risk of loss does not apply "if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods had been lost or damaged unless the seller has disclosed such fact to the buyer".

#### Article 66

(1) In cases not covered by article 65 the risk passes to the buyer as from the time when the goods were placed at his disposal and taken over by him.

(2) If the goods have been placed at the disposal of the buyer but they have not been taken over by him or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract. If the contract relates to the sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

<sup>108</sup> Article 5.

<sup>109</sup> Article 67 affects the application of article 65 if there has been a fundamental breach of contract.

## PRIOR UNIFORM LAW

ULIS, articles 97 and 98.

## Commentary

*Risk of loss in cases not governed by article 65, paragraph (1)*

1. Article 66 (1) governs the risk of loss in all cases in which article 65 does not apply.<sup>110</sup> In such case "the risk passes to the buyer as from the time when the goods were placed at his disposal and taken over by him".

2. In order for the risk to pass under article 66 (1), the buyer must take over the goods. The goods are taken over when the buyer either takes physical possession or, if the goods are in the hands of a third person, when the appropriate act has occurred after which the third person is liable to the buyer for the goods. Such act includes the handing over of a negotiable document of title (e.g., negotiable warehouse receipt) or the acknowledgement by the third person that he holds the goods for the benefit of the buyer.

*Where the buyer has wrongfully not taken over the goods, paragraph (2)*

3. Since article 66 (1) shifts the risk of loss to the buyer only when the buyer has taken over the goods, article 66 (2) is necessary to provide for the situation in which the goods are placed at the buyer's disposal but he wrongfully fails to take them over. Article 66 (2) provides that in such a case "the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract".

4. Article 66 (2) goes on to specify that the risk of loss of goods not identified to the contract at the time of the conclusion of the contract does not pass until the goods have been clearly identified to the contract and the buyer has been informed of such identification. This provision is intended to assure that the seller cannot identify goods to the contract which were damaged after the risk of loss would have passed under article 66 (1). It should be noted that article 66 (2) does not apply to contracts which involve carriage of the goods. For the rule in respect of such contracts, see article 16 (1) and the commentary thereon.

*Example 66A:* The Buyer was to take delivery of 100 cartons of transistors at the Seller's warehouse during the month of July. On 1 July the Seller marked 100 cartons with the Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July the Buyer took delivery of the 100 cartons. Therefore, the risk of loss passed to the Buyer on 20 July at the moment that the goods were taken over by him.

*Example 66B:* In the contract described in example 66A the Buyer did not take delivery of the 100 cartons until 10 August. The risk of loss passed to him at the close of business on 31 July, the last moment he could have taken over the goods without committing a breach of contract.

*Example 66C:* Although the Seller in the contract described in example 66A should have had the 100

cartons ready for the Buyer to take delivery at any time during the month of July, no cartons were marked with the Buyer's name or otherwise identified to the contract until 15 September. The Buyer took delivery on 20 September, which was within a reasonable time after he was notified of the availability of the goods. The risk of loss passed to the Buyer on 20 September, the time when the Buyer took delivery of the goods. This result occurs, rather than the result given in example 66B, because the Buyer was not in breach of the contract for not taking delivery before 20 September.

## Article 67

If the seller has committed a fundamental breach of contract, the provisions of articles 65 and 66 do not impair the remedies available to the buyer on account of such breach.

## PRIOR UNIFORM LAW

ULIS, article 97, paragraph 2.

## Commentary

1. Article 67 provides that the passage of the risk of loss under article 65 or 66 does not impair any remedies which the buyer may have which arise out of a fundamental breach of contract by the seller.

2. The primary significance of article 67 is that the buyer may be able to insist on the delivery of substitute goods under article 27 or 28 or to declare the contract avoided under article 30 (1) (a) or (b) even though the goods have been lost or damaged after the passage of the risk of loss under article 65 or 66. In this respect article 67 constitutes an exception to article 52 (1) as well as to articles 65 and 66 in that, subject to three exceptions enumerated in article 52 (2), "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

3. Article 67 must be read in connexion with articles 23 and 30 (2) because in some examples the buyer will lose his right to declare the contract avoided or to require the seller to deliver substitute goods because he did not act within the time-limits required by those articles.

*Example 67A:* The contract was the same as in example 66A. The Buyer was to take delivery of 100 cartons of transistors at the Seller's warehouse during the month of July. On 1 July the Seller marked 100 cartons with the Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July the Buyer took delivery of the 100 cartons at which time he paid the price. Therefore, under article 66 (1) the risk of loss passed to the Buyer on 20 July.

On 21 July, before the Buyer could give the examination required under article 22, 50 of the cartons were destroyed in a fire. When the Buyer examined the contents of the remaining 50 cartons, the transistors were found not to conform to the contract to such a degree that the lack of conformity constituted a fundamental breach of the contract.

In spite of the Buyer's inability to return all 100 cartons because of the fire which had occurred after the

<sup>110</sup> Article 67 affects the application of article 66 if there has been a fundamental breach of contract.

passage of the risk of loss, the Buyer could avoid the contract and recover the price he had paid.

*Example 67B:* The facts are the same as in example 67A except that the Buyer did not examine the remaining 50 cartons of transistors for six months after he received them. In such a case he could probably not avoid the contract because it would probably be held under article 23 (1) that he had not given notice of the lack of conformity "within a reasonable time after he . . . ought to have discovered it" and under article 30 (2) (b) that he had not declared the contract avoided "within a reasonable time . . . after he . . . ought to have known of such breach".

*Example 67C:* In partial fulfilment of his obligations under the contract in example 67A, on 1 July the Seller identified to the contract 50 cartons of transistors rather than the 100 cartons called for in the contract.

On 5 August, before the Buyer took delivery of the goods, the 50 cartons were destroyed in a fire in the Seller's warehouse. Even though the risk of loss in respect of the 50 cartons had passed to the Buyer at the close of business on 31 July,<sup>111</sup> if identifying to the contract only 50 cartons instead of 100 cartons constituted a fundamental breach of contract, the Buyer could still declare the contract avoided by reason of article 67. However, he must do so "within a reasonable period of time . . . after he knew or ought to have known" of the shortage or he will lose the right to declare the contract avoided by virtue of article 30 (2) (b).

*Example 67D:* Although the Seller in the contract described in example 67A should have had the 100 cartons ready for the Buyer to take delivery at any time during the month of July, no cartons were marked

with the Buyer's name or otherwise identified to the contract until 15 September. The Buyer took delivery on 20 September. As was stated in example 66C, the risk of loss passed to the Buyer on 20 September, the time when the Buyer took delivery of the goods.

On 23 September the goods were damaged through no fault of the Buyer. If the Seller's delay in putting the goods at the Buyer's disposal amounted to a fundamental breach, article 67 provides that the damage to the goods after the passage of the risk of loss would not prohibit the Buyer from declaring the contract avoided. However, under article 30 (2) (a), it is likely that it would be held that once the Buyer had taken delivery of the goods by picking them up at the Seller's warehouse, he had lost the right to declare the contract avoided for not having "done so within a reasonable time . . . after he [became] aware that delivery has been made".

*Example 67E:* The contract was similar to that in example 67A except that the Seller was to ship the goods on FOB terms during the month of July. The goods were shipped late on 15 September. Under article 65 (1) the risk of loss passed on 15 September.

On 17 September the goods were damaged while in transit. On 19 September both the fact that the goods had been shipped on 15 September and that they were damaged on 17 September were communicated to the Buyer. Under these facts, if the late delivery constituted a fundamental breach, the Buyer could avoid the contract if he did so "within a reasonable time . . . after he has become aware that delivery has been made"<sup>112</sup> a time which would undoubtedly be very short under the circumstances.

<sup>111</sup> See example 66B.

<sup>112</sup> Article 30 (2) (a).

#### 4. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Note by the Secretary-General: draft commentary on the draft Convention on the International Sale of Goods . . . . .	A/CN.9/WG.2/WP.22
Provisional agenda and annotations . . . . .	A/CN.9/WG.2/WP.24
Comments and proposals by the observer of Norway on the draft Convention on the International Sale of Goods as approved or deferred by the Working Group at its first six sessions . . . . .	A/CN.9/WG.2/WP.25
Report of the Drafting Group: Part I. Substantive provisions. Chapter I. Sphere of application . . . . .	A/CN.9/WG.2/VII/CRP.1 and Add.1 to 8
Draft report of the Working Group, Geneva 5-16 January 1976 . . . . .	A/CN.9/WG.2/VII/CRP.2 and Add.1 and 2

## II. INTERNATIONAL PAYMENTS

### 1. Report of the Working Group on International Negotiable Instruments on the work of its fourth session (New York, 2-12 February 1976) (A/CN.9/117)

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#### INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a "Draft Uniform Law on International Bills of Exchange and International Promissory Notes, with commentary" (A/CN.9/WG.IV/WP.2).<sup>1</sup> At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.<sup>2</sup>

2. The Working Group held its first session in Geneva in January 1973. At that session the Working Group considered articles of the draft uniform law relating to transfer and negotiation (articles 12 to 22), the rights and liabilities of signatories (articles 27 to 40), and the definition and rights of a "holder" and a "protected holder" (articles 5, 6 and 23 to 26).<sup>3</sup>

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), UNCITRAL, report on the fourth session (1971), para. 35 (UNCITRAL Yearbook, Vol. II: 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7; report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), UNCITRAL, report on the fifth session (1972), para. 61 (2) (c) (UNCITRAL Yearbook, Vol. III: 1972, part one, II, A).

<sup>2</sup> UNCITRAL, report on the fifth session (1972), para. 61 (1) (a).

<sup>3</sup> Report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77 (UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1).

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (articles 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (articles 46 to 61).<sup>4</sup>

4. The third session was held in Geneva in January 1975. At that session the Working Group continued its consideration of the articles concerning notice of dishonour (articles 63 to 66). The Group also considered provisions regarding the sum due to a holder and to a party secondarily liable who takes up and pays the instrument (articles 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (articles 69 to 78).<sup>5</sup>

5. The Working Group held its fourth session at United Nations Headquarters in New York from 2 to 12 February 1976. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. With the exception of Egypt, all the members of the Working Group were represented. The session was also attended by observers of the following members of the Commission: Argentina, Austria, Bul-

<sup>4</sup> Report of the Working Group on International Negotiable Instruments on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (UNCITRAL Yearbook, Vol. V: 1974, part two, II, 1).

<sup>5</sup> Report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (UNCITRAL Yearbook, Vol. VI: 1975, part two, II, 1).



garia, Federal Republic of Germany, Hungary, Kenya and the Philippines, and by observers from the International Monetary Fund, the Hague Conference on Private International Law, the International Chamber of Commerce and the European Banking Federation.

6. The Working Group elected the following officers:

Chairman ..... Mr. René Roblot (France)  
Rapporteur ..... Mr. Roberto Mantilla-Molina (Mexico)

7. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.5); draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2);<sup>6</sup> draft text of article 79 of the uniform law (A/CN.9/WG.IV/CRP.9); report of the Working Group on the work of its first session (A/CN.9/77);<sup>7</sup> report of the Working Group on the work of its second session (A/CN.9/86),<sup>8</sup> and report of the Working Group on the work of its third session (A/CN.9/99).<sup>9</sup>

#### DELIBERATIONS AND CONCLUSIONS

8. As at its previous session, the Working Group decided to concentrate its work on the substance of the draft uniform law and to request the Secretariat to prepare a revised draft of those articles in respect of which its deliberations would indicate modifications of substance or of style.

9. In the course of its session, the Working Group considered articles 79 to 86 and articles 1 to 11 of the draft uniform law. The Group thereby completed its first reading of the draft uniform law. A summary of the Group's deliberations and its conclusions are set forth in paragraphs 11 to 116 of this report.

10. At the close of its session, the Working Group expressed its appreciation to the representatives of international banking and trade organizations that are members of the UNCITRAL Study Group on International Payments for the assistance they had given to the Group and the Secretariat. The Group expressed the hope that the members of the Study Group would continue to make their experience and services available during the remaining phases of the current project.

#### A. Limitation of actions

##### Article 79

"(1) A right of action arising on an instrument can no longer be exercised

"(a) Against the acceptor, the maker or his guarantor, after four years have elapsed;

"(b) Against an endorser, the drawer or his guarantor, after two months have elapsed.

Either period of time is hereinafter referred to as 'the limitation period'.

"(2) The limitation period shall commence to run on the date on which the action accrues.

"(3) (a) The action of the holder against the acceptor, the maker, and endorser or his guarantor

shall accrue on the date on which protest is made. Where protest is dispensed with, such action shall accrue on the date of dishonour in the case of dishonour by non-acceptance and on the date of maturity in the case of dishonour by non-payment, except that in the case mentioned in article 61 (2) (b), the action shall accrue upon the expiry of 30 days after maturity or, in the case of an instrument payable on demand, 30 days after the expiration of the time-limit for presentment for payment.

"(b) The action of an endorser, the drawer or their guarantor against the acceptor or his guarantor shall accrue on the date on which the instrument was taken up and paid.

"(c) The action of an endorser or his guarantor against an endorser, the drawer or their guarantor shall accrue on the date on which the instrument was taken up and paid.

"(4) Where the party to whom the action has accrued performs, before the expiration of the limitation period, any act which, under the law of the jurisdiction in which the party liable has his habitual residence or place of business, has the effect of suspending or recommencing a limitation period, the limitation period shall cease to run or recommence as the case may be.

"(5) Where a party liable, before the expiration of the limitation period, performs any act which, under the law of the jurisdiction in which that party has his habitual residence or place of business, has the effect of an acknowledgment of his liability on the instrument, the limitation period shall recommence.

"(6) In any event the dispatch, before the expiration of the limitation period, of a written notification signed and dated by a party to whom a right of action has accrued to a party liable stating:

"(a) That it is dispatched under article 79; and

"(b) That payment is demanded by him;

shall effect a cessation of the running of the limitation period in favour of the party liable from the time of dispatch.

"(7) Where, as a result of a circumstance which is beyond the control of the party to whom the action has accrued and which he could neither avoid nor overcome, such party has been prevented from causing the limitation period to cease to run or to recommence, the limitation period shall:

"(a) In the case of a right of action against the acceptor or his guarantors, be extended so as not to expire before the expiration of six months from the date on which the relevant circumstance ceased to exist, or

"(b) In the case of a right of action against an endorser, the drawer or their guarantor, recommence.

"(8) The cessation of recommencing of the limitation period shall operate only against the party in respect of whom the limitation period has been interrupted."

<sup>6</sup> UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.

<sup>7</sup> UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

<sup>8</sup> UNCITRAL Yearbook, Vol. V: 1974, part two, II, 1.

<sup>9</sup> UNCITRAL Yearbook, Vol. VI: 1975, part two, II, 1.

11. This article introduces special rules in respect of the period of time within which an action arising on an instrument must be brought. Under article 79, actions are time-barred against a party primarily liable (the acceptor or the maker) after four years have elapsed, and against parties secondarily liable (endorsers, guarantors and the drawer) after two months have elapsed. The limitation period commences to run on the date on which the cause of action accrues. Paragraph 3 sets forth provisions when an action accrues in respect of a party liable. Paragraphs 4 to 6 contain rules in respect of the cessation and recommencing of a period. Paragraph 7 deals with the special case of "force majeure".

12. The Working Group considered three possible approaches with respect to the limitation of actions arising on an instrument:

(a) Not to introduce into the uniform law provisions special to an international negotiable instrument and to leave the matter governed by national law;

(b) To introduce into the uniform law detailed provisions on the lines of the proposed article 79;

(c) To provide in the uniform law only for the period or periods of time within which an action must be brought and for the date on which the limitation period would commence to run, on the lines of articles 70 and 71 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes.

13. The Working Group was of the view that it would be in the interest of uniformity if the uniform law contained special provisions concerning the period of time within which an action must be brought and the date of commencement of such period. The Group was agreed that it would not be feasible to lay down special rules governing such questions as suspension and interruption.

*Action by the holder against the acceptor, the maker and their guarantor*

(a) *Length of the limitation period*

14. There was general consensus that a period of four years, as proposed in article 79, was acceptable.

15. One representative was in favour of a period of three years, and reserved his position.

(b) *Date on which the period commences to run*

16. The Working Group was agreed that, in respect of an instrument payable at a definite time, the period should commence to run on the date of maturity.

17. With respect to an instrument payable on demand, the Working Group considered several possibilities:

- (i) The date on which the instrument was issued;
- (ii) The day after the instrument was created;
- (iii) The date on which the instrument was accepted;
- (iv) The first day on which the holder could claim payment according to the terms of the instrument; and

(v) The date on which the instrument was presented for payment.

18. The Working Group was unable to reach consensus on the date on which the period of limitation, in respect of actions on a demand instrument, should commence to run. According to one view, a course of action against the acceptor of a bill or the maker of a note should accrue on the date on which the instrument, signed by the acceptor or maker, was issued to the payee. According to another view, a course of action against the acceptor or the maker would only accrue on the date on which a demand for payment was made and payment was refused. According to yet another view, the cause of action should accrue on the day the instrument was created, but the period of limitation should not include the day on which the period commenced; the draft uniform law should therefore set forth a general provision on the lines of article 73 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes.

19. The majority view was that there should be an identical rule and an identical result in respect of an instrument payable at a definite time and an instrument payable on demand, and that the date on which the period commenced to run should be the date of maturity. The maturity date of a bill payable on demand should be the date on which the bill was presented for payment.

20. The Working Group was agreed that if presentment of a note payable on demand or an accepted bill payable on demand was not made within the one-year period, laid down in article 53 (e), the date from which the period of four years should be calculated should be the day on which the period of one year, within which presentment for payment must be made, expired.

*Action of the holder against an endorser and the drawer*

(a) *Length of the limitation period*

21. The Working Group was of the opinion that the limitation period in respect of an action of the holder against prior parties should be the same as the limitation period in respect of the action by the holder against the acceptor, i.e. four years.

(b) *Date on which the period commences to run*

22. There was general agreement that, in respect of an action by the holder against parties secondarily liable, the period of four years should be calculated, in respect of all these parties, from the date on which a party first became liable on the instrument. It was understood that, in the case of dishonour by non-acceptance or by non-payment, this date should be the day on which the instrument was duly protested. Where protest was dispensed with, the date should be the day on which the instrument was dishonoured.

*Action by parties secondarily liable*

(a) *Length of the limitation period*

23. The Working Group was agreed that the limitation period in respect of an action of an endorser against an endorser or against the drawer should be four years. However, the Group was of the view that in respect of an action of an endorser or the drawer of a bill against the acceptor or of the endorser of a note against

the maker, an action might still be brought within one year from the day on which the endorser or the drawer took up and paid the bill or note or from the day on which they themselves were sued. Such a rule would prevent injustice to a party secondarily liable in the rare case where he would be sued towards the end of the period of four years.

(b) *Date on which the period commences to run*

24. The Working Group was of the opinion that the four-year period should be calculated in the same manner as the period in respect of an action by the holder against parties secondarily liable. The date of commencement of the additional period of one year should be as stated in paragraph 23 above.

*General provision on date on which a period commences to run.*

25. The Working Group requested the Secretariat to consider, when redrafting article 79 in the light of its conclusions, whether it would be feasible to replace the detailed rules in respect of the date from which the period should be calculated by a general rule under which the period would be calculated from the date on which a party became first liable to pay the instrument.

*Suspension and interruption of the limitation period*

26. The Working Group recognized that in some legal systems a period of limitation could be suspended or interrupted by an act of the creditor or of the debtor. The Group considered two questions:

(a) Whether the uniform law should set forth special provisions in respect of the causes and consequences of suspension and interruption of actions, arising on an international instrument, and of "force majeure"; and

(b) If the answer to question (a) was negative and the matter would consequently be left to national law, whether the uniform law should set forth a specific provision to that effect.

27. In respect of question (a), the Working Group was of the view that questions concerning the causes and consequences of suspension and interruption presented complex problems which could not adequately be dealt with in the context of a uniform law on international bills of exchange and promissory notes and should therefore be left to national law.

28. In respect of question (b), the Working Group was agreed that an express reference to national law would be necessary in view of the fact that under some legal systems the absence of such a reference would result in the non-recognition of the effects of suspension or interruption.

29. The Working Group requested the Secretariat to draft a provision on the lines of article 17 of annex II to the Geneva Convention on Bills of Exchange and Promissory Notes according to which it was for the law of each High Contracting Party to determine the causes of interruption or suspension of limitation in the case of actions on bills of exchange which came before its courts. The Group was of the view that this provision should be extended to comprise also other questions that could arise in the context of limitation,

such as the question whether the interruption or suspension of a limitation period should operate in respect of all parties liable or only against the party in respect of whom the period had been interrupted.

*Limitation of actions arising outside an instrument*

30. The Working Group considered the question whether actions arising outside an instrument, but connected with it, should be made subject to a specific limitation period. Such actions could either relate to the underlying transaction or to those that were specifically provided for in the uniform law (i.e. in articles 22, 42 and 66). The Group was of the opinion that the regulation of the limitation period in respect of these actions should be left to national law.

*B. Lost instruments*

31. Under the uniform law, the rights on an instrument are vested in the holder. Article 5 (6) defines the holder as the payee or endorsee of an instrument who is in possession thereof. The question thus arises which are the rights, if any, of a holder who has lost possession of the instrument. Articles 80 to 85 set forth special provisions concerning the rights and obligations of a "holder" who has lost the instrument (hereinafter referred to as "ex-holder") and of the party who pays the lost instrument.

32. The Working Group considered whether the uniform law should set forth provisions dealing with the situation where an instrument was lost. It was noted that the issue was of practical importance and one which was proper to the law on negotiable instruments. Furthermore, the laws of various countries which provided a solution in respect of lost instruments differed widely and a uniform régime would thus be beneficial. It was also noted that the laws of some countries provided for the possibility of having an instrument that had been lost, whether by theft, destruction or otherwise, declared cancelled. The Group was of the opinion that the institution of cancellation would not be acceptable in the context of an international negotiable instrument because cancellation took place on the basis of a judicial decision which would not necessarily be known in countries other than the country in which it was rendered. Consequently, the Group was agreed that the uniform law should contain provisions along the lines of articles 80 to 85 of the draft uniform law before it.

*Article 80*

"(1) Where an instrument is lost [whether by destruction, wrongful detention or otherwise] the person who lost the instrument shall, subject to the provisions of paragraphs (2) and (3) of this article, have the same right to payment which he would have had if he had been in possession of the instrument.

"(2) (a) A person claiming payment of a lost instrument shall establish in writing to the satisfaction of the party from whom he claims payment

"(i) The fact that, when in possession of the instrument, he had a right to payment;

"(ii) The facts which prevent production of the instrument; and

"(iii) The contents of the lost instrument.

"(b) The party from whom payment of a lost instrument is claimed may request the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

"(c) The kind of security and its terms shall be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the kind of security and its terms shall be determined by the Court.

"(d) Where security cannot be given, the Court may order the party from whom payment is claimed to deposit the amount of the lost instrument, and any interest and expenses which may be claimed under articles 67 and 68, with the Court or any other competent authority. Such deposit shall be considered as payment to the person claiming payment."

33. The basic policy underlying article 80 is:

(a) That the fact that an instrument is lost should not deprive the ex-holder of the rights which he would have had if he had remained in possession of the instrument; and

(b) That the party liable on the lost instrument should not bear the risk of having to pay the instrument twice, i.e. to the ex-holder and to the holder in possession of the instrument.

The policy under (a) above is implemented by the provision that the ex-holder has the same right to payment which he would have had if he had not lost the instrument (cf. para. (1)). The policy under (b) above is implemented by the provision that the party from whom payment is claimed may require the ex-holder to give him security which would enable him to indemnify himself in the event of his having paid the instrument a second time to the holder in possession thereof.

#### *Paragraph (1)*

34. The Working Group considered whether the word "lost" should stand alone or should be explained by the words "whether by destruction, wrongful detention or otherwise" which had been placed between brackets. The Group was of the view that paragraph (1) should elaborate on the meaning of the word "lost" in the sense indicated in the present text. The Group requested the Secretariat to consider whether this could be better achieved by defining the term "loss" in a separate paragraph.

35. Doubts were expressed whether the phrase "have the same right to payment which he would have had if he had been in possession of the instrument" expressed adequately the idea that the fact that the instrument was lost could not be relied upon as a defence by a party liable. The Working Group requested the Secretariat to examine the possibility of a different wording of the paragraph which would convey that idea.

#### *Paragraph (2) (a)*

36. The Working Group noted that paragraph (2) (a) introduced a subjective test in that the ex-holder was required to establish certain facts "to the satis-

faction of the party from whom he claims payment". The Group concluded that the question whether the establishment of certain facts was satisfactory for the purposes of article 80 should be decided on objective grounds. It requested the Secretariat to redraft the paragraph accordingly.

#### *Paragraph (2) (a) (i)*

37. The Working Group was agreed that subparagraph (a) (i) should be reworded as follows: "The fact that, if he had been in possession of the instrument, he would have had a right to payment."

#### *Paragraph (2) (a) (ii)*

38. The Working Group expressed agreement with this provision.

#### *Paragraph (2) (a) (iii)*

39. The Working Group requested the Secretariat to reconsider this provision and to determine what elements were material for the purposes of the "writing" under paragraph (2) (a).

#### *Paragraph (2) (b)*

40. The Working Group was in agreement with this provision. However, it was suggested that the word "request" should be replaced by the word "require".

#### *Paragraph (2) (c)*

41. The Working Group expressed agreement with this provision. However, the Group was of the view that the Court should be given a greater measure of discretion and should be at liberty to decide whether security was required in a given case and what would be the duration of the security and its terms.

#### *Paragraph (2) (d)*

42. The Working Group expressed agreement with the substance of this paragraph, subject to introducing also in this paragraph wording that would allow the Court to use its discretion in deciding the period of time during which the amount would remain in deposit.

### *Article 81*

"(1) A party who has paid a lost instrument, and to whom the instrument is subsequently presented for payment by another person, shall notify the person to whom he paid of such presentment.

"(2) Such notification shall be given on the day the instrument is presented or on one of the two business days which follow and shall state the name of the person presenting the instrument and the date and place of presentment.

"(3) Failure to notify shall render the party who has paid the lost instrument liable for any damages that the person whom he paid may suffer from such failure (provided that the total amount of the damages shall not exceed the amount of the instrument)."

43. This article imposes upon the party who has paid the instrument to the ex-holder the obligation to notify him of a subsequent presentation of the instrument for payment. If such party does not do so, he is liable for damages. The purpose of this provision is

to safeguard the rights which the ex-holder may have on the instrument and to enable him to claim the instrument from the holder. If the ex-holder claims the instrument, the party who has paid the lost instrument may raise as a defence against a demand for payment by the holder the right of the ex-holder to the instrument (cf. article 24 (3)).

44. The Working Group expressed general agreement with this provision. However, the Group was of the view that article 81 should be supplemented by a provision on the lines of article 65 concerning the circumstances in which delay in giving notification would be excused or be dispensed with.

#### Article 82

"(1) A party who has paid a lost instrument and who is subsequently discharged of his liability on the instrument shall have the right

"(a) Where security was given, to indemnify himself; or

"(b) Where the amount was deposited with a Court or other competent authority, to reclaim the amount so deposited.

"(2) Where the amount was deposited with a Court or other competent authority and was not reclaimed under paragraph (1) (b) of this article within the period of time provided by article 79, the person for whose benefit the amount was deposited may request the Court which ordered the deposit to order that the amount deposited be paid out to him. The Court shall grant such request upon such terms and conditions as it may require."

45. Paragraph (1) of this article deals with the right of the party who has paid the ex-holder to reimburse himself out of the security if subsequent to this payment the lost instrument is presented by a holder for payment and paid. Paragraph (2) concerns the situation where a party paying under article 80 deposited the amount with a Court or other competent authority (cf. article 80 (2) (d)), and the amount was not claimed within the period of limitation laid down in article 79. In such a case, the ex-holder may request the Court that the money be refunded to him.

#### Paragraph (1)

46. The Working Group expressed agreement with the substance of article 82. However, it was pointed out that the present wording did not state with sufficient clarity that:

(a) The words "a party who has paid a lost instrument" referred to a party who has paid a lost instrument under the provisions of article 80; and

(b) The words "and who is subsequently discharged of his liability" covered not only the case of a second payment by the party who has paid the ex-holder, but also other cases in which the rights of that party were impaired, e.g. where that party could no longer exercise a right of recourse against prior parties. For example: an endorser pays the ex-holder and receives security. The instrument is subsequently presented to the drawer and paid by him. The endorser should be able, under article 82, to indemnify himself since he cannot ex-

ercise a right of recourse against the drawer. The Group requested the Secretariat to redraft paragraph (1) accordingly.

#### Paragraph (2)

47. The Working Group was of the opinion that paragraph (2) should be redrafted so as to make it clear that the Court, acting under article 80 (2) (d), was not obliged to indicate the beneficiary of the deposited amount. Furthermore, paragraph (2) should be enlarged so as to comprise also the case where a security had been given.

48. The Working Group requested the Secretariat to consider the advisability of enlarging article 80 (2) (d) by giving the Court a larger discretionary power; this would possibly make paragraph (2) of article 82 superfluous.

#### Article 83

"A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a copy of the lost instrument or a writing establishing the elements of the lost instrument pertaining to the requirements set out in article 1 (2) or 1 (3)."

49. The fact that the instrument is lost does not dispense the ex-holder of the obligation to protest the instrument in the event of dishonour by non-acceptance or by non-payment. Article 83 lays down rules as to how protest is to be effected in this case.

50. The question was raised whether the fact that the instrument was lost should dispense the ex-holder of effecting a protest. The Working Group concluded that, if the uniform law required, as it now did, that protest was necessary in order to establish the liability of parties secondarily liable, protest should also be required in the case of dishonour of a lost instrument.

51. It was noted that under article 83 protest would duly be made by using a copy of the lost instrument or a writing establishing the elements thereof, and that these elements should correspond with the formal requisites that would, under article 1, make a writing an international negotiable instrument. The Working Group was agreed that where a copy of a lost instrument was available, such copy could be used for purposes of protest. However, the Group was of the view that the elements of the writing to be used for purposes of protest should be identical to the elements of the writing required under article 80 (2).

52. The question was raised what would be the legal effect of the impossibility for the ex-holder to effect a protest by reason of the refusal of the person authorized to certify dishonour to draw up an authenticated protest. The Working Group was of the view that if the refusal to draw up an authenticated protest was based on the fact that the instrument was non-existent or that certain elements of the lost instrument could not be reconstructed, the ex-holder would be dispensed of making protest under article 61.

#### Article 84

"A person receiving payment of a lost instrument in accordance with article 80 shall deliver to the

person paying the writing required under article 80 (2) (a) (iii) receipted by him."

53. Article 84 lays down a rule under which the person receiving payment of a lost instrument has an obligation similar to that of the person receiving payment of an instrument that was not lost (article 70 (2)). In the case of a lost instrument, the person receiving payment must deliver to the payor the writing required under article 80 receipted by him.

54. The Working Group expressed agreement with this article, subject to:

(a) Omitting in the article the reference to subparagraph (iii) of article 80 (2) (a); and

(b) Adding the words "and any authenticated protest" at the end of the provision.

#### Article 85

"A party who paid a lost instrument in accordance with article 80 shall, upon due proof of such payment, have the same rights which he would have had if he had been in possession of the instrument."

55. The provision of article 85 establishes in respect of parties who paid and took up a lost instrument rights similar to those of the ex-holder under article 80. Thus, where an endorser, upon dishonour by the acceptor, pays the ex-holder, the endorser in turn has, against prior parties, those rights on the lost instrument which he would have had if he had acquired, upon payment, possession of the instrument.

56. The Working Group expressed agreement with the provision of article 85. However, the Group was of the view that it was not necessary for the party who paid the instrument to furnish proof of such payment, since he would be in possession of the receipted writing referred to in article 84. Consequently, the words "upon due proof of such presentment" should be deleted.

#### Article 86

"[(a) Where an instrument was lost by the payee or by his endorsee for collection whether by destruction, wrongful detention or otherwise, the payee upon due proof of the fact that he or his endorsee for collection lost the instrument, shall have the right to request the drawer or the maker to issue a duplicate of the lost instrument. The drawer or maker, upon issuing such duplicate may request the payee to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

"(b) The kind of security and its terms shall be determined by agreement between the drawer or maker issuing a duplicate of a lost instrument and the payee. Failing such an agreement, the kind of security and its terms shall be determined by the Court.

"(c) (i) The drawer or the maker when issuing a duplicate of a lost bill or note may write on the face thereof the word 'duplicate' (or words of similar import).

"(ii) Where an instrument is marked as being duplicate, it shall be considered as

an instrument under this law, provided that a duplicate of a lost bill or note cannot be negotiated except for purposes of collection.

"(d) Refusal by the drawer or maker to issue a duplicate of a lost instrument shall render the drawer or maker liable for any damages that the payee may suffer from such refusal (provided that the total amount of the damages shall not exceed the amount of the lost instrument).]"

57. Article 80 gives the ex-holder the right to demand payment when the lost instrument is due. Article 86 confers upon the ex-holder the right to ask the drawer or the maker to issue a duplicate of the lost instrument. The rights conferred upon the ex-holder under articles 80 and 86 are not concurrent and the ex-holder has therefore an option. Article 86 also establishes the procedure to be followed when a duplicate is issued: the drawer or the maker may request the ex-holder to give security in order to protect himself against any loss which he may suffer by reason of subsequently paying the holder of the instrument.

58. Doubts were expressed whether a provision in respect of duplicate instruments was necessary. It was stated that the practical necessity for such a rule was probably not very great. The Working Group, after deliberation, decided to defer consideration of article 86 until after it had received from the Secretariat a note containing information on the law obtaining in various countries in respect of a duplicate and on the practice followed.

#### C. Sphere of application; form

59. Under the terms of reference given to it by the Commission, the Working Group is requested to draw up uniform rules applicable to a special negotiable instrument for optional use in international transactions. There are thus two requirements that must necessarily underlie the uniform law:

(a) The use of the instrument must be optional; and

(b) The instrument is to be used for settling international transactions and the uniform rules should not be used in respect of purely domestic transactions.

##### (a) Exercise of the option

60. The initial choice to use a bill or a note subject to the uniform law is exercised by the drawer or the maker. He may do so if certain international elements are present, but he is under no obligation to draw a bill or make a note under the uniform law. Persons other than the drawer or the maker are bound by the uniform law by virtue of their signature on the international instrument or by taking it up.

##### (b) International elements

61. There are two alternative approaches that would ensure compliance with the requirement that the international instrument is to be used for settling international transactions:

(i) To provide that the transaction underlying the drawing of an international bill or the making of an international note should be international.



This approach would entail that proof of the "internationality" of the instrument would have to be deduced from the commercial character of the underlying transaction; or

- (ii) To provide that the "internationality" of the instrument should appear from the instrument itself.

Articles 1 to 3 of the draft uniform law are based on the second approach because it is essential that the question whether the uniform law applies can be answered, in all cases, from what appears on the face of the instrument.

#### Article 1

"(1) This Law shall apply to international bills of exchange and to international promissory notes.

"(2) An international bill of exchange is a written instrument which

"(a) Contains, in the text thereof, the words 'Pay against this International Bill of Exchange, drawn subject to the Convention of ———' (or words of similar import); and

"(b) Contains an unconditional order whereby one person (the drawer) directs another person (the drawee) to pay a definite order; and

"(c) Is payable on demand or at a definite time; and

"(d) Is signed by the drawer; and

"(e) Shows that it is drawn in a country other than the country of the drawee or of the payee or of the place where payment is to be made.

"(3) An international promissory note is a written instrument which

"(a) Contains, in the text thereof, the words 'Against this International Promissory Note, made subject to the Convention of . . . , I promise to pay . . .' (or words of similar import); and

"(b) Contains an unconditional promise whereby one person (the maker) engages to pay a definite sum of money to a specified person (the payee) or to his order; and

"(c) Is payable on demand or at a definite time; and

"(d) Is signed by the maker; and

"(e) Shows that it is made in a country other than the country of the payee or of the place where payment is to be made."

62. Paragraph (2) lays down the formal requisites which are required in order

(a) To make a negotiable instrument, and

(b) To make a negotiable instrument an international negotiable instrument that is subject to the uniform law.

63. The Working Group expressed agreement with the provisions of article 1.

64. It was noted that, by virtue of articles 9 and 10 of the Geneva Convention of 1930 for the Settlement of Certain Conflicts of Laws in connexion with Bills of

Exchange and Promissory Notes, States having ratified that Convention might be prevented from ratifying a convention on international bills of exchange and international promissory notes. It was also noted that article 18 of the above-mentioned Geneva Convention of 1930 sets forth a procedure for the revision of some or all of the provisions of that Convention. The view was expressed that, if there were a substantial obstacle standing in the way of a convention on international negotiable instruments, one possibility would be for States that were bound by the Geneva Convention of 1930 to remove the obstacle during the Conference of Plenipotentiaries that would be convened to adopt a convention on international negotiable instruments. The view was also expressed that the contracting parties to the Geneva Convention of 1930 should take steps within the United Nations that would lead to the necessary amendment of that Convention. The observer of the Hague Conference on Private International Law stated that the Hague Conference had included the question of conflicts of law in the field of negotiable instruments in its programme of work and was considering the possibility of a revision of the Geneva Convention of 1930 or of drawing up a new convention on conflicts of law in this field.

65. The Working Group, whilst recognizing that the Geneva Convention of 1930 on conflicts of law might stand in the way of a future convention on international negotiable instruments, was of the view that any conclusion it might reach on the relationship between the two conventions would do little to solve the problem of potential incompatibility. The Group requested the Secretariat to prepare, in consultation with other interested international organizations such as the Hague Conference on Private International Law, a study of the issue involved and of the possible procedures that could be followed, and to submit it to the Group at its next session.

#### Paragraph 1

66. The Working Group expressed general agreement with the provision of this paragraph.

#### Paragraph 2

##### "Written instrument"

67. It was suggested that the uniform law should contain a definition of the word "written". The view was expressed that the definition should be such as to make it possible for an international instrument to be printed out by electronic means. However, doubts were expressed whether such an instrument would still be an instrument for the purposes of the uniform law. The Working Group was agreed that the term "written" should encompass "handwritten", "typed" and "printed", but that the uniform law itself should not set forth a definition to that effect.

##### Subparagraph (a)

68. The Working Group was of the view that the instrument should bear on its face the words "international bill of exchange" and that it should contain a reference to the applicable law, i.e. "the Convention of . . .". The Group requested the Secretariat to consider whether it would be more appropriate to list these requirements after the present subparagraph (d). One representative expressed the view that the words

"international bill of exchange" should be inserted in the body of the instrument.

69. The Working Group considered the question whether the words "international bill of exchange" should be expressed in the language employed in drawing up the bill, as was required by the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes. The Group was of the view that this requirement should not be included in article 1 because of the not infrequent cases where a bill was drawn up in more than one language.

*Subparagraph (b), (c) and (d)*

70. The Working Group expressed agreement with the provisions of these subparagraphs. The question was raised whether an international instrument could be made payable initially to bearer. Some representatives expressed themselves in favour of such a rule. However, the Group was informed that certain central banks had raised objections to such instruments. The Group, after deliberation, was agreed that, in the light of that opposition, bearer instruments should be excluded.

*Subparagraph (e)*

71. The Working Group expressed agreement with the requirement that at least two "international elements" should appear on the face of the instrument and that the elements mentioned covered adequately the types of international transaction in respect of which an international instrument could be used. The Group considered various proposals aimed at improving the present wording of subparagraph (e). After deliberation, the Group was agreed that either two of the following elements should appear on the face of the instrument.

- (i) That it is drawn in one State and payable in another State; or
- (ii) That it is drawn in one State in favour of a payee in another State; or
- (iii) That it is drawn in one State on a drawee in another State.

The Group requested the Secretariat to consider the situations where the drawee and payee, or the drawee and the place of payment, or the payee and the place of payment were in different States and to draft appropriate wording covering these situations.

*Additional elements*

72. The Working Group considered a number of suggestions that additional formal requirements at present found in national legislations should be included amongst the requirements set forth in paragraph (2), such as the place of drawing, the place of payment, the date of issue and that the bill should mention that it was drawn "to the order of" a payee. The Group was of the opinion that adding further requirements might give rise to cases where, through the lack of a requirement on the instrument, the instrument would not be a negotiable instrument under the uniform law. However, the Group was of the view that the instrument should be dated, in view of the fact that the date of the instrument was relevant in other provisions of the uniform law. The Group requested the Secretariat to redraft subparagraph (d) as follows:

"(d) Is signed by the drawer and dated;"

73. The Working Group requested the Secretariat to consider the desirability of rearranging subparagraphs (d) to (e) so that the "international elements" under (d) and (e) would be together and would appear after the formal requisites set forth in subparagraphs (b), (c) and (d).

*Paragraph 3*

74. The Working Group was agreed that its conclusions in respect of paragraph (2) also obtained in respect of paragraph (3).

*Article 2*

"The incorrectness of statements made on an instrument for the purpose of paragraph (2) (e) or (3) (e) of article 1 shall not affect the application of this Law."

75. The purpose of article 2 is to ensure that it is sufficient for the purpose of article 1 (2) (e) or (3) (e) that the bill or note shows on its face the elements of internationality set forth in those subparagraphs. Proof brought to the contrary does not make the law inapplicable, although incorrect or false statements made on the bill or note as to those elements may be considered by a State as violating its law.

76. The Working Group expressed general agreement with the substance of article 2. However, the Group was of the view that the article should be redrafted in order to make it clear that, for the purposes of paragraph (2) (e) or (3) (e), statements on the face of the instrument should conclusively be presumed to be true.

*Article 3*

"This Law shall apply without regard to whether the countries indicated on an international bill of exchange or an international promissory note pursuant to paragraph (2) (e) or (3) (e) of article 1 are Contracting States."

77. A party who signs or takes up an international instrument manifests thereby his intention that his rights and obligations on the instrument are to be governed by the uniform law. Consequently, a Court in a contracting State should apply the uniform law regardless of the fact whether the States indicated on the instrument for purposes of paragraph (2) (e) or (3) (e) are contracting States.

78. The Working Group expressed agreement with the provision of article 3. However, the Group was of the view that the article should be redrafted to the effect that the uniform law would apply in a Contracting State without regard to whether the States indicated on the instrument for purposes of paragraph (2) (e) or (3) (e) of article 1 were contracting States.

79. An observer suggested that, for the purpose of the application of the uniform law, there should be the requirement that the uniform law would apply only if the instrument showed on its face that the drawee was in a contracting State. The Working Group did not accept this suggestion on the ground that it would unnecessarily restrict the sphere of application of the uniform law.

## D. Interpretation

## 1. GENERAL

## Article 4

"In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application."

80. Article 4 is designed to promote uniformity in the interpretation and application of the uniform law. The article corresponds to a provision recommended by the Working Group on the International Sale of Goods.

81. The Working Group expressed agreement with this provision. The Group noted that the article, as now worded, did not correspond to the provision adopted in article 7 of the Convention on the Limitation Period in the International Sale of Goods, which read as follows:

"In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity."

The Group requested the Secretariat to reword article 4 accordingly.

## Article 5

"In this Law:

"(1) 'Bearer' means a person in possession of a bill or of a note endorsed in blank;

"(2) 'Bill' means an international bill of exchange governed by this Law;

"(3) 'Note' means an international promissory note governed by this Law;

"(4) 'Instrument' means an international bill of exchange or an international promissory note governed by this Law;

"(5) (a) 'Endorsement' means a signature, or a signature accompanied by a statement designating the person to whom the instrument is payable, which is placed on the instrument by the payee, by an endorsee from the payee, or by any person who is designated under an uninterrupted series of such endorsements. An endorsement which consists solely of the signature of the endorser means that the instrument is payable to any person in possession thereof;

"(b) 'Endorsement in blank' means an endorsement which consists solely of the signature of the endorser or which includes a statement to the effect that the instrument is payable to any person in possession thereof;

"(c) 'Special endorsement' means an endorsement which specifies the person to whom the instrument is payable;

"(6) 'Holder' means the payee or the endorsee of an instrument who is in possession thereof;

"(7) 'Issue' means the first transfer of an instrument to a person who takes it as holder;

"(8) 'Party' means a party to an instrument;

"(9) 'Protected holder' means the holder of an instrument which, on the face of it, appears to be complete and regular and not overdue, provided that such holder was, when taking the instrument without knowledge of any claims or defences affecting the instrument or of the fact that it was dishonourable."

82. Article 5 sets forth definitions in respect of terms used in the uniform law.

83. The Working Group noted that it had considered paragraphs (5), (6), and (9) at its first session (see A/CN.9/77, paras. 60-71; UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1).

Paragraph (1): "bearer"

84. It was noted that the expression "bearer" was not used in the uniform law and that there was therefore no need for a definition of "bearer".

Paragraphs (2), (3), (4) and (8): "bill", "note", "instrument", "party"

85. The Working Group expressed agreement with the definitions given for "bill", "note", "instrument" and "party".

Paragraph (7): "issue"

86. The Working Group requested the Secretariat to reconsider the definition of "issue" in the light of its conclusions in respect of article 12 (see A/CN.9/77, paras. 11-13; UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1).

Other definitions

87. The suggestion was made that article 5 should set forth a definition of "dishonour" since this term was not used in the Geneva Uniform Law and could not easily be translated into other languages. The suggestion was also made that article 5 should define what constituted an "unconditional order". The Working Group requested the Secretariat to consider appropriate formulations of these terms and to place a draft text before it at its next session.

## 2. INTERPRETATION OF FORMAL REQUIREMENTS

## Article 7

"The sum payable by an instrument is a definite sum although the bill states that it is to be paid

"(a) With interest; or

"(b) By stated instalments; or

"(c) According to an indicated rate of exchange or according to a rate of exchange to be determined as directed by the instrument."

88. This article provides that if an instrument states that it is to be paid with interest, by stated instalments, or according to a certain rate of exchange, the sum payable is a definite sum for the purpose of article 1 (2) (b) or (3) (b).

Paragraph (a)

89. The Working Group was agreed that the uniform law should permit the stipulation of interest on a bill or note.

*Paragraph (b)*

90. The Working Group was agreed that an international instrument could be made payable by instalments. However, paragraph (b) should make it clear that the sum payable was a definite sum even if it was stipulated on the instrument that upon default in payment of any instalment the unpaid balance would become due.

*Paragraph (c)*

91. The Working Group expressed agreement with the substance of this provision on the understanding that the "rate" referred to in this paragraph referred to the rate of exchange mentioned in article 74 and not to any other rates.

92. The question was raised of what would be the relationship between paragraph (c) and article 74. The Working Group, after deliberation, decided to defer consideration of this question until it considered article 74 in second reading. In this connexion, the Group requested the Secretariat to inquire amongst banking and trade institutions whether and, if so, what kind of clauses, such as multicurrency clauses, were used in practice, and to examine whether the use of such clauses could affect the "definiteness" of the sum payable by an instrument, and to report to it at its next session.

*Article 8*

"(1) If there is a discrepancy between the amount of the instrument expressed in words and the amount expressed in figures, the sum payable shall be the amount expressed in words.

"[(2) If the amount of the instrument is specified in a currency having the same designation but a different value in the country where it was drawn or made and the country where payment is to be made, the designation shall be considered to be in the currency of the country where payment is to be made [provided that the place where payment is to be made is indicated on the instrument].]

"(3) Where an instrument states that it is to be paid with interest, without specifying the date from which interest is to run, interest shall run from the date of the instrument [and if the instrument is undated, from the issue thereof].

"(4) Where an instrument states that it is to be paid with interest, without specifying the rate, simple interest at the rate of [five] per cent per annum shall be payable."

93. Article 8 gives rules of interpretation with regard to the amount of the instrument.

94. Paragraph (1) deals with the case where there is a discrepancy between the amount expressed in words and the amount expressed in figures. Paragraph (2) settles the question which arises when the amount of an instrument is denominated in a currency which has the same designation but a different value in the country of drawing and the country of payment.

95. Paragraphs (3) and (4) lay down rules that obtain when the amount of the instrument is to be paid with interest.

*Paragraph (1)*

96. The Working Group expressed agreement with the substance of this paragraph.

97. Consideration was given to suggestions concerning additional rules of interpretation that would be applicable in cases of discrepancy between the amount in words and the amount in figures other than the case mentioned in paragraph (1). It was suggested that if the words in which the amount was expressed were ambiguous and the figures were not, the sum payable should be the amount expressed in figures (cf. sect. 3-118 (c) of the Uniform Commercial Code). It was further suggested that article 8 should reflect the situation envisaged in article 6 of the Geneva Uniform Law, according to which if the sum payable by a bill was expressed more than once in words or more than once in figures, and there was discrepancy, the smaller sum would be the sum payable. The Working Group, after deliberation, decided not to retain these suggestions.

*Paragraph (2)*

98. The Working Group concluded that this paragraph should be redrafted in such a way that the currency designated on the instrument would be considered to be the currency of the country where payment was to be made if the following conditions were met:

(a) The amount of the instrument is specified in a currency having the same denomination in at least one other State than the State where payment was to be made; and

(b) The currency is not identified as the currency of any State; and

(c) The State where payment is to be made is indicated on the instrument.

*Paragraph (3)*

99. The Working Group expressed agreement with this provision and decided to delete the words that were placed between brackets in view of its decision under article 1 (2) and (3) that the instrument must be dated.

*Paragraph (4)*

100. The Working Group was agreed that paragraph 4 should be aligned on article 5 of the Geneva Uniform Law: if interest was stipulated and the rate of interest was not indicated, the stipulation should be deemed not to have been written.

*Article 9*

"(1) An instrument is payable on demand

"(a) If it states that it is payable on demand or at sight or on presentment or if it contains words of similar import;

"(b) If no time for payment is expressed.

"(2) An instrument, which is accepted or endorsed or guaranteed after maturity is an instrument payable on demand as regards the acceptor, the endorser or the guarantor.

"(3) A bill is payable at a definite time if it states that it is payable

"(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the bill; or

"(b) At a fixed period after sight; or

"[(c) By instalments at successive dates, even when it is stipulated in the bill that upon default in payment of any instalment the unpaid balance shall become due immediately.]

"(4) A note is payable at a definite time if it states that it is payable

"(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the note; [or]

"[(b) By instalments at successive dates, even when it is stipulated in the note that upon default in payment of any instalment the unpaid balance shall become due immediately.]

"(5) The time of payment of an instrument payable at a fixed period after date is determined by reference to the date stated on the instrument regardless of whether instrument is ante-dated or post-dated."

101. This article provides when an instrument is considered to be payable on demand and at a definite time.

#### *Paragraphs (1) and (2)*

102. The Working Group expressed agreement with these provisions.

#### *Paragraph (3)*

##### *Subparagraphs (a) and (b)*

103. The Working Group expressed agreement with these provisions.

##### *Subparagraph (c)*

104. The Working Group expressed agreement with the substance of this provision, subject to the following considerations:

(a) In view of the fact that an acceleration clause could provide for payment of the unpaid balance at a date later than the day of default, the word "immediately" should be deleted;

(b) Supplementary rules should be drafted in respect of the rights and obligations of parties in the event of the unpaid balance having become due (acceleration clause).

#### *Paragraph (4)*

105. The Working Group was agreed that its conclusions in respect of paragraph 3 should obtain also in respect of paragraph 4.

#### *Paragraph (5)*

106 Paragraph (5) provides that the expression "date on the instrument" means the date stated on the instrument regardless of the true date.

107. The Working Group expressed its agreement with this provision, but considered that the words "regardless of whether the instrument is ante-dated or post-dated" should be deleted since the date stated on the instrument should be presumed to be conclusive.

108. One representative expressed the view that paragraph 5 should be deleted.

109. The Working Group considered the question of what would be the legal effect of an instrument which stated that it was to be paid on a stated date or before. According to one view, such an instrument would be an instrument payable on demand. According to another view, a distinction should be made according to whether it was the holder who demanded payment before the stated date or whether it was the party liable who made payment before that date. The Group requested the Secretariat to consider these questions and to inquire whether instruments with this kind of maturity date were used in practice.

### *Article 10*

"(1) A bill may

"(a) Be drawn upon two or more drawees.

"(b) Be signed by two or more drawers,

"(c) Be payable to two or more payees.

"(2) A note may

"(a) Be made by two or more makers,

"(b) Be payable to two or more payees.

"(3) If an instrument is payable to two or more payees in the alternative it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any other case the instrument is payable to all of them and the rights of a holder can only be exercised by all of them."

110. Article 10 provides that a bill or a note may be drawn by two or more drawers or on more than two or more drawees or be payable to two or more payees. It also provides that if the instrument is payable to two or more payees in the alternative (A or B), it is payable to any one of them and any one of them may endorse the instrument. If the instrument is payable to two or more payees not in the alternative (A and B), it is payable to A and B together and it must be endorsed by both.

111. The Working Group was agreed that the uniform law should contain a rule permitting a plurality of drawers, drawees or payees. However, the Group was of the view that the provisions in the draft uniform law governing cases where there was such a plurality should be reconsidered and completed.

### 3. COMPLETION OF AN INCOMPLETE INSTRUMENT

#### *Article 11*

"(1) The possessor of a writing which

"(a) Contains, in a text thereof, the words 'pay against this international bill of exchange, drawn subject to the Convention of ...', or the words 'against this international promissory note, made subject to the Convention of ... I promise to pay ...' (or words of similar import), and

"(b) Is signed by the drawer or the maker, but which lacks elements pertaining to one or more of the

other requirements set out in article 1 (2) or 1 (3) shall be presumed to have received authority from the drawer or the maker to insert such elements, and the instrument so completed is effective as a bill or as a note;

"(2) When such a writing is completed otherwise than in accordance with the authority given, the lack of authority cannot be set up as a defence against a holder who took the instrument without knowledge of the lack of authority."

112. Article 11 deals with the completion of an instrument which lacks elements that are required for purposes of negotiability under the uniform law. The article does not apply to the alteration or correction of elements that appear on a completed instrument; in such a case article 29, concerning material alterations, applies. Article 11 applies when two conditions are met:

(a) The instrument must contain the words "international bill of exchange" or "international promissory note", and must mention that it is subject to the Convention of . . . ; and

(b) The instrument must be signed by the drawer or the maker.

If these conditions are satisfied, then every possessor of the writing has an authority, derived from the drawer or maker, to insert the elements that are lacking. If such insertion is made in accordance with the authority given, then the instrument as completed is effective as an instrument under the uniform law. If the insertion is not made in accordance with the authority given, the instrument is also effective as an instrument under the uniform law, but any person who signed the instrument before such completion may use the absence of authority as a defence. However, such a defence cannot be raised against a holder who took the instrument without knowledge of the lack of authority. The article establishes the presumption, subject to proof to the contrary, that the instrument was completed in accordance with the authority given.

113. The Working Group was agreed that the issue dealt with in article 11 should be governed by the uniform law. The Group was also agreed that article 11 should apply only when the "writing" contained the words "international bills of exchange" or "international promissory note" and a reference to the Conven-

tion as the applicable law, and was signed by the drawer, the maker or the acceptor.

114. The Working Group requested the Secretariat to redraft article 11 along the following lines:

(a) The article should not refer to any presumption;

(b) The article should not refer expressly to any authority given by the drawer or the maker;

(c) The expression "possessor" should not be used;

(d) The article should make it clear that it applied only when elements were missing and could therefore be inserted, and not to cases of correction of the existing words or figures;

(e) The article should specify that when elements were inserted contrary to the agreement between the parties, the instrument was a negotiable instrument under the uniform law, but parties who signed before such completion would have a defence against liability on the instrument vis-à-vis a holder who took the instrument with knowledge of the absence of agreement.

115. One representative expressed the view that any signature should suffice for the purposes of article 11.

116. The Working Group requested the Secretariat, when redrafting article 11, to take account of the wording of article 10 of the Geneva Uniform Law.

#### FUTURE WORK

117. The Working Group, having terminated its first reading of the draft Uniform Law on International Bills of Exchange and International Promissory Notes, requested the Secretariat to place before it, at its fifth session, a revised draft uniform law that would reflect its deliberations and conclusions. The Group agreed with the suggestion made by its Secretary that the Secretariat should approach representatives of the Group for the purpose of preparing a revised text in the various official languages.

118. The Working Group gave consideration to the timing of its fifth session. The Group was of the opinion that the consideration of the time and place for that session should be left for decision by the Commission at its forthcoming ninth session, which will convene on 12 April 1976.

## 2. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Provisional agenda . . . . .	A/CN.9/WG.IV/WP.5
Draft uniform law on international bills of exchange and international promissory notes: draft text of article 79 . . . . .	A/CN.9/WG.IV/CRP.9
Draft uniform law on international bills of exchange and international promissory notes, with commentary . . . . .	A/CN.9/WG.IV/CRP.10 and Add.1 to 6



### III. INTERNATIONAL COMMERCIAL ARBITRATION

#### 1. Report of the Secretary-General: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/112)\*

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#### INTRODUCTION

##### (1) *Terms of reference*

1. The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session (April 1973) requested the Secretary-General:

"In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE

Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;"<sup>1</sup>

2. The initial version of such draft arbitration rules was prepared by the Secretariat in consultation with Professor Pieter Sanders of the Netherlands who served as a consultant to the Secretariat on the subject. At the

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its sixth session, *Official Records of the General Assembly: Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 85 (UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A).

\* 7 November 1975.

invitation of the Secretariat, the International Committee on Commercial Arbitration (formerly known as the International Organizing Committee) of the International Arbitration Congress, a body composed of representatives of centres of international commercial arbitration and of experts in this field, appointed a Consultative Group of four experts to consult with the Secretariat concerning the draft arbitration rules.<sup>2</sup> The Consultative Group submitted comments on two versions of the draft arbitration rules.

3. Thereafter, draft rules entitled "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade" (reproduced in document A/CN.9/97)\* were circulated for comments to the regional commissions of the United Nations and to some 75 centres of international commercial arbitration. These draft rules were also considered at the Fifth International Arbitration Congress held at New Delhi, India, from 7 to 10 January 1975. The comments made and the modifications suggested at that meeting regarding the draft rules were reproduced in document A/CN.9/97/Add.2.\* The Fifth International Arbitration Congress also adopted a resolution on the draft arbitration rules, by which it endorsed the principles of the preliminary draft set of rules, and encouraged UNCITRAL, in the light of comments made on this draft, to finalize the rules and make them available for use at the earliest possible date.<sup>3</sup>

4. Owing to the fact that most centres of international commercial arbitration were represented at the Fifth International Arbitration Congress, and that they submitted their observations directly to the two working groups established at that congress, few replies were received by the Secretariat from these centres. Replies were received from the Economic Commission for Europe, the International Chamber of Commerce, and the Argentine Chamber of Commerce (all reproduced in A/CN.9/97/Add.1);\* the Government of Norway, the Hungarian Chamber of Commerce, the Inter-American Commercial Arbitration Commission and the Inter-American Development Bank (all reproduced in A/CN.9/97/Add.3);\* and the Commission of the European Communities (reproduced in A/CN.9/97/Add.4).\*

5. The "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade", together with the comments and replies referred to above, were placed before the eighth session of the Commission (Geneva, 1-17 April 1975) for consideration. At that session, the Commission was agreed that, in considering the preliminary draft arbitration rules, it would concentrate on the basic concepts under-

lying the draft and on the major issues dealt with in the individual articles thereof. The Commission was further agreed that, at that session, it should not reach final conclusions on matters of substance, and that the main purpose of its deliberations was to have a general debate on the preliminary draft as a whole. A summary of the Commission's deliberations at that session is set forth in the report of the Commission on the work of its eighth session (A/10017, annex 1).<sup>4</sup> At the conclusion of its deliberations, the Commission decided to request the Secretary-General:

(a) To prepare a revised draft of these rules, taking into account the observations made on the preliminary draft in the course of its eighth session.

(b) To submit the revised draft arbitration rules to the Commission at its ninth session.

6. In response to that request, the Secretariat, in consultation with Professor Pieter Sanders, who has continued to serve as a consultant to the Secretariat on the subject, has prepared two documents.<sup>5</sup> The present document sets forth an integrated text of draft arbitration rules, which is based on the preliminary draft set of rules which the Commission examined at its eighth session and which takes into account observations and suggestions made at that session.<sup>6</sup> A second document (A/CN.9/113)\*\* sets forth a text which, on certain issues, contains provisions which reflect observations and suggestions not retained in the integrated text. This text is sometimes presented in the form of alternative provisions.

7. In drafting the rules, the following international conventions were taken into account:

New York 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Geneva 1961	European Convention on International Commercial Arbitration
Washington 1965	Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The following existing rules were also given special consideration:

ECE Rules	Arbitration rules of the United Nations Economic Commission for Europe, 1966
ECAFE Rules	Rules for international commercial arbitration of the United Nations Economic Commission for Asia and the Far East (now the United Nations Economic and Social Commission for Asia and the Pacific), 1966

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, III.

<sup>2</sup> The Consultative Group was composed as follows:

(a) Dr. Carlos A. Dunshee de Abranches, Director-General of the Inter-American Commercial Arbitration Commission;

(b) Professor Tokusuke Kitagawa, Tokyo Metropolitan University;

(c) Mr. Donald B. Straus, President of the Research Institute of the American Arbitration Association;

(d) Professor Heinz Strohbach, Court of Arbitration of the Chamber of Commerce of the German Democratic Republic.

<sup>3</sup> The text of the resolution is reproduced in A/CN.9/97/Add.1, annex IV.

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1.

\*\* Reproduced in this volume, part two, III, 3, *infra*.

<sup>4</sup> The Secretariat gratefully acknowledges the assistance given to it by Professor Pieter Sanders in the preparation of the two documents.

<sup>5</sup> A commentary on the integrated text of draft arbitration rules is set forth in A/CN.9/112/Add.1, reproduced in this volume, part two, III, 2, *infra*.

ICC Rules	Rules of conciliation and arbitration of the ICC, 1975
Inter-American Arbitration Commission Rules	Rules of procedure of the Inter-American Commercial Arbitration Commission
American Arbitration Association Rules	Commercial arbitration rules of the American Arbitration Association
USSR Chamber of Commerce Rules	Rules of procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce

Attention has also been given to the provisions of various other arbitration rules.

### (2) Organization of the rules

8. The Rules are divided into four sections:

- Section I Introductory rules (articles 1 to 5);
- Section II Appointment of arbitrators (articles 6 to 13);
- Section III Arbitral proceedings (articles 14 to 26);
- Section IV The award (articles 27 to 34).

9. Pursuant to the Commission's decision taken at its eighth session referred to in paragraph 1 above, the proposed rules are designed for arbitration where, in accordance with the agreement of the parties, a dispute is submitted for decision to a sole arbitrator or to a three-member arbitral tribunal established specifically (*ad hoc*) for settling the dispute in question.

### (3) The arbitration clause or agreement

10. An agreement to submit disputes to arbitration is normally concluded before a dispute has arisen, and is contained in a clause of the contract (the arbitration clause) or in a separate arbitration agreement. Less frequently, the arbitration agreement is concluded in a separate document after a dispute has arisen. An arbitration clause or separate arbitration agreement should be carefully drafted, since it serves as the legal basis for the arbitration. It may be noted that arbitrators are incompetent to act beyond the scope of the arbitration clause or separate arbitration agreement.

11. It may also be noted that, under article 1, paragraph 1, of the rules, applicability of the rules depends on an express reference to them, in writing, in the arbitration clause or separate arbitration agreement. A simple reference in an arbitration clause or in a separate arbitration agreement that all disputes that may arise out of the contract will be settled according to the UNCITRAL arbitration rules will suffice.

12. However, since an inappropriate or incomplete arbitration clause or separate arbitration agreement may lead to difficulties and delays in the arbitral proceedings, the text set forth below is recommended. This text clearly determines the scope of the arbitration clause or separate arbitration agreement, and, by giving the arbitrators authority to decide on a wide range of disputes, reduces the possibility of allegations that disputes connected with the contract fall outside the competence of the arbitrators. The text of this basic model arbitra-

tion clause or separate arbitration agreement is as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL arbitration rules which the parties declare to be known to them. Judgement upon the award made by the arbitrator(s) may be entered by any court having jurisdiction thereof."

13. The last sentence of the text set forth above has been added to facilitate the practice in some jurisdictions of seeking judicial enforcement not of the arbitral award, but of a judgement based on the award entered by a court having jurisdiction.

### (4) Possible additions to the basic model arbitration clause or separate arbitration agreement

14. An arbitration clause or separate arbitration agreement may contain more than the mere agreement by the parties to submit certain categories of disputes to arbitration under the rules. In the course of an arbitration certain questions may arise which the parties could have resolved by incorporating appropriate provisions in the arbitration clause or separate arbitration agreement. By setting forth provisions which seek to resolve these problems, the model arbitration clause or separate arbitration agreement will also draw the attention of the parties to these potential problems. Possible additions concern the following:

#### (a) The appointing authority

15. The rule provide that, in certain cases, arbitrators shall be appointed by "an appointing authority". Appointment is by an appointing authority when the parties fail to reach agreement on the choice of a sole arbitrator (article 7, paras. 3 and 6) or presiding arbitrator (article 8, paras. 5 and 8), and when, in the case of a three-member arbitral tribunal, a party fails to appoint an arbitrator (article 8, para. 3). The rules also provide that a decision on the challenge of an arbitrator shall be made by an appointing authority (article 11, para. 1). The rules authorize the parties to agree on the designation of an appointing authority, which may either be a physical person or an institution. They may agree on the designation of an appointing authority in the arbitration clause or separate arbitration agreement, or at a later stage, after the dispute to be referred to arbitration has arisen. The rules also prescribe a procedure for designation of an appointing authority where the parties fail to make such a designation (article 7, para. 4, and article 8, paras. 3 and 6). However, since the designation of an appointing authority by the parties prior to the commencement of arbitral proceedings can expedite both the appointment of arbitrators and the decision on possible challenges, it is recommended that the appointing authority should be designated in the arbitration clause or separate arbitration agreement by adding the following thereto:

"The parties also agree that:

"(i) the appointing authority shall be ....."  
[name of person or institution].

#### (b) Number of arbitrators

16. Under article 6 of the rules, the parties may decide whether their dispute is to be heard by a sole ar-

bitrator or by a three-member arbitral tribunal. The parties may agree on the number of arbitrators in the arbitration clause or separate arbitration agreement, or they may agree on the number once the particulars of the dispute being referred to arbitration are known. Where the required number of arbitrators can be determined at the time of the conclusion of the arbitration clause or separate arbitration agreement, the inclusion of that number in the arbitration clause or separate arbitration agreement may expedite the arbitral proceedings. Such inclusion may be in the following terms:

"The parties also agree that:

"The number of arbitrators shall be . . . ." (one or three).

(c) *Place of arbitration*

17. Under article 15, paragraph 1, the place where the arbitration is to be held is the place agreed upon by the parties. If there has been no such agreement, it is the place determined by the arbitrators. Further, under article 15, paragraph 4, the award has to be made at the place of arbitration. At the time that the parties conclude the agreement to arbitrate they may not wish to choose the place of arbitration, since the identity of the most suitable place of arbitration may depend on the nature and circumstances of the particular dispute that will be submitted to arbitration. Where it is possible to choose the place of arbitration at the time of the conclusion of the agreement to arbitrate, such choice may be added to the arbitration clause or separate arbitration agreement in the following terms:

"The parties also agree that:

"The place of arbitration shall be . . . ." (town or country).

(d) *Languages*

18. Under paragraph 1 of article 16, the language or languages to be used in the arbitration proceedings is determined by agreement between the parties. In the absence of such agreement, the arbitrators make the determination under the provision of that paragraph. The parties may find it convenient to determine this question in the arbitration clause or separate arbitration agreement in the following terms:

"The parties also agree that:

"The language(s) to be used in the arbitral proceedings shall be . . . ." (language(s)).

(e) *Arbitration ex aequo et bono or as amiables compositeurs*

19. Under article 28, paragraph 3, arbitrators can decide a dispute referred to them *ex aequo et bono* or as *amiables compositeurs* only if the parties have expressly authorized the arbitrators to do so and the arbitration law of the country where the award is to be made permits such arbitration. The parties may wish to authorize the arbitrators, in the arbitration clause or separate arbitration agreement, to so decide.

(f) *Model arbitration clause or separate arbitration agreement*

20. In the light of the observations made above, the following wording is proposed for adoption as the arbitration clause or separate arbitration agreement:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL arbitration rules which the parties declare to be known to them. Judgement upon the award made by the arbitrator(s) may be entered by any court having jurisdiction thereof.

"The parties also agree that:

"(a) The appointing authority shall be . . . . . (name of person or institution);

"(b) The number of arbitrators shall be . . . . . (one or three);

"(c) The place of arbitration shall be . . . . . (town or country);

"(d) The language(s) to be used in the arbitral proceedings shall be . . . . .;

"[(e) Authorization, if considered desirable, for the arbitrators to act *ex aequo et bono* or as *amiables compositeurs*]."

INTERNATIONAL COMMERCIAL ARBITRATION RULES  
(REVISED DRAFT)

SECTION I. INTRODUCTORY RULES

SCOPE OF APPLICATION

*Article 1*

1. These Rules shall apply when the parties to a contract, by an agreement in writing which expressly refers to the UNCITRAL Arbitration Rules, have agreed that disputes arising out of that contract shall be settled in accordance with these Rules.

2. "Parties" means physical or legal persons, including legal persons of public law.

3. "Agreement in writing" means an arbitration clause in a contract or a separate arbitration agreement, including an agreement contained in an exchange of letters, signed by the parties, or in an exchange of telegrams or telexes.

4. "Disputes arising out of that contract" includes disputes, existing or future, that arise out of, or relate to, a contract concluded between the parties or its breach, termination or invalidity.

MODIFICATION OF THE RULES

*Article 2*

The parties may at any time agree in writing to modify any provision of these Rules, including any time-limits established by or pursuant to these Rules.

RECEIPT OF COMMUNICATIONS; CALCULATION  
OF PERIODS OF TIME

*Article 3*

1. For the purposes of these Rules a notice, notification, communication or proposal by one party to the other party is deemed to have been received on the day on which it is delivered at the habitual residence or place of business of the other party, or if that party has no such residence or place of business, at his last known residence or place of business.

2. For the purposes of calculating a period of time prescribed under these Rules, such period shall begin to run on the day on which a notice, notification, communication or proposal is received, and that day shall be counted as the first day of such period. If the last day of such period is an official holiday or non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

#### NOTICE OF ARBITRATION

##### Article 4

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") notice that an arbitration clause, or a separate arbitration agreement concluded by them is invoked.

2. Arbitral proceedings shall be deemed to commence on the date on which such notice (hereinafter called "notice of arbitration") is delivered at the habitual residence or place of business of the respondent or, if he has no such residence or place of business, at his last known residence or place of business.

3. The notice of arbitration shall include, but need not be limited to, the following:

- (a) The names and addresses of the parties;
- (b) A reference to the arbitration clause or agreement that is invoked;
- (c) A reference to the contract out of or in relation to which the dispute arises;
- (d) The general nature of the claim and an indication of the amount involved, if any;
- (e) The relief or remedy sought;
- (f) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

#### REPRESENTATION

##### Article 5

A party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party. This communication is deemed to have been given where the notice of arbitration, the statement of claim, the statement of defence, or a counter-claim is submitted on behalf of a party by a counsel or agent.

#### SECTION II. APPOINTMENT OF ARBITRATORS

##### NUMBER OF ARBITRATORS

##### Article 6

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

#### APPOINTMENT OF THE SOLE ARBITRATOR

##### Article 7

1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties.

2. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator. The parties shall endeavour to reach agreement on the choice of the sole arbitrator within 30 days after the receipt by the respondent of the claimant's proposal.

3. If on the expiration of this period of time the parties have not reached agreement on the choice of the sole arbitrator, or if before the expiration of this period of time the parties have concluded that not such agreement can be reached, the sole arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall, by telegram or telex, propose to the respondent the names of one or more institutions or persons, one of whom would serve as the appointing authority. The parties shall endeavour to reach agreement on the choice of the appointing authority within 15 days after the receipt by the respondent of the claimant's proposal.

4. If on the expiration of this period of time the parties have not reached agreement on the designation of the appointing authority, the claimant shall apply for such designation to:

(a) The Secretary-General of the Permanent Court of Arbitration at The Hague, or,

(b) [Here add an appropriate organ or body to be established under United Nations auspices.]

The authority mentioned under (a) or (b) may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it.

5. The claimant shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract.

6. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:

The appointing authority shall communicate to both parties an identical list containing at least three names;

Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties.

If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

The appointing authority may require from either party such information as it deems necessary to fulfil its function.

#### APPOINTMENT OF THREE ARBITRATORS

##### *Article 8*

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the president of the arbitral tribunal.

2. The presiding arbitrator shall be of a nationality other than the nationality of the parties.

3. If within 15 days after the receipt of the claimant's notification of the appointment of an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, the claimant shall:

(a) If the parties have previously designated an appointing authority, request that authority to appoint the second arbitrator,

(b) If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, apply for such designation to either of the authorities mentioned in article 7, paragraph 4.

The appointing authority may exercise its discretion in appointing the second arbitrator.

4. If within 15 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator. The parties shall endeavour to reach agreement on the choice of the presiding arbitrator within 30 days after the receipt by the respondent of the claimant's proposal.

5. If on the expiration of this period of time the parties have not agreed on the choice of the presiding arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the presiding arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall, by telegram or telex, propose to the respondent the names of one or more institutions or persons, one of whom would serve as the appointing authority. The parties shall endeavour to reach agreement on the choice of the appointing authority within 15 days after the receipt by the respondent of the claimant's proposal.

6. If on the expiration of this period of time the parties have not reached agreement on the designation of the appointing authority, the claimant shall apply to either of the authorities mentioned in article 7, paragraph 4, for the designation of an appointing authority. The authority applied to may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it. The ap-

pointing authority may require from either party such information as it deems necessary to fulfil its function.

7. The claimant shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract.

8. The appointing authority shall appoint the presiding arbitrator in accordance with the provisions of article 7, paragraph 6.

#### CHALLENGE OF ARBITRATORS

##### *Article 9*

1. Either party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator, irrespective of whether such arbitrator was:

Originally proposed or appointed by him, or

Appointed by the other party or an appointing authority, or

Chosen by both parties or by the other arbitrators, if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. The circumstances mentioned in paragraph 1 of this article include any financial or personal interest of an arbitrator in the outcome of the arbitration or a family tie or any past or present commercial tie of an arbitrator with a party or with a party's counsel or agent.

3. A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

##### *Article 10*

1. The challenge of an arbitrator shall be made within 30 days after his appointment has been communicated to the challenging party or within 30 days after the circumstances mentioned in article 9 became known to that party.

2. The challenge shall be notified to the other party and to the arbitrator who is challenged. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed or chosen pursuant to the procedures applicable to the appointment or choice of an arbitrator as provided in article 7 or 8.

##### *Article 11*

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;



(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the provisions of article 7 or 8.

2. If, in the cases mentioned under subparagraphs (a), (b) and (c) of paragraph 1, the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

#### DEATH OR RESIGNATION OF AN ARBITRATOR; INCAPACITY OF AN ARBITRATOR, OR HIS FAILURE TO ACT

##### Article 12

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8.

2. In the event that an arbitrator is incapacitated or fails to act, the procedure in respect of the challenge and replacement of an arbitrator as provided in articles 10 and 11 shall apply.

3. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

#### PARTICULARS ON PROPOSED ARBITRATORS

##### Article 13

Where, in connexion with the appointment of arbitrators, the names of one or more persons are proposed by the parties or by an appointing authority, their full names, addresses and their nationality shall be furnished, together with, as far as possible, a description of their qualifications for appointment as arbitrator.

### SECTION III. ARBITRAL PROCEEDINGS

#### GENERAL PROVISIONS

##### Article 14

1. Subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate, provided that the parties are treated with equality and with fairness.

2. If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitrators shall decide whether to hold such hearings or whether the proceedings shall be conducted solely on the basis of documents and other written materials.

3. All documents or information supplied to the arbitrators by one party shall at the same time be communicated by that party to the other party.

#### PLACE OF ARBITRATION

##### Article 15

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators.

2. The arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties. They may hear witnesses and hold interim meetings for consultation among themselves at any place they deem appropriate, having regard to the exigencies of the arbitration.

3. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

#### LANGUAGE

##### Article 16

1. Subject to an agreement by the parties, the arbitrators shall, promptly after their appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings should take place, to the language or languages to be used in such hearings.

2. Arbitrators may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitrators.

#### STATEMENT OF CLAIM

##### Article 17

1. Within a period of time to be determined by the arbitrators, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents he will submit.

3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered, provided the respondent is given the opportunity to exercise his right of defence in respect of the change.

## STATEMENT OF DEFENCE

*Article 18*

1. Within a period of time to be determined by the arbitrators, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 17, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents he will submit.

3. In his statement of defence the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 17, paragraph 2 and 3, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

## PLEAS AS TO ARBITRATOR'S JURISDICTION

*Article 19*

1. The arbitrators shall have the power to rule on objections that they have no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitrators shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 19, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitrators do not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. If such a plea is raised at a later stage, the arbitrators may nevertheless admit the plea, provided the delay in raising it is justified under the circumstances.

4. The arbitrators may rule on such a plea as a preliminary question, or they may proceed with the arbitration and rule on it in their final award.

## FURTHER WRITTEN STATEMENTS; SUPPLEMENTARY DOCUMENTS OR EXHIBITS

*Article 20*

1. The arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods of time for communicating such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements.

2. If in the statement of defence a counter-claim is raised, the arbitrators shall afford the claimant an opportunity to present a written reply to such claim.

3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period of time as the arbitrators shall determine.

## TIME-LIMITS

*Article 21*

The periods of time fixed by the arbitrators for the communication of written statements should not exceed 45 days, and in the case of the statement of claim, 15 days. However, the arbitrators may extend the time-limits if they conclude that an extension is justified.

## HEARINGS, EVIDENCE

*Article 22*

1. In the event of an oral hearing, the arbitrators shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitrators and to the other party the names and addresses of the witnesses he intends to present and the language in which such witnesses will give their testimony.

3. The arbitrators shall make arrangements for the interpretation of oral statements made at a hearing and for a verbatim record of the hearing if either is deemed necessary by the arbitrators under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the arbitrators at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. With the consent of the parties, the arbitrators may permit persons other than the parties and their counsel or agent to be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitrators shall determine the admissibility, relevance and materiality of the evidence offered.

## INTERIM MEASURES OF PROTECTION

*Article 23*

1. At the request of either party, the arbitrators may take any interim measures they deem necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitrators shall be entitled to require security for the costs of such measures.

3. A request for interim measures may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration agreement, or as a waiver of that agreement.

## EXPERTS

## Article 24

1. The arbitrators may appoint one or more experts to report to them, in writing, on specific issues to be determined by the arbitrators. A copy of the expert's terms of reference, established by the arbitrators, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such experts as to the relevance of the required information or production shall be referred to the arbitrators for decision.

3. Upon receipt of the expert's report, the arbitrators shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties and their counsel or agent shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 22 shall be applicable to such proceedings.

## FAILURE TO SUBMIT A STATEMENT; ABSENCE OF A PARTY

## Article 25

1. If the claimant, within the period of time determined by the arbitrators under article 17, fails to communicate his statement of claim, the arbitrators may afford the claimant a further period of time to communicate his statement of claim. If, within such further period of time, he fails to communicate his statement of claim without showing sufficient cause for such failure, the arbitrators shall issue an order for the discontinuance of the arbitral proceedings.

2. If the respondent, within the period of time determined by the arbitrators under article 18, fails to communicate his statement of defence without showing sufficient cause for such failure, the arbitrators may proceed with the arbitration.

3. If one of the parties fails to appear at a hearing duly called under these Rules, without showing sufficient cause for such failure, the arbitrators shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties.

4. If one of the parties, after having been duly notified, fails without showing sufficient cause, to submit documentary evidence when an award is to be made solely on the basis of documents and other written materials, the arbitrators may make the award on the evidence before them.

## WAIVER OF RULES

## Article 26

A party who knows that any provision of, or requirement under, these Rules has not been complied with

and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

## SECTION IV. THE AWARD

## FORM AND EFFECT OF THE AWARD

## Article 27

1. In addition to making a final award, the arbitrators shall be entitled to make interim, interlocutory, or partial awards.

2. An award shall be binding upon the parties. An award shall be made in writing and shall state the reasons upon which it is based, unless both parties have expressly agreed that no reasons are to be given.

3. When there are three arbitrators, an award shall be made by a majority of the arbitrators.

4. An award shall be signed by the arbitrators. When there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the validity of the award. The award shall state the reason for the absence of an arbitrator's signature.

5. The award may only be made public with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitrators.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered, the arbitrators shall comply with this requirement within the period of time required by that law.

## APPLICABLE LAW

## Article 28

1. The arbitrators shall apply the law designated by the parties as applicable to the substance of the dispute. Such designation must be contained in an express clause, or unambiguously result from the terms of the contract.

2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable.

3. The arbitrators shall decide *ex aequo et bono* or as *amiables compositeurs* only if the parties have expressly authorized the arbitrators to do so and the arbitration law of the country where the award is to be made permits such arbitration.

4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade.

## SETTLEMENT OR OTHER GROUNDS FOR DISCONTINUANCE

## Article 29

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an

award. If, before the award is made, the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason, the arbitrators shall inform the parties of their intention to issue an order for the discontinuance of the proceedings. The arbitrators shall have the power to issue such an order unless a party objects to the discontinuance.

2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of arbitration as specified under article 33. Unless otherwise agreed to by the parties, the arbitrators shall apportion the costs between the parties as they consider appropriate.

3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitrators to the parties. Where an arbitral award on agreed terms is made, the provisions of article 27, paragraph 7, shall apply.

#### INTERPRETATION OF THE AWARD

##### Article 30

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitrators give an interpretation of the award. Such interpretation shall be binding on the parties.

2. The interpretation shall be given in writing within 45 days after the receipt of the request, and the provisions of article 27, paragraphs 3 to 7, shall apply.

#### CORRECTION OF THE AWARD

##### Article 31

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitrators may within 30 days after the communication of the award make such corrections on their own initiative.

2. Such corrections shall be in writing, and the provisions of article 27, paragraphs 6 and 7, shall apply.

#### ADDITIONAL AWARD

##### Article 32

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. **Report of the Secretary General: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1)\***

#### SECTION I

##### Commentary on article 1

#### Introduction

1. The purpose of the UNCITRAL Arbitration Rules is to facilitate arbitration of disputes arising out

\* 12 December 1975.

2. If the arbitrators consider the request for an additional award to be justified and consider that the omission can be rectified without any further hearing or evidence, they shall complete their award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 27, paragraphs 2 to 7, shall apply.

#### COSTS

##### Article 33

1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

(a) The fee of the arbitrators, to be stated separately and to be fixed by the arbitrators themselves;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitrators;

(d) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

(e) The compensation for legal assistance of the successful party if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators;

(f) Any fees charged by the appointing authority for its services.

2. The costs of arbitration shall in principle be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties if they consider that apportionment is reasonable.

#### DEPOSIT OF COSTS

##### Article 34

1. The arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of the arbitration.

2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties.

3. If the required deposits are not paid in full within 30 days after the communication of the request, the arbitrators shall notify the parties of the default and give to either party an opportunity to make the required payment.

4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

of international trade transactions. This object is made clear in the title: "International commercial arbitration rules", and from certain provisions of the Rules appropriate to international arbitration, such as the provisions that a sole arbitrator and a presiding arbitrator shall be of a nationality, other than that of the parties (article 7, para. 1, and article 8, para. 2).

2. The Rules, however, do not include a provision limiting their scope of application to the settlement of disputes arising out of international trade transactions. An attempt to so limit the scope of application of the Rules by a provision in the Rules would present the difficult problem of defining the term "international trade transactions", and might open up new grounds for challenges to arbitration.

3. Furthermore, it does not appear necessary to have such a limiting provision. In the case of a uniform law or convention which is applicable despite the absence of specific agreement between the parties as to its applicability, the need to define the scope of application is imperative. In contrast, since the Rules become applicable only when the parties have entered into a written agreement making them applicable, a clear indication of the intended scope of application of the Rules is sufficient. The parties can then make the Rules applicable to cases they consider appropriate.

4. The Rules also do not require that the arbitration clause or separate arbitration agreement referring to these Rules have an international character in that the parties, when concluding it, must have their habitual residence or their principal places of business in different countries. Such a requirement would also give rise to problems of interpretation and create additional grounds for challenge to arbitration.

5. Another reason for the absence of a provision in the Rules restricting their scope of application to "international trade transactions" is the fact that the Rules permit the parties, by written agreement, to modify any provision in the Rules (article 2). When the parties are given this option, a provision restricting the scope of applicability of the Rules ceases to be mandatory, since the parties can give to the Rules a wider scope of application whenever they so desire.

6. These considerations have led to the result that the scope of application of the Rules is not restricted to the arbitration of disputes arising out of international trade transactions. The parties can therefore also apply the Rules in purely domestic cases, although the Rules have been prepared with international trade transactions in mind.

#### *Paragraphs 1 and 4*

7. Under paragraph 1, the Rules become applicable by virtue of an agreement in writing which expressly refers to the Rules. Writing is required in order to avoid uncertainty as to whether the Rules have been made applicable. The agreement may be concluded after a dispute has arisen, or—the normal case—long beforehand by an arbitration clause in a contract. Under paragraph 4, the class of disputes that can be settled in accordance with the Rules is defined in very wide terms. The language of this paragraph is modelled on that of article 1, paragraph 1, of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

#### *Paragraph 2*

8. This paragraph makes it clear that a Government, State agency, or State organization may be party

to an arbitration clause or agreement which refers to the Rules. The paragraph is modelled on article II, paragraph 1, of the 1961 European Convention on International Commercial Arbitration, which similarly recognizes the right of legal persons, considered by the law applicable to them as "legal persons of public law", to conclude valid arbitration agreements.

#### *Paragraph 3*

9. This paragraph is substantially based on article II, paragraph 2, of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, in recognition of modern business practices, provision has been made for an exchange of telexes as a possible method of entering into an arbitration clause or arbitration agreement. A similar provision is found in article I, paragraph 2 (a) of the 1961 European Convention on International Commercial Arbitration.

#### *Commentary on article 2*

1. Under this article the parties may regulate the course of the arbitral proceedings in the manner they consider appropriate. The requirement that a modification of the Rules must be in writing is intended to create certainty as to the ambit of such a modification.

2. It may be noted that, under article 26, the Rules can be modified by the behaviour of one party if the other party does not promptly object to such behaviour (implied waiver).

#### *Commentary on article 3*

##### *Paragraph 1*

1. The Rules provide for the giving of notices, notifications, communications or proposals by one party to the other at various stages in the arbitral proceedings, within periods of time established under the Rules. This paragraph specifies when such notices, notifications, communications or proposals are deemed to have been received. The paragraph supplements the rule contained in the first sentence of paragraph 2 of this article with regard to the date on which a period of time prescribed under the Rules commences to run. The rule contained in paragraph 1 is modelled on article 14, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

##### *Paragraph 2*

2. Several provisions in the Rules state that actions described in such provisions shall or may be taken by the parties or the arbitrators within a specified period of time after the receipt of a notice, proposal, notification or communication (e.g., article 6—after receipt of notice; article 7, paragraphs 2 and 3—after receipt of proposal; article 8, paragraph 3—after receipt of notification; article 10, paragraph 1—after receipt of communication). The first sentence of this paragraph specifies the day on which such period shall begin to run, while the other sentences concern the effect of official holidays and non-business days on the running of the period.

*Commentary on article 4**Paragraphs 1 and 3*

1. The notice to be given under paragraph 1 is intended to inform the respondent of the fact that arbitration proceedings have been initiated for the purpose of asserting a claim against him. Similar provisions appear in article 3 of the ECE Arbitration Rules, article II, paragraph 3 of the ECAFE Arbitration Rules, section 7 of the Commercial Arbitration Rules of the American Arbitration Association, and section 7 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

2. The information required to be included in the notice under subparagraphs (b), (c), (d) and (e) of paragraph 3 will acquaint the respondent with the particulars of the claim and enable him to decide on his future course of action, e.g., whether the claim should be contested, and if contested, the identity of the person he should choose or appoint as arbitrator. Subparagraph (f) enables the claimant to take at this stage a step which may be necessary to carry forward the arbitral proceedings, i.e., to suggest whether the arbitral tribunal should be composed of one or three arbitrators.

*Paragraph 2*

3. The time of commencement of arbitral proceedings may have relevance to the question whether provisions on prescription of rights or limitation of actions under national law are operative in relation to the dispute or disputes submitted to arbitration. This paragraph lays down a rule as to the time arbitral proceedings are deemed to commence. This rule is modelled on that contained in article 14, paragraph 2, of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

*Commentary on article 5*

1. This article gives a party the right to be represented by a counsel or agent upon the communication of the name and address of such person to the other party. The right to be represented by an agent is also recognized in article 30 of the ECE Arbitration Rules, article VI, paragraph 8 of the ECAFE Arbitration Rules, section 21 of the Commercial Arbitration Rules of the American Arbitration Association, section 20 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, and article 15, paragraph 5 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

2. Such representation may take place at any stage of the arbitral proceedings, including any hearing called by the arbitrators (e.g., under article 14, para. 2) or any meeting convened by the arbitrators for the inspection of goods (under article 15, para. 3). The communication of the name of the counsel or agent is necessary so as to assure the other party that such counsel or agent possesses the requisite authority to act on behalf of the party whom he claims to represent.

3. The second sentence of this article has been added in recognition of the fact that, in arbitration practice, the requisite authority always exists and need not be expressly communicated when a counsel or agent acts in the manner described therein. A similar provision appears in section 21 of the Commercial

Arbitration Rules of the American Arbitration Association.

## SECTION II

*Commentary on article 6*

1. Early agreement by the parties to an arbitration clause or arbitration agreement on the number of arbitrators will accelerate the arbitral proceedings by eliminating the period of time specified under this article within which parties must endeavour to reach agreement on such number. The introduction to the Rules (A/CN.9/112, para. 16) recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented, whenever possible, by an agreement as to the number of arbitrators.

2. Since it is normal practice to have three arbitrators in the arbitration of disputes arising out of international trade transactions, this article specifies that there shall be three arbitrators if the parties fail to reach agreement on this question. A similar provision as to the number of arbitrators is contained in section 8 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, and article 4 of the ECE Arbitration Rules.

3. The 15-day period specified in the article is considered to be sufficient to allow the parties to communicate with each other and reach agreement as to the desired number of arbitrators.

4. The question has been examined as to whether this article should contain a provision stating that, even where parties fail to reach agreement on the number of arbitrators within the 15-day period specified in this article and the arbitral tribunal, therefore, is to consist of three members, the parties have the right to agree subsequently that there shall be a single arbitrator. It is considered that no express provision to this effect is needed, since the desired result may be obtained by the parties agreeing in writing to modify this article in accordance with article 2.

*Commentary on article 7**Paragraph 1*

1. The requirement that a sole arbitrator shall be of a nationality other than that of the parties is designed to further a desired objective, namely, that the sole arbitrator shall be impartial in the performance of his duties. A similar requirement is contained in article 2, paragraph 6 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Cases may arise, however, where both parties have complete confidence in the impartiality of a proposed sole arbitrator of the nationality of one or both parties. In such cases the parties can appoint that person as the sole arbitrator, after agreeing in writing to modify this paragraph in accordance with article 2.

*Paragraph 2*

2. The provision within this paragraph requiring the claimant to make his proposal by telegram or telex is imposed with a view to accelerating the arbitral proceedings. It is considered that 30 days is a period of time of sufficient length for the parties to communicate with each other and endeavour to reach agreement on the identity of the sole arbitrator.



*Paragraph 3*

3. If, before the expiration of the 30 days specified in paragraph 2 of this article, the parties conclude that they cannot agree on the identity of the sole arbitrator, there would be an unwarranted delay in the arbitral proceedings if the parties were nevertheless compelled to await the expiration of the comparatively long period of 30 days before applying to a previously designated appointing authority, or before endeavouring to reach agreement on an appointing authority in cases where there has been no previous designation. This paragraph therefore provides that the appropriate step can be taken immediately after the parties have concluded that they cannot agree.

4. Since a previous designation by the parties of an appointing authority will accelerate arbitral proceedings which reach the stage covered by this paragraph, the introduction to the Rules (A/CN.9/112, para. 15),\* recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented by an agreement between the parties designating an appointing authority.

5. Although the parties may not have sufficient confidence in the same individual whom they could choose as the sole arbitrator, they may have sufficient confidence in the ability of an impartial appointing authority to make a suitable appointment. This paragraph, therefore, requires the parties, when they have not previously designated an appointing authority, to endeavour to reach agreement on the choice of such an authority. The specified period of time within which they must endeavour to reach agreement is 15 days, in contrast to the period of 30 days specified in paragraph 2 of this article for reaching agreement on the choice of a sole arbitrator. It is considered that this shorter period is justified by the fact that the number of possibilities which are likely to be examined by the parties when endeavouring to reach agreement on the choice of an appointing authority is likely to be smaller than would be the case when they are endeavouring to reach agreement on the choice of a sole arbitrator.

*Paragraph 4*

6. If, in the circumstances described in paragraph 3 of this article, the parties have not succeeded in designating an appointing authority who would appoint the sole arbitrator, the claimant can under this paragraph apply to one of the institutions mentioned in subparagraphs (a) and (b) in order to secure the designation of an appointing authority.

*Paragraph 5*

7. The obligation to send to the appointing authority the documents described in this paragraph is imposed on the claimant in order to ensure that the appointing authority will have the information necessary to enable it to select an arbitrator qualified to deal with the dispute in question.

*Paragraph 6*

8. The list-procedure to be followed under this paragraph is contained in the arbitral rules of certain arbitral institutions, e.g., section 12 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission; section 12 of the Commercial Arbitration

Rules of the American Arbitration Association; and article 9 of the Rules of the Netherlands Arbitration Institute. The advantage of this procedure is that it gives the parties, who failed to agree on the appointment of the sole arbitrator, some indirect influence over the ultimate appointment by permitting them to express their preferences and objections with regard to the names communicated by the appointing authority.

9. Examples of cases in which the penultimate sentence of this paragraph becomes applicable because the list-procedure fails to produce the desired result are: the failure of one or both parties to return a list; objections by one or both parties to all the names on the list; and failure by the parties to reach common agreement with regard to any person on the list.

*Commentary on article 8**Paragraph 1*

1. This paragraph specifies the usual procedure for the appointment of arbitrators where the arbitral tribunal is to consist of three arbitrators. Under this paragraph, read together with paragraph 4 of this article, the right to choose the presiding arbitrator is given in the first instance to the arbitrators, and not to the parties. This solution is in conformity with current practice in the arbitration of commercial disputes. Similar provision are contained in article II, paragraph 3 (b) of the ESCAP (formerly ECAFE) Arbitration Rules, and article 3 (b) of the ECE Arbitration Rules.

*Paragraph 2*

2. The impartiality of the presiding arbitrator is of special importance in an arbitral tribunal consisting of three arbitrators since the other two arbitrators are normally appointed directly by the parties. The requirement that the presiding arbitrator be of a nationality other than the nationality of the parties is intended to further the objective that the presiding arbitrator be impartial. A similar provision is contained in article 2, paragraph 6, of the Rules of Conciliation and Arbitration of the ICC. Cases may arise, however, where the two party-appointed arbitrators, or the parties, have complete confidence in the impartiality of a proposed presiding arbitrator of the nationality of one or both parties. In such cases that person may be appointed as the presiding arbitrator after the parties have agreed in writing to modify the requirement of nationality, in accordance with article 2.

*Paragraph 3*

3. This paragraph provides a procedure whereby the arbitral proceedings can be continued despite the failure of the respondent to appoint his arbitrator. In such a case, the appointing authority, at the request of the claimant, appoints the second arbitrator in the place of the respondent, and does so at its discretion.

4. Since a previous designation by the parties of an appointing authority will accelerate the arbitral proceedings in the circumstances under consideration, the introduction to the Rules (A/CN.9/112, para. 115),\* recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented by an agreement between the parties designating an appointing authority.

\*Reproduced in this volume, part two, III, 1, *supra*.

\*Reproduced in this volume, part two, III, 1, *supra*.

*Paragraph 4*

5. The provision in this paragraph requiring the claimant to make his proposal by telegram or telex is intended to secure the acceleration of the arbitral proceedings. It is considered that 30 days is a period of time of sufficient length for the parties to communicate with each other and endeavour to reach agreement on the identity of the presiding arbitrator.

*Paragraph 5*

6. This paragraph is identical with paragraph 3 of article 7, except that that paragraph applies to the choice of a sole arbitrator, while this paragraph applies to the choice of a presiding arbitrator. Subject to this difference in the scope of application of this paragraph, the comments made in relation to paragraph 3 of article 7 also apply to this paragraph.

*Paragraph 6*

7. The comments made in relation to paragraph 4 of article 7 are also applicable to this paragraph.

*Paragraph 7*

8. This paragraph is identical with paragraph 5 of article 7, and the comments made in relation to paragraph 5 of article 7 are also applicable to this paragraph.

*Paragraph 8*

9. The comments made in relation to paragraph 6 of article 7 are applicable to this paragraph, i.e., the appointing authority shall appoint the presiding arbitrator by following the list-procedure provided for in that paragraph.

*Commentary on article 9*

1. Although this article specifies the categories of arbitrators who can be challenged, and the grounds for challenge, it should be noted that the provisions contained in this article are subject to the mandatory rules relating to these issues contained in the applicable national law.

*Paragraph 1*

2. Under this paragraph, either party may challenge any arbitrator who was chosen or appointed under these Rules, irrespective of the method of choice or appointment. The paragraph also lays down a single ground for challenge of all categories of arbitrators. Since this ground for challenge has general application, it may be noted that a party-appointed arbitrator on a 3-member arbitral tribunal can be challenged on the ground that circumstances exist that give rise to justifiable doubts as to such arbitrator's impartiality or independence, even if such doubts are due to his relationship to the party who appointed him. The provisions contained in this paragraph are modelled on similar provisions contained in article 6 of the ECE Arbitration Rules, and article III, paragraph 1, of the ESCAP (formerly ECAFE) Arbitration Rules.

*Paragraph 2*

3. This paragraph sets forth a list, which is not exhaustive, of circumstances constituting grounds for challenge under paragraph 1. Proof of the existence of a circumstance would disqualify an arbitrator, even though no doubt in fact existed as to the impartiality and independence of the arbitrator concerned. This list also serves to draw the attention of the parties to

typical cases which fall within the general ground of challenge specified in paragraph 1. Paragraph 11 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission, and section 18 of the Commercial Arbitration Rules of the American Arbitration Association also contain provisions specifying that the financial or personal interest of an arbitrator is a ground for his disqualification.

*Paragraph 3*

4. Since no one knows better than a prospective arbitrator himself whether circumstances exist which are likely to disqualify him, this paragraph imposes an obligation on him to disclose such circumstances at the earliest stage at which disclosure is possible. Such disclosure is likely to prevent the appointment of arbitrators who may later be challenged successfully. Thus the interruption of the course of arbitral proceedings resulting from a challenge is avoided.

5. This provision is modelled on similar provisions contained in paragraph 17 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission and section 18 of the Commercial Arbitration Rules of the American Arbitration Association. As an appointment may take place despite such disclosure by a prospective arbitrator, an obligation is also imposed on an arbitrator upon appointment to disclose circumstances likely to disqualify him to parties to whom there had been no prior disclosure. The result of the latter rule, combined with the time-limit for a challenge imposed by paragraph 1 of article 10, is that most challenges are likely to be made at an early stage of the arbitral proceedings, when they will cause less disruption of the course of the arbitral proceedings.

*Commentary on Article 10**Paragraph 1*

1. Challenge of an arbitrator results in an interruption of the course of arbitral proceedings, and a successful challenge will result in a serious interruption arising from the need to appoint a substitute arbitrator and the possible need to repeat hearings held prior to such challenge (para. 3 of article 12). It is therefore desirable that challenges, if any, should be made at the earliest possible stage in the arbitral proceedings. The time-limit of 30 days imposed by this paragraph seeks to achieve this objective.

2. The first 30-day period mentioned in this paragraph will apply when the ground for the challenge was already known to the challenging party at the time notice of the appointment of the arbitrator who may be challenged was communicated to such party. The 30-day period mentioned thereafter applies if the ground for the challenge becomes known to the challenging party subsequent to such communication.

3. A party who has a right of challenge may waive such right. A waiver will take place automatically when no challenge is made within the applicable 30-day period specified in this paragraph.

*Paragraph 2*

4. The notice of the challenge required under this paragraph enables, *inter alia*, the other party to decide whether he is to agree to the challenge, and the challenged arbitrator to decide whether he is to withdraw

from his office, as provided in paragraph 3 of this article.

#### Paragraph 3

5. If the other party agrees to the challenge, the challenged arbitrator is removed from office, irrespective of the view of the challenged arbitrator, or of the view of the appointing authority who may have appointed such arbitrator, as to the validity of the challenge.

6. When an arbitrator loses his office under the circumstances described in this paragraph, the application of the provisions contained therein will result in a substitute arbitrator being appointed or chosen pursuant to the procedures applicable under article 7 or 8 to the appointment or choice of the particular type of arbitrator (i.e., sole, presiding or party-appointed) who has lost his office.

#### Commentary on article 11

##### Paragraph 1

###### Subparagraph (a)

1. An appointing authority which has appointed an arbitrator in accordance with the provisions of article 7 or 8 of the Rules is a neutral third party. Such authority is therefore an appropriate tribunal to decide on the challenge of the arbitrator it had appointed.

###### Subparagraph (b)

2. An appointing authority designated by the parties would have been so designated because the parties considered that such authority was impartial. Such authority is therefore an appropriate tribunal to decide on the challenge of an arbitrator, although it had not appointed the arbitrator concerned.

###### Subparagraph (c)

3. When subparagraphs (a) and (b) do not apply, subparagraph (c) provides for the designation of an appointing authority in accordance with the provisions of article 7 or 8 to decide on the challenge. The provisions of article 7 will apply to such designation if the challenged arbitrator is a sole arbitrator; the provisions of article 8, paragraph 3 will apply if the challenged arbitrator is a party-appointed arbitrator; and the provisions of article 8, paragraphs 5 and 6 will apply if the challenged arbitrator is a presiding arbitrator.

##### Paragraph 2

4. When an arbitrator loses his office by reason of a challenge being sustained, the application of the provisions contained in this paragraph will result in a substitute arbitrator being appointed or chosen pursuant to the procedures applicable under article 7 or 8 to the appointment or choice of the particular type of arbitrator (i.e., sole, presiding, or party-appointed) who has lost his office. With the object of preventing delay in the course of the arbitral proceedings, this paragraph modifies the procedures applicable under article 7 or 8 by providing that, where such procedures would require the designation of an appointing authority for the appointment of an arbitrator, the appointing authority which decided on the challenge under paragraph 1 shall make the appointment.

#### Commentary on article 12

1. Rules governing arbitral proceedings generally provide for the replacement of arbitrators on the follow-

ing grounds: death of an arbitrator; inability of an arbitrator to perform his functions due to his physical or mental incapacity; unwillingness to perform the functions required of an arbitrator; or resignation by an arbitrator from his office.

##### Paragraph 1

2. Under paragraph 1, on the death or resignation from office of an arbitrator, the substitute arbitrator is selected according to the procedure that, under these Rules, applies to the appointment or choice of the arbitrator who is to be replaced. Therefore, if a sole arbitrator is to be replaced, the provisions of article 7 apply, and the relevant provisions of article 8 govern the replacement of a party-appointed arbitrator or of a presiding arbitrator.

##### Paragraph 2

3. This paragraph applies to the challenge and replacement of arbitrators on the ground of incapacity or failure to perform the functions of an arbitrator, the procedures governing the challenge and replacement of arbitrators under articles 10 and 11 of these Rules. Consequently, the party who alleges that an arbitrator is incapacitated or has failed to act must notify the arbitrator concerned and the other party of this challenge. Upon receipt of this notification, the other party may agree to the removal of the challenged arbitrator or the arbitrator may decide to withdraw from his office; in all other cases, pursuant to the procedures laid down in article 11, the appropriate appointing authority will have to decide on the validity of the challenge made against the arbitrator.

4. When an arbitrator loses his office on the ground of incapacity or of failure to act, regardless of whether such loss of office resulted from the agreement of the other party to the charge, the withdrawal of the arbitrator from his office, or the decision of an appointing authority, a sole arbitrator shall be replaced in accordance with the provisions of article 7 of these Rules, and a party-appointed or presiding arbitrator in accordance with the relevant provisions of article 8.

##### Paragraph 3

5. In recognition of the special role that is played in arbitral proceedings by the sole or presiding arbitrator, this paragraph provides that when such an arbitrator is replaced, all hearings that were held previously must be repeated. When a party-appointed arbitrator is replaced, following the appointment of the substitute arbitrator, the arbitral tribunal has discretion to decide whether any or all prior hearings shall be repeated.

#### Commentary on article 13

1. This article applies to all instances where the names of persons who may be appointed as arbitrators are proposed by one party to the other party, or by an appointing authority to both parties. Such proposals may concern the appointment of the sole arbitrator (article 7, paras. 2 and 6) or the appointment of the presiding arbitrator (article 8, paras. 4 and 8).

2. This article is designed to ensure that, when these Rules provide that a party may be involved in the process of selecting an arbitrator, he will be provided with information as to the name, nationality and

qualifications of persons proposed as arbitrators by the other party or by an appointing authority.

### SECTION III

#### *Commentary on article 14*

##### *Paragraph 1*

1. Article 14 contains provisions concerning the conduct of the arbitral proceedings by the arbitrators. Since flexibility during the proceedings and reliance on the expertise of the arbitrators are two of the hallmarks of arbitration, paragraph 1 gives the arbitrators the power to regulate the conduct of the proceedings, provided that both parties "are treated with equality and with fairness".

##### *Paragraph 2*

2. Under this paragraph the arbitrators must, if either party so requests, hold hearings for the presentation of evidence by witnesses or for oral argument by the parties or their counsel. If neither party requests the holding of hearings, the arbitrators may nevertheless decide to hold hearings to hear the presentation of evidence by witnesses or to hear oral argument by the parties or their counsel.

3. Under this paragraph, the arbitrators are not given the power to refuse to hear evidence that a party wishes to present by witnesses, on the ground that such evidence would be immaterial or irrelevant to the resolution of the dispute. Even in a case where the arbitrators decide to conduct the proceedings "solely on the basis of documents and other written materials", they may, under paragraph 3 of article 15, arrange for the inspection of goods, other property or documents.

4. It may be noted that on the question of hearings, article 14, paragraph 2, adopts a middle course between the differing approaches taken in the ECE Arbitration Rules and the ECAFE Arbitration Rules. Under the ECE Arbitration Rules (article 23), hearings will be held unless the parties agree that the arbitrators may render an award based solely on documentary evidence. Under the ECAFE Arbitration Rules (article VI, paragraph 5), normally proceedings are to be conducted solely on the basis of documents, subject to an agreement to the contrary by the parties or a decision to the contrary by the arbitrators. Under these rules, the arbitrators determine in principle how to conduct the arbitration, but they must hold hearings if one party so requests.

##### *Paragraph 3*

5. This paragraph, based on the rule found in article VI, paragraph 2, of the ECAFE Arbitration Rules, is intended to ensure that each party is fully informed, at the same time as the arbitrators, of the contents of documents and information furnished by the other party to the arbitrators during the arbitral proceedings.

#### *Commentary on article 15*

##### *Paragraph 1*

1. Following closely the wording of article 14 in the ECE Arbitration Rules, this paragraph provides that in the absence of an agreement by the parties on the place of arbitration, such place shall be determined by the arbitrators. The agreement of the parties as to

the place of arbitration may be contained in the arbitration clause (e.g., the model arbitration clause at paragraph 20 of the introduction to these Rules (A/CN.9/112)\* and the ECE model form of arbitration clause make provision for an agreement by the parties as to the place of arbitration), in the separate arbitration agreement, or in a later agreement by the parties. If the agreement by the parties as to the place of arbitration is arrived at on a later date, it need not be in writing, but must be communicated to the arbitrators.

##### *Paragraphs 2 and 3*

2. These paragraphs preserve some freedom for the arbitrators in determining the locale of arbitral proceedings, even in cases where the parties have agreed upon the country or city that will be the place of arbitration. This limited flexibility is necessary so that the arbitrators can perform certain functions, e.g. hear witnesses or inspect goods, at locales that are appropriate, having regard to the exigencies of the particular arbitration.

##### *Paragraph 4*

3. Paragraph 4 of this article is useful, since, when issues arise concerning the enforceability of arbitral awards or the requirements as to the form of such awards, reference is on some occasions made to the national law of the "place of arbitration" and on other occasions to the national law of the "country where the award was made" (see e.g. article V, paragraph 1, subparagraphs (a), (d) and (e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

#### *Commentary on article 16*

1. This article resolves the problems of language that may arise in international arbitrations, where the parties, arbitrators and witnesses often have differing language backgrounds. It is desirable that the agreement of the parties, or in its absence the determination by the arbitrators, as to the language or languages to be used should be arrived at as early as possible.

##### *Paragraph 1<sup>1</sup>*

2. Under this paragraph, the parties may agree on the language or languages that will be used in a particular arbitral proceeding. This agreement may be contained in the arbitral clause or separate arbitration agreement, or may be reached at some time before or even after the commencement of the arbitral proceedings. (See article 4, para. 2, as to the date on which arbitral proceedings are deemed to commence.) However, this faculty can no longer be exercised if the arbitrators have been appointed and, despite a request by the arbitrators, the parties fail to reach an agreement on the language or languages to be used. In the absence of an agreement by the parties, the arbitrators will determine the language or languages to be used

\* Reproduced in this volume, part two, III, 1, *supra*.

<sup>1</sup> It is suggested that the following revised text should replace the text of article 16, para. 1, reproduced in A/CN.9/112. The revision consists of the addition of the words in *italics*:

"1. Subject to a *prior* agreement by the parties, the arbitrators shall, promptly after their appointment, determine, after consultation with the parties, the language or languages to be used in the proceedings".

in the proceedings, taking into account the exigencies of the arbitration.

#### Paragraph 2

3. Under paragraph 1, the agreement of the parties or the determination by the arbitrators governs the language to be used at any oral hearings, as well as the language in which written communications and statements are to be made. Where documents are submitted in a language that is not the language agreed to by the parties or determined by the arbitrators, the arbitrators, under paragraph 2, may order the party concerned to accompany such documents by a translation in the language or languages of the arbitration.

#### Commentary on article 17

1. The "statement of claim", which is dealt with in this article, must be distinguished from the "notice of arbitration" governed by article 4 of these Rules. The "notice of arbitration" serves the function of informing the respondent that the claimant is submitting to arbitration a dispute arising out of a contract between them. The date of delivery of this notice marks the commencement of the arbitral proceedings and sets in motion the machinery for the choice or appointment of the arbitrators. This notice also sets forth, *inter alia*, the general nature of the claim, an indication of the amount involved, and the relief or remedy sought by the claimant. The information contained in the "notice of arbitration" will help the parties, or the appointing authority, as the case may be, in the selection of arbitrators. On the other hand, the "statement of claim" is communicated only after the arbitrators have been chosen or appointed. It is the first written statement in a possible series of such statements by which the parties endeavour to state and substantiate their positions regarding the dispute (see articles 18 and 20).

2. The arbitrators may, in some cases, have received a copy of the notice of arbitration before their appointment (e.g. if they asked to see it before deciding whether or not to agree to serve as arbitrators), or soon after their appointment. However, article 4 contains no requirement that the "notice of arbitration" be sent to the arbitrators upon their appointment.

#### Paragraph 1

3. The first document that the claimant must communicate to the arbitrators is the "statement of claim" governed by this article. Paragraph 1 provides that the claimant must communicate his statement of claim, in writing, to the respondent and to each of the arbitrators. In order to apprise the arbitrators of the scope of their jurisdiction and of the frame of reference for the dispute, this paragraph requires that a copy of the contract and of any separate arbitration agreement be annexed to the statement of claim.

4. It should be noted that, while article 17, paragraph 1, requires that the statement of claim shall be communicated "within a period of time to be determined by the arbitrators", article 21 provides that normally this period of time should not exceed 15 days.

#### Paragraph 2

5. This paragraph describes the information that must be contained in the statement of claim. Although

in his statement of claim the claimant is obliged to include "a statement of the facts supporting the claim", he is not required to annex the documents which he deems relevant and on which he intends to rely. Paragraph 2, however, states that, should he wish to do so, a claimant may annex to his statement of claim a list of the documents he intends to submit in support of his claim or he may even annex the relevant documents themselves. It is believed that, since claimants are generally interested in the resolution of the dispute submitted to arbitration as quickly as possible, they will in a large number of cases annex to their statements of claim the documents or copies of the documents on which they intend to rely. In cases where the claimant does annex a list of such documents or copies of the documents themselves, he is not precluded from submitting additional or substitute documents at a later stage in the arbitral proceedings, in the light of the position taken by the respondent in his statement of defence.

#### Paragraph 3

6. Under this paragraph, the statement of claim may be supplemented or altered by the claimant, provided that the arbitrators in their discretion permit the change to be made and, further, that the respondent is given an opportunity to reply to the claim as modified.

#### Commentary on article 18

#### Paragraph 1

1. Under the provisions of this paragraph, the statement of defence must be communicated by the respondent to the claimant and to each of the arbitrators "within a period of time to be determined by the arbitrators". It should be noted that under article 21 of these rules, the time-limits established by arbitrators for the communication of written statements should normally not exceed 45 days.

#### Paragraph 2

2. This paragraph is designed to ensure that the statement of defence responds to the information that is required to be included in the statement of claim under the provisions of subparagraphs (b), (c) and (d) of paragraph 2 of article 17. In addition, the respondent has the option (similar to the option given to the claimant under article 17, para. 2) of annexing the documents or copies of the documents on which he intends to rely for his defence or of including a reference to such documents, without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceedings.

#### Paragraph 3

3. This paragraph permits the respondent to assert in his statement of defence claims arising out of the same contract as the one on which the claim made in the statement of claim was based. Such claims may be asserted either as counterclaims or as set-off.

4. Although, under this paragraph, a claim asserted as a counterclaim or set-off must arise out of the same contract as the claim made in the statement of claim, the parties may agree, under special circumstances, that the respondent may assert as a counterclaim or



set-off a claim that did not arise out of the same contract as the claim raised in the statement of claim, such as where disputes arising out of other contracts are also referred to arbitration under these Rules. Pursuant to article 2 of these Rules, such agreement of the parties would have to be in writing.

#### *Paragraph 4*

5. This paragraph makes it clear that the provisions of article 17 relating to the required contents of the statement of claim and to the possibility of supplementing or altering claims apply also to counterclaims and to claims relied on as set-off.

#### *Commentary on article 19*

1. This article empowers the arbitrators to rule on objections to their jurisdiction to decide the particular dispute that is before them. Similar provisions may be found, e.g., in article V, paragraph 3 of the 1961 European Convention on International Commercial Arbitration; article 41, paragraph 1 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States; article 18, paragraph 1 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration; article VI, paragraph 3 of the ECAFE Arbitration Rules; and article 18 of the ECE Arbitration Rules.

2. It should be noted that, although article 19 does not state expressly that rulings by the arbitrators as to their jurisdiction are subject to judicial supervision and control, it is clear that these rulings are subject to such supervision and control, exercised in accordance with the mandatory provisions of the applicable national law.

#### *Paragraph 1*

3. This paragraph gives the arbitrators power to rule on objections to their jurisdiction and provides specifically that objections based on a denial of the existence or validity of the arbitration clause or separate arbitration agreement are included among the objections to their jurisdiction on which the arbitrators are empowered to rule. Objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement may be based, amongst others, on any of the following grounds: non-existence or lapsing; nullity, including nullity resulting from the fact that under the applicable arbitration law the subject-matter of the dispute may not be submitted to settlement by arbitration; and claims that the particular dispute does not fall within the scope of the parties' agreement to submit certain specified disputes to arbitration.

4. Objections as to the existence or validity of the arbitration clause or of the separate arbitration agreement constitute allegations that the arbitrators were not validly authorized to function as arbitrators. Other objections, e.g. that the arbitrators exceed their terms of reference at some point during the arbitral proceedings or that they failed to comply with a material provision in the arbitration clause or in the separate arbitration agreement, are only allegations that the arbitrators lacked jurisdiction to take some particular action and do not involve allegations to the effect that

the arbitrators could not serve at all in that capacity. Paragraph 1 of article 19 is designed to cover all objections to the jurisdiction of the arbitrators, irrespective of the grounds for, and extent of, such objections.

#### *Paragraph 2*

5. This paragraph establishes the separability of the arbitration clause from the contract of which the arbitration clause forms a part. It authorizes the arbitrators to determine the existence or validity of such a contract, but makes it clear that the invalidity of the arbitration clause does not necessarily follow from a finding that the main contract is invalid. A similar provision may be found in article 18 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration. Paragraph 2 reflects the view that the arbitration clause, although contained in, and forming a part of, the contract, is in reality an agreement distinct from the contract itself, having as its object the submission to arbitration of disputes arising from or relating to the contractual relationship.

#### *Paragraph 3*

6. Under the provisions of this paragraph, pleas alleging the lack of jurisdiction of the arbitrators must normally be raised in the statement of defence or, with respect to a counterclaim, in the reply to the counterclaim. However, the arbitrators may admit a plea that is made only at a later stage in the arbitral proceedings if the delay was justified under the circumstances. An example of a plea raised with justified delay would be a plea based on facts newly discovered by the objecting party.

#### *Paragraph 4*

7. Since objections as to the jurisdiction of the arbitrators involve procedural matters, this paragraph authorizes the arbitrators to either rule on such objections as preliminary questions or to decide these issues only in their final award. This solution is in conformity with the discretion granted to arbitrators by article 14, paragraph 1 of these Rules to conduct the arbitral proceedings "in such manner as they consider appropriate" and with paragraph 2 of article 41 of the 1965 Washington Convention on the Settlement of Investment Disputes: "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the centre . . . , shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".

#### *Commentary on article 20*

1. Under these Rules, the claimant must communicate his statement of claim to the respondent and to each of the arbitrators (article 17). Article 25, paragraph 1 provides the sanction for non-compliance: "the arbitrators shall issue an order for the discontinuance of the arbitral proceedings". The respondent is then given an opportunity to respond to the statement of claim (article 18). Article 25, paragraph 2 provides that if the respondent fails to submit a statement of defence, nevertheless "the arbitrators may proceed with the arbitration". Thus, normally, the arbitrators will receive a statement of claim and a statement of defence.



*Paragraph 1*

2. Under this paragraph, the arbitrators may require that the parties submit written statements in addition to the statement of claim and the statement of defence. Also, the parties themselves may agree on a further exchange of written statements. This paragraph provides the arbitrators and the parties with an opportunity to insist on an exchange of further written statements, in recognition of the custom under several national arbitration laws, especially in countries with a civil law system, to call for a second statement by the claimant (rejoinder or *réplique*) and a second response by the respondent (reply to the rejoinder, or *duplicque*).

*Paragraph 2*

3. Since a claim raised by the respondent in his statement of defence as a counterclaim is a novel claim as far as the claimant is concerned (although article 18, para. 3 requires that the counterclaim must have arisen out of the same contract as the original claim by the claimant), paragraph 2 of article 20 provides that the arbitrators must permit the claimant to present a written reply to the counterclaim.

*Paragraph 3*

4. This paragraph is based closely on a provision in article 24 of the ECE Arbitration Rules. Although incorporated as a guide to the arbitrators and the parties, this provision may be viewed as a specific example of the general rule in article 14, paragraph 1 to the effect that "the arbitrators may conduct the arbitration in such manner as they consider appropriate".

*Commentary on article 21*

1. Disputes submitted to arbitration should be settled as quickly as possible. It is, however, not possible to prescribe in these Rules rigidly fixed time-limits within which the various required written statements must be communicated. It has been found that rigid time-limits cannot be imposed in domestic commercial arbitrations and of course this holds true even more for international commercial arbitrations. The 45-day period mentioned in this article as the usual time-limit for the communication of written statements is merely intended to serve as a general guideline from which the arbitrators may deviate whenever warranted by the particular circumstances.

2. Under this article, the claimant should normally be given only 15 days to communicate his statement of claim to the other party and to the arbitrators. The reason for this is that already at the time he initiates the arbitral proceedings by sending the notice of arbitration (article 4), the claimant should start the preparation of his statement of claim (article 17). During the time period that elapses between the sending of the notice of arbitration and the appointment of the arbitrators (who then establish the time-limit for the communication of the statement of claim, under article 17), the claimant can continue to prepare his statement of claim.

3. Under this article, the arbitrators retain the discretion to extend any time-limits that they had fixed, if such extension is warranted under the circumstances.

4. It should be noted that, pursuant to article 2 of these Rules, the parties may, by an agreement in writing, modify any provision in these Rules pursuant to which the arbitrators are to determine the period of time within which a particular written statement is to be communicated; the parties can accomplish this by a written agreement in which they themselves set the time-limit for the communication of a particular written statement, and they should thereafter inform the arbitrators accordingly.

*Commentary on article 22*

1. This article sets forth a number of general provisions which are considered useful for the regulation of hearings that may be held in the course of the arbitral proceedings. In addition, the article deals with the presentation of evidence of witnesses by means of their written statements (para. 5) and establishes that the arbitrators have the duty to weigh and evaluate the evidence offered by the parties (para. 6).

*Paragraph 1*

2. This paragraph requires that the arbitrators "give the parties adequate advance notice" of each hearing. Such notice must specify the date, time and place of the hearing. In most cases hearings will be held at the place of arbitration. However, pursuant to article 15, paragraph 2, the arbitrators may hear witnesses "at any place they deem appropriate, having regard to the exigencies of the arbitration".

*Paragraph 2*

3. Under this paragraph, each party must disclose, at least 15 days before the hearing, the identity of the witnesses he intends to present. This information will give some idea to the other party of the evidence that will be presented at the hearing and will enable that party to prepare his response to that evidence.

*Paragraph 3*

4. This paragraph deals with certain preparatory measures for hearings that the arbitrators must take in order to ensure that the hearings will run smoothly. The basic rule is that the arbitrators have full discretion regarding possible arrangements for the interpretation of oral statements and for a verbatim record of the hearing, in keeping with the general rule contained in article 14, paragraph 1, that "subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate". However, the arbitrators have to arrange for interpretation or a verbatim record of they receive a timely request from both parties to this effect.

*Paragraph 4*

5. This paragraph provides that, as a rule, hearings shall be held *in camera*, in conformity with the principle of privacy that is customary in commercial arbitration. The parties, however, may agree that some or all the hearings should be open.

6. The manner in which witnesses are to be interrogated is left to the discretion of the arbitrators. Thus, the arbitrators may decide whether cross-examination of the witnesses is or is not to be permitted. Cross-examination is a technique that is customarily

employed in many areas of the world and cannot therefore be prescribed for international arbitration. Consequently, in cases where both parties or their counsel are accustomed to the technique of cross-examination, the arbitrators may in their discretion permit it, while in cases where one or both parties are unacquainted with this technique the arbitrators may find it inappropriate to permit it.

#### Paragraph 5

7. This paragraph gives a desired latitude in the manner of presenting evidence at arbitral hearings, by permitting the presentation of evidence in the form of written statements signed by the witnesses. However, it is not required under this paragraph that the witnesses signing such statements also swear to their veracity.

#### Paragraph 6

8. This paragraph makes it clear that the arbitrators have discretion to decide on the admissibility, relevance and materiality of the evidence offered, and to determine the probative weight that is to be given to such evidence. A similar provision is contained in article 24 of the ECE Arbitration Rules.

#### Commentary on article 23

1. This article deals with the possibility that during the course of the arbitral proceedings a party will request that interim measures be taken in order to protect the subject-matter of the dispute. Under some national laws such measures may be taken only by the competent judicial authorities, while under other national laws the arbitrators have the discretion to take appropriate interim protective measures. However, if there is a need for the immediate enforcement of protective measures, the assistance of the judicial authorities may be essential in all cases.

#### Paragraphs 1 and 2

2. These paragraphs concern those cases where under the applicable national law the arbitrators are empowered to take interim measures of protection regarding the subject-matter of the dispute. Under paragraph 1, the arbitrators have the discretion to take such measures, but only if requested by one or both parties.

This paragraph is based on article VI, paragraph 6 of the ECAFE Arbitration Rules, and article 27 of the ECE Arbitration Rules.

3. In order to facilitate the enforcement of interim measures taken by the arbitrators pursuant to paragraph 1 of this article, paragraph 2 authorizes the arbitrators to establish these measures in the form of interim awards. Since the taking of interim measures may entail "costs of arbitration" (article 33), paragraph 2 gives arbitrators the power to require security for such costs.

#### Paragraph 3<sup>2</sup>

4. This paragraph makes it clear that a party to the arbitral proceedings may, if he so wishes, request

<sup>2</sup> It is suggested that the following revised text should replace the text of article 23, paragraph 3, reproduced in A/CN.9/112. This revised text is identical with the text repro-

duced in A/CN.9/112, except that the words in italics have been added:

an appropriate judicial authority to take interim protective measures, without thereby violating the agreement to arbitration contained in the arbitration clause or separate arbitration agreement under which the arbitral proceedings arose. This provision is based on article VI, paragraph 4 of the 1961 European Convention on International Commercial Arbitration.

#### Commentary on article 24

1. In cases involving matters of a technical nature, or where the existence and scope of particular commercial usages is at issue, the arbitrators may wish to have the benefit of expert opinion before they make their award. In some cases, the arbitrators may also want to receive expert advice on questions of law, although the actual resolution of such questions must be made by the arbitrators themselves.

#### Paragraph 1

2. This paragraph authorizes the arbitrators to appoint experts who will report to the arbitrators on specific issues arising during the arbitral proceedings. The terms of reference for such experts are established by the arbitrators; however, a copy of the terms of reference must be communicated to the parties. The paragraph is modelled on similar provisions found in the rules of several arbitral institutions, e.g. section 23 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce; article 14, paragraph 2 of the Rules of Conciliation and Arbitration of the ICC; and article 21, paragraph 2 of the Rules of the Netherlands Arbitration Institute.

#### Paragraphs 2, 3 and 4

3. The provisions contained in these paragraphs enable the expert to perform his functions and, at the same time, safeguard the interests of both parties to the arbitration.

#### Commentary on article 25

1. This article deals with the consequences of a party's failure to submit his statement of claim, statement of defence or other required documentary evidence, and with the effect of a party's failure to appear at a hearing that had been duly called.

#### Paragraph 1

2. The "statement of claim" is the first document that, pursuant to article 17, must be communicated by the claimant to the arbitrators. Without the statement of claim the arbitrators cannot commence consideration of the dispute, since it is only through that statement that the arbitrators become fully informed about the points at issue and about the facts that in the view of the claimant support his claim. Nor can the respondent prepare his statement of defence without having the statement of claim. For these reasons, paragraph 1 of article 25 provides specifically that if a claimant fails

duced in A/CN.9/112, except that the words in italics have been added:

"A request for interim measures may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration clause or separate arbitration agreement, or as a waiver of that arbitration clause or separate arbitration agreement."

The commentary to this paragraph considers the revised text.

to communicate his statement of claim within the period of time set by the arbitrators, the arbitrators have the discretion of granting him an extension of time. Such an initial extension of time will usually be granted by the arbitrators as a matter of course, and may be granted even if the failure to communicate the statement of claim was not justified under the circumstances. It may be noted, on the other hand, that under the general provisions in article 21 of these Rules, the arbitrators may extend any time-limits fixed by them "if they conclude that an extension is justified".

3. However, should the claimant fail to communicate his statement of claim by the date the initial extension granted by the arbitrators for its submission has expired, then under this paragraph the arbitrators are obliged to "issue an order for the discontinuance of the arbitral proceedings", unless the claimant shows "sufficient cause for this failure".

4. Paragraph 1, as a whole, reflects the view that once the claimant has initiated the arbitral proceedings by sending his notice of arbitration to the other party (pursuant to article 4), he should within a reasonable time communicate his statement of claim to the other party and to the arbitrators or face the discontinuance of the arbitral proceedings; in this way the claimant is prevented from threatening the institution of arbitral proceedings regarding a particular dispute without in fact formally going forward with his claim in earnest.

#### *Paragraph 2*

5. This paragraph is designed to prevent the possibility that the respondent would try to frustrate the arbitral proceedings by failing to submit his statement of defence. Accordingly, paragraph 2 of article 25 provides that in such a case the arbitrators may go forward with the arbitration, disregarding the fact that no statement of defence was submitted. If, however, the respondent shows that he had justification for failing to submit his statement of defence within the established time-limit, then the arbitrators, pursuant to the provisions of article 21, have the discretion to grant him an extension of time.

6. Where the respondent does not communicate his statement of defence, when proceeding with the arbitration the arbitrators may still convene oral hearings and/or require further documentary evidence from one or both parties. Should the respondent then fail to appear at a duly called hearing or fail to submit further required documentation, the provisions of paragraphs 3 or 4 of this article will apply, respectively.

#### *Paragraph 3*

This paragraph assures that a party cannot frustrate the arbitral proceedings by the expedient of not appearing at a hearing that was duly called. It provides, following similar provisions contained in article 31, paragraph 1 of the ECE Arbitration Rules, and article 15, paragraph 2 of the Rules of Conciliation and Arbitration of ICC, that the arbitrators may proceed with the arbitration and that all the parties will be deemed to have been present at the hearing in such a case.

#### *Paragraph 4*

8. Under this paragraph, based on article 31, paragraph 2 of the ECE Arbitration Rules, if a party fails

to submit any documentary evidence required by the arbitrators, the arbitrators may nevertheless proceed, and make their award on the evidence that had been presented to them during the arbitral proceedings.

#### *Commentary on article 26*

1. Under this article, a party to an arbitral proceeding who knows that a provision of, or requirements under, these Rules was not complied with is deemed to waive his right to object if he does not promptly raise an objection thereto. It should be noted that without a knowledge of the contents of these Rules there can be no knowledge of any non-compliance with them.

2. However, where a party has submitted to arbitration under these Rules, it will be very difficult for him to allege during the arbitral proceedings that he lacks knowledge of the contents of one or more of the provisions of these Rules. Such an allegation would be even more difficult to sustain if the parties had adopted the text of the model arbitration clause or separate arbitration agreement recommended in the introduction to these Rules (A/CN.9/122, para. 12),\* since that text contains an express declaration by the parties that the Rules are known to them.

3. It may be noted that this article and article 2 (modification of the Rules by written agreement of the parties) are in some respects interrelated. A waiver pursuant to the provisions of article 26 may be regarded as a modification of these Rules by a tacit, informal agreement of the parties, manifested by the action of one party derogating from the Rules and the knowing acquiescence by the other party to such action.

4. In practice, a waiver under article 26 of the right to object will normally take place only in respect of provisions and requirements in the Rules that are of minor importance. The effect of such a waiver would be that, when an award resulting from the arbitral proceedings is sought to be enforced, the objection to recognition and enforcement of the award specified in article V, paragraph 1 (d) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (i.e., that "the arbitral procedure was not in accordance with the agreement of the parties") could not be raised as to the non-compliance that was the subject-matter of the waiver.

5. This article is based on similar provisions found in section 37 of the Commercial Arbitration Rules of the American Arbitration Association and article 37 of the Inter-American Commercial Arbitration Rules.

### SECTION IV

#### *Commentary on article 27*

1. This article deals with a number of technical questions regarding the manner in which arbitrators are to make their award and with the legal effect of arbitral awards. The provisions contained in this article are, however, subject to the mandatory provisions of the applicable national law.

#### *Paragraph 1*

2. This paragraph, similarly to article 36 of the ECE Arbitration Rules and article VII, paragraph 2

\* Reproduced in this volume, part two, III, 1, *supra*.

of the ECAFE Arbitration Rules, authorizes the arbitrators to make interim, interlocutory or partial awards whenever justified under the circumstances of the particular dispute that is before them. The arbitrators may make such awards at any time during the arbitral proceedings.

#### Paragraph 2

3. The rule in this paragraph, to the effect that awards must contain the reasons upon which they are based, unless the parties have expressly agreed to the contrary, corresponds to article 40 of the ECE Arbitration Rules. This provision reflects the law in many jurisdictions, particularly countries with a civil law system, to require that arbitral awards incorporate the reasons for the decision reached by the arbitrators. At the same time, paragraph 2 permits the parties to agree that the award should not contain reasons in cases where the place of arbitration is in a jurisdiction in which an award need not contain reasons in order to be valid.

#### Paragraph 3

4. This paragraph requires that an award be made by a majority of the arbitrators in cases where there is a three-member arbitral tribunal. Thus, at least two of the three arbitrators must concur in the award for it to become valid; however, it is not required that the presiding arbitrator be one of the two arbitrators who agree on the award.

5. If a majority of the arbitrators fail to agree on an award, the arbitral tribunal must resolve the deadlock in accordance with the relevant law and practice at the place of arbitration, which is the place where according to article 15, paragraph 4 of these Rules the award must be made. Under the law and practice in many jurisdictions, arbitrators must continue their deliberations until they arrive at a majority decision.

#### Paragraph 4<sup>3</sup>

6. This paragraph deals with two matters of a technical nature concerning the form and content of arbitral awards; the requirement that the arbitrators sign their award, and the requirement that the award contain the date and place at which the award was made. As a general rule, all the arbitrators must sign the award, in order to make it clear that all the arbitrators participated in the arbitral proceedings and in the making of the award.

7. An award must contain an indication of the date on which it was made, since that date is of great importance on account of the time-limits that are established by national laws for the filing or registration of arbitral awards, and for the enforcement of arbitral awards. Similarly, an award must clearly show the place where it was made, since the arbitral proceedings must have been conducted in conformity with the mandatory rules of the law applicable at

<sup>3</sup> It is suggested that the following revised text should replace the text of the first sentence of article 27, paragraph 4, reproduced in A/CN.9/112. This revised text is identical with that reproduced in A/CN.9/112, except that the words in italics have been added:

"4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made..."

The commentary on this paragraph considers the revised text.

the place of arbitration, and under article 15, paragraph 4 of these Rules, "the award shall be made at the place of arbitration".

8. Paragraph 4 provides further that the validity of an award is not impaired by the failure of any one arbitrator on a three-member arbitral tribunal to sign the award; however, pursuant to this paragraph, the award must state the reason for the absence of that arbitrator's signature. Thus, where two of the three arbitrators agree on an award, the third arbitrator cannot prevent the making of the award by a refusal to sign the award.

9. It should be noted that in some jurisdictions the applicable arbitration law may require that an arbitral award be signed by all the arbitrators before it becomes valid and enforceable; in such a case the applicable national law would prevail over the provision in paragraph 4 of article 27.

10. Paragraph 4 of article 27 does not deal with the possibility that an arbitrator dissenting from the award agreed on by the other two arbitrators may wish to append his dissenting opinion to the award. Consequently, the question of whether an arbitrator may add his dissenting opinion to the award is left for decision to the law applicable at the place of arbitration.

#### Paragraph 5

11. This paragraph establishes that an award may only be published with the consent of both parties. When publication of an award does take place, the names of the parties are usually omitted and other measures are also taken to avoid disclosure of their identity.

#### Paragraphs 6 and 7

12. These paragraphs are designed to ensure that both parties will promptly receive copies of the award and that the arbitrators comply with any requirement at the place of arbitration that the award be filed or registered.

### Commentary on article 28

#### Paragraph 1

1. This paragraph is based on the principle of party autonomy for the choice of the law applicable to the substance of a dispute that is referred to arbitration. The wording of this paragraph is modelled on article 2 of the Hague Convention on the Law Applicable to International Sale of Goods of 15 June 1955.

2. The parties' choice of the applicable law may be contained in an express provision in the contract, in the separate arbitration agreement or in a subsequent written agreement between the parties on this point. Alternatively, the choice of law may be an implied one, resulting "unambiguously" from the terms of the contract.

3. It should be noted that in some jurisdictions parties may only choose as the law applicable to the substance of their dispute the law of a jurisdiction having some real connexion with the transaction.

**Paragraph 2**

4. This paragraph applies where there was no choice of the applicable substantive law under paragraph 1 of article 28, whether by an express clause or resulting from the terms of the contract. In such cases, the law applicable to the substance of the dispute must be chosen by the arbitrators; under paragraph 2 they "shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable". This approach, also found in article VII, paragraph 1, of the 1961 European Convention on International Commercial Arbitration and article 38 of the ECE Arbitration Rules, permits the arbitrators to exercise their discretion in choosing the applicable conflict of laws rules in the light of the particular circumstances of the dispute.

**Paragraph 3**

5. This paragraph deals with cases where the parties expressly authorize the arbitrators to decide the substance of their dispute *ex aequo et bono* or as *amiables compositeurs*, i.e., based not on the substantive law of any particular jurisdiction but on general principles of law and trade practices. In many jurisdictions arbitrators are permitted to decide on these bases, and provisions similar to paragraph 3 may be found in article VII, paragraph 2, of the 1961 European Convention on International Commercial Arbitration, article 39 of the ECE Arbitration Rules, and article VII, paragraph 4 (b) of the ECAFE Arbitration Rules.

6. Paragraph 3, however, contains an explicit proviso making it clear that arbitrators may decide *ex aequo et bono* or as *amiables compositeurs* only if the arbitration law at the place of arbitration permits such arbitration. Even where such arbitration is permitted, it is generally accepted that the arbitrators remain bound by fundamental principles of public policy (*ordre public*) at the place of arbitration.

**Paragraph 4**

7. This paragraph provides that "in any case", i.e., regardless of whether the law applicable to the substance of the dispute was determined according to paragraph 1 or 2 of this article, or whether the arbitrators were authorized by the parties to decide the dispute *ex aequo et bono* or as *amiables compositeurs*, the arbitrators throughout the arbitral proceedings and particularly in the making of their award "shall take into account the terms of the contract and the usages of the trade". This gives the arbitrators considerable latitude in arriving at their decision. Similar provisions are contained in article VII, paragraph 4 (a) of the ECAFE Arbitration Rules, article 24 of the ECE Arbitration Rules, and article 13, paragraph 5 of the Rules of Conciliation and Arbitration of the ICC. Furthermore, in the sphere of international commercial arbitration for which these Rules were designed, this result corresponds with the intentions and expectations of the parties.

**Commentary on article 29**

1. This article applies if, before the award is made, the parties agree to a settlement of their dispute, or if the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason. It gov-

erns the manner in which the arbitral proceedings are to be concluded in such cases and deals with the apportionment of the costs of arbitration between the parties.

**Paragraph 1**

2. Where the parties agree to a settlement of their dispute during the course of the arbitral proceedings, this paragraph makes provision for an "order for the discontinuance of the arbitral proceedings" as well as for "an arbitral award on agreed terms". A settlement recorded in the form of an award on agreed terms acquires the legal force of an award. Rule 43 of the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes similarly distinguishes between an "order of discontinuance" and a "settlement in the form of an arbitral award", while provisions in other arbitration rules, such as paragraph 1 of article VIII of the ECAFE Arbitration Rules, and paragraph 43 of the Rules of Procedure of the Inter-American Arbitration Commission, mention only the latter possibility.

3. Under paragraph 1, to have a settlement reached by the parties recorded as an arbitral award on agreed terms it is not required that the parties submit to the arbitrators the full text of their settlement in such a form that it can be embodied in an award. In practice, the settlement may often be reached orally during the course of a hearing, possibly with the assistance of the arbitrators, and the parties may request the arbitrators to draft an award on agreed terms that corresponds to the settlement reached.

4. The arbitrators, however, are not obligated to record a settlement as an award on agreed terms, even if requested by both parties. Thus, exercising their discretion, arbitrators may be expected to refuse to record as awards those settlements that they deem unlawful or against public policy (*ordre public*) at the place of arbitration.

5. Where the parties reached a settlement and did not request the arbitrators to embody the settlement in an award or where, although requested, the arbitrators in their discretion refused to do so, the arbitrators will issue an order for the discontinuance of the arbitral proceedings.

6. Paragraph 1 also deals with instances where, before an award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible even though the parties have not agreed to a settlement of their dispute. In such cases the arbitrators must notify the parties of their intention to discontinue the arbitral proceedings and may then issue an order of discontinuance. If one or both parties object, however, the arbitrators must proceed with the arbitration and make an award.

**Paragraphs 2 and 3**

7. These paragraphs have been added to resolve certain technical problems that arise in practice when the arbitral proceedings are for any reason discontinued pursuant to the provisions of paragraph 1 of this article. Under paragraph 2, the apportionment of the costs of arbitration in such cases is left to the discretion of the arbitrators. Under the particular circumstances covered by article 29, the basic principle of article 33, para-

graph 2 to the effect that the "costs of arbitration shall in principle be borne by the unsuccessful party" cannot be applied. It may be expected that, in the absence of any special circumstances, the arbitrators will divide the costs of arbitration equally between the parties in such cases. In addition, any agreement by the parties as to the apportionment of the costs of arbitration would bind the arbitrators.

#### *Commentary on article 30*

##### *Paragraph 1*

1. After the award has been made, one or both parties may wish that the arbitrators provide an interpretation of the award they have rendered, in order to clarify for the parties its exact meaning and scope. This paragraph permits either party to request that the arbitrators interpret their award. Similar provisions, authorizing the arbitrators to interpret their award, are found in article VIII, paragraph 2 of the ECAFE Arbitration Rules and article 50 of the 1965 Washington Convention on the Settlement of Investment Disputes.

##### *Paragraph 2*

2. Under this paragraph, whenever an interpretation is requested by a party and is given by the arbitrators, it must comply with the formal requirements for awards contained in article 27 of these Rules.

3. Article 30 is considered useful in that it provides a vehicle for one or both parties to secure clarification of the award where necessary. Furthermore, in some jurisdictions the competence of the arbitrators is deemed to end with the making of the award, unless the parties had expressly agreed that the arbitrators are to retain a certain limited competence even after the making of their award. Articles 30-32 of these Rules embody express agreements of the parties whereby they authorize the arbitrators to interpret or correct their award and to rectify an omission in their award.

#### *Commentary on article 31*

1. This article authorizes the arbitrators to correct certain mistakes in the award, such as errors in computation or those of a clerical nature. A similar provision is contained in article VIII, paragraph 3 of the ECAFE Arbitration Rules.

2. Under that paragraph, the arbitrators may make corrections in their award within a defined period of time, either at the request of a party or on their own initiative. Even in cases where the arbitrators receive a timely request from one or both parties that an error in the award is corrected, the arbitrators have full discretion to decide whether or not they wish to issue such a correction (e.g., the arbitrators may decide that the alleged error whose correction was requested was not an error at all).

##### *Paragraph 2<sup>4</sup>*

3. This paragraph provides that any correction of an award issued by the arbitrators must be signed by

<sup>4</sup> It is suggested that the following revised text should replace the text of article 31, para. 2, reproduced in A/CN.9/112. This revised text is identical with that reproduced in

the arbitrators, communicated by them to the parties and that the requirements at the place of arbitration for the filing or registration of awards must be complied with by the arbitrators. However, in the case of an arbitral tribunal composed of three arbitrators, it is sufficient if the correction of the award is signed by the presiding arbitrator, provided he consulted the other arbitrators prior to his issuing the correction. This latter provision was added to this paragraph in recognition of the fact that in international arbitrations it is likely that the members of a three-member arbitral tribunal reside far from each other and that consequently it may be difficult and time-consuming to obtain the signatures of all the arbitrators.

#### *Commentary on article 32*

1. This article is designed to prevent the invalidation of awards on the ground that in their award the arbitrators failed to deal with and decide upon one or more claims presented by either party during the arbitral proceedings. Most national arbitration laws provide that the arbitrators' failure or omission to deal with all the claims raised in the arbitration is sufficient reason for setting aside or refusing to enforce an award. In the absence of a provision such as article 32, a lengthy, costly arbitration might be totally invalidated because the arbitrators inadvertently failed to rule in their award on each part of every claim raised during the arbitral proceedings. To permit, after an award has been made, the making of an additional award as to claims or parts of claims presented during the arbitral proceedings but not dealt with in the original award would contribute to the efficient and effective resolution of the dispute between the parties that had been referred to arbitration.

2. By their adoption of the UNCITRAL Arbitration Rules the parties agree to an extension of the authority of the arbitrators in a number of respects, subject to the mandatory provisions of the law applicable at the place of arbitration. Under article 30 of these Rules the arbitrators may give a binding, written interpretation of the award they have made, and under article 31 the arbitrators may correct errors of a clerical or similar nature in their award. The present article empowers the arbitrators, upon the request of either party, to complete an award they have made by issuing "an additional award as to claims presented in the arbitral proceedings but omitted from the award".

##### *Paragraph 1*

3. This paragraph permits a party to request the arbitrators to make an additional award only as to claims that were formally presented during the course of the arbitral proceedings. It therefore applies to matters such as an unintentional failure to fix or apportion the costs of arbitration (article 33), to rule on a claim for interest payments, or to adjudicate in the award a counter-claim that was asserted without substantial supportive evidence.

A/CN.9/112, except that the words in italics have been added: "2. Such corrections shall be in writing and shall be signed by the sole arbitrator or if there was an arbitral tribunal of three members, by the presiding arbitrator after consultation with the other arbitrators. The provisions of article 27, paras. 5, 6 and 7, shall apply."



*Paragraph 2*

4. Under this paragraph, the arbitrators have full discretion, upon receipt of the request of a party for an additional award, to decide whether or not to make such an award. In addition, the arbitrators may make an additional award only if the omission in the award "can be rectified without any further hearing or evidence". Thus, the additional award would have to be based on the evidence that the arbitrators had before them at the time that they made their original, incomplete award.

*Paragraph 3*

5. In recognition of the fact that an "additional award" is an "award" within the meaning of these Rules, this paragraph applies the provisions of paragraphs 2 to 7 of article 27 to an additional award.

*Commentary on article 33**Paragraph 1*

1. This paragraph contains a non-exhaustive enumeration of items that are included in the "costs of arbitration". Pursuant to this paragraph, the costs of arbitration are to be fixed in the award and the fee charged by the arbitrators for their services, which forms part of such costs, must be stated separately.

2. Because of the great differences in the nature of disputes that may be referred to arbitration, in the length of arbitral proceedings, and in the demands made on and efforts required of the arbitrators as a consequence, it was not believed possible to develop a uniform schedule of fees for arbitrators.<sup>5</sup> However, arbitrators, who were selected by the parties or by an appointing authority based on faith in their expertise and in their readiness to adjudicate the dispute with impartiality and fairness, may be expected to act reasonably in setting their own fees.

3. While, under subparagraph (a) of paragraph 1, the fee of the arbitrators must be stated separately in the award, all the other costs of arbitration may be combined into one figure. In cases where arbitrators

<sup>5</sup> A note concerning a schedule of fees for arbitrators is contained in document A/CN.9/114, reproduced in this volume, part two, III, 4, *infra*.

were named by an appointing authority, the arbitrators may consult with that authority before setting their fees.

*Paragraph 2*

4. Similarly to provisions appearing in article 43 of the ECE Arbitration Rules and article VII, paragraph 7 of the ECAFE Arbitration Rules, paragraph 2 of this article lays down as the general rule that the costs of arbitration should be borne by the unsuccessful party, but authorizes the arbitrators to apportion these costs in a different manner whenever justified by the particular circumstances.

*Commentary on article 34**Paragraphs 1 and 2*

1. In *ad hoc* arbitration, it is customary for arbitrators to require an advance payment to cover the costs that will be incurred during the course of the arbitral proceedings. Paragraph 1 provides that each party is to make one half of such advance payment. Paragraph 2 authorizes the arbitrators to require supplementary deposits from the parties, in the light of developments during the arbitral proceedings, e.g., if the proceedings take longer than anticipated or the arbitrators decide that they will need the testimony of experts reporting to them on particular issues (article 24). Similar provisions are contained in article VI, paragraph 7 of the ECAFE Arbitration Rules, and article 28 of the ECE Arbitration Rules.

*Paragraph 3*

2. Under this paragraph, if a deposit required pursuant to paragraph 1 or 2 of this article is not paid in full within a specified period of time, the arbitrators must notify both parties and give to each party the opportunity to make the required payment. The rule in this paragraph is motivated by the practical consideration that a party who has fulfilled his own obligation by paying one half of the required deposit may have a strong interest in seeing that the arbitration proceeds to a conclusion and may therefore be willing to make the payment required of the other party. If the required payment is still not forthcoming, the arbitrators may either suspend or discontinue the arbitral proceedings.

### 3. Working paper prepared by the Secretariat: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules); alternative draft provisions for the draft UNCITRAL Arbitration Rules (A/CN.9/113)

## INTRODUCTION

*Terms of reference*

1. At its eighth session (1-17 April 1975) the United Nations Commission on International Trade Law considered a "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade" (A/CN.9/97; UNCITRAL Yearbook, Vol. VI: 1975, part two, III, 1). A summary of the Commission's deliberations at that session is set forth in the report of the Commission on the work of its eighth session (A/10017, annex I; UNCITRAL

Yearbook, Vol. VI: 1975, part one, II, 1). At the conclusion of its deliberations, the Commission decided to request the Secretary-General:

(a) To prepare a revised draft of these rules, taking into account the observations made on the preliminary draft in the course of its eighth session;

(b) To submit the revised draft arbitration rules to the Commission at its ninth session.

2. In response to that request the Secretariat has prepared two documents:

(a) Document A/CN.9/112\* sets forth a revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules). That revised set of rules is based on the preliminary draft set of rules which the Commission examined at its eighth session, and takes into account the observations and suggestions made at that session. A commentary on the revised draft set of rules is contained in document A/CN.9/112/Add.1.\*\*

(b) The present document sets forth alternative draft provisions in respect of certain articles, or paragraphs of certain articles, reflecting observations and suggestions made at the eighth session which are not incorporated in the text of the draft "UNCITRAL Arbitration Rules".

#### *Arrangement of the text*

3. The text contained in the present document is, as far as possible, set forth in a manner complementary to the presentation of the draft UNCITRAL Arbitration Rules in document A/CN.9/112.\* In this connexion, the following may be noted:

(a) With the exception of article 2 *bis*, each draft article, and each paragraph of a draft article, set forth in the present document, bears the same number as the corresponding article and paragraph in the draft UNCITRAL Arbitration Rules dealing with the same subject-matter. Article 2 *bis* covers a special case not provided for in the draft UNCITRAL Arbitration Rules.

(b) Where all the suggestions made at the eighth session of the Commission in respect of a particular article, or a paragraph of an article, are incorporated in the draft UNCITRAL Arbitration Rules, the text of that article or paragraph is not reproduced in this document.<sup>1</sup> Similarly, the text of an article or paragraph of an article, in respect of which no suggestions were made at the eighth session of the Commission, has also not been reproduced herein.

(c) Those observations and suggestions which have not been incorporated either in the draft UNCITRAL Arbitration Rules or in the text contained in this document, are noted in this document below each article.

(d) In some cases an observation or suggestion made in regard to a particular article or paragraph of the text set forth herein would, if adopted by the Commission, require consequential changes in other articles, or paragraphs of articles in the text. Such consequential changes are not reflected, since this would make the text complex and difficult to follow.

(e) Alternative suggestions are either entitled as such, or indicated by enclosing the language reflecting

each suggestion within square brackets, and placing the suggestions enclosed within square brackets in immediate sequence. In some cases, language has been placed within square brackets when a suggestion has been made that such language should either be introduced or deleted. In every case where language is enclosed within square brackets, or a suggestion or observation is incorporated in the text, foot-note references are given to the source of the particular observation or suggestion reflected therein. In most cases, this source is the summary of discussions by the Commission at its eighth session contained in the report of the Commission on the work of its eighth session (A/10017, annex I; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1). When a reference is made by a foot-note to a paragraph in that summary, that paragraph also reveals the exact nature of the observation or suggestion that has been made. In a few cases, indicated by appropriate foot-notes, certain provisions have been included at the suggestion of a member of the Consultative Group.

#### *Schedule of fees for arbitrators*

4. Article 33 in the present document deals with the costs of arbitration, and an alternative in paragraph 1 (a) of that article provides for the fee of arbitrators, to be stated separately, and to be fixed by the arbitrators themselves "in accordance with the schedule of fees for arbitrators set out in annex A of these Rules". In order to enable the Commission to consider certain difficulties which may arise in the drafting of such a schedule, a separate note on the question of a schedule of fees for arbitrators is contained in document A/CN.9/114.\*

### SECTION I. INTRODUCTORY RULES

#### *Scope of application*

##### *[Article 1]*

1. These Rules shall apply when the parties to a contract, by an agreement [in writing]<sup>1</sup> which expressly refers to the UNCITRAL Arbitration Rules, have agreed that disputes arising out of a defined legal relationship existing between them<sup>2</sup> shall be settled in accordance with these Rules.

[2. "Parties" means physical or legal persons, including legal persons of public law.]<sup>3</sup>

[3. "Agreement in writing" means an arbitration clause in a contract or a separate arbitration agreement, including an agreement contained in an exchange of letters, signed by the parties, or in an exchange of telegrams or telexes.]<sup>4</sup>

4. "Disputes arising out of a defined legal relationship" includes disputes, existing or future, that arise out of, or relate to, a defined legal relationship existing

\* Reproduced in this volume, part two, III, 1, *supra*.

\*\* Reproduced in this volume, part two, III, 2, *supra*.

<sup>1</sup> (a) Article 7, paragraph 3 of the text contained herein is identical with the first sentence of article 7, paragraph 3 of the draft UNCITRAL Arbitration Rules. It is nevertheless reproduced below because it forms a separate paragraph in the present text.

(b) Article 34, paragraphs 3 and 5, of the text contained herein are identical with article 34, paragraphs 2 and 4, of the draft UNCITRAL Arbitration Rules. They are nevertheless reproduced herein since the numbering of the paragraph differs.

\* Reproduced in this volume, part two, III, 4, *infra*.

<sup>1</sup> Report of UNCITRAL on the work of its eighth session, A/10017, annex I, para. 18 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>2</sup> *Ibid.*, para. 17.

<sup>3</sup> *Ibid.*, para. 20.

<sup>4</sup> *Ibid.*, para. 21.

between the parties,<sup>5</sup> or its breach, termination or invalidity.]<sup>6</sup>

#### Note

The following suggestions are not presented as alternatives in the above text:

(a) To include a provision limiting the scope of the Rules to the arbitration of "disputes arising out of international trade transactions" (A/10017, annex I, paras. 3 and 16; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1);

(b) To include a provision defining the circumstances in which a person not a party to an arbitration clause or agreement might participate in an arbitration arising from such clause or agreement (A/10017, annex I, para. 19; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Modification of the Rules

##### Article 2

The parties may at any time agree [in writing]<sup>7</sup> to modify any provision of these Rules, including any time-limits established by or pursuant to these Rules.

#### Administered arbitration

##### [Article 2 bis

Where the parties have agreed to select an arbitral institution to administer the arbitration, they shall be deemed to have selected the arbitration rules which such institution may have established for such purpose, unless they have expressly specified otherwise.]<sup>8</sup>

#### Receipt of communications;

#### Calculation of periods of time

##### Article 3

1. For the purpose of these Rules, a notice, notification, communication or proposal by one party to the other party or to the arbitrators shall be effective when received by the addressee.<sup>9</sup>

2. Failing proof to the contrary,<sup>10</sup> it is presumed that a notice, notification, communication or proposal sent by telegram or telex, has been received [one day] [three days]<sup>11</sup> after it was sent, and a communication by registered mail [five] [eight]<sup>12</sup> days after it was sent.<sup>13</sup>

3. ...

#### Notice of arbitration

##### Article 4

1. ...

[2. Arbitral proceedings shall be deemed to commence on the date on which such notice (hereinafter called "notice of arbitration") is delivered at the habitual residence or place of business of the respondent

or, if he has no such residence or place of business, at his last known residence or place of business.]<sup>14</sup>

3. The notice of arbitration shall include, but need not be limited to the following:

(a) The names and addresses of the parties;

(b) A reference to the arbitration clause or agreement that is invoked;

(c) A reference to the contract out of or in relation to which the dispute arises;

(d) The general nature of the claim and an indication of the amount involved, if any;

[(e) The relief or remedy sought;]<sup>15</sup>

(f) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The claimant may state in the notice of arbitration that such notice also serves as his statement of claim. In such a case, the claimant:

(a) Shall annex to the notice of arbitration a copy of the contract referred to in subparagraph (c) of paragraph 2 above, and a copy of the arbitration agreement referred to in subparagraph (b) of paragraph 2 above if it is not contained in the contract;

(b) Shall include in the notice a statement of the facts supporting the claim, and the points at issue; and

(c) May annex to the notice all documents he deems relevant or may add a reference to the documents he will submit.<sup>16</sup>

#### Note

The following suggestions are not presented as alternatives in the above text:

(a) To specify the language in which the notice of arbitration must be given (A/10017, annex I, para. 25; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

(b) To specify the method by which the notice is to be transmitted by the claimant to the respondent (A/10017, annex I, para. 26; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Representation

##### Article 5

A party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party. This communication is considered<sup>17</sup> to have been given where the notice of arbitration, the statement of claim, the statement of defence, or a counter-claim is submitted on behalf of a party by a counsel or agent, unless the other party, promptly upon such submission, requests proof as to the authority of such counsel or agent to represent the party whom he claims to represent.<sup>18</sup>

<sup>14</sup> *Ibid.*, para. 24.

<sup>15</sup> *Ibid.*, para. 27 (third sentence from the end).

<sup>16</sup> *Ibid.*, para. 27.

<sup>17</sup> *Ibid.*, para. 30 (last sentence).

<sup>18</sup> *Ibid.*, para. 30.

<sup>5</sup> *Ibid.*, para. 17.

<sup>6</sup> *Ibid.*, para. 22.

<sup>7</sup> *Ibid.*, para. 18.

<sup>8</sup> *Ibid.*, para. 23.

<sup>9</sup> *Ibid.*, para. 31.

<sup>10</sup> *Ibid.*, para. 35.

<sup>11</sup> *Ibid.*, para. 36.

<sup>12</sup> *Ibid.*, para. 36.

<sup>13</sup> *Ibid.*, para. 34.

## SECTION II. APPOINTMENT OF ARBITRATORS

*Number of arbitrators**Article 6*

If the parties have not previously agreed on the number of arbitrators (i.e., one or three), and if within 15 days after the receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be three arbitrators, one<sup>19</sup> arbitrator shall be appointed.

*Note*

The following suggestion is not presented as an alternative in the above text: that this article should require the number of arbitrators to be three when a substantial sum of money is at stake in the arbitration, and one when the sum involved in comparatively small (A/10017, annex I, para. 40; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

*Appointment of the sole arbitrator**Article 7*

1. If a sole arbitrator is to be appointed, such appointment shall be made having regard to such considerations as are likely to secure the appointment of an independent and impartial sole arbitrator.<sup>20</sup>

2. ...

3. If on the expiration of this period of time the parties have not reached agreement on the choice of the sole arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the sole arbitrator shall be appointed by the appointing authority previously designated by the parties.

4. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall apply for such designation to:<sup>21</sup>

(a) The Secretary-General of the Permanent Court of Arbitration at The Hague, or,

(b) [Here add an appropriate organ or body established under United Nations auspices.]

The authority mentioned under (a) or (b) may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it.

5. ...

6. The appointing authority shall appoint the sole arbitrator in such manner as it considers appropriate.<sup>22</sup> The appointing authority may require from either party such information as it deems necessary to fulfil its function.

*Article 8*

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The parties<sup>23</sup> shall

<sup>19</sup> *Ibid.*, para. 39.

<sup>20</sup> *Ibid.*, paras. 44, 47 and 48.

<sup>21</sup> *Ibid.*, para. 49.

<sup>22</sup> *Ibid.*, para. 53.

<sup>23</sup> *Ibid.*, para. 60.

jointly choose the third arbitrator who will act as the president of the arbitral tribunal.

2. The presiding arbitrator shall be appointed having regard to such considerations as are likely to secure the appointment of an independent and impartial presiding arbitrator.<sup>24</sup>

3. ...

4. Within 15 days after the appointment of the second arbitrator, the claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator. The parties<sup>25</sup> shall endeavour to reach agreement on the choice of the presiding arbitrator within 30 days after the receipt by the respondent of the claimant's proposal.

5. If on the expiration of this period of time the parties have not agreed on the choice of the presiding arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the claimant shall request the two arbitrators to choose a presiding arbitrator.<sup>26</sup> The arbitrators shall endeavour to reach agreement on the choice of the presiding arbitrator within 15 days after the receipt by the arbitrators of the claimant's request.

6. If on the expiration of this period of time the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall apply for such designation to either of the authorities mentioned in article 7, paragraph 4.<sup>27</sup> The authority applied to may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it. The appointing authority may require from each party such information as it deems necessary to fulfil its function.

7. ...

8. The appointing authority designated under paragraph 6 of this article shall appoint the presiding arbitrator in such manner as it considers appropriate.<sup>28</sup>

*Challenge of arbitrators (articles 9-11)**Article 9*

## ALTERNATIVE A

1. Either party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator,<sup>29</sup> irrespective of whether such arbitrator was:

Originally proposed or appointed by him, or

Appointed by an appointing authority, or

<sup>24</sup> *Ibid.*, paras. 44, 47-48 and 56.

<sup>25</sup> *Ibid.*, para. 60.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, paras. 49 and 58.

<sup>28</sup> *Ibid.*, paras. 53 and 64.

<sup>29</sup> *Ibid.*, para. 69 (last sentence).

Chosen by both parties or by the other arbitrators, only<sup>80</sup> if such arbitrator has a financial or personal interest in the outcome of the arbitration or a [close]<sup>81</sup> family [or commercial]<sup>82</sup> tie with a party or a party's counsel or agent.

#### ALTERNATIVE B

1. Either party may challenge a sole arbitrator or a presiding arbitrator,<sup>83</sup> irrespective of whether such arbitrator was:

Originally proposed by him, or

Appointed by an appointing authority, or

Chosen by both parties or by the other arbitrators, if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

[2. The circumstances mentioned in paragraph 1 of this article include any financial or personal interest] [any direct financial or personal interest]<sup>84</sup> of an arbitrator in the outcome of the arbitration or a [close]<sup>85</sup> family [or commercial]<sup>86</sup> tie of an arbitrator with a party or with a party's counsel or agent.]<sup>87</sup>

3. An arbitrator, once appointed or chosen, shall disclose to the parties any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.<sup>88</sup>

#### Note

The following suggestion is not presented as an alternative in the above text:

To distinguish in paragraph 2 of this article between "absolute" grounds for challenge (e.g. specified close family ties, or direct financial or personal interest of an arbitrator in the outcome of the dispute) and "relative" grounds, which require proof both of the existence of the grounds and of the fact that they give rise to justifiable doubts as to the arbitrator's impartiality or independence (A/10017, annex I, para. 71; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Article 10

[1. The challenge of an arbitrator shall be made within 30 days after his appointment has been communicated to the challenging party or within 30 days after the circumstances mentioned in article 9 became known to that party.]<sup>89</sup>

2. The challenge shall be notified to the other party and to the arbitrator who is challenged. The notification [shall be in writing and]<sup>40</sup> shall state the reasons for the challenge.

3. ...

#### Article 11

1. If the other party does not agree to the challenge

<sup>80</sup> *Ibid.*, para. 73.

<sup>81</sup> *Ibid.*, para. 71.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, para. 69 (third sentence).

<sup>84</sup> *Ibid.*, para. 71.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, para. 70.

<sup>88</sup> *Ibid.*, para. 75.

<sup>89</sup> *Ibid.*, para. 78.

<sup>40</sup> *Ibid.*, para. 80.

and the challenged arbitrator does not withdraw, the decision on the challenge shall be made:

(a) By the competent court having jurisdiction [at the place of arbitration] [at the place of residence of the challenged arbitrator]<sup>41</sup> or

(b) If there is no competent court having jurisdiction at such place, by the president of the chamber of commerce [at the place of arbitration] [at the place of residence of the challenged arbitrator].<sup>42</sup>

2. The decision of the competent court or the president of the chamber of commerce is final.<sup>43</sup> If, in the cases mentioned under subparagraphs (a) and (b) of paragraph 1, the competent court or the president of the chamber of commerce sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8.

*Death or resignation of an arbitrator*

*Incapacity of an arbitrator, or his failure to act*

#### Article 12

1. ...

2. ...

3. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated [unless a verbatim record was kept of those hearings].<sup>44</sup> If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of [the remaining arbitrators who participated in those hearings] [the party by whom or on whose behalf the substitute arbitrator is appointed under article 8].<sup>45</sup>

#### Note

The following suggestions are not presented as alternatives in the above text:

(a) To add a provision "to the effect that, where an arbitrator resigns or ceases to act, he must give his reasons for such action" (A/10017, annex I, para. 89; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

(b) To consider the advisability of adding definitions of the terms "incapacity" and "resignation" (A/10017, annex I, para. 91; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

(c) To provide that "where the arbitral tribunal consisted of a sole arbitrator, a decision as to the holding of a rehearing should be made by the new sole arbitrator" (A/10017, annex I, para. 92; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

*Particulars on proposed arbitrators*

#### Article 13

...

### SECTION III. ARBITRAL PROCEEDINGS

#### General provisions

#### Article 14

1. Subject to these Rules [and subject to any agreements by the parties],<sup>46</sup> the arbitrators may conduct the

<sup>41</sup> *Ibid.*, para. 85.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, para. 92.

<sup>45</sup> *Ibid.*, para. 94.

<sup>46</sup> *Ibid.*, para. 97.

arbitration in such manner as they consider appropriate, provided that the parties are treated with [absolute]<sup>47</sup> equality and with fairness.

2. If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitrators shall decide whether to hold such hearings or whether the proceedings shall be conducted solely on the basis of documents and other written materials, [without prejudice to any inspection of goods or of other property that the arbitrators may consider appropriate during the course of the arbitral proceedings].<sup>48</sup>

3. Even in the absence of a request from one or both parties, the arbitrators should, as a rule, hold oral hearings for the presentation of evidence.<sup>49</sup> The arbitrators may exclude evidence that a party offers to present by witnesses at a hearing, provided that the arbitrators unanimously decide that such proposed evidence is irrelevant.<sup>50</sup>

4. Any document or information supplied to the arbitrators by one party shall not be acted upon by the arbitrators unless such document or information is shown to have also been communicated to the other party.<sup>51</sup>

#### Place of arbitration

##### Article 15

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators [having regard to the exigencies of the arbitration].<sup>52</sup>

2. [The arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties].<sup>53</sup> [They may hear witnesses and hold interim meetings for consultation among themselves at any place they deem appropriate, having regard to the exigencies of the arbitration].<sup>54</sup>

3. ...

4. ...

#### Note

The following suggestions emanating from the Fifth International Arbitration Congress held at New Delhi in January 1975 were not presented as alternatives in the above text:

(a) To substitute "seat of arbitration" for the term "place of arbitration" (A/10017, annex I, para. 106; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1);

(b) To require that the arbitrators determine the place of arbitration "at the commencement of the arbitration proceedings" (A/10017, annex I, para. 106; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>47</sup> *Ibid.*, para. 98.

<sup>48</sup> *Ibid.*, para. 100.

<sup>49</sup> *Ibid.*, para. 101.

<sup>50</sup> *Ibid.*, para. 102.

<sup>51</sup> *Ibid.*, para. 104.

<sup>52</sup> *Ibid.*, para. 105.

<sup>53</sup> *Ibid.*, para. 107.

<sup>54</sup> *Ibid.*, para. 108.

#### Language

##### Article 16

1. Subject to a prior agreement by the parties, the arbitrators shall, promptly after their appointment, determine, after consultation with the parties, the language or languages to be used in the proceedings, paying special regard to the language of the contract, the language used in correspondence between the parties,<sup>55</sup> as well as the language abilities of the arbitrators,<sup>56</sup> the parties and their counsel.<sup>57</sup> This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings should take place, to the language or languages to be used in such hearings.

2. ...

[3. The arbitrators shall make the necessary arrangements for the translation of documents into the language or languages used in the arbitral proceedings. They shall also make the necessary arrangements for providing, at all hearings, interpretation into such language or languages].<sup>58</sup>

#### Note

The following suggestion is not presented as an alternative in the above text:

To consider the amalgamation of articles 13 and 15 in document A/CN.9/97 (UNCITRAL Yearbook, Vol. VI: 1975, part two, III, 1) (corresponding to articles 14 and 16 in document A/CN.9/112\*) into a single article (A/10017, annex I, para. 115; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Statement of claim

##### Article 17

1. Within a period of time to be determined by the arbitrators, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. [Copies of all relevant documents]<sup>59</sup> [Copies of all relevant documents on which the claimant relies to support his claim]<sup>60</sup> together with a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A full statement of the facts and a summary of the evidence supporting these facts;<sup>61</sup>
- (c) The points at issue [in the view of the claimant];<sup>62</sup>
- (d) The relief or remedy sought [including a claim for payment of interest];<sup>63</sup>

\* Reproduced in this volume, part two, III, 1, *supra*.

<sup>55</sup> *Ibid.*, para. 111.

<sup>56</sup> *Ibid.*, para. 112.

<sup>57</sup> *Ibid.*, para. 113.

<sup>58</sup> *Ibid.* It may be considered, whether, if paragraph 3, in the alternative text above for article 16, were adopted, paragraph 2 in that article could then be deleted.

<sup>59</sup> A/10017, annex I, para. 117 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>60</sup> *Ibid.*, para. 116.

<sup>61</sup> *Ibid.*, paras. 119 (last sentence) and 117.

<sup>62</sup> *Ibid.*, para. 120.

<sup>63</sup> *Ibid.*, para. 121.



(e) A reference to the documents which the claimant intends to present in support of his claim.<sup>64</sup>

3. During the course of the arbitral proceedings the claimant may<sup>65</sup> [supplement or alter] [modify]<sup>66</sup> his claim, provided the respondent is given the opportunity to exercise his right of defence in respect of the change. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement,<sup>67</sup> or of the subject-matter of the claim raised in the notice of arbitration.<sup>68</sup>

#### Note

The following suggestions are not presented as alternatives in the above text:

(a) To empower the arbitrators "to require the submission to them of all documents relevant to the points at issue after these points had been clarified" (A/10017, annex I, para. 116; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1);

(b) To clarify that "a statement of the facts supporting the claim" and "the points at issue" have to be included in the statement of claim only to the extent that they are known to the claimant at the time the statement of claim is prepared (A/10017, annex I, para. 122; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1);

(c) To require that the claimant bear any expense incurred by the respondent due to an amendment of the claim, unless the arbitrators decide otherwise (A/10017, annex I, para. 132; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Statement of defence

##### Article 18

1. ...

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 17, para. 2). The respondent shall annex to his statement [copies of all relevant documents]<sup>69</sup> [copies of all relevant documents on which he relies to support his defence]<sup>70</sup> [a reference to the documents which he intends to present in support of his defence].<sup>71</sup>

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitrators decide that the delay was justified under the circumstances,<sup>72</sup> the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off. The respondent may also raise as a counter-claim or set-off a claim arising out of another contract concluded between the parties in the course of the same transaction, provided

<sup>64</sup> *Ibid.*, para. 116.

<sup>65</sup> *Ibid.*, para. 125.

<sup>66</sup> *Ibid.*, paras. 127-129.

<sup>67</sup> *Ibid.*, para. 130.

<sup>68</sup> *Ibid.*, para. 131.

<sup>69</sup> This alternative corresponds to the alternative text above for article 17, paragraph 1, at foot-note 59 therein.

<sup>70</sup> Corresponds to the alternative text above for article 17, paragraph 1, at foot-note 60 therein.

<sup>71</sup> Corresponds to the alternative text above for article 17, paragraph 2 (e), at foot-note 64 therein.

<sup>72</sup> A/10017, annex I, para. 135 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

that such other contract contains an arbitration clause in identical language or is covered by the same arbitration agreement.<sup>73</sup>

4. ...

#### Note

The following suggestion is not presented as an alternative in the above text:

"that it would be desirable that the Rules should contain provisions relating to the consolidation of hearings in appropriate cases" (A/10017, annex I, para. 137; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Pleas as to arbitrator's jurisdiction

##### Article 19

1. [The arbitrators shall have the power to rule on objections that they have no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement]<sup>74</sup> [and on any objections alleging that the arbitrators exceeded their terms of reference].<sup>75</sup>

[2. The arbitrators shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 19, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.]<sup>76</sup>

3. ...

4. In general, arbitrators should rule on a plea concerning their jurisdiction as a preliminary question. However, when warranted by exceptional circumstances, the arbitrators may proceed with the arbitration and rule on such a plea in their final award.<sup>77</sup>

#### Further written statements

##### Supplementary documents or exhibits

##### Article 20

...

#### Note

The following suggestion is not presented as an alternative: that "where a counter-claim was raised in the statement of defence and the claimant replied, the respondent should be given the right to answer" (A/10017, annex I, para. 149; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Time-limits

##### Article 21

...

#### Hearings, evidence

##### Article 22

1. ...

<sup>73</sup> *Ibid.*, paras. 136 and 140 (last sentence).

<sup>74</sup> *Ibid.*, para. 141.

<sup>75</sup> *Ibid.*, para. 144.

<sup>76</sup> *Ibid.*, para. 147.

<sup>77</sup> *Ibid.*, para. 145.

2. If witnesses are to be heard, at least 15 days before the hearings each party shall communicate to the arbitrators and to the other party the names and addresses of the witnesses he intends to present and the language in which such witnesses will give their testimony. [A party may present experts as witnesses to testify on points at issue.]<sup>78</sup>

3. ...

4. ...

5. ...

6. The arbitrators shall determine the admissibility, relevance and materiality of the evidence offered. [When permitted under the law applicable at the place of arbitration, arbitrators have the discretion to depart from the legal rules of evidence.]<sup>79</sup>

#### *Interim measures of protection*

##### *Article 23*

1. [At the request of either party, and with notice to the other party,<sup>80</sup> the arbitrators may take any interim measures they deem necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.]<sup>81</sup> [and the issuance of orders to a party to take an interim action in relation to the goods forming the subject-matter of the dispute.]<sup>82</sup>

2. ...

3. A request for interim measures or for the enforcement of interim measures taken by the arbitrators pursuant to paragraph 1<sup>83</sup> may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration clause or separate arbitration agreement, or as a waiver of that arbitration clause or separate arbitration agreement.

#### *Experts*

##### *Article 24*

#### *Note*

The following suggestion is not presented as an alternative: that "if provision were made for the appointment of experts by the parties, the relationship of the evidence of such experts to that of experts appointed by the arbitrators might need to be clarified" (A/10017, annex I, para. 168; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### *Failure to submit a statement*

#### *Absence of a party*

##### *Article 25*

1. ...

2. ...

3. If one of the parties fails to appear at a hearing duly called under these Rules, without showing sufficient

<sup>78</sup> *Ibid.*, para. 167.

<sup>79</sup> *Ibid.*, para. 159.

<sup>80</sup> *Ibid.*, para. 164.

<sup>81</sup> *Ibid.*, para. 162 (third sentence).

<sup>82</sup> *Ibid.*, para. 165.

<sup>83</sup> *Ibid.*, para. 163.

cause for such failure, the arbitrators shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties. [If both parties fail to appear at a hearing duly called under these Rules, the arbitrators shall call a second hearing; if both parties also fail to appear at such second hearing, the arbitrators [shall] [may] issue an order for the discontinuance of the arbitral proceedings.]<sup>84</sup>

4. ...

#### *Waiver of Rules*

##### *Article 26*

A party who knows or should have known<sup>85</sup> that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

#### SECTION IV. THE AWARD

#### *Form and effect of the award*

##### *Article 27*

1. ...

2. ...

3. ...

4. An award shall be signed by the arbitrators, and it shall contain the date on which the place where the award was made. When there are three arbitrators, the failure of an arbitrator other than the presiding arbitrator<sup>86</sup> to sign the award shall not impair the validity of the award. The award shall state the reason for the absence of an arbitrator's signature, but it [may] [shall not] include any dissenting opinion.<sup>87</sup>

5. ...

6. ...

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitrators,<sup>88</sup> [the arbitrators] [the sole or presiding arbitrator]<sup>89</sup> shall comply with this requirement within the period of time required by that law

#### *Applicable law*

##### *Article 28*

1. The arbitrators shall apply the law or the rules<sup>90</sup> [agreed to by the parties] [determined or clearly indicated by the parties]<sup>91</sup> as applicable to the substance of the dispute.

#### *Alternative A*

2. Failing such [agreement] [determination or indication] by the parties, the arbitrators shall apply the law determined by the conflict of laws rules applicable

<sup>84</sup> *Ibid.*, paras. 171-172.

<sup>85</sup> *Ibid.*, para. 174.

<sup>86</sup> *Ibid.*, para. 177.

<sup>87</sup> *Ibid.*, para. 179.

<sup>88</sup> *Ibid.*, para. 184.

<sup>89</sup> *Ibid.*, para. 184.

<sup>90</sup> *Ibid.*, para. 186 (subpara. (e)).

<sup>91</sup> *Ibid.*, para. 186.

[at the place of arbitration] [at the place of business of the respondent] [at the place of business of the claimant].<sup>92</sup>

#### Alternative B

2. Failing such [agreement] [determination or indication] by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable, taking into account the terms of the contract and the usages of the trade.<sup>93</sup>

3. The arbitrators shall decide *ex aequo et bono* or as *amiables compositeurs* only if the parties have expressly authorized the arbitrators to do so and if a decision by the arbitrators on such basis is not repugnant to the arbitration law applicable at the place of arbitration.<sup>94</sup>

[4. In any case, the arbitrators, in deciding the substance of the dispute, shall give importance to the mandatory provisions of the law governing the substance of the dispute, to the express terms of the contract, and to the usages of the trade in that order.]<sup>95</sup>

#### Note

The following suggestion is not presented as an alternative in the above text:

that paragraph 1 of this article should read "the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute" (A/10017, annex I, para. 186 (d)).

#### Settlement or other grounds for discontinuance

##### Article 29

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties,<sup>97</sup> record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award. [However, the arbitrators shall refuse to record the settlement in the form of an arbitral award on agreed terms if such settlement is unlawful or contrary to public policy at the place of arbitration.]<sup>98</sup> If, before the award is made, the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason, the arbitrators shall inform the parties of their intention to issue an order for the discontinuance of the proceedings. The arbitrators shall have the power to issue such an order unless a party objects to the discontinuance.

2. ...

3. ...

<sup>92</sup> *Ibid.*, para. 188.

<sup>93</sup> *Ibid.*, para. 190. If this proposal were adopted, it is suggested that para. 4 of article 28 could then be deleted.

<sup>94</sup> *Ibid.*, para. 192.

<sup>95</sup> *Ibid.*, para. 193.

<sup>96</sup> It should be noted that the suggestion to delete para. 4 of this article is linked to adding at the end of para. 2 of this article the words "taking into account the terms of the contract and the usages of the trade" (A/10017, annex I, para. 190; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>97</sup> A/10017, annex I, para. 194 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>98</sup> *Ibid.*, para. 195.

#### Interpretation of the award

##### Article 30

[1. [Within 30 days after the receipt of the award,]<sup>99</sup> either party, with notice to the other party, may request that the arbitrators give [an authentic interpretation]<sup>100</sup> [a clarification]<sup>101</sup> of the award. Such [interpretation] [clarification] shall be binding on the parties.

2. The [interpretation] [clarification] shall be given in writing and communicated to the parties<sup>102</sup> within 45 days after the receipt of the request, and the provisions of article 27, paragraphs 3 to 7, shall apply.]<sup>103</sup>

#### Correction of the award

##### Article 31

1. [Within 30 days after the receipt of the award,]<sup>104</sup> either party, with notice to the other party, may request the arbitrators to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitrators may [within 30 days after the communication of the award]<sup>105</sup> make such corrections on their own initiative.

2. Such corrections shall be in writing and shall be signed by the sole arbitrator or, if there was an arbitral tribunal of three members, by the presiding arbitrator after consultation with the other arbitrators. The provisions of article 27, paragraphs 5, 6 and 7, shall apply.

#### Note

The following suggestions are not presented as alternatives in the above text:

(a) to provide that the periods of 30 days specified in paragraph 1 of this article should commence "from the day fixed in the award for the performance by the parties of their obligations thereunder" (A/10017, annex I, para. 208; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1);

(b) to delete the article dealing with the interpretation of awards (article 30 in A/CN.9/112)\* and to add a reference to the present article on the correction of awards (article 31 in A/CN.9/112)\* to cover interpretations and clarifications (A/10017, annex I, para. 205 (last sentence), UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

#### Additional award

##### Article 32

[1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to make an additional award as to claims presented in the arbitral proceedings but omitted from the award due to the mistake or negligence of the arbitrators.]<sup>106</sup>

2. If the arbitrators consider the request for an additional award to be justified and consider that the

\* Reproduced in this volume, part two, III, 1, *supra*.

<sup>99</sup> *Ibid.*, para. 202.

<sup>100</sup> *Ibid.*, para. 200.

<sup>101</sup> *Ibid.*, para. 201.

<sup>102</sup> *Ibid.*, para. 204.

<sup>103</sup> *Ibid.*, para. 205.

<sup>104</sup> *Ibid.*, para. 207.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, para. 210.

omission can be rectified without any further hearing or evidence, they shall complete their award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 27, paragraphs 2 to 7, shall apply.<sup>107</sup>

#### Costs

##### Article 33

1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

(a) The fee of the arbitrators, to be stated separately and to be fixed by the arbitrators themselves [in accordance with the schedule of fees for arbitrators set out in annex A of these Rules]<sup>108</sup> [taking into account the amount in dispute and the duration of the arbitral proceedings].<sup>109</sup> [When an appointing authority has been designated, the arbitrators shall fix their fees after consultation with that appointing authority. Such authority may make any comment it deems appropriate concerning the fee the arbitrators are suggesting for themselves].<sup>110</sup>

(b) The fee charged and costs incurred by the appointing authority in connexion with its services, except for any portion that had been paid previously;<sup>111</sup>

(c) The travel and other expenses incurred by the arbitrators;

(d) The costs of expert advice and of other assistance required by the arbitrators;

(e) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

(f) The compensation for legal assistance of the successful party if such compensation was claimed during the arbitral proceedings, but only to the extent that the compensation is deemed reasonable and appropriate

<sup>107</sup> *Ibid.*, para. 212.

<sup>108</sup> *Ibid.*, para. 214.

<sup>109</sup> *Ibid.*

<sup>110</sup> This alternative text is based on A/10017, annex I, para. 215 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1), and on a suggestion made by a member of the Consultative Group.

<sup>111</sup> This alternative text is based on a suggestion made by a member of the Consultative Group.

by the arbitrators [and if it may be recovered under the applicable law at the place of arbitration].<sup>112</sup>

2. Arbitrators shall keep the costs of arbitration as low as possible and they shall not be entitled to any additional remuneration for interpreting or correcting their award, or for making an additional award pursuant to article 32 of these Rules.<sup>113</sup>

3. The costs of arbitration shall [ordinarily]<sup>114</sup> be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties if they consider that apportionment is reasonable.

#### Deposit of costs

##### Article 34

1. ...

2. An appointing authority, upon its designation as such, may require each party to deposit an amount equal to half its fee.<sup>115</sup>

3. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties.

4. If the deposits required under paragraphs 1 and 2 of this article are not paid in full within 30 days after the communication of the demand, the arbitrators shall notify both parties of the default and give to each party an opportunity to make the payment required of him or of the other party.<sup>116</sup> If, nevertheless, a required payment is even then not made, the arbitrators may order the suspension or discontinuance of the arbitral proceedings.<sup>117</sup>

5. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

6. A designated appointing authority may be authorized by the arbitrators to perform the functions described in paragraphs 1, 3, 4 and 5 of this article.<sup>118</sup>

<sup>112</sup> A/10017, annex I, para. 218 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>113</sup> *Ibid.*, para. 222.

<sup>114</sup> *Ibid.*, para. 219.

<sup>115</sup> This alternative text is based on a suggestion made by a member of the Consultative Group.

<sup>116</sup> A/10017, annex I, para. 224 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

<sup>117</sup> *Ibid.*, para. 225.

<sup>118</sup> This alternative text is based on a suggestion made by a member of the Consultative Group.

#### 4. Note by the Secretariat: draft UNCITRAL Arbitration Rules; schedule of fees of arbitrators (A/CN.9/114)\*

1. This note examines the feasibility, in the context of the draft UNCITRAL Arbitration Rules,<sup>1</sup> of establishing a schedule of fees which would set the upper and lower limits of the arbitrators' remuneration for their services. The draft Rules, in article 33, paragraph 1, provide that the arbitrators themselves fix their fee, and the commentary states that arbitrators may be expected to act reasonably in setting the amount thereof. Moreover, in most countries, if overcharge is alleged,

the arbitrators' decision as to their fees may be submitted to a court.

2. During the discussion of the preliminary draft Rules which contained a provision similar to paragraph 1 of article 33, the view was expressed that there should be a limitation on the power of the arbitrators to settle for themselves what they considered a proper remuneration for their services, and the suggestion was made that the Rules should set out a scale of fees which would impose a ceiling on the fees payable.<sup>2</sup>

\* 1 April 1976.

<sup>1</sup> The revised draft UNCITRAL arbitration rules are set forth in A/CN.9/112, and the commentary thereon in A/CN.9/112/Add.1 (both reproduced in this volume, part two, III, 1 and 2, *supra*).

<sup>2</sup> See Report of the United Nations Commission on International Trade Law on the work of its eighth session, *Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017)*, paras. 213-215 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).

3. A schedule of fees usually takes into account the amount of the claim and will provide for minimum and maximum rates, or for maximum rates only, based on such an amount. Arbitration rules that provide for a schedule also make provision for an administrative body which fixes the fees in accordance with the schedule and, under most arbitration rules, may do so with a large measure of discretion. Such discretion seems desirable in view of the length of time which a particular arbitration may take or of the complexity of the issues submitted for arbitration. In some instances, the administrative body may assess the arbitrators' remuneration outside the schedule.<sup>3</sup>

4. Since the UNCITRAL Arbitration Rules are designed to facilitate arbitration in all parts of the world and in respect of different kinds of cases, a fee schedule under the Rules would probably have to establish a wide margin between minimum and maximum rates so as to allow flexibility in determining the fees.<sup>4</sup> Therefore, the mere fact of a maximum rate being indicated in the schedule would not effectively inform the parties in advance what the cost of arbitration will be and would not necessarily, in every case, preclude the assessment of improper charges by arbitrators.

5. The effectiveness of a schedule of fees would thus seem to depend on the intervention of an independent body. As noted above, the only arbitration rules which include fee schedules are those administered by

arbitration institutions. If the Commission were of the view that a schedule should be included in the Rules and be "administered" by an independent authority, consideration might be given to the possibility either of giving the appointing authority discretionary power to assess the remuneration of arbitrators in accordance with the schedule, or of providing that the arbitrators must fix their fees in accordance with the schedule after consultation with the appointing authority.

6. Under the Rules, there is an appointing authority

(a) When such authority has been designated in the arbitration clause or arbitration agreement;

(b) When the parties have failed to reach agreement on the choice of a sole arbitrator (article 7 (3) and (6)) or presiding arbitrator (article 8 (5) and (8)) or when, in the case of a three-member tribunal, a party fails to appoint an arbitrator (article 8 (3));

(c) When an appointing authority has been designated to make the decision on the challenge of an arbitrator (article 11 (1) (c)).

In all other cases, where no appointing authority exists because of one of the above circumstances, resort might be had to an appointing authority to be designated in accordance with the provisions of article 7 or 8 of the Rules.

### Conclusions

7. In conclusion, the following options in connexion with the fixing of fees of arbitrators are submitted to the Commission for consideration:

(a) To maintain the present text of article 33 under which the arbitrators themselves fix their fees;

(b) To include in the Rules a schedule of fees, establishing minimum and maximum rates, or a maximum rate only, based on the amount of the claim and to add an additional provision to article 33 under which the arbitrators' fees are to be fixed by the appointing authority in accordance with the schedule or under which the arbitrators are to fix their fees after consultation with the appointing authority;

(c) Not to include a schedule of fees in the Rules but to add an additional provision to article 33 under which the arbitrators are to fix their fees after consultation with the appointing authority.

<sup>3</sup> For example, article 20, para. 3, of the Rules of Conciliation and Arbitration of the International Chamber of Commerce (1975 version) provides that "the ICC Court may fix the arbitrators' fees at a figure higher or lower than that which would result from the application of the annexed scale if in the exceptional circumstances of the case this appears to be necessary".

<sup>4</sup> For example, the schedule of fees set forth in appendix II of the ICC Rules establishes the following range between the minimum and maximum fees shown:

Sums in dispute (in thousands of U.S. dollars)	Fees (in %)	
	Minimum	Maximum
Under 10	(min. \$600)	10
from 10 to 50	1.5	6
from 50 to 200	0.8	3
from 200 to 600	0.5	2
from 600 to 1,500	0.3	1.5
from 1,500 to 3,000	0.2	0.6
from 3,000 to 10,000	0.1	0.3
over 10,000	0.1	0.15

## IV. INTERNATIONAL LEGISLATION ON SHIPPING

### 1. Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (A/CN.9/109)\*

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#### Introduction

1. At its fourth session (29 March-20 April 1971) the United Nations Commission on International Trade Law decided to examine the rules governing the responsibility of ocean carriers for cargo. The relevant resolution of the Commission at that session stated that:

"The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations."<sup>1</sup>

2. To carry out this programme of work, the Commission at that session established a new Working Group on International Legislation on Shipping. This Working Group thereafter commenced to carry out its programme of work and, at its eighth session (10-21 February 1975), completed its mandate and approved the text of a new draft convention entitled "Draft convention on the carriage of goods by sea".<sup>2</sup>

3. In accordance with a decision of the Commission taken at its seventh session (13-17 May 1974), the text of this draft convention was transmitted to Governments and interested international organizations for their comments.

4. All comments received by the Secretariat as at 27 January 1976 are reproduced herein. The text of

\* 29 January 1976.

\*\* Comments by the UNCTAD secretariat are contained in documents TD/B/C.4/ISL/19 and Supplements 1 and 2. Comments by the UNCTAD Working Group on International Shipping Legislation are contained in documents TD/B/C.4/148 and TD/B/C.4/ISL/21.

<sup>1</sup> *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17; UNCITRAL Yearbook, Vol. II: 1971, part two, II, A.*

<sup>2</sup> A/CN.9/105, annex; UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 4.



the draft convention is also reproduced herein preceding the comments.

5. An analysis of these comments prepared by the Secretariat is contained in document A/CN.9/110.\*

## I. Text of the draft Convention on the Carriage of Goods by Sea

### PART I. GENERAL PROVISIONS

#### Article 1. Definitions

In this Convention:

1. "Carrier" or "contracting carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper.

2. "Actual carrier" means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods.

3. "Consignee" means the person entitled to take delivery of the goods.

4. "Goods" means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

5. "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered.

6. "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

#### Article 2. Scope of application

1. The provisions of this Convention shall be applicable to all contracts for carriage of goods by sea between ports in two different States, if:

(a) The port of loading as provided for in the contract of carriage is located in a Contracting State, or

(b) The port of discharge as provided for in the contract of carriage is located in a Contracting State, or

(c) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

(d) The bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

(e) The bill of lading or other document evidencing the contract of carriage provides that the provi-

\* Reproduced in this volume, part two, IV, 3, *infra*; these comments often refer to certain international transport conventions. A list of these conventions and documentary references is set out in paragraph 6 of document A/CN.9/110.

sions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of paragraph 1 of this article are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

3. A Contracting State may also apply, by its national legislation, the rules of this Convention to domestic carriage.

4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading.

#### Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

### PART II. LIABILITY OF THE CARRIER

#### Article 4. Period of responsibility

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

2. For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

(a) By handing over the goods to the consignee; or

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

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

3. In the provisions of paragraphs 1 and 2 of this article, reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

#### Article 5. General rules

1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly

agreed upon in writing or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article.

4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

5. With respect to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents.

6. The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea.

7. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss, damage or delay in delivery the carrier shall be liable only for that portion of the loss, damage or delay in delivery attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss, damage or delay in delivery not attributable thereto.

#### *Article 6. Limits of liability*

##### *Alternative A*

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost, damaged or delayed.

##### *Alternative B*

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost or damaged.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

##### *Alternative C*

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

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

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

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

##### *Alternative D*

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

*variation X:* [double] the freight;

*variation Y:* an amount equivalent to  $(x-y)^*$  francs per package or other shipping unit or  $(x-y)$  francs per kilo of gross weight of the goods delayed, whichever is the higher.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

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

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

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

##### *Alternative E*

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

\* It is assumed that the  $(x-y)$  will represent lower limitations on liability than those established under subparagraph 1 (a).

Article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable.

*The following paragraphs apply to all alternatives:*

A franc means a unit consisting of 65.5 milligrams of gold or millesimal fineness 900.

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

#### *Article 7. Actions in tort*

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

#### *Article 8. Loss of right to limit liability*

The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

#### *Article 9. Deck cargo*

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

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

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, in accordance with the provisions of articles 6 and 8. The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8.

#### *Article 10. Liability of contracting carrier and actual carrier*

1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The contracting carrier shall, in relation to the carriage performed by the actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of the second sentence of article 8 shall apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing.

4. Where and to the extent that both the contracting carrier and the actual carrier are liable, their liability shall be joint and several.

5. The aggregate of the amounts recoverable from the contracting carrier, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

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

*Article 11. Through carriage*

1. Where a contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the carriage shall be performed by a person other than the contracting carrier, the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article 10.

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

## PART III. LIABILITY OF THE SHIPPER

*Article 12. General rule*

The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier or by the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

*Article 13. Special rules on dangerous goods*

1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.

2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

## PART IV. TRANSPORT DOCUMENTS

*Article 14. Issue of bill of lading*

1. When the goods are received in the charge of the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things the particulars referred to in article 15.

2. The bill of lading may be signed by a person having authority from the contracting carrier. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the contracting carrier.

*Article 15. Contents of bill of lading*

1. The bill of lading shall set forth among other things the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage;

(h) The number of originals of the bill of lading;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him; and

(l) The statement referred to in paragraph 3 of article 23.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

*Article 16. Bills of lading: reservations and evidentiary effect*

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking

such particulars, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) The bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee, shall be *prima facie* evidence that no freight is payable by the consignee. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

#### Article 17. Guarantees by the shipper

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no

right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued.<sup>b</sup>

#### Article 18. Documents other than bills of lading

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

### PART V. CLAIMS AND ACTIONS

#### Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any.

2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day.

3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 days from the time that the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the contracting carrier.

#### Article 20. Limitation of actions

1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within [one year] [two years]:

(a) In the case of partial loss of or damage to the goods, or delay, from the last day on which the carrier has delivered any of the goods covered by the contract;

(b) In all other cases, from the ninetieth day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall not be included in the period.

<sup>b</sup> In regard to drafting changes that may be necessary, see A/CN.9/105, sect. B, foot-note 17; UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 3.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. The provisions of paragraphs 1, 2 and 3 of this article shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier.

5. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than ninety days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

#### Article 21. Jurisdiction

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

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

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

(c) The port of loading; or

(d) The port of discharge; or

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

2. (a) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

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

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 of this article. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (a) Where an action has been brought before a court competent under paragraphs 1 and 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

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

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

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

#### Article 22. Arbitration

1. Subject to the rules of this article, parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

(a) A place in a State within whose territory is situated

(i) The port of loading or the port of discharge, or

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

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

(b) Any other place designated in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.

### PART VI. DEROGATIONS FROM THE CONVENTION

#### Article 23. Contractual stipulations

1. Any stipulation of the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall



contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in the preceding paragraph, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the court seized of the case.

#### Article 24. General average

Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average.

#### Article 25. Other conventions

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

## II. Comments by Governments

### AFGHANISTAN

[Original: English]

The Government of Afghanistan has studied the draft convention on the carriage of goods by sea, and believes that such a convention will facilitate the regulation of the international trade and would contribute to its further expansion.

### AUSTRALIA

[Original: English]

1. The Australian Government continues to support the object of the convention, namely the revision of the Hague Rules, 1924, although there are some aspects of the draft which cause concern. Australia's final attitude

would depend upon those matters presently causing concern being resolved before the convention proceeded to a diplomatic conference.

2. Australia considers that the provisions relating to liability in article 5 of the draft convention are fundamental in determining an over-all attitude to the draft convention. Article 5 in conjunction with the monetary level set in article 6 will have significant economic consequences to shipper, carrier and insurance interests. Australia is presently investigating what those economic consequences may be and therefore has no firm view on article 5. However, it is hoped that a firm attitude to the draft convention will have been formulated by the ninth session in 1976.

3. It is Australia's view that the draft convention should apply to the sea leg of a multimodal movement of cargo. As presently drafted the convention may be interpreted to apply solely to conventional port to port carriage, thereby excluding carriage under a "through bill of lading" or under any contract of carriage covering another mode of carriage in addition to a sea carriage.

4. There are some minor drafting ambiguities which could exacerbate the inevitable interpretative litigation that would follow implementation of the convention. However, it is considered that these could be rectified at the ninth session of UNCITRAL or at a diplomatic conference.

### AUSTRIA

[Original: English]

### GENERAL

In relation to the Brussels Convention of 1924 on the Unification of Certain Rules relating to Bills of Lading, as amended by the Brussels Protocol of 1968, the draft represents a very great advance with respect to both form and content. Generally speaking, it may therefore be considered a welcome step forward. Its general pattern corresponds to that of conventions on the carriage of goods by other means of transport, either already existing or in the process of being drafted.

#### Article 5

Paragraph 1 construes the carrier's liability as liability for fault with reversed *onus probandi*. There is no objection to that. Paragraph 4, on the other hand, stipulates that the *onus probandi* shall not be reversed for damage caused by a fire on board ship. But precisely in the case of fire, the claimant will rarely be in a position to prove what caused the fire. This is a question concerning events on board the carrier's ship which are entirely under the carrier's control. Hence paragraph 4 should be deleted, which would make paragraph 1 applicable to damage caused by fires as well.

#### Article 6

Alternative B is preferable. It would be a hardship for the carrier to be liable for delay up to the same limit as he is for loss or damage of the goods. If the limitation is based alternatively on shipping units or weight, this only leads to unnecessary difficulties: the liability limit will then largely depend on the quantity of goods placed in one package. Recent conventions on international goods carriage by other means of transport invariably

stipulate that the weight of the goods lost, damaged or delayed is to be the only criterion.

As regards the question whether the carrier's liability for delay should not exceed the freight or double the freight, there are precedents for both provisions. Hence either solution is acceptable.

#### Article 8

It follows from this article that the carrier can claim limited liability where he himself has committed a gross fault (except where his behaviour was definitely wanton and reckless) or even where the people for whom he is normally liable act with malicious intent. This is in keeping with the rules laid down in other conventions relating to the law of the sea, but it is unfair to the person entitled to the goods. The carrier should be liable without limitation whenever the damage has been caused by gross negligence—either by himself or by his servants or agents. Similarly, these servants or agents for their part should be liable without limitation for any damage they cause by gross negligence.

#### Article 20

As the period of limitation may, under paragraph 1 (b), start to run as early as the ninetieth day after the conclusion of the contract, and the contract may have been made long before carriage actually starts, two years is preferable.

The second sentence of paragraph 5 gives rise to some doubts, since the rule it lays down for the period of limitation in actions for indemnity against a third person—in fact, any and all such actions—may be inconsistent with obligations undertaken by a State by virtue of some other international agreement. The second sentence should therefore be deleted. But since, without the second sentence, the first sentence states no more than a truism, it would be advisable to omit paragraph 5 altogether.

#### Article 21

In some countries difficulties with regard to judicial procedure may arise from the application of paragraph 2, which states that though *forum arresti* is the general rule, this may be avoided if the defendant furnishes adequate security.

Generally speaking, it is not helpful if an agreement specifies rules on jurisdiction but fails to make provision for the recognition and enforcement of the judgements delivered by the courts in the contracting States that are competent by virtue of the agreement. The defendant may have assets in a contracting State whose courts lack jurisdiction by virtue of paragraph 1, and the plaintiff will not be able to touch these assets because the judgement issued by the court competent under paragraph 1 is not enforceable in that contracting State, and a new action in that State is ruled out by the convention. It is therefore worth considering whether article 21 should not perhaps be complemented by provisions on the recognition and enforcement of judgements.

#### Article 25

The end of subparagraph (b) of paragraph 2 calls for comparisons between national law and two international conventions in order to determine which of them is more favourable to the person entitled to the

goods. In some cases it will be almost impossible to answer this question. It should therefore suffice to lay down that the operator of a nuclear installation shall be liable in accordance with applicable national law. As past experience shows, this liability will always be stricter, as far as its general nature and limits, if any, are concerned, than is the carrier's liability under the present draft convention. Hence the qualification in subparagraph (b) of paragraph 2 should be omitted.

#### BELGIUM

[Original: French]

#### A. GENERAL COMMENTS

The Belgian Government and the Belgian maritime authorities take a generally favourable view of the texts drafted by the UNCITRAL Working Group.

The Belgian Government is happy to note that an area of agreement has been found among delegations from different continents whose legal systems and philosophical or moral ideas are often very different from one another. It sees this as an encouraging sign for the implementation of other projects which are as ambitious in scope as the Convention on the Carriage of Goods by Sea.

It also welcomes the results achieved by the UNCITRAL Working Group.

The sought-after balance between the interests of the carriers and those of the owners of cargoes, including persons who dispatch, ship or take delivery of goods on the latter's behalf, may be regarded as on the way to achievement. Actual practice will confirm the merits of this undertaking.

At the theoretical level at least, both with regard to their drafting and presentation and with regard to their substance, most of the provisions constitute a clear improvement over the texts of the 1924 Brussels Convention. The Belgian Government therefore hopes that the forthcoming Convention, elaborated in a broader framework, will prove as successful as the Convention which it is designed to replace and will have the same duration.

#### B. SPECIFIC COMMENTS

The Belgian Government does not feel that there is any need for it to submit, as part of these comments, any drafting proposals with regard to such provisions as the definition of the actual carrier and related articles or to article 2, paragraph 4. The Belgian delegation will make such proposals at a later stage.

The articles of the draft do not call forth any substantive comments, except for the ones which follow.

#### Article 5

1. The Belgian Government regrets the omission from article 5 of the clause relieving the carrier of liability for errors in navigation committed by the captain, members of the crew or persons servicing the ship.

By this term it means errors in navigation in the strict sense, thus excluding the commercial management of the ship.

It remains convinced that the omission of such a clause will not benefit any of the parties to the contract of carriage.

The main purpose of such a clause is to avoid disputes as to whether the operation of the ship had caused damage to goods, with the resulting protracted and costly legal claims. Another purpose is to keep down the cost of insurance and ensure that it can be directly and readily controlled by the shippers.

Lastly, the working conditions on board the ship are sometimes such that it would be unreasonable to make the carrier liable for acts committed in the course of their work by the persons responsible for the navigation of the ship.

2. Article 5, paragraph 4, contains a liability clause with regard to fire which departs from the general rule. The solution which it offers is acceptable but could also give rise to litigation.

The Belgian Government had preferred a more radical and clear-cut solution, i.e. the adoption of a clause providing for relief from liability in the case of fire as well.

3. The Belgian Government also regrets that in incorporating into the draft the principle of liability for delay—which it regards as a substantial improvement in the liability rules—it was thought necessary to depart from the wording of the 1924 Convention, which holds the carrier liable for any loss or damage to goods and not, as article 5, paragraph 1, of the draft puts it, for loss, damage or expense resulting from loss or damage.

This version not only departs from the wording of the Convention which the draft is designed to replace but also differs from the provisions of other international conventions on carriage.

In order to bring the draft into line with a legal view and doctrine firmly established on the basis of the wording of the 1924 Convention, we should revert to the language of that Convention.

Article 5, paragraph 1, would thus begin as follows:

"The carrier shall be liable for any loss or damage to the goods and for any harm resulting from delay in delivery if the occurrence which caused the loss, damage or harm took place . . . (etc.)."

#### Article 6

At this stage, the Belgian Government does not wish to endorse any of the alternatives proposed under article 6.

However, it notes that those concerned with sea transport would not be opposed to a simpler formula than the dual method of computation (unit and weight) which was provided for in the Protocol to Amend the 1924 Convention and adopted in 1968. At the same time, this simple formula is acceptable only on condition that the limits of liability are not substantially extended as a result.

The Belgian Government also recognizes the urgent need to find some other means of determining the basic reference currency.

It can support the system of special drawing rights, which has been accepted by the International Monetary Fund and has been proposed in the International Civil Aviation Organization (ICAO).

#### Article 16

The provision at the end of paragraph 1, which requires a carrier wishing to enter a reservation to make special note of his grounds or of the inaccuracies or absence of reasonable means of checking, is contrary to a commercial practice which has never given rise to any serious difficulties. If adopted, it could complicate the process of completing documents or delay the shipment of the goods.

#### Article 21

We have two comments on this article.

1. As a result of paragraph 1 (b), the legal proceeding might be removed from the place where the contract was made, which might be contrary to the interests of the parties to the dispute.

Since in practice the carrier will seek to avoid placing himself under the jurisdiction of a court which is distant from his area of business or from the place where the contract was made, he will take care to conclude contracts in respect of which he will be able to defend his interests effectively, which will not be the case when he acts on behalf of the shippers through an agency.

Thus, the reference to an "agency" will impede, to the detriment of the shippers, negotiations for the conclusion of a contract of carriage on the spot.

A recent convention (the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea) contains a more acceptable formula in article 17.

The same comment applies to article 22, paragraph 2 (d) (iii).

2. The second sentence of paragraph 2 (a) is not acceptable because in its application it might conflict with the 1952 Brussels Convention for the Unification of Certain Rules concerning the Arrest of Seagoing Ships, which Belgium has ratified (see article 7 of this Convention).

Under certain circumstances, this Convention gives the court of the State in which the ship was arrested jurisdiction to decide on the substance of the case. If the plaintiff has the arrest made in order to safeguard his interests, he does not have the option of removing the action, at the request of the defendant, to the jurisdiction of another court.

We therefore propose that the sentence should be deleted.

#### Article 24

This article should be worded in such a way that the application of rule D of the York-Antwerp Rules is not affected by the provisions of the Convention under consideration.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]

The draft convention on the carriage of goods by sea prepared by the United Nations Commission on International Trade Law contains a number of provisions which give rise to doubts and require clarification. As far as the name of the convention is concerned, it should be noted that the proposed formula is too broad. As can be seen from the text of the convention, it deals with

a number of the main questions relating to the contract for carriage of goods by sea but not with all of them. It would seem advisable to take that fact into account when the draft is finalized.

#### Article 1

1. It seems inadvisable to include in paragraph 4, which defines the term "goods", a provision to the effect that "goods" include "live animals".

2. In the definition of the term "contract of carriage" in paragraph 5, it should be stipulated that the contract must be drawn up in writing.

#### Article 2

The words "unless such holder is a charterer" should be added at the end of paragraph 4, which deals with the application of the convention.

#### Article 4

The last part of paragraph 1, beginning with the words "at the port of loading", can be deleted, since the period during which the goods are in the charge of the carrier is in fact defined in paragraph 2 of this article.

#### Article 5

1. There seems no purpose in including paragraph 5 in the article since paragraph 1 presumably establishes, on the basis of the general principle, that the carrier is without fault and therefore relieved of any liability where damage has resulted from the "special risks" inherent in the carriage of live animals.

2. Paragraph 6, which relieves the carrier of any liability for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea, requires some clarification. In particular, the criterion of "reasonableness" may in the present instance have an adverse effect on compliance by the masters of cargo vessels with the traditional laws of navigation, including the provision of assistance to ships in distress.

#### Article 6

Alternative D, variation X—"the freight"—is to be preferred for future consideration of this article, which establishes the limits of liability.

#### Article 8

The words "or recklessly and with knowledge that such damage would probably result" at the end of the first sentence should be deleted, since it would be extremely difficult to prove the existence of such subjective circumstances.

#### Article 9

1. It would be desirable to make paragraph 1 more specific by referring to the applicable rules or regulations of the legislation of a particular country, such as "the country of the port of loading".

2. It would probably be advisable to make certain drafting changes in paragraph 3 and, in particular, to formulate more clearly its main provision to the effect that articles 6 and 8 apply where goods have been unlawfully carried on deck and there has been loss, dam-

age or delay in delivery which results solely from the carriage on deck.

3. The notation in the bill of lading that goods have been carried on deck is an important element both in the relationship between the shipper and the consignee and in that between the carrier and the owner of the goods. It would therefore be advisable to include such a provision at the beginning of article 9 or in article 15.

#### Article 11

It would seem advisable for paragraph 1 to include a provision which defines more specifically the situations envisaged in articles 10 and 11 by stating that those articles refer to cases in which the contract contains a special clause and that the carrier is performing only the stipulated part of the carriage.

#### Article 16

A provision should be included at the end of paragraph 1 to the effect that, under specified conditions, the carrier is entitled to enter in the bill of lading an appropriate reservation with regard to those particulars concerning the goods which he had grounds for questioning or which he was unable to check.

#### Article 17

1. Paragraph 3 can probably be deleted since the questions dealt with in it can be resolved in accordance with the provisions of national law.

2. Paragraph 4 can also be omitted since article 8 already makes provision for resolving the questions with which it deals.

#### Article 19

1. In paragraph 2, just as in paragraphs 1 and 5, the time used in calculating the period within which the consignee must give notice in writing to the carrier should be made uniform by specifying the time when "the goods are handed over to the consignee".

2. It would be advisable for paragraph 6 to include a provision to the effect that the notice to the carrier would also be regarded as valid in relation to an actual carrier who has performed part of the carriage.

#### Article 20

Paragraph 3 should be worded in the same manner as article 22, paragraph 2, of the 1974 Convention on the Limitation Period in the International Sale of Goods, which reads as follows: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed."

#### Article 21

There seems no purpose in including this article in the text of the convention since the problem of jurisdiction with which it deals is too complex and is outside the scope of the convention. The problem should obviously be left to be dealt with in accordance with the provisions of national law. An alternative might be to provide that the rule concerning jurisdiction contained in paragraph 1 (a), (b), (c) and (d) is to apply in cases where the competent court is not specified in the contract of carriage itself.

## Article 22

The inclusion of this article in the draft is of questionable value since it might result in failure to make use—in relation to contracts for carriage of goods by sea—of the widely recognized procedure of arbitration, which has a number of advantages in comparison with judicial proceedings, particularly in that it is more efficient, simpler and much less expensive.

## CANADA

[Original: English]

## I. GENERAL COMMENTARY ON THE DRAFT TEXT

Although the quality of the drafting makes it difficult to obtain a complete understanding of the legal and commercial implications of the proposed Convention, there appears to be a significant departure from the existing Hague Rules.<sup>1</sup> The legal system of liability which the draft attempts to establish is close to the general law of contract but it goes some way towards recognizing the necessity to protect the consignee, who is not normally a party to the conclusion of the contract of carriage. To this end, the draft more or less proposes a legal system which recognizes the concept of the holder in due course of a negotiable instrument of commerce, while simultaneously regulating in some degree the outlines of the over-all relationship between the parties to a contract of carriage.

It is apparent that the drafters have attempted to cover every foreseeable situation. In so doing, not only have they, in many instances, stipulated in a manner apparently inconsistent with what Canada would understand to be the over-all intent of the Convention, but they may have lost some of the perspective of the purpose of a convention on the carriage of goods by sea. It is the Canadian opinion that a convention would be desirable to the extent that it established a uniform international understanding of the relationship between the parties to a contract of carriage and protected those who do not have the opportunity knowingly to agree to the terms of the contract, but who are affected by it. The Canadian commentary on the draft Convention flows from the basic premise that:

Where the contract is one of adhesion, or where the consignee or other receiver of the goods was not a party to the concluding of the contract of carriage, a convention is needed to make the terms and conditions of such a contract fair and reasonable for those "innocent" parties while, at the same time, striking an equitable balance between the parties to the contract.

In the light of this basic premise a number of others have been evolved and it is upon these that a detailed commentary on the draft is subsequently formulated.

It is the Canadian opinion that the proposed Convention should, as its name implies, apply only to the carriage of goods by sea and, in particular, to those international aspects of maritime carriage which are properly subject to harmonization through an international convention for the carriage of goods by sea.

<sup>1</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Brussels, 25 August 1924.

## First premise

In the interests of uniformity in its application, the Convention should provide only for those matters which are not properly the exclusive concern of the domestic law of contracting States.

Under this premise, the relationship between the carrier and pilot, stevedore or shiprepairer, for example, would be matters of national law.

The vicarious liability flowing from the relationship between the carrier and master, for example, is of a quite different nature, however. While the legal arrangements of such a relationship should be matters of national law, the Convention would apply to the servants and agents of both the carrier and the shipper.

## Second premise

The rights and liabilities of the carrier under the Convention in relation to a contract of carriage should extend to his servants and agents.

It is well known that, in international maritime transport, there is no formal document known as a contract of carriage as it exists in other transport modes. The argument as to whether or not a bill of lading is a contract of carriage, continues. Some consideration has been given to the practicability of suggesting that perhaps a convention on the carriage of goods by sea should be brought into line with other transport modes by providing for the terms and conditions of a contract of carriage but it was concluded that, on balance, such a proposal is unlikely to command universal support at the present time.

## Third premise

The Convention should apply strictly to the performance of a contract of carriage by sea. It should codify some mandatory elements of the relationship between the parties to a contract of carriage, namely, the carrier and the shipper, and especially their rights and liabilities, while protecting the right of the consignee or other person authorized by him to take delivery of the goods in the same condition as when they were shipped. The contract of carriage, concluded on the basis of good faith, should not be allowed to alter or overrule any of these rights and liabilities: thus, the Convention should be binding upon the parties and there should be no opportunity for opting out.

In Canadian legislation, the Carriage of Goods by Water Act provides, *inter alia*, that the Hague Rules shall apply to outward cargoes only. In the interests of uniformity and to encourage the adoption of the new Convention by as many States as possible:

## Fourth premise

The Convention should apply to the carriage of all goods by sea. The Convention should apply to cargoes outwards and inwards, but not to domestic carriage unless it is determined by each State individually that the application of the Convention to such carriage is in its public interest.

As a measure of the good faith aspects of the contract of carriage, the carrier and the shipper should have certain fundamental duties, respectively as follows:

*Fifth premise*

The carrier should have a duty to provide and maintain a vehicle of transport suitable to the nature of the goods to be carried. During the period of his responsibility for the goods, the carrier should have a duty to care for the goods as if they were his own.

*Sixth premise*

The shipper should have a duty to inform the carrier of the true nature of the goods to be carried, of any special vice inherent in them and of any special characteristics of the goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged.

On the understanding, expressed in the first and third premises that the Convention would apply only to matters which are not properly the exclusive concern of the domestic law of contracting States, and strictly to the carriage of goods by sea, Canada supports the apparent intent of the draft that the Convention should apply to the whole period of responsibility of the carrier.

*Seventh premise*

The period of the carrier's responsibility for the goods should be limited to and extend from the time when the goods come under his control to the time when he relinquishes control over the goods by handing them over to the consignee or other authorized person.

With respect to carrier liability, none of the five draft alternatives proposed concerning its quantification provide, at the same time, a satisfactory solution to uncertainties of gold as a monetary unit of measure, nor to the various court decisions as to the meaning of a "package" nor to liability relating to a "unit of weight". Canada has given consideration to relating the quantum of carrier liability to the insured value of the cargo or to a mandatory declared value on a bill of lading. It was found, however, that to do so, might require the shipper to reveal information to the carrier which, for commercial reasons, he may wish to keep confidential. Consideration was also given to the idea that the quantum of liability of the carrier for goods of undeclared value while they are in his control might be limited in direct relation to the amount paid as freight, in accordance with a formula to be determined. This suggestion is itself not wholly free of difficulty and may lead to some inequities, but it appears to be at the least worthy of further analysis and examination of its application in practice.

The role and purpose of a bill of lading continues to be argued at a time when consideration is being given to the further development of through bills of lading in multimodal transport and even to the possible demise of the bill of lading as it has been known for many years. The transmission of information respecting goods by means of EDP or ADP and the wide use of documentary credits seem to point the way towards the emergence of an entirely new régime of transport documentation. In the meantime, however, it appears essential to continue to recognize the importance and significance of the bill of lading.

*Eighth premise*

The Convention should recognize a bill of lading as the document of transport which would serve, in the

absence of a formal contract of carriage, as a document of title, a receipt for goods shipped and as evidence of a contract of carriage. The issue of a bill of lading by the carrier would constitute an undertaking by him to deliver the goods to the person named therein or to the endorsee thereof or to the person entitled to take delivery of the goods.

The term "bill of lading" would, of course, need to be so defined as to give effect to this eighth premise.

It is consistent with the first, third and fourth premises and with the purpose and intent of the others that the ninth and final premise be:

*Ninth premise*

The Convention should not apply to multimodal carriage but strictly to the carriage of goods by sea, determined by the period of responsibility of the carrier as provided in the Convention.

## II. CLAUSE BY CLAUSE COMMENTARY ON THE DRAFT TEXT

(Note: The numbering of the paragraphs of the draft has been followed in this commentary.)

### Article 1. Definitions

*Paragraph 1*

Except, possibly, in some time charters where the carrier is not known, the Hague Rules definition of "carrier" is not perceived to have given rise to difficulty or uncertainty. The definition of "carrier" in the UNCITRAL draft is considered an improvement because it identifies the carrier in terms of his contractual arrangement with the shipper and as a party to the contract of carriage. It would, however, be inconsistent with the premises, previously expressed, to agree to the inclusion of the term "contracting carrier" with that of "carrier". The drafters themselves seem to have been uncertain as to the exact relationship between the carrier and the contracting carrier and no practical usefulness can be seen in the inclusion of the term "contracting carrier" with that of "carrier", nor can any advantage be seen in the interchangeability of these terms. The exporter (shipper) must always know with whom he has contracted for the carriage of goods and nothing should prevent him from contracting directly with the actual carrier nor from his right of action against him. The inclusion of the term "contracting carrier" with that of "carrier" as well as its introduction into the Convention places these rights in some doubt and may necessitate an examination of the traditional principal-agent relationships and of existing agency agreements because more responsibilities would fall to the ship's agent if the term was retained. Moreover, shippers might be compelled to always deal through freight forwarders rather than directly with the carrier if the term "contracting carrier" was retained. Freight forwarders are said to be used less in Canada than in some other developed countries and this is the situation preferred by Canadian shippers. Article 1 (1) should, therefore, be worded as follows:

"1. Carrier means any person by whom, or in whose name, a contract of carriage is made with a shipper."



*Paragraph 2*

Many of the arguments put forward with respect to the term "contracting carrier" apply to the inclusion of the term "actual carrier". While acknowledging the practice whereby a carrier will delegate some of his authority to a third party, this practice is perhaps best left to national law, since it is neither general nor uniform and it would not be desirable to incorporate this practice in an international legal instrument. Where the carrier intends, at the time he enters into a contract of carriage, to delegate some of his authority to a third party, such intent should be referred to in the contract of carriage. The inclusion of the terms "actual carrier" and "contracting carrier" would make unnecessarily rigid what are now flexible commercial practices and lead to higher shipper's costs. They should be left to a convention dealing with multimodal transport. Article 1 (2) should, therefore, be deleted.

*Paragraph 3*

The definition of "consignee" does not make clear if it means in fact any person in a position to surrender the bill of lading and the phrase "to take delivery of the goods" needs clarification as to the time when such delivery was to occur. The following wording is suggested:

"3. Consignee means the person named in a bill of lading or the endorsee thereof or the person entitled to take delivery of the goods."

*Paragraph 4*

The existing definition of "goods" in the Hague Rules is inadequate and the new definition is preferred. There is no objection to the inclusion of live animals provided the carrier is required to exercise due care in their carriage. Passenger luggage should be excluded from the definitions since these "goods" are covered in the Athens Convention.<sup>2</sup> There is, however, an important need for clarification as to the meaning of the phrase "article of transport". Packaging is an important cost consideration of the shipper. The purpose of packaging is to protect the goods, and freight costs include the cost of transporting the packaging along with the goods. Carrier interest is centred upon the security which the packaging provides the goods in terms of his responsibility for their handling and stowage. If the shipper were to supply such sophisticated articles of transport as containers (which is rarely the case in Canada for a number of reasons, including the cost of back-haul) there would undoubtedly be damage claims in respect of them against the carrier, and the carrier, in his turn, would protect himself by higher liability insurance which would be reflected in higher freight rates. It may be noted that damage claims against the carrier in respect of such locally reusable and marketable articles of transport as bags and pallets are not unknown in some countries and the likelihood of this practice spreading is considered to be high. We would suggest the following wording which would delete reference to the supply of such articles of transport by the shipper:

"4. Goods means anything to be carried under a contract of carriage, excluding passenger luggage,

and where the goods are consolidated in a container, pallet or similar article of transport, such article of transport."

*Paragraph 5*

With some minor amendments, the definition of "contract of carriage" in the draft is preferred over the Hague Rules definition for its simplicity. With amendments, the text would read as follows (the use of the word "water" in place of "sea" should be noted as being a Canadian preference):

"5. Contract of carriage means a contract evidenced by a bill of lading whereby a carrier agrees with a shipper to carry goods by water, against payment of freight, from one place to another."

*Paragraph 6*

With a few minor drafting changes, the definition of "bill of lading" would meet practical requirements. The suggested wording which follows would assist in differentiating between a bill of lading and a contract of carriage, as defined:

"6. Bill of lading means a document of title, receipt for goods and a document which evidences the contract of carriage."

*Article 2. Scope of application*

In accordance with the premises, previously expressed, there should be a clear distinction between those matters which should fall under national law (such as the relationship between the carrier and pilot, wharfinger, warehouseman or stevedore) and those which might properly be a matter for uniform application in all States being a party to the Convention. Accordingly, Canada is opposed to a broadening of the scope of application into areas of national jurisdiction.

*Paragraph 1*

The opening words to paragraph 1 of article 2 might be drafted as follows:

"1. This Convention shall apply to all contracts of carriage by water between places in two different States if:"

In this article, wherever it appears, the word "port" should read "place".

Subparagraph (c) of paragraph 1 is considered redundant in light of subparagraph (b).

Inasmuch as the bill of lading, as defined, would be the document which evidences the contract of carriage, the Convention should give primacy to it, and, such other documents of transport as mates' receipts, dock receipts and booking notes should not be permitted to rebut the terms and conditions of the bill of lading. Accordingly, the phrase "or other document evidencing the contract of carriage" should be deleted from subparagraphs (d) and (e). Moreover, subparagraph (e) should be drafted as follows:

"(e) The bill of lading provides that this Convention or the legislation of any State giving effect to it is to govern the contract of carriage."

*Paragraph 2*

This paragraph is unnecessary and its inclusion is potentially dangerous. If the nationality of the ship has

<sup>2</sup> Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

no bearing upon the applicability of the provisions of paragraph 1 of article 2, it ought not to have any bearing upon the application of any of the other provisions of the Convention.

#### Paragraph 3

Acceptable.

#### Paragraph 4

It is unknown for the charterer and the consignee to be one and the same person. The shipper has frequently been placed in a number of conflict of interest situations by being, in addition to the shipper, the charterer and the consignee. Apart from observing these practices and noting that the term "charter-party" is not defined, there are no comments on this paragraph, beyond referring back to the basic premise of this commentary.

#### Article 3. Interpretation of the Convention

The wording for this article had been drawn from article 7 of the Convention on the Limitation Period in the International Sale of Goods and similar wording is to be found in article 15 of the Convention providing a Uniform Law on the Form of an International Will and Canada has no objection to the inclusion of this article.

#### Article 4. Period of responsibility

As previously expressed, Canada is opposed to any broadening of the Convention into areas of national jurisdiction and would not wish to see this article applied so as to prejudice the application of domestic law to matters which are exclusively domestic.

This article does not define adequately for commercial purposes the time at which the carrier took control of the goods although the article appears to be quite clear as to the handing over of the goods. The importance of this article was also considered in terms of conditions of sale (i.e. FOB, CIF, FAS) but it was decided that to mix conditions of sale with conditions of carriage might well confuse the passage of property with the passage of responsibility.

There would appear to be no opportunity in article 4 whereby the carrier might revise his period of responsibility in his favour or in favour of the shipper by suitable wording in a bill of lading or contract of carriage provided that the period of responsibility was made more certain. The carrier ought not to be allowed to vary his period of responsibility. On these grounds, there is no objection to the exclusion of article 7 of the Hague Rules.

#### Paragraph 1

From a legal viewpoint, perhaps the word "charge" may be the best in the circumstances, but possibly "control" would better reflect operational realities.

#### Paragraph 2

The expression "taken over" is not a proper expression for a legal text as it has no defined legal meaning. The opening words of paragraph 2 should be redrafted as follows:

"2. For the purposes of paragraph 1 of this article, a carrier shall be deemed to be in control of the

goods from the time he takes possession of the goods until he has delivered the goods."

There is no objection to subparagraph (a) but it is defeated by subparagraph (b) which might allow the stipulation of any provision with respect to the delivery to the consignee. The Convention should be more specific on the question of delivery to the consignee. It may also be advisable to include a provision relating to notices. To paragraph 2 should be added the expression: "this paragraph applies *mutatis mutandis* to the receipt of the goods by the carrier".

#### Paragraph 3

This paragraph should be redrafted as follows:

"3. In paragraphs 1 and 2 of this article, reference to the carrier or the consignee shall include the servant or agent or the carrier or consignee, respectively."

#### Article 5. General rules

As previously noted, there is no objection to the inclusion of live animals in the general definition of "goods", provided that the carrier be required to provide a proper ship and to exercise proper care for the goods (the "due diligence" clauses of the Hague Rules having been dropped from the UNCITRAL draft) and a suitable expression of these caveats should be included under this article.

#### Paragraph 1

Although there is no objection to the drafting of this paragraph, the use of the words "loss", "damage" and "expense" therein is somewhat at variance with their use under Canadian law. There should be uniform meaning given these words throughout the Convention and so as to remove confusion between physical and financial loss.

#### Paragraph 2

It is unclear from the present wording of this paragraph if the drafters intended to provide for frustration in the contract of carriage in a manner similar to frustration in charter-parties. Moreover, the paragraph would benefit from an exception provision where the whereabouts of the goods are known. In any case, paragraphs 1 and 2 should be redrafted as follows:

"1. The carrier shall be liable for loss of or damage to the goods as well as expense arising from such loss or damage if such loss or damage occurred while the goods were in his control as defined in article 4 unless the carrier proves that he took all measures reasonably necessary to avoid the occurrence and its consequences.

"2. The carrier shall be liable for delay in delivery of the goods as well as expense arising from such delay unless the carrier proves that he took all measures reasonably necessary to avoid the delay.

"3. For the purposes of paragraph 2 of this article, delay in delivery occurs when the goods have not been delivered at the place of discharge in accordance with the provisions of the contract of carriage within the time specified therein."

#### Paragraph 3

Acceptable.

*Paragraph 4*

This paragraph should be redrafted as follows:

"4. In case of damage, loss or delay caused by fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents."

*Paragraph 5*

This paragraph should be deleted since there is now no reason specifically to cover live animals.

*Paragraph 6*

Apart from the difficulty of deciding what is "reasonable", this paragraph is acceptable.

*Paragraph 7*

The word "concurrs" might be replaced by "contributes".

*Article 6. Limits of liability*

As presently worded, it would be difficult for a carrier fully to grasp the scope of his liability at the time of making a contract of carriage. Canadian contract law makes the contracting parties liable to make good the damages a prudent person could reasonably foresee at the time of making the contract as a necessary consequence of a breach of it.

None of the five alternatives proposed in this article fully resolve the difficulty of determining the quantum of liability of the carrier. Other possibilities, such as using the insured value of the goods or their declared value were considered but both of them would require disclosure by the shipper of information which he might wish, for commercial reasons, to remain confidential. The carrier's liability should be limited and such limitation should apply to loss of or damage to the goods as well as to delay. There seem to be a number of advantages to relating the carrier's limitation of liability to a function (multiple or fraction) of the freight but there is a lack of data and information as to its potential effect.

*Article 7. Actions in tort**Paragraph 1*

It may be noted that there are more than two classes of action. If it is the intention of the drafters to apply the defences and limits to all classes of action, the expression "or in tort" should read "or otherwise".

*Paragraph 2*

It is not clear if the "servant or agent" referred to means the parties covered in paragraph 3 of article 4 and the reason why the same wording was not used is not understood. Read in conjunction with article 4, the intention of the drafters would appear to be to deem the goods in the control of the carrier as soon as they are "handled" by a person employed by him.

*Paragraph 3*

Acceptable.

*Article 8. Loss of right to limit liability*

There is a good deal of confusion and uncertainty in this article. It is noted that the word "damage" is used alone whereas the words "loss", "damage" and "expense" are used in paragraph 1 of article 5. Noting

further that the whole of the second sentence is devoted to agents and servants, it would appear that the word "carrier" in the first sentence was not intended to include servants and agents. Accordingly, this article might be redrafted to provide that both the carrier and his servants would lose the benefit of the limitation of liability as provided in the first sentence and the second sentence might be deleted, ending the article at the first word "result".

*Article 9. Deck cargo**Paragraph 1*

To begin with, this paragraph should at least be drafted positively:

"1. Goods may be carried on deck in accordance with the contract of carriage, with the usage of the particular trade or with statutory rules or statutory regulations."

Secondly, the expression "statutory rules or statutory regulations" might be expressed by "statutory provisions". Furthermore, when this paragraph is read in conjunction with paragraph 3, it could be that there would be no liability for loss, damage or expense when the goods are carried on deck in accordance with this paragraph. Finally, even when redrafted as suggested, there may still be an opportunity for a carrier to agree with one shipper that his cargo be carried under deck for a premium while agreeing with a second shipper that his cargo be carried on deck at an apparent discount and for a carrier to give preferential treatment to a large shipper for under-deck space.

*Paragraph 2*

It is uncertain what the drafters mean by the word "statement" but it is assumed that such statements would not include printed clauses. The enforceability against third parties of statements in a document not a bill of lading is not clear. In the interests of clarity, reference to such other documents might be deleted.

*Paragraph 3*

The drafting in this paragraph is awkward. It is assumed the intention of the drafters was that the limit of liability remains unchanged except where goods are carried on deck contrary to an express agreement.

*Paragraph 4*

This paragraph could be considered unnecessary as any action by the carrier to deliberately breach a contract of carriage should be deemed to be an act to which article 8 would apply.

*Article 10. Liability of contracting carrier and actual carrier*

Inasmuch as the premises suggest that there be no reference in an international convention on the carriage of goods by water to third parties to whom the carrier, by means of national contract law, may choose to delegate some of his authority under a contract of carriage, this article might be deleted. Even if there be no reference to actual carriers as opposed to contracting carriers, it may still be appropriate to provide that the carrier shall always be personally liable notwithstanding that he may not have personally performed the contract.

If, however, reference to actual carriers as opposed to contracting carriers is retained, then this article does

have the advantage of simplifying the recourse of the claimant who will know of at least one person who would be primarily liable to make good his loss. The provisions of this article would greatly simplify the settlement of claims as the contracting carrier would be apt to settle quickly with the claimant and the indemnity that the contracting carrier may be in a position to obtain from the actual carrier will probably also be as easily determined in view of the direct contractual relationship in each case between the claimant and the party liable.

#### *Article 11. Through carriage*

The retention of this article would be inconsistent with the premises previously expressed, if in fact it applies to multimodal transport. At the eighth session of the UNCITRAL Working Group on International Legislation on Shipping there was some confusion and misunderstanding of this article and its inclusion in the present draft was supported by a very narrow vote. In any case, this article, to all intents and purposes, is in clear conflict with the provisions of article 10 and could create very serious problems relating to, for example, jurisdiction and the enforcement of judgements against actual carriers. No purpose seems to be served by the retention of this article as the situation envisaged could be otherwise arranged — by a first agreement to carry from point A to point B, then a subsequent agreement to carry from point B to point C for which latter carriage the original carrier would act only as agent and he would not be the contracting carrier.

#### *Article 12. General rule*

This article might be redrafted as follows:

"Neither the shipper nor his servants or agents shall be liable for loss of or damage to the goods nor for expense arising from such loss or damage unless such loss or damage was caused by the fault or neglect of the shipper, his servants, or agents."

At the UNCITRAL Working Group's eighth session, there was discussion on the practicability of providing further for the liability of the shipper. Canada is opposed to the development of such a concept in this Convention provided that the sixth premise relating to the fundamental duties of the shipper is provided for (possibly para. 1 of article 17 already does this).

#### *Article 13. Special rules on dangerous goods*

To begin with, the expression "dangerous goods" should be defined by reference to the International Convention for the Safety of Life at Sea.<sup>8</sup>

##### *Paragraph 1*

This paragraph raises questions about the use of the expression "if necessary" and "whenever possible". As to the first, it is uncertain if it is related to the character of the danger, or the experience of the shipper or the experience of the carrier or the custom of the trade. The second expression is best deleted. In consonance with the sixth premise, this paragraph might be redrafted along the following lines:

"1. The shipper shall, before the goods come under the control of the carrier, inform the carrier of the nature of the dangerous goods to be carried and

of any special characteristics of the dangerous goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged, as provided in article 4."

##### *Paragraph 2*

This paragraph might be redrafted as follows:

"2. The carrier may at any time unload, destroy or render innocuous, as the circumstances require, any dangerous goods under his control which have become a danger to life or property whether or not the carrier had knowledge of the nature or character of such dangerous goods."

##### *Paragraph 3*

This paragraph should be redrafted to provide that where the carrier or his servants unload, destroy or render innocuous dangerous goods shipped in accordance with paragraph 1, he does so without liability, but where the dangerous goods are unloaded, destroyed or rendered innocuous by reason of the failure of the carrier or of his servants to take the precautions indicated by the shipper, or by reason of an act or omission as provided in article 8, he shall be liable in accordance with article 5.

#### *Article 14. Issue of bill of lading*

##### *Paragraph 1*

This paragraph might be redrafted as follows:

"1. When the carrier takes control of the goods as provided in article 4, he shall issue to the shipper on demand a bill of lading showing among other things, the particulars referred to in article 15."

##### *Paragraph 2*

The present wording of this paragraph is ambiguous and the first sentence could be deleted as it is covered in subparagraph (j) of paragraph 1 of article 15. The second sentence could become a new paragraph 2 if it were redrafted as follows:

"2. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been issued on behalf of the carrier."

#### *Article 15. Contents of bill of lading*

##### *Paragraph 1, subparagraph (f)*

The question is raised of the propriety of inserting the date on the bill of lading (see subpara. (f) of para. 1). The bill of lading could become a self-serving document. The shipper would not be too concerned with the date indicated in the bill of lading but the consignee could be prejudiced if the carrier has indicated a date which is later than the actual date where the goods were taken under his control, thus losing the benefit of the Convention for the period not covered as a consequence of the date indicated on the bill of lading. The question of when the goods are taken under the control of the carrier should be left as a question of fact.

#### *Article 16. Bills of lading: reservations and evidentiary effect*

The effect of this whole article appears to provide a penalty for failure to comply with the provisions of subparagraphs (b) and (k) of paragraph 1 of article 15 but the drafting does not assist in deciding if these sanctions are sufficient.

<sup>8</sup> Signed at London, 17 June 1960.

*Paragraph 1*

As a general comment to this paragraph, it is unclear what the sanctions are vis-à-vis the carrier for failure to comply with the provisions of this paragraph.

*Paragraphs 2, 3 and 4*

The remaining paragraphs of this article would be acceptable if the article also provided that the issue of a bill of lading by the carrier constituted an undertaking by him to deliver the goods as specified therein.

*Article 17. Guarantees by the shipper**Paragraph 1*

This paragraph, when read in conjunction with paragraph 1 of article 16 where an obligation to check is imposed, could lead to some confusion. The intent of this paragraph seems to be to govern the relationship between the carrier and the shipper, whereas in paragraph 1 of article 16, the relationship between the holder of a bill of lading and the carrier is envisaged.

*Paragraphs 2, 3 and 4*

Canada favours deleting paragraphs 2, 3 and 4. Bills of lading should either reflect the state of the goods or not. Letters of indemnity are contentious and in most cases would be invalid as against public order being documents that *prima facie* are designed to mislead the subsequent holders of the bill of lading as to the condition of the goods as evidenced by the bill of lading.

*Article 18. Documents other than bills of lading*

The inclusion of this article would create considerable uncertainty as to the validity of the "other documents" envisaged and their status vis-à-vis the Convention. Other documents, such as those envisaged by this article, could be issued well in advance of the time when the carrier takes control of the goods. In any case, the matter appears to be adequately dealt with in paragraph 3 of article 23 and perhaps article 18 is unnecessary.

*Article 19. Notice of loss, damage or delay**Paragraph 1*

This paragraph might be redrafted using the wording preferred for article 4, as follows:

"1. Unless notice of loss or damage specifying the general nature of such loss or damage is given by the consignee or such other person authorized to receive the goods, to the carrier, his servants or agents at the time when the carrier, his servants or agents deliver the goods as provided in paragraph 2 of article 4, such delivery shall be *prima facie* evidence of the condition of the goods as described in the bill of lading."

*Paragraphs 2, 3, 4, 5 and 6*

Paragraphs 2, 3, 4 and 5 are acceptable but, in the interests of consistency, paragraph 6 should be deleted.

*Article 20. Limitation of action**Paragraph 1*

It has not been possible to obtain consensus on the time period, but the majority in Canada seem to favour one year while recognizing that the tendency in some

modern legislation is to extend the period when an action may be taken.

The word "initiated" should be replaced with "instituted".

With respect to subparagraphs (a) and (b) of this paragraph, the drafting of paragraph 6 of article 3 of the Hague Rules is preferred. It is recognized, however, that subparagraph (b) of this paragraph probably covers a new type or class of action in relation to the failure by the carrier to perform the contract by not even taking control of the goods. It may also probably relate to the earlier articles of the convention which envisage situations where the contract of carriage can be altogether frustrated for various reasons.

*Paragraph 4*

Paragraph 4 of this article should be deleted in the interests of consistency.

*Article 21. Jurisdiction**Paragraph 1*

This paragraph will greatly facilitate recourse by the claimant as it will probably settle many jurisdictional disputes raised in connexion with applications to serve outside of the jurisdiction before various national courts.

*Paragraph 2 (a)*

The opening phrase of this subparagraph should be redrafted in order to make it clear that an action may be brought before any court in contracting State that may have legally arrested the vessel concerned in lieu of the expression "courts of any port in a contracting State". National courts are not always set up with limited geographical jurisdictions within their country. A good example of this may be seen in a comparison of the jurisdiction of the Federal Court of Canada with that of the civil courts of the Province of Quebec, the latter being set up in districts within the Province and the former having national jurisdiction.

*Paragraph 3*

The object or scope of the provisional or protective measures mentioned in the last sentence of this paragraph is not clear. There is no objection to this paragraph, however, as it seems to tend to protect claimants who wish to secure their claims in a jurisdiction other than those mentioned in paragraph 1. This paragraph may, however, be inconsistent with the object of paragraph 4 which is to eliminate vexatious proceedings or abuse of the process of law against a carrier by multiple arrests in several jurisdictions.

*Paragraph 4*

This paragraph, as previously noted, has as its purpose the prevention of vexatious actions, but where sufficient security cannot be found in any one jurisdiction, the claimant may be in difficulty.

*Article in general*

Generally, with respect to this article, paragraphs 1, 2 and 3 are considered to be proper provisions for inclusion in the Convention but paragraph 4 and 5 get very much involved in questions of national law. Moreover, the provisions of paragraph 5 may often be impossible to apply in view of the jurisdiction *ratione materiae* and *ratione personae* of the tribunals that can-

not be altered by convention of the parties. Accordingly, paragraphs 4 and 5 should be deleted.

#### Article 22. Arbitration

There is no fundamental objection to the inclusion of this article nor to its terms. There should, however, be additional provisions dealing with the interrelation of court actions and arbitration proceedings between the same parties. In other words, does recourse to a court action constitute an absolute waiver of arbitration proceedings? A further question is the obtaining of security by recourse to the courts prior to arbitration.

#### Article 23. Contractual stipulations

##### Paragraph 1

The last sentence of this paragraph should be deleted. It is dangerous to specify one case which could qualify the very broad terms of the prior provisions of this paragraph.

##### Paragraph 2

Provided the benefits to the carrier as a result of this paragraph extend no further than to give him an economic or commercial opportunity, there would be no objection to it.

##### Paragraph 3

Acceptable.

##### Paragraph 4

This paragraph seems to be the sanction for failure to comply with the provisions of paragraphs 2 and 3. The scope of the costs referred to in this paragraph described as legal costs is not clear. It is difficult to understand why the provisions for compensation as to legal costs are qualified by the expression "shall be determined in accordance with the law of the court seized of the case". In fact, many national courts do not allow legal costs to be recovered and it would seem therefore that the provisions of this whole article could be to a great extent annihilated before such national courts. If the intention of the drafters was the integral application of the principle of *restitutio in integrum*, then this paragraph should be redrafted and this intent indicated in more direct language. Furthermore, this paragraph seems to give the carrier an opportunity of deliberately inserting a clause in a bill of lading knowing it to be null and void in order to force an action by the consignee. Moreover, this paragraph appears to impinge upon an area of national law in attempting to negate the prerogative of the national courts seized of the case to determine or award costs in actions. On balance, it might be advisable to delete this paragraph altogether.

#### Article 24. General average

In the Canadian view, a convention on the carriage of goods by sea is not the proper place in which to give to general average a prominence greater than that which it has occupied in private law. Among other things, this is what article 24 would do. As presently drafted, this article is not sufficient to protect a cargo owner's contribution in general average whenever loss of or damage to his cargo did not occur but it does limit the amount which a carrier would indemnify a consignee while doing no more for the consignee than suggesting that the carrier may have a responsibility to indemnify him.

The present Hague Rules go only as far as not preventing the insertion in a bill of lading of a provision regarding general average and, apart from noting that standard clauses found in bills of lading are drafted primarily by carrier interests, there have been no practical or legal difficulties in Canada with the present wording of the Hague Rules. The second sentence is inconsistent with this view.

#### Article 25. Other conventions

##### Paragraph 1

Canada opposes reference in this paragraph to overriding provisions of other conventions that would subordinate this Convention to them.

##### Paragraph 2

Acceptable.

#### CZECHOSLOVAKIA

[Original: English]

In general, the new draft convention on the carriage of goods by sea as prepared by the UNCITRAL Working Group on International Shipping Legislation may be considered as a positive step forward in fulfilment of the task given to UNCITRAL in consequence of the resolution of the Working Group of UNCTAD on International Shipping Legislation of 25 February 1971. It is appreciated that the UNCITRAL Working Group has taken into consideration when preparing the draft convention the lines for the revision of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 as mentioned in the resolution of the Working Group of UNCTAD.<sup>1</sup>

The draft convention may therefore be used as a basis of further consideration by appropriate bodies such as a plenary session of UNCITRAL and the Working Group of UNCTAD on International Shipping Legislation in accordance with the agenda of the next meetings concerned.

It has been noted that there are some alternatives contained in the draft and that several parts of the text are in square brackets that should be removed at a later stage of the consideration of the draft. However, some principles recommended by the resolution of the Working Group of UNCTAD on International Shipping Legislation to be reflected in the new draft, e.g. extension of the period of carrier's liability for the period during which the goods are in the charge of the carrier or his servants, agents or other persons acting pursuant to the instructions of the carrier (article 4 of the draft), seem to have been complied with. Besides, the attempt to solve the problem of contracting and actual carriers is worth while considering further.

Without intending to go into details at this stage the following remarks are considered appropriate to be made now:

#### Article 1

A definition of the words "carriage by sea" should be given covering carriage on canals and other inland waterways accessible to sea-going vessels as well.

<sup>1</sup> See document TD/B/C.4/86, annex I. The resolution is reproduced in annex II to the report of the UNCITRAL Working Group on its first session, A/CN.9/55; UNCITRAL Yearbook, Vol. II: 1971, part two, III.



## Article 2

In paragraph 2, line 2, "actual carrier" should be added in the enumeration after "the carrier" as "carrier" should mean in accordance with the definition given in article 1, paragraph 1 "carrier" or "contracting carrier" only.

## Article 5

The burden of proof lying on the claimant in paragraph 4 seems to be extremely difficult, if not practically impossible, to discharge; besides, it is contrary to the principle contained in paragraph 1, so that a further consideration of both principles is necessary with the aim of bringing them into coincidence.

## Article 6

The number of alternatives for limits of liability of the carrier appears to be sufficient as a basis for considering them at a later stage. In any case, however, the draft convention should regulate problems connected with carriage of goods in containers, pallets or similar articles of transport, in particular the question of liability of the carrier in such cases.

## Article 9

The liability of the carrier for goods carried on deck in accordance with paragraph 1 and 2, i.e. in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations, should not differ from the carrier's liability for goods carried under deck. If it is foreseen to regulate the carrier's liability with some exceptions, e.g. as the sole consequence of carriage on deck, it should be formulated in clear words.

## Article 10

In paragraph 3 an obligation of the contracting carrier should be laid down to ensure with the actual carrier that the latter assumes obligations in the same extent at least as they have been assumed by the contracting carrier.

The principle of joint and several liability of the contracting carrier and the actual carrier is worth considering providing for in the draft convention in cases where it is not possible to ascertain in which part of the carriage, performed either by the contracting or the actual carrier, the loss of or damage to the goods or the delay occurred.

## Article 11

The relation between paragraph 2 of this article and paragraph 1 of article 10 should be reconsidered.

## Article 15

Among particulars set forth in the draft convention as regards the contents of the bill of lading reference to goods in containers, pallets or similar articles of transport should not be omitted.

The above-mentioned remarks cannot be considered as final and covering all problems connected with the draft convention that will be subject to further consideration at a later stage of dealing with draft convention in appropriate forums.

## DENMARK

[Original: English]

The Danish Government is of the opinion that the draft as a result of carefully elaborated compromises could form an acceptable basis for further deliberations.

The Danish Government is of the view that it is of the greatest importance that a new convention be acceptable to as many States as possible and thus become a global solution of the questions concerning carriage of goods by sea which would entirely replace the 1924 Convention.<sup>1</sup>

## Article 5

It is on this assumption that the Danish Government as a preliminary view can accept the compromise solution concerning the provisions on the carrier's liability in article 5 although it would like to express some concern because of the heavier burden placed on the carriers.

## Article 6

Among the different systems proposed in article 6 concerning the system of limitation of liability Denmark would prefer alternative A as the most simple system. Further the Danish Government is of the opinion that the limitation amount should not be expressed in gold francs but in Special Drawing Rights as defined by the IMF.

The Danish Government reserves its position with regard to other details of the draft convention.

## FIJI

[Original: English]

## Article 6

## Paragraph 1, alternatives A-E

Alternative A is the most appropriate and the unit of weight (or measurement) should be that on which freight is charged. Unless this criterion is applied disputes could easily arise.

## Paragraph 2

Conversion of franc to national currency should be based upon the rate prevailing at the time of the loss—this being the value at that time. Subsequent delays in bringing arbitration may result in an appreciable variation in such values. Moreover, it is suggested that owing to fluctuations in the price of gold there should here be reference to special drawing rights as a more stable system instead of using the gold francs.

## Article 15

## Paragraph 1 (f)

Add "and place" after "date".

## Article 19

## Paragraphs 1 and 2

Article 19 paragraph 1 appears to clash with paragraph 2. It should be made more clear that notice in writing of damage or loss must be given within 10 days

<sup>1</sup> International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, 25 August 1924.

of acceptance of the goods by the consignee. It is very important that the carrier's responsibility continue until acceptance by the consignee other than in the special case mentioned and in that case the consignee must authorize the Ports Authority Fiji or other person to act on its behalf to accept delivery of the goods and thus liability for them from the carrier.

## FINLAND

[Original: English]

### A. GENERAL OBSERVATIONS

The Finnish authorities, after having studied the draft convention on the carriage of goods by sea adopted by the UNCITRAL Working Group on International Legislation on Shipping, find the draft to be a considerable improvement to the international legislation in the field of shipping. The structure of the draft convention as well as most of the provisions in it are acceptable to Finland, and therefore the draft will form a good basis for further deliberations.

The Working Group has chosen the form of a new convention. Finland is fully in agreement with this. It is, however, stressed that it would be unsatisfactory if the convention on the carriage of goods by sea would exist as a parallel convention to the old Hague Rules.<sup>1</sup> Every measure should therefore be taken to make the new convention acceptable to as many States as possible so that the new convention would replace the Hague Rules.<sup>1</sup> In this respect Finland considers the compromise solutions found in the draft of great value.

### B. OBSERVATIONS ON SOME PARTICULAR POINTS

#### *Scope of application of the new draft convention*

##### *Article 1, paragraph 5 and article 4, paragraph 2*

The scope of application of the rules governing the carriage of goods by sea will change, if the draft will eventually be accepted. First of all, widening of the scope of application will take place in so far as the draft also includes cases when no bill of lading is used (article 1, para. 5). Secondly, the period of responsibility of the carrier is longer than before, starting from the moment when he has taken over the goods and ending when he has delivered them (article 4, para. 2). The Finnish authorities consider both of these to be useful modifications.

#### *Liability of the carrier*

##### *Article 5*

The most important change in the draft compared with the existing rules concerns the liability of the carrier. It seems likely that the merits of the draft convention will be judged in the light of these provisions. The draft is based on the presumption of fault on the part of the carrier, and it does not include any defence where an error in navigation is concerned (article 5, para. 1). The carrier is also liable in case of fire, if the claimant proves that there is fault or negligence on the part of

the carrier (article 5, para. 4). Thus, the draft involves removing some risks from the consignor and placing them on the carrier, which at least from the point of view of a non-professional consignor is advantageous. As a whole, the provisions of the draft seem to be acceptable as a compromise solution. The Finnish authorities would, however, like to express their concern in one respect because of the heavier burden laid on the carrier. In the carriage of goods by sea from one country to another, the consignor usually takes out cargo insurance for the goods. Changing the risk from the consignor to the carrier means in practice that the final risk is borne by the P and I insurance of the carrier and not by the cargo insurance as presently. This may, of course, increase the number of recourse actions by the cargo insurers against the P and I insurers but the main concern in Finland is the fact that no P and I insurance industry exists in Finland and thus a larger part of the over-all insurance premiums in the carriage of goods by sea are therefore going to be paid to foreign insurers.

#### *Limits of liability of the carrier*

##### *Article 6*

Among the different liability systems contained in article 6, Finland would prefer alternative A because of its simplicity. A limitation based on package may lead to unexpected results. As there still would be a considerable need for marine insurance, the problems relating to light, but valuable goods could be solved by way of insurance and need not be especially taken care of in the provisions on the carrier's liability. Otherwise the Finnish authorities regard the limits accepted in Brussels in 1968<sup>2</sup> as sufficient.

Finland would, however, like to submit for reconsideration the question of the unit of liability. In article 6, the unit is the gold franc, but taking into consideration the problems with this unit it may be worth while to study what possibilities the substitution of the special drawing right (SDR) of the International Monetary Fund for the gold franc might offer in this connexion.

#### *Shipping of live animals*

##### *Article 1, paragraph 4 and article 5, paragraph 5*

The Finnish authorities wish to reserve their position as far as the transportation of live animals is concerned. It may be useful to reconsider whether they should be included in the definition of "goods" (article 1, para. 4).

#### *Carriage of dangerous goods*

##### *Article 13*

Finland wishes to point out that according to the IMCO regulations the shipper always has to mark dangerous goods as such. This might be taken into consideration when drafting the final form of paragraph 1 of article 13.

<sup>1</sup> International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924.

<sup>2</sup> Article 2 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

*Time-limit for claims and actions**Article 19*

In case of apparent loss of or damage to the cargo, the consignee has to give immediate notice to the carrier (article 19, para. 1). If the loss or damage is not apparent, the consignee has a period of 10 days to give notice of the loss of or damage to the goods (article 19, para. 2). The Finnish authorities are of the opinion that these time-limits may be insufficient, whereas the limit of 21 days in paragraph 5 of the same article seems to give enough protection to the consignee in case of delay in the delivery of the cargo.

*Jurisdiction**Article 21*

In article 21, jurisdiction is limited to the Contracting States only. This may cause problems especially immediately after the Convention has entered into force when the number of Contracting States is thus relatively small. It is not quite clear how an action shall be removed from one court to another under subparagraph 2 (a) of article 21. The Finnish authorities presume that such a removal shall not affect the time-limit for actions.

## FRANCE

[Original: French]

*Article 1**(a) Paragraphs 1 and 2*

The wording of paragraph 1 could be simplified by taking as a model that used in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974. It is unnecessary when defining the carrier, in paragraph 1, to refer to the concept of contracting carrier—which does not appear in the Athens Convention. At the most, in paragraph 2, concerning the definition of the actual carrier, the carrier might be called the contracting carrier (as opposed to the actual carrier). The best solution, however, would be to use only the single term carrier, as in the Athens Convention:

*Paragraph 1.* "Carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper, whether the carriage is in fact performed by the carrier or by an actual carrier.

*Paragraph 2.* "Actual carrier" means any person to whom the carrier has entrusted the performance of all or part of the contract for carriage of goods.

*(b) Paragraph 3*

The definition of consignee must be amplified: it is in fact too vague, because it does not indicate by virtue of what or under what arrangement a person is entitled to take delivery of the goods. The text proposed below is modelled on elements appearing in French legislation (article 49 of decree 66-1078 of 31 December 1966 on charter-parties and maritime transport):

*Paragraph 3.* "Consignee" means the person entitled to take delivery of the goods by virtue of the contract of carriage; it is the person whose name is indicated in the bill of lading when the bill of lading is made out to a named person, the person who presents the

bill of lading on arrival when the bill of lading is made out to bearer, and the last endorsee when the bill of lading is made out to order.

*(c) Paragraph 5*

It seems necessary to add to the definition of the contract of carriage, in which only the shipper and the carrier are mentioned. The consignee must be able to invoke a contract of carriage to which he is not a party; in the absence of a bill of lading which is the documentary evidence of the goods, the consignee could not exercise the rights of the shipper, except by availing himself, if he can, of provisions of a national legislation recognized as applicable which confer that right on him; all countries do not, however, have such provisions in their national legislation or legal machinery such as the provision in favour of a third party enabling the consignee to have the possibility of exercising the rights of the shipper. In order to avoid recourse to national legislation, it is in any case desirable, if the international Convention contains a definition of contract of carriage which establishes the rights of the shipper and of the carrier, to specify that the rights of the consignee are also established thereby; such a specification is necessary when there is no bill of lading. Moreover, it should also be specified that by virtue of the contract of carriage the carrier acquires the right to take action arising from that contract against the consignee, particularly concerning payment of freight. Accordingly, the draft definition should be supplemented as follows,

*Paragraph 5.* ... By virtue of this contract, the consignee may exercise the rights of the shipper and be subject to his obligations.

*Article 2**(a) Paragraph 1*

It would be better style in French to delete the "ou" appearing at the end of each subparagraph, which reflects the English text, and to add the word "soit" before the enumeration (... "lorsque, soit:").

*(b) Paragraph 4*

The wording leads one to fear that, by means of an endorsement in favour of an authorized agent of the shipper, the provisions of the charter-party may be held to be incontestable since a bill of lading has been issued; the holder of the bill of lading must not be the shipper or one of his representatives. Accordingly, it is preferable to replace the phrase "holder of the bill of lading" by "third party holder in good faith".

*Article 5**Paragraph 4*

This provision relating to fire is the sole survivor of the 17 instances of immunity appearing in article 4, paragraph 2, of the 1924 Convention and deleted in the UNCITRAL draft. It is not satisfactory and constitutes a breach in the new system of liability based on general presumption of fault in regard to the carrier: it has no equivalent in other international conventions on carriage. The system proposed is quite unfavourable to the shipper who will not be able, in practical terms, to establish fault or negligence by the carrier, his servants or agents.

This provision is the outcome of a political compromise and, from a purely legal standpoint, could not be justified and should be deleted.

A more equitable compromise could be sought on the same basis by making it incumbent on the shipper to establish that the ship had appropriate means of averting the fire and that all measures had been taken to avert it and to limit its consequences. The following text might then be retained:

*Paragraph 4.* In case of fire the carrier shall be liable, unless he proves that the ship had appropriate means of averting it and that, when the fire occurred, he, his servants and agents took all reasonable measures to avert it or to limit its consequences, except where the claimant proves the fault or negligence of the carrier, his agents or servants.

#### Article 6

The dual method for the limitation of the carrier's liability based on the package or unit and on the weight, which is similar to that established by the 1968 Protocol, seems more satisfactory than the system of calculating limitation on the basis of the weight alone (alternatives A and B). In this system, it seems preferable to select a particular limitation in case of delay in delivery, calculated on the amount of the freight, rather than to calculate the limitation of liability for delay in the same way as in the case of loss or damage (alternative C). Accordingly, alternative D might be retained together with variation X; variation Y, which specifies in respect of liability for delay an amount which is distinct from liability for loss or damage but which varies according to whether it relates to limitation based on the package or the weight, and alternative E which, while retaining the dual system, specifies that the limitation of liability based on the package or unit shall not be applicable when a container or pallet is used to consolidate goods, should be set aside. On the other hand, alternative D includes the provision contained in the 1968 Protocol whereby in such a case the package or unit enumerated in the bill of lading shall be deemed packages or shipping units.

Nevertheless, if a clear majority appears to be in favour of the system of limitation calculated on the basis of weight alone, which is that utilized by the other international conventions on carriage, there would be no serious objection to agreeing to it. The dual system is preferred because it appears to give expression to the compromise established by the 1968 Protocol between the current system under the 1924 Convention calculating limitation only on the basis of the package or unit and the system of calculating on the basis of the weight alone which is used in other modes of transport. If the system of calculating on the basis of weight alone is agreed to, alternative B should be selected since it provides for a special limitation in the case of delay, calculated on the amount of the freight (double the freight).

#### Article 7

On a point of drafting, the "d" before "*un retard à la livraison*" should be deleted in the third line of the French text of paragraph 1.

#### Article 8

The draft specifies that limitation of liability should be set aside in the case of intentional wrongdoing or inexcusable wrongdoing by the carrier alone, if the latter acts recklessly and with knowledge that damage would probably result. The criterion of wrongdoing, which is taken from The Hague Protocol of 1955 amending the Warsaw Convention relating to carriage by air and which has tended to spread to other international conventions on carriage, does not give rise to any objection. Already, the 1968 Protocol relating to bills of lading (unlike the 1924 Convention which contains no provision on that point) provides for the case of intentional or inexcusable wrongdoing by the servant or agent alone, but only in the case where his liability is brought into question; the case of the same wrongdoing by the carrier is not covered. In this draft the same provision is included and, in addition, the same wrongdoing by the carrier himself which has the effect of setting aside the benefit of limitation of liability is retained. However, there is no provision, as in air law, to the effect that the carrier shall not be entitled to the benefit of the limitation of liability in the case of intentional or inexcusable wrongdoing by himself or his servants or agents.

In the absence of such a stipulation, which appears essential, the wrongdoing of the carrier, whether intentional or inexcusable, would be quite theoretical. Indeed, under the provisions of the draft, if such wrongdoing was established, an attempt could be made to establish the liability of a servant, or agent and the latter would be unable to invoke the benefit of limitation; on the other hand, in such a case, the carrier would be liable for the wrongdoing of his servant or agent, but could himself benefit from limitation of liability. This situation is completely unsatisfactory and it is proposed that it should be remedied by the following provision taken from air law:

After the word "carrier" add: "or his servants or agents acting within the scope of their employment".

#### Article 10

##### *The article as a whole*

In line with the comments made with regard to article 1 on the definition of the term "carrier", the word "contracting" should be deleted in the article and in the title of the article.

##### *Paragraph 3*

The provision in this paragraph calls for some reservations. Any agreement concluded between the shipper and the carrier imposing obligations not provided for under the Convention or increasing the liability of the carrier, must remain valid even if the carriage is performed by an actual carrier. The latter could be considered as bound, in respect of the shipper, by the contractual undertakings made by the carrier, who must inform him of them when requesting him to perform the carriage; if he should fail to do so, the actual carrier would nevertheless remain bound with respect to the shipper, but would be able to bring a claim against the carrier. The shipper has, in effect, concluded the contract of carriage with the carrier, and it would be too easy for the latter to evade fulfilling those of his contractual obligations which exceed the obligations im-

posed under the Convention by causing the carriage to be performed by an actual carrier who did not agree specifically to carry out those obligations. Such a solution, while providing the shipper with effective protection, would nevertheless be harsh on the actual carrier.

Furthermore, in the event that the actual carrier does not agree to fulfil the additional obligations assumed by the carrier, it could be expressly stipulated that the latter should remain personally bound by those obligations in respect of the shipper, and that in such a case, he may not benefit from limitation of liability.

For this purpose, the following sentence should be added to paragraph 3:

"3. ... The carrier shall nevertheless remain bound by the obligations or waivers resulting from such a special agreement, failure to fulfil which shall be considered as an act or omission of the carrier within the meaning of article 8."

#### Article 11

##### *The article as a whole*

The same comment as for the preceding article with regard to the deletion of the word "contracting".

##### *Paragraph 2*

The provision in paragraph 2 is totally unacceptable. By enabling the carrier to exonerate himself from liability for any damage caused during the part of the carriage performed by the actual carrier, it has the effect of totally negating the provisions of article 10, which establishes the principle of the liability of the carrier for the entire carriage when he causes part of it to be performed by an actual carrier. This rule of principle loses all significance in that it can be overridden by a contrary stipulation made by the carrier at the expense of the shipper.

This provision first appeared in the draft as an alternative and then was adopted by the Working Group at its seventh session. If the rule in article 10 is to retain its full force, it seems essential to delete paragraph 2 of this article.

#### Article 14

##### *The article as a whole*

The same comment as above regarding the deletion of the word "contracting".

#### Article 15

##### *Paragraph 1 (k) (drafting note)*

On a point of drafting, in subparagraph (k), the conjunction "and" should be deleted since it is completely redundant in a list of items.

#### Article 16

##### *Paragraph 3*

The words "including any consignee" in paragraph 3 appear redundant. It is of little importance whether or not this third party is the final endorser in the case of a bill of lading made out to order, or the bearer who will claim delivery of the goods in the case of a bill of lading made out to bearer. Furthermore, this reference is superfluous in the case of a bill of lading made out to a named person, since, except where it is transmitted to a banker who is a third party with a view to obtaining a documentary credit, this bill of lading is not transfer-

able to any other person in order to take delivery of the goods, and the consignee named on the bill of lading cannot be considered a third party to the contract of carriage since he can avail himself of it and exercise the rights of the shipper; if the goods are not in the condition described on the bill of lading at the time of delivery, it is for him to make reservations and to establish the condition of the goods; in the event of proof to the contrary being brought by the carrier, it will be for him to file a claim against the shipper if the latter is the seller of the goods under the terms of the contract of sale. On the other hand, to consider the consignee who is a party to the contract of carriage as a third party because he can exercise the rights of the shipper and invoke the contract in respect of the carrier might facilitate fraud and would even have the effect of making the carrier responsible to the shipper himself if the latter was at the same time the consignee of the goods, without any possibility of proof to the contrary.

It would therefore be preferable to keep to the more conventional and restrictive wording designed to protect only third parties to a contract of carriage, as contained in article 1 of the 1968 Protocol, amending article 3, paragraph 4, of the 1924 Convention: "However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

#### Article 17

##### *Paragraphs 2, 3 and 4*

From a purely drafting point of view, the word "*de*" preceding the word "*convention*" in the first line of paragraph 2 in the French text should be deleted.

For the reasons given with regard to article 16, paragraph 3, the words "including any consignee" should be deleted in paragraphs 2, 3 and 4.

#### Article 19

##### *Paragraph 1*

The words "if any" at the end of paragraph 1 should be deleted, since it is impossible to speak of a "document of transport, if any". Such a document must exist; without it, no valid claim could be made with regard to the condition of the goods at the time when they were handed over to the carrier.

#### Article 20

##### *Paragraph 1*

It appears that the one-year period, as prescribed in the present Convention, should be retained; it has not given rise to any special difficulties. It prevents the possibility of a dispute hanging over the carrier for too long a period.

#### Article 23

##### *Paragraph 1*

It would be preferable to refer to "any document relating to carriage" after the reference to the bill of lading, since the use of the words "any other document evidencing the contract of carriage" as in the draft, involves duplication with the contract of carriage referred to in the first line; the words "any other document relating to carriage", on the other hand, refer to cases in which no bill of lading is issued.

## Article 25

## Paragraph 2

The same comment applies for article 2, paragraph 1, namely, that the word "ou" at the end of subparagraph (a) in the French text, which is taken from the English wording, should be deleted and the word "soit" added before the enumeration ("... de ce dommage, soit: ...").

## GERMAN DEMOCRATIC REPUBLIC

[Original: English]

## GENERAL OBSERVATIONS

## Articles 4 and 10

1. The German Democratic Republic appreciates the work done by the UNCITRAL Working Group on International Legislation on Shipping since 1969 which has examined the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention, 1924) and the Protocol to amend that Convention (the Brussels Protocol, 1968) with a view to revising them, and which has finally elaborated a draft Convention on the Carriage of Goods by Sea.

The German Democratic Republic welcomes the efforts reflected in the draft to harmonize international transport law and to make provision for new transport technologies in the stipulations of the draft Convention. In particular, the German Democratic Republic supports the concepts on which articles 4 and 10 are based. Article 4 containing the binding liability of the carrier from the time the goods were taken over until the time the goods were delivered covers the period when most of the damages take place in practice. Consequently, article 10 establishes the joint liability of contracting carriers and actual carriers. These stipulations should be retained and made even more precise.

2. To contribute to completing the draft Convention, the German Democratic Republic submits the following remarks:

## Article 2

2.1. Article 2, paragraph 4, excludes charter-parties from the scope of application of this Convention. Therefore, the title of the Convention does not correspond to the real subject of the Convention. The German Democratic Republic would appreciate if this discrepancy would be eliminated by including charter-parties in the scope of application of the Convention in keeping with the title.

## Article 6

2.2. Concerning limits of liability to a certain amount (article 6), the German Democratic Republic would prefer alternative B, completed by the container rule (alternative C, paragraph 2 (a)). In this article, we think it would be appropriate to formulate the last phrase of the part which applies to all alternatives as follows:

"The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the pre-

ceding paragraph of this article on the date of the judgement or arbitration award or on the date of the agreement on the party concerned."

The stipulation of the draft Convention is based on the assumption that any claim can only be enforced by recourse to law, whilst practice proves that a large number of disputes are settled by agreement of the parties concerned.

## Article 8

2.3. The German Democratic Republic would consider it desirable if a general rule were included in the draft Convention to the effect that the carrier is liable for acts and omissions of his servants or agents and if, consequently, article 8 would be so modified that the carrier shall not be entitled to the benefit of the limitation of liability with respect to damage resulting from such fault mentioned in this article caused by the carrier or his servants or agents.

## Article 9

2.4. Concerning article 9, paragraph 1, the German Democratic Republic holds that it remains unclear to which "statutory rules or regulations" reference is made. We think that this stipulation should make it clear that these statutory rules or regulations are not national ones. Therefore, the German Democratic Republic proposes to restrict article 9, paragraph 1, in such a way that the carrier shall be entitled to carry the goods on deck only by express contractual agreement. In case of container transport, article 9 should be supplemented by another paragraph saying that the carrier shall be entitled to carry containers on deck without any express contractual agreement if he provides the same legal conditions as for under deck carriage.

## Article 11

2.5. The German Democratic Republic recommends the deletion of article 11, paragraph 2, as, from our legal point of view, this stipulation is contradictory to the through carriage concept. Where the carrier undertakes an obligation to an entire transport, he should also be responsible for the whole period covered by the contract.

## Article 18

2.6. The German Democratic Republic holds that article 18 should be based on a premise like this:

"When a carrier issues a document other than a bill of lading by request of the shipper, such document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

In order to take into account trends of international development, article 18 should be supplemented to cover the legal effects of such other documents. The German Democratic Republic proposes the following wording:

"The carrier shall be obliged for delivering goods to the consignee as named in this document at the port of destination.

"The shipper retains the right to dispose of the goods until they have reached the port of destination, unless he has transferred this right beforehand in writing and without any reserve to the consignee or



to a third person and has informed the carrier of such a transfer.

"If this document makes reference to carriage conditions, these are valid if and when they are made known or otherwise accessible."

#### *Articles 21 and 22*

2.7. The German Democratic Republic believes that it would be more correct if articles 21 and 22 proceeded from the fact that, in case of a dispute resulting from or in connexion with a carriage contract, such dispute would always be brought before that court upon which the partners agreed in the contract, or if States are parties to a treaty under international law which determines the place of venue for specific disputes, these stipulations under international law should be applicable.

Only if the parties did not conclude an agreement on a place of venue, or if the States where the parties have their residences, or in the absence thereof, their places of business, have no binding obligations under international law, should this draft Convention give the plaintiff a right of choice. It would be preferable to limit this choice to a court at the place of

The port of loading, or

The port of discharge, or

The main place of business of the carrier.

#### *Article 2, paragraph 2, and article 5, paragraph 4*

2.8. Additionally, when editing the draft Convention, it should be examined once again whether, in accordance with the definitions laid down in article 1, the specification under article 2, paragraph 2, and article 5, paragraph 4, should be supplemented by the term "actual carrier".

#### FEDERAL REPUBLIC OF GERMANY

[Original: English]

#### GENERAL REMARKS

The Federal Government welcomes the draft prepared by the Working Group of UNCITRAL as an effort to modernize and to improve the legal situation in ocean transport. The draft convention submitted to comments by the governments seems to be a valuable basis for future work. It is hoped that it might be possible to finalize a convention on the subject in the near future, justifying the hope that world-wide unification of the law on ocean transport will be achieved.

The Federal Government therefore welcomes the draft convention and suggests that UNCITRAL should provide for a diplomatic conference on this subject as soon as possible. We feel, however, that there should be some improvements on the draft, a great number of them being of a mere technical nature. Some of them, which are of major importance, are pointed out in the following remarks as to the specific articles.

The list of these comments is not understood as an exhaustive one. We reserve our position as to further amendments to be put forward at the later diplomatic conference.

#### REMARKS AS TO SPECIFIC ARTICLES

##### *Article 2*

##### *Subparagraph 1 (d)*

The provision should be deleted. It does not seem justified to apply the convention on the grounds of the mere fact that the bill of lading or other document evidencing the contract of carriage has been issued in a contracting State even if all other relevant elements of the contract are performed in non-contracting States. The new draft convention is based on the idea (different from that of the Hague Rules) that it applies to every contract of carriage irrespective whether a bill of lading has been issued or not. It would be contrary to that philosophy to look again to where the document happened to be issued. This could, as a reason for application at the utmost, be justified in case of a bill of lading in the proper sense of the word, but would at any rate go too far as to any other document only "evidencing the contract of carriage". We believe, however, that for these reasons not only the reference to the "other document evidencing the contract" should be deleted, but the whole provision. If a similar reference to any documents should be retained it could perhaps be acceptable to refer to documents evidencing the receipt of the goods.

##### *Paragraph 4*

It would be desirable to give a definition of the term "charter-party". This must not necessarily be done in the context of the definitions in article 1 but could be inserted in the operative article 2, paragraph 4, first sentence. The following language for the first sentence of article 2, paragraph 4 is suggested:

"The provisions of this Convention shall not be applicable to contracts by which the carrier assumes the obligation to let the carrying capacity of a distinct vessel wholly or partially for a distinct time (time-charter) or for one or several distinct voyages (voyage-charter) at the disposal of the shipper."

##### *Article 5*

##### *Paragraph 1*

The proposed change as to the present exemption of the carrier from liability for nautical fault and fire has the advantage of a better compliance with the general principles of contractual liability in civil law in general and in the law of other means of transport in particular. For the reasons pointed out already at former occasions and by other governments it should, however, be considered very carefully whether the change would not be likely to lead to an increase of over-all costs of transportation.

Higher liability of the carrier needs higher and therefore more expensive liability insurance on the part of the carrier which would necessarily again lead to higher freight rates for the shipper without him being discharged by a corresponding decrease of his cargo insurance premiums. It is doubtful whether the cargo insurer—whose services will for various reasons be needed in future as well—will recover by recourse action from the carrier or his insurer amounts which enable him to reduce his premiums according to the increase of the liability insurance costs.

In this context it may be of interest that in the Federal Republic of Germany not only the carriers' but also the shippers' associations have pleaded in favour of leaving the legal situation as it is because they do fear, in case of the proposed change in the legal allocation of risks, an increase of over-all transportation costs. It is argued that liability insurance is by its nature more costly than cargo insurance and that the shipper in principle is more interested in being indemnified by an insurer of his own than by an insurer of somebody else. Similar discussion has developed in connexion with the preparatory work for the draft convention on multimodal transport. There, in addition, some countries have, as a reason for lower liability of the carrier, invoked the fact that cargo insurance is not only the more economic form of insurance of transport risks but at the same time renders it possible to the shipper to insure in his own country which is not only of advantage for him being indemnified without complications as to problems of claiming and enforcing judgements in foreign countries but also could be of interest to some states in so far as cargo insurance can be done by their insurance industry whereas liability insurance is available only in a few maritime countries.

For these reasons the Federal Government deems it necessary to discuss very thoroughly the possible economic consequences of the proposed change because the new convention should, especially regarding the present situation of world trade, not finally lead to an increase of transportation costs. This would be contrary to the idea which lies behind the suggestion of UNCTAD to examine the Hague Rules with the view to revision in particular as to a better allocation of risks. A better allocation in our mind would not be an allocation of risks which would increase the overall costs of the carriage lastly to be borne by the shipper. The Federal Republic of Germany is, like other exporting and importing countries, vitally interested in moderate freight rates.

The new study on marine cargo insurance, recently performed by the UNCTAD secretariat (TD/B/C.3/120) will, *inter alia*, serve as a valuable basis for the discussion of this problem.

#### Article 5

##### Paragraph 7

The provision should be deleted. The mere fact that somebody else is at fault or negligence with regard to the same damage which has been caused by the carrier himself should not exonerate the latter. It should be left to general rules of civil law to decide the relationship of claims which the shipper may have against the carrier and other persons. In the important case of collision, the pro-rata distribution provided for in article 5, paragraph 7 is already laid down in the Collision Convention of 1910.<sup>1</sup> In other cases it should be left to specific conventions or to national law, which might provide in these cases for a liability of the two persons joint and several.

#### Article 6

The Federal Republic of Germany is in favour of alternative D, variation X. This priority is based on the

<sup>1</sup> International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, Brussels, 23 September 1910.

assumption that the limitation amount as to the weight would not be considerably higher than that provided for in the Visby Rules (i.e. 30 Poincaré francs). Alternative A, which we would, because of its simplicity, in principle prefer to D, could be chosen only in case of a much higher limitation based on weight, because the amount mentioned would not give a reasonable chance of indemnification to cargo beyond the average value of bulk cargo. We do, therefore, feel that a decision as to the system of limitation is only possible after the final decision on the amount, at least on the approximate level of the limitation based on weight. The Federal Republic of Germany would in this respect deem it sufficient to apply the figures of the Visby Rules, perhaps slightly raised. But because it seems improbable that UNCITRAL will decide at its forthcoming meeting on these figures and because it will be necessary anyway to discuss this central item at the diplomatic conference, the different alternatives should be put to the disposal of the diplomatic conference itself. We propose, therefore, that the draft should retain the various alternatives.

#### Paragraphs applying to all alternatives

The amounts should not be fixed in terms of Poincaré francs but in Special Drawing Rights of the IMF. A pattern is to be found in the Montreal Protocol of 1975 to the Warsaw Convention.

#### Article 15

##### Subparagraph 1 (a)

The draft provision requires that "the number of packages or pieces and the weight of the goods" be set forth in the bill of lading. We suggest to require, according to article 3, subparagraph 3 (b) of the Hague Rules, only one of the two elements, i.e. number of packages or pieces or weight of the goods. The draft would demand from the carrier in the frequent cases where it is reasonably impossible for him to check the weight of the goods, in particular because of the fast charging and discharging of ships, either not to insert the weight in the bill of lading or to insert a qualified special note setting out the grounds for absence of reasonable means of checking (article 16). Such a rule would not only be contrary to the normal situation at the loading port but moreover to the economic interest of the shipper. Under the present legal situation the shipper gets, within the bill of lading, mention of the weight of his goods indicated by himself, even if it is subject to a general unknown clause. This clause does not render unclear the bill of lading in the sense of banking practice as to a letter of credit. This situation might change if the bill of lading would contain either no indication as to weight at all or a qualified reservation as to that indication.

#### Article 21

##### Subparagraph 2 (a), second sentence

This provision seems not to be in compliance with the Brussels Convention of 1952 on arrest of seagoing ships.<sup>2</sup> In addition, removal of an action brought in one country to the jurisdiction of another country will hardly work in practice regarding the actual state of

<sup>2</sup> International Convention relating to the arrest of Seagoing Ships, Brussels, 10 May 1952.

unification of procedural law. The sentence therefore should be deleted.

#### HUNGARY

[Original: Russian]

The draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping is, on the whole, an important advance in the unification of international trade law, particularly since, in place of the previously existing incomplete and to some extent one-sided regulation, it seeks to establish up-to-date regulation under international law which meets the current requirements of international trade and is based on a balanced compromise between the interests of the parties concerned, i.e. carriers and shippers. The draft provides a higher level of regulation than that which previously existed, reflects essential new solutions and approaches to the various questions involved and is more in keeping with other international rules concerning the carriage of goods. On the whole, therefore, we take a favourable view of the draft.

#### PART I

##### Articles 1 and 2

With regard to part I of the draft (General provisions), we consider it significant that the Convention's scope of application is defined in a clear-cut manner and is broader than was the case with the 1924 Brussels Convention.<sup>1</sup> We agree that the Convention, in accordance with the draft and the criteria established by it, should apply to contracts for carriage of goods and not only to bills of lading or contracts confirmed by bills of lading. We are in agreement with the broadening of the Convention's scope of application by the five alternative criteria set out in article 2, paragraph 1, since this deals with the question in an unambiguous manner and, in addition, represents an important advance towards universality.

#### PART II

Part II of the draft deals with questions relating to the liability of the carrier.

##### Article 4

In this connexion, we regard it as important that, in conformity with other international agreements on the carriage of goods, the draft defines the period of carriage as extending from the time the carrier has taken over the goods until the time he has delivered them. Thus, the draft abandons the approach taken by the Brussels Convention, which seriously affects the interests of the shipper and has long been criticized. The Brussels Convention defines the period of carriage as beginning when the goods are loaded on the ship and ending when they are discharged.

##### Article 5

In our opinion, it is very important that the question of the carrier's liability has been resolved on the basis of a reasonable and equitable apportionment of risk

<sup>1</sup> International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, 25 August 1924.

among the parties concerned. Liability, which is based on fault, is accompanied by an evidentiary procedure, which is the most suitable approach at the present time. The judicial practice of various countries will, of course, determine differently the prescribed level of prevention, as occurred in connexion with the Warsaw Convention on International Carriage by Air.<sup>2</sup> The Warsaw Convention deals with the question in a similar manner. The positive aspect of the limitation of liability is reflected in the fact that each alternative indicates the limit in units of weight (kilos) and fixes the amount to be paid in Poincaré francs, which, in contrast with the existing system, eliminates the role played by inflation in reducing liability.

At the same time, it would seem advisable to simplify article 5, paragraph 5. It is proposed that the first sentence should be retained and the following one deleted.

##### Article 6

Among the alternatives presented for article 6, we regard A and C as appropriate, since they establish a single rule on the limits of the carrier's liability in the event of loss, damage or delayed delivery. However, we consider it inadvisable to take a final position before a determination is made as to the amount which will in each alternative represent the upper limit of the required payment. At the same time, we feel that a provision concerning declaration of value should be included in the draft, as was done in the 1968 Brussels Protocol.<sup>3</sup>

In assessing the system of liability established in the draft, we have some difficulties because of the fact that the limits of liability are at present indicated only in the form of alternatives. If a limitation based on units is adopted, it will be necessary to indicate the contents of the container since in a given case the value of the packing units in the container might be considerable. If a limitation of liability based on kilos is adopted, however, this problem will not arise.

##### Article 8

It seems advisable to broaden the rule laid down in the first sentence of article 8 so as to prevent the carrier from invoking the limitation of liability under article 6 even in cases where his servants or agents committed the acts referred to in that sentence. The carrier normally acts through his servants or agents, and the solution adopted in article 8—bearing in mind also the second sentence—affords the shipper very little real protection in the event that damage occurs in the manner envisaged in this article.

##### Article 9

Article 9, paragraph 1, provides that goods may also be carried on deck if that is in accordance with the usage of the particular trade. It might be advisable to define the term "usage" more precisely since it could give rise to divergent interpretations in the future. (The term most often used in the literature, in discussing

<sup>2</sup> Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929.

<sup>3</sup> Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924, Brussels, 23 February 1968.

carriage on deck, is "binding custom".) It would seem advisable to clarify the implication of the text.

It is not quite clear how one is to interpret article 9, paragraph 3. If the correct interpretation is that the carrier is not liable for damage which results solely from carriage on deck, then the rule is one-sided and has no justification.

#### Articles 10 and 11

We agree with the definitions of the terms "contracting carrier" and "actual carrier" and with the manner in which the two are distinguished. We also agree with the provisions of article 10. Article 11, paragraph 2, seems to conflict with article 10, paragraph 1, and we therefore propose that it should be deleted.

#### PART IV

##### Article 17

Article 17, paragraphs 2, 3 and 4 (part IV of the draft), which deals with letters of guarantee and their legal effects, may result in controversial practice. In our opinion, the draft merely lays down the rule—operative in all law—that fraud results in invalidity, and from that standpoint the text is quite correct. However, the draft cannot preclude the claim by the shipper which is guaranteed under other international rules for the purpose of ensuring the issuance by the carrier of a so-called "clean bill of lading". It is therefore proposed that paragraphs 2, 3 and 4 should be deleted.

##### Article 20

With regard to the limitation of actions under article 20, paragraph 1, we favour a two-year time-limit, particularly since it is current practice to set a one-year time-limit subject to extension. Since the law of various countries differs regarding the legal nature or possibility of an extension of this time-limit and also regarding the types of extension, international practice is not uniform and presents risks for both parties. A two-year time-limit would conform to the solution adopted in the above-mentioned Warsaw Convention, and it should be borne in mind that the carriage of goods by sea is from this standpoint (geographical distance, the possibility of the filing of claims) akin to the carriage of goods by air.

#### JAPAN

[Original: English]

#### GENERAL OBSERVATIONS

The draft convention prepared by the UNCITRAL Working Group has introduced several new ideas in the field of international carriage of goods by sea. It is certain that the provisions based on such new ideas will make changes not only in law and practice on shipping but also in other fields relating to them; thus this draft will have a great effect on actual international trade. The Government of Japan feels that it is a difficult task to comment on this draft, taking into consideration the interests of various parties. This comment by the Government of Japan is of a tentative character and further consideration will be needed until the ninth session of UNCITRAL.

#### Article 1 (Definitions)

##### Paragraph 4

By the definition of "goods" in paragraph 4, a container, pallet or similar article of transport supplied by the shipper is included in "goods" for transport. But this definition is neither practical nor follows the commercial custom. It is desirable to delete the second sentence of this paragraph, or to modify the wording in order to indicate that "goods" includes an article of transport for multiple use if this paragraph should be retained.

In the same paragraph the phrases "or where they are packed" and "or packaging" should be deleted, because packaging materials are usually not durable, and damage to them is not necessarily damage to the goods packed by them. It seems to be sufficient to leave the matter to the decision of the court in particular cases.

##### Article 2 (Scope of application)

(1) The scope of application of this draft convention is wider than the Brussels Convention of 1924<sup>1</sup> and the Protocol of 1968.<sup>2</sup> Consequently, conflicts of application of the conventions among the Contracting States of one or more of these conventions will arise when these conventions have entered into force. Such conflicts should be avoided or prevented by virtue of technical provisions in the final clauses of a new convention.

(2) As some of the so-called "quantity contracts" are in their character similar to charter parties, "quantity contracts" should be treated in the same way as charter parties. It might be desirable to provide in paragraph 4 to that effect in the case of such kinds of quantity contracts.

(3) Further, it would be useful and practical to make an exception to the application of this draft convention, where the bill of lading is not issued and the shipper and the carrier expressly agreed that the convention shall not apply to the contract.

##### Article 5 (General rules)

##### Paragraph 1

(1) As a principle, the Government of Japan does not necessarily oppose the adoption of the system of carrier responsibility stated in paragraph 1 of this draft article and the abolition of the long list of exemption clauses in article 4, paragraph 2, of the Brussels Convention. However, the special character of "perils, dangers, and accidents of the sea" still exists, and damages by them have a tendency to become bigger, but techniques for preventing such damages are still in the course of developing.

Provisions like paragraph 1 will cause much more disputes and law suits on damages arising from carriage by sea, and will put heavy burdens on the carrier in litigation as well as in navigation. The most fundamental change is that to extend carrier's liability will lead to raise in freight through increase of costs of liability insurance, which is more than cargo insurance, and these

<sup>1</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Brussels, 25 August 1924.

<sup>2</sup> Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968.

charges will be shifted upon shippers and consumers. This change will no doubt produce a great influence on present practice of carriage by sea and maritime insurance system, and ultimately consumers will have to bear the higher cost of goods, which includes unnecessary cost of liability insurance and other charges and expenses.

For this reason, such a policy adopted in the draft convention (in this respect) should be still under careful study in the next session of UNCITRAL from the viewpoint that the total cost of transportation had better be kept to a reasonably low level.

#### Paragraph 3

(2) In connexion with paragraph 3, it would be desirable to add a provision which makes it clear that when the claimant treated the goods as lost in accordance with this provision, he must give assistance necessary for the carrier to dispose of or sell the goods at a reasonable price or on reasonable terms.

#### Article 6 (Limits of liability)

##### Alternative B

Alternative B is preferable, since the single limitation system based on weight is simple and practical. In addition to this, with respect to valuable goods with light weight, it is desirable to adopt a system in accordance with the declared value of goods as provided in article 4, paragraph 5, of the Brussels Convention, which reads "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading".<sup>3</sup>

##### Alternative E

Another preferable alternative is E.

#### Paragraphs applying to all alternatives

With respect to paragraph 3, a provision will be necessary for making clear the formula for conversion of the international standard into national currencies.

#### Article 9 (Deck cargo)

It would be desirable to add such a provision that where the goods are properly carried on deck pursuant to paragraph 1, the carrier shall be relieved of his liability for loss, damage or delay in delivery resulting from special risks inherent in that kind of carriage. In this case the carrier shall be required to prove that the loss, damage or delay in delivery could be attributed to such risks.

#### Article 12 (General rule)

In this article it would be necessary to make an additional provision to the effect that the shipper shall be liable for the loss, damage or expense suffered by the carrier as the result of the consignee's failure to take delivery of the goods within reasonable time. This is to solve the difficulties to be encountered by the carrier such as charges for storage.

<sup>3</sup> The relevant subparagraph of article 4, para. 5, reads as follows:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

#### Article 15 (Contents of bill of lading)

##### Paragraphs 1 and 3

There is no absolute reason for providing such a long list of items in the bill of lading as in paragraph 1. The relation between paragraphs 1 and 3 is not entirely clear.

It is sufficient to leave the matter of items in a bill of lading to commercial practice.

#### Article 16 (Bills of lading: reservations and evidentiary effect)

##### Paragraph 4

It is very difficult to justify paragraph 4. This paragraph should be deleted.

#### Article 17 (Guarantees by the shipper)

##### Paragraphs 3 and 4

Paragraphs 3 and 4 are against the long and widely established commercial practice on a "letter of indemnity", and will bring shippers to difficulties for getting export and import finance. Therefore, these paragraphs should be deleted.

#### Article 20 (Limitation of actions)

##### Paragraph 1

(1) One year is preferable as the limitation period.

(2) It would be desirable to provide that the limitation period in paragraph 1 also covers the liability for wrong delivery made by the carrier in good faith in exchange for a letter of guarantee issued by a bank.

#### Article 21 (Jurisdiction)

It is advisable to put a provision in this paragraph to the effect that the court shall have jurisdiction over one of the foregoing places in accordance with rules of internal law.

This amendment is intended to prevent the claimant from bringing an action in a place (e.g. Alaska) far from the place connecting with the elements of contract of carriage (e.g. New York) in the same contracting State.

#### Article 23 (Contractual stipulations)

##### Paragraphs 3 and 4

It is not necessary to make such a provision as paragraph 3.

The provision in paragraph 4 with respect to the omission of the clause referred to in paragraph 3 will not make any sense in practice. Paragraphs 3 and 4 in this respect should be deleted.

#### Article 24 (General average)

The second reference of the draft provision should be subject to careful review together with article 5, paragraph 1. These provision will undermine the foundation of general average since it allows the consignee to recover from the carrier the contribution to general average, where it was necessitated as the result of error in navigation.

MEXICO

[Original: Spanish]

#### Article 1

The inclusion of a legal definition of the shipper, although not strictly necessary, would be justified be-

cause article 1 of the draft Convention contains definitions of the other parties to the contract of carriage, namely the carrier and the consignee. The following definition of the shipper could be included in article 1:

“Shipper” means any person who in his own name or in name of another concludes with a carrier a contract for carriage of goods by sea.”

#### Article 5, paragraph 4

The content of article 5, paragraph 4, is inappropriate and it is therefore proposed that the paragraph should be deleted. It refers to the liability of the carrier in case of fire on board the ship, but that liability is made conditional upon the proviso that “the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents”.

The Government of Mexico considers that it would be going too far to place the burden of proof on the claimant, and that in practice it would be impossible to prove fault or negligence on the part of the carrier, his servants or agents, especially when the fire occurs on the high seas, when the shipper and the consignee would be unable to ascertain the causes of the fire or avoid or alleviate its consequences. Consequently, in the case of fire as for any other occurrence, the governing principle should be the general one established in article 5, paragraph 1, namely that “The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods . . . if the occurrence which caused the loss or damage . . . took place while the goods were in his charge . . . unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

#### Article 6

The Working Group which drew up the draft Convention proposed for consideration by Member States five alternatives for article 6 relating to the basic issue of the limits of the liability of the carrier.

After perusing and studying each of those alternatives the Government of Mexico believes that the most suitable is alternative E, which is more complete (especially in relation to alternative A) and refers to various criteria for the quantification of the loss (weight, packages, shipping units) and to various possibilities with regard to transport, without having implications such as those resulting from alternative C with regard to the calculation of the liability deriving from alternatives C and D.

#### Article 15, paragraph 1

The Government of Mexico suggests that a new subparagraph (m) should be added to article 15, paragraph 1, indicating that when the goods are carried on deck that fact should be set forth in the bill of lading. This addition is important because the régime for deck cargo is given special treatment in the Convention, as can be seen from article 9.

#### Article 20, paragraph 1

Article 20, paragraph 1, suggests two periods for limitation of actions, after which the carrier shall be discharged from all liability, namely one year and two years. Although the maritime law tradition might lead

to acceptance of the shorter period of one year, the Government of Mexico believes that the interests of Mexico, which does not have a large merchant marine and therefore has no special reason to limit the liability of foreign carriers, would be better protected by adoption of a two-year limitation period. The Government of Mexico accordingly suggests that the limitation period mentioned in article 20, paragraph 1, should be two years.

#### NETHERLANDS

[Original: English]

#### GENERAL OBSERVATIONS

With much interest the Netherlands Government has taken note of the draft convention on the carriage of goods by sea.

As a general observation, the Netherlands Government wishes to express its concern that certain major changes in the present liability régime might have a negative effect on international trade.

An extension of the liability of the carrier, which in the end would result in an increase in the cost of transportation without a corresponding reduction in cargo insurance costs, would lead to worsening the positions of both the carrier and the cargo owner. The Netherlands Government fears that such negative effect could result from the deletion of *inter alia* the defences of fire and error in navigation.

Moreover, the cargo owner's interest in cargo insurance should not be overlooked. The cargo owner has a direct business relationship with the cargo insurer and thus he is in a position to obtain prompt settlement of his claims and will be able to keep his insurance costs under control. The P and I insurer, being the carrier's insurer, can never offer advantages of that kind to the cargo owner.

Finally, whilst cargo insurance would still be required, a substantial extension of the liability of the carrier would put more emphasis on P and I insurance, which is concentrated in a limited number of markets traditionally dealing with this type of insurance.

#### Article 1

##### Paragraph 2

The proposed definition of “actual carrier” contains two inaccuracies. First, the contracting carrier may arrange with a third person to perform the carriage, or part thereof, and he may, in such arrangement, permit him to arrange for the actual carriage, or part thereof, to be performed by yet a different person. As the actual carrier is defined as the person to whom the contracting carrier has *entrusted* the performance of the carriage, it could be argued that, in case of the above-mentioned arrangements, there was no actual carrier, since the person who actually performed the carriage, did not himself enter into a contract with the contracting carrier. Secondly, the meaning of the word “performance” is unclear in this connexion.

As a result of the uncertainties, especially in those cases where there is a chain of consecutive time—and/or voyage charters, it will be difficult for the claimant to identify the actual carrier.



The most simple solution would be to define "actual carrier" as the *owner of the ship carrying the goods*. At present the situation is already such that in many cases the owner will be bound by a bill of lading signed by the master. If there is a demise charter, a bill of lading signed by the master binds the charterer, but not the shipowner; however under the system, where the shipowner can already be held liable, he may in such case look to the charterer for indemnity.

The system of joint and several liability of the contracting carrier and the shipowner would solve all identification problems for the claimant, since the name and principal place of business of the contracting carrier are stated in the bill of lading (article 15 (1) (c)) and the shipowner is easily identifiable by consulting the ship's register. Moreover even where claims for cargo damage are not secured by a maritime lien on the ship, the assets of the shipowner, particularly his ship, would give some certainty that the claim can be recovered.

#### Paragraph 4

Passengers' luggage should be excluded. If a bill of lading would be issued in respect of luggage, these goods lose their character of luggage. In the definition of "luggage" in the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, article 1, paragraph 5, articles and vehicles carried under a bill of lading or other contract primarily concerned with the carriage of goods are excluded.

#### Paragraph 5

The Netherlands Government understands the Convention to apply also when the performance of part of the carriage in one and the same ship will be by inland waterways, provided that the stage of the carriage by inland waterways is subordinate to that by sea. Perhaps this intention should be expressed more clearly in the text.

The word "port" should be replaced by "port or place".

#### Article 2

##### Paragraph 4

In order to make it clear that the bill of lading does not govern the relation between the carrier and the charterer, the words "not being the charterer" should be added after the words "holder of the bill of lading" at the end of this paragraph.

#### Article 5

It should be realized that the deletion of the exceptions of "error in navigation" and "fault in the management" constitutes a major change in the allocation of risks between the cargo owner and the carrier under the Hague Rules. The deletion of the exception of fault in the management may be justifiable in view of the many disputes this exception gives rise to. This is not the case as regards exception of error in navigation. Shifting the risk in the case of error in navigation towards the shipowner may bring on an increase in total costs of transportation without an equivalent reduction in cargo insurance costs and will not induce the shipowner to act with more care towards the goods in view of his own interest in this case. For economic reasons preference is given to retaining the exception of error in navigation.

The same reasoning pleads for unreduced fire exception.

In view of the fact that in other provisions the word "expense" does not appear and that there does not seem to be any logic in the concept of "loss resulting from delay", the wording of paragraph 1 might be improved by using the formula of article 17 of the CMR convention:<sup>1</sup> "The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery . . .".

#### Article 6

A provision regarding the calculation of the value of the goods should be inserted in this or in the previous article (cf. Protocol 1968, article 2 (b)).<sup>2</sup>

It is proposed that the limitation amounts be expressed in special drawing rights of the International Monetary Fund. This would circumvent the problems with regard to the gold franc, which arise from the disappearance of an official gold price, the working of the unit of account as a *numéraire* and the calculation of exchange rates in the absence of official parities.

#### Article 9

##### Paragraph 3

The apparent intention of this provision is that *in addition* to the liability in accordance with articles 6 and 8 which applies to carriage on deck in any case, there is liability for loss, damage and delay resulting solely from the carriage on deck. This intention should be expressed more clearly.

##### Paragraph 4

Paragraph 4 should be deleted since there is no sufficient ground to discard the principle of article 8 in this respect.

#### Article 10

##### Paragraphs 1 and 2

The following proposals are put forward in connexion with the comments made above on the definition of "actual carrier" and the proposal to define the "actual carrier" by "owner of the ship carrying the goods".

The first sentence of paragraph 1 should read:

"Where the contracting carrier is not the actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention."

In the first sentence of paragraph 2 the words "for the carriage performed by him" should be replaced by "for the carriage by his ship".

#### Article 11

In order to make a clear distinction between the actual carrier, the successive carrier and the contracting carrier the following is proposed:

"1. Where the contract of carriage provides that the contracting carrier shall perform only part of the voyage covered by the contract, and that the rest of

<sup>1</sup> Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956.

<sup>2</sup> Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968.

the voyage shall be performed by a person other than the contracting carrier (the successive carrier), the responsibility of the contracting carrier and of the successive carrier shall be determined in accordance with the provisions of article 10.

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

3. The provisions of article 10 regarding the responsibility of the actual carrier shall apply correspondingly to the parts of the voyage mentioned in paragraph 1 of this article."

#### Article 13

##### *The article as a whole*

It is not clear which liabilities would be incurred by the actual carrier and the successive carrier, as the case may be, in case the contracting carrier does not pass on the relevant information.

##### *Paragraph 2*

The second sentence of paragraph 2 should be modified as follows:

"Where dangerous goods are shipped without the carrier having knowledge of their nature or dangerous character or of the precautions to be taken, the shipper shall be liable..." (see note on page 16 of the document setting forth the draft text).<sup>3</sup>

#### Article 16

##### *Paragraph 1*

It would be undesirable if preprinted reservations like "weight unknown" might not be considered a "special" note, since for instance in most cases the carrier has no reasonable means of checking the weight as stated.

#### Article 21

##### *Paragraphs 1 and 3*

In paragraphs 1 and 3 the words "legal proceeding arising out of the contract of carriage" also include disputes concerning the freight. As the convention does not deal with freight, except for article 15 (1) (k), these words should be replaced by: "legal proceeding arising under this Convention".

##### *Paragraph 2*

It is proposed to delete paragraph 2, as this provision deals with a number of questions on procedure, which should be left to national law.

<sup>3</sup> This note is as follows:

"Some representatives pointed out that paragraph 1 of article 13 imposed upon the shipper who hands dangerous goods to the carrier the obligation not only to inform the carrier of the nature of the goods and the character of the danger but also of the precautions to be taken. However, paragraph 2 of article 13 omitted any reference to 'precautions to be taken'. In the view of these representatives the second sentence of paragraph 2 should therefore be modified along the following lines: 'Where dangerous goods are shipped without the carrier having knowledge of their nature or dangerous character or of the precautions to be taken, the shipper shall be liable...' See also A/CN.9/105, C, para. 4; UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 3.

#### Article 24

The second phrase creates the danger that cargo interests refuse to contribute in general average on the ground of the contention that the carrier is liable and rule D of the York-Antwerp Rules is overruled. The following solution is proposed:

"1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average.

"2. The rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution in general average.

"3. The provisions of the foregoing paragraph shall not affect the obligation to contribute in general average in case the carrier has no answer for the event which may give rise to the sacrifice or expenditure."

NIGER

[Original: French]

#### THE CONVENTION AS A WHOLE

It should be noted that the provisions of this convention did not give rise to any comments by the Government, which means that, on the whole, the draft convention meets with its approval.

#### Article 1, paragraph 4

Although there has been a shift in the meaning of the term "container" as compared with its generally accepted definition, it would have been desirable for the Working Group established by the United Nations Commission, in the event of its confirming the definition that should henceforth be the only valid one internationally, to set the rules for the invoicing of transport costs in the case of goods shipped by container. For example, the Niger continues to pay for the weight of this empty box, which may be as much as a ton or several tons, because rail and road carriers regard the container as packaging.

On this point, it is worth recalling that it has already been stated, at an ECA seminar on external trade statistics held in Addis Ababa, that international organizations have categorically decided on other occasions that the container is a means of transport and not packaging. Yet it is still customary to regard it as packaging.

#### Article 6

With regard to the various versions of article 6 concerning limits of the liability of the carrier, the Niger prefers the alternative which takes into account the container problem, that being an important question for an inland country.

#### Article 20, paragraph 1

The Niger would prefer a two-year limitation period.

NIGERIA

[Original: English]

#### Article 5

##### *Paragraph 3*

The 60-days period within which goods may be treated as lost should be extended to 90 days.

## Paragraph 4

The paragraph requires a claimant to prove that the fire arose due to fault or negligence on the part of the carrier, his servant or agent. It is felt that a claimant would have difficulties in proving negligence on the part of the carrier, his servant or agent since he is not present on board during transit. It is therefore considered that it would be better if the burden of proof is on the carrier, his servant or agent to show that he has taken all reasonable care and has not been negligent in the performance of his duty.

## Article 6

It is too early to decide on which alternative to support because the calculation formulae are rather intricate and may not be easily understood until fully discussed through exchange of views at a future conference. In the meantime, our position on this point is reserved.

## Article 20

A two-year period of limitation in arbitral proceedings is preferred.

## NORWAY

[Original: English]

## GENERAL OBSERVATIONS

The Norwegian Government is of the opinion that the draft convention will constitute a suitable basis for the finalizing of a new international treaty on the carriage of goods by sea. The proposed provisions are in many respects an improvement compared with existing international rules in this field, and on the whole the Norwegian can support the structure of the draft convention as well as most of its provisions.

The Working Group has proposed a new convention instead of amendments to the existing Hague Rules, and the Norwegian Government supports this proposal. It would like to stress that it considers it most important that the new convention is made acceptable to as many States as possible so that it will replace already existing international rules. In this respect the draft convention is considered to represent an over-all solution which can be expected to receive wide international support as an acceptable compromise between the diverging opinions on the regulation of the matter on an international basis.

## Article 6

I. The Working Group has not succeeded in finding a joint solution for the calculation of the *limit of liability*. Among different systems proposed in article 6 the Norwegian Government prefers *alternative A*. The reasons for this have already been stated in the Norwegian reply to your questionnaire of 18 July 1972 (LE 133 (5)),<sup>1</sup> which reply was as follows:<sup>2</sup>

"The Norwegian Government has for a long time considered that the provisions relating to limitation of carriers' liability in the Convention<sup>3</sup> article 4 (5) are unsatisfactory. The reasons for this view have

been set out in an explanatory note to an amendment submitted to the first session of the 1967/68 Diplomatic Conference in Brussels, in which the Government proposed that a simple weight unit limitation system should be introduced also in the law of carriage of goods by sea. The following views were then expressed:<sup>4</sup>

"The system of limiting the carrier's liability to a certain sum "per package or unit" has proved to be unsatisfactory.

"The term "package or unit" is vague and ambiguous and has been interpreted differently not only by the courts in the various Contracting States, but even in the national legislations effecting the Convention. The uniformity which was aimed at has, therefore, not been achieved.

"Frequently, the practical solutions arrived at under the "package or unit" system appear to be arbitrary and are considered unjust in the numerous cases where the compensation offered to the cargo owners is purely nominal. The raising of the sum per package or unit will not remedy this basic flaw in the system. Thus, it is still undecided in most countries how to apply the present system to "containers".

"Since the Hague Rules were adopted the liability of the carrier by rail, by road and by air has become subject to a system of limitation which is more consistent with the intentions of the Rules, more easy to apply, and more satisfactory to the cargo owners.

"For the reasons stated it is submitted that the limitation system embodied in article 1, paragraph 5 of the Convention has outlived its usefulness and should now go. It is proposed that it be replaced by the simple weight unit limitation system already adopted in the international conventions for the carriage of goods by rail (CIM), by road (CMR) and by air (Warsaw).

"The limitation units, thus, should be the equivalent of a certain amount of gold per kilogram of the goods.

"The question of the amount of gold to be stipulated is, of course, debatable, but it seems reasonable to look to the CMR which contains the most recent solution of the problem. Article 23 of the CMR provides for 25 gold francs (each franc containing 10/31 of a gramme of gold of millimal fineness 900) per kilogram. As, however, all other maritime conventions, including the Stockholm Drafts, have adopted the Poincaré franc, it is submitted that this monetary unit be resorted to also in the Hague-Visby-Rules. The equivalent amount would then be 125 Poincaré francs."

"During the first session of this Conference most delegations had serious objections to the proposed amendment. In an effort to reach the best compromise conceivable under the circumstances, the Norwegian delegation submitted an amendment containing in substance the combined unit/weight limitation system now embodied in the Convention, article 4 (5),

<sup>1</sup> A/CN.9/WG.III/WP.10/Add.1, annex I.

<sup>2</sup> *Ibid.*, annex II.

<sup>3</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924.

<sup>4</sup> Conférence diplomatique de droit maritime, douzième session (1ère phase), Brussels 1967, p. 679.

as amended by the Brussels Protocol.<sup>5</sup> However, the Conference was unable to reach agreement on any of the proposed amendments relating to limits of liability, and at the second session of the Conference the Norwegian delegation maintained its original position and—together with the delegations of Finland and Sweden—submitted an amendment for a simple weight unit limitation of liability.<sup>6</sup> In support of the proposed amendment these delegations submitted the following views on the combined unit/weight limitation system:<sup>7</sup>

“However, a combined solution . . . would still include the present disadvantages of the package or unit limitation and would fail to establish an acceptable correspondence with the solutions adopted in the other international conventions on carriage of goods, first of all the CMR convention. In our view it is essential to reach a solution which does not create problems in modern combined transports and highly desirable to get rid of the disadvantages created by the package or unit limitation of the Hague Rules.

“Investigations have been made in Scandinavia into the economic consequences of changing over to the CMR solution of limitation based on weight. The investigations were based on official Scandinavian statistics concerning foreign trade as well as on the private statistics of underwriters and shipping lines, Scandinavian and others. The results indicate that the CMR limitation would be sufficient to cover practically all damage to general cargo and that the increase in price to be paid in the form of insurance would indeed be negligible. This adds to the weight of the argument that limitation should be based on weight only and should be on the same level as in the CMR convention: it should be kept in mind that the limitation rule primarily was intended to apply in case of damage to exceptionally valuable goods.

“When the economical problems involved are small, more attention may well be paid to the legal technical aspects. The advantages of full correspondence between the two conventions concerned are obvious. To this should be added the fact that experience over the years has shown how difficult it is for the Courts to interpret the words “package or unit” and that no international uniformity can be achieved on that basis.”

“In accordance with the views expressed in the quoted passages the Norwegian Government again submits that the limit of liability should be fixed as a certain amount of Poincaré francs per kilo of the gross weight of the goods lost or damaged. In accordance with usual practice the particular amount should perhaps be left to be discussed and decided by the future diplomatic conference, and the Government will not ask for a discussion of that question in the UNCITRAL Working Group. However, it is submitted that, in order to take care of certain prob-

lems relating to the carriage in small parcels of light-weight goods of relatively high value, there should be added a provision of the same type as that contained in the Draft Convention on Combined Transports (TCM), article 10 (3): ‘The minimum gross weight of such goods shall be deemed to be . . . kilos’.

“In the opinion of the Norwegian Government such a simple system of weight limitation of liability is clearly preferable both to the unit limitation system of the Convention, article 4 (5), and to the combined unit and weight limitation system of article 4 (5) as amended by the Brussels Protocol.”

II. In the draft article 6, the limitation amount is expressed in gold francs. In order to avoid the difficulties caused by the uncertainties of the price of gold, the Norwegian Government is of the opinion that the special drawing right (as defined by the International Monetary Fund) should be used as the unit of account in the new convention instead of the franc. The Norwegian Government will at a later stage put forward a proposal to this effect.

#### PHILIPPINES<sup>1</sup>

[Original: English]

#### Article 1

##### Paragraph 1

The term “Carrier” means not only “contracting carrier” but also “actual carrier” defined in paragraph 2; hence, it should be deleted as part of the definition only of “contracting carrier”. Perhaps, it would be advisable to define “carrier” in addition to “contracting carrier” and “actual carrier”. If “carrier” is to be defined, it may be defined as “A PERSON WHO, FOR COMPENSATION, AGREES TO UNDERTAKE TO CARRY GOODS BY SEA.”

##### Paragraph 3

“Consignee” is not just any person who is “entitled to take delivery of the goods” because the definition will include taking delivery under any lawful authority, such as a sheriff by court order; but its meaning should be confined to the person designated to take delivery *under the terms of the contract or by the terms of the bill of lading* whether deliverable to a named person, to order, or to bearer.<sup>2</sup>

##### Paragraph 4

It is not advisable to use the same term in defining a term. Instead of “goods”, ARTICLE OF COMMERCE OR MERCHANDISE should be used. The words “if supplied by shipper” should be deleted because whoever supplied the package seems immaterial

<sup>5</sup> *Op. cit.*, p. 694. Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

<sup>6</sup> Conférence diplomatique de droit maritime, douzième session (2ème phase), Brussels 1968, p. 192.

<sup>7</sup> *Op. cit.*, p. 206-7.

<sup>1</sup> In the case of certain comments made by the Philippine Government proposing amendments to the text of the draft convention, the full scope of the proposed amendments appears in a text of the draft convention incorporating these amendments submitted by the Philippine Government together with their comments. In these cases, the text incorporating the amendments is set forth below in the form of foot-notes. In such foot-notes, as also in the text, words in *capital letters* indicate proposed additions to the text, while words *enclosed within brackets* indicate proposed deletions.

<sup>2</sup> “Consignee” means the person WHO, UNDER THE TERMS OF THE CONTRACT OF CARRIAGE OR THE BILL OF LADING, is entitled to take delivery of the goods.” (para. 3 as amended).

in order that the same shall be considered part of the article itself.<sup>3</sup>

#### Paragraph 5

The words "where the goods are to be delivered" should be deleted because carriage of goods by sea from one port to another does not necessarily involve the duty to deliver to a consignee or to someone in another port. This is true in the case of carriage of goods by a ship for purposes of mere exhibition or exposition.

"Freightage", instead of "freight" should be used if it means the price for transporting the goods or of the "freight" taken in.

#### Paragraph 6

"Against surrender of the document" should be deleted because if the bill of lading or its equivalent issued to the shipper or consignee is lost, the delivery of the goods to the consignee may be made by either requiring the consignee to sign a receipt acknowledging the delivery of the goods and/or the giving of a bond to secure the carrier for misdelivery. The "surrender" of the bill of lading should not be its essential characteristic, but as evidence of the contract of carriage of goods.<sup>4</sup>

#### Observations on Article 1

Should not the term "charterer" be also defined in article 1 and to state whether the term "carrier" includes a "charterer"? It is to be noted that although article 2, paragraph 4 states that the provisions of this convention shall not be applicable to charter-parties, yet the same paragraph also provides that "where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention SHALL APPLY to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading." If the term "charterer" is also to be defined in article 2, it is proposed to harmonize its definition with the definition given, if any, in the draft on international shipping legislation. In the absence of such draft definition, it is proposed to define "charterer" as A PERSON WHO HIRES OR ACQUIRES THE USE OF A SHIP OR VESSEL OR A PORTION THEREOF TO CARRY GOODS BY SEA FROM ONE PORT TO ANOTHER IN CONSIDERATION OF PAYMENT OF FREIGHTAGE, FOR HIS ACCOUNT OR FOR THE ACCOUNT OF OTHERS.

#### Article 2

##### Paragraph 1

The word "two" should be deleted, inasmuch as the carriage of goods may involve ports in more than two States.

<sup>3</sup> "Goods" means any kind of [goods] ARTICLE OF COMMERCE OR MERCHANDISE, including live animals; where the goods are consolidated in a container, pallet, or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging [if supplied by the shipper]. (para. 4 as amended).

<sup>4</sup> "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods [against surrender of the document] TO THE CONSIGNEE. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking. (para. 6 as amended).

#### Article 4

##### Title

The word "Responsibility" in the title of article 4 should be changed to "Liability" to conform with the general title of part II under which it appears.

#### Article 5

##### Paragraph 4

Under the draft convention, the carrier will be liable only for loss due to fire if the claimant proves the fire arose due to his negligence; under the proposed amendment, he will be liable if he cannot prove that he or his agents exercised all diligence to prevent the fire. Under Philippine law, common carriers are required to exercise extraordinary diligence which means they are presumed liable unless proven otherwise.<sup>5</sup>

#### Article 6

##### Paragraph 1

All the alternatives in the Draft Convention in article 6 fixing the liability of the carrier to a fixed amount without any condition and without the consent of the shipper or the consignee, under Philippine jurisprudence, are void as against public policy. Thus, in the Philippine case of *Heacock v. Macondray and Co.* (vol. 42 Philippine Reports, p. 205), the Philippine Supreme Court held: "Three kinds of stipulations have often been made in a bill of lading: (a) One exempting the carrier from any and all liability for loss and damage occasioned by its own negligence; (b) one providing for an unqualified limitation of such liability to an agreed valuation; (c) one limiting the carrier's liability to an agreed valuation, unless the shipper declares a higher value and pays a higher rate of freight. The first and second stipulations are invalid as being contrary to public policy; the third is valid and enforceable." All the "alternatives" in article 6 of the draft convention fall under the second kind of stipulation above quoted, and are void under Philippine jurisprudence.

We, therefore, propose that article 6 should, instead, provide as follows:

The liability of the carrier according to the provisions of article 5, shall be limited to an amount equivalent to ( . . . ) francs per kilo of gross weight of the goods lost or damaged, or, in case of delay, to an amount not exceeding [double] the freightage paid or payable, unless the shipper declares a higher value and pays a higher rate of freightage based on the declared value.

This proposed provision is in accordance with Philippine law and jurisprudence. Or, if this proposed provision is unacceptable to the Working Group, it is suggested that article IV, paragraph 5 of the Brussels Convention of 1924 be adopted, which reads:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding

<sup>5</sup> "In case of fire, the carrier shall be liable, [provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.] UNLESS HE PROVES THAT HE, HIS SERVANTS OR AGENTS TOOK ALL NECESSARY MEASURES TO PREVENT THE FIRE." (para. 4 as amended).

100 pounds per package unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

The present Philippine Code of Commerce (art. 372) provides: "The appraisal of the goods which the carrier must pay in case of their being lost or mislaid shall be fixed in accordance with what is stated in the bill of lading, no proofs being allowed on the part of the shipper that there were among the goods declared therein articles of greater value, and money."

The present Philippine Civil Code (art. 2226) also provides: "Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof." A fixed or liquidated damage imposed by law (or by the draft convention) cannot be considered as an agreement of the parties.

#### *Paragraphs applying to all alternatives*

The provisions on the equivalence of one franc (or pound as the case may be), and its conversion to national currency of the State seized of the case may be retained as appearing in the draft convention.

#### *Article 13*

##### *Paragraph 2*

The words "and the precautions to be taken" should be inserted to harmonize the provision of paragraph 2 with paragraph 1.<sup>6</sup>

##### *Paragraph 3*

Same as above. It also suggested that the word "actual" be inserted before the word "danger", so that before the carrier may be authorized to unload, destroy, or render innocuous the goods accepted by him as dangerous, its "actual" dangerousness must be evident. The goods from the beginning are known to the carrier to be "dangerous"; hence, to authorize him to unload, destroy or render same innocuous, the same must have subsequently appeared to be an "actual" danger to the ship or cargo; otherwise, such a provision will give the carrier to act arbitrarily or with abuse of discretion.<sup>7</sup>

#### *Article 15*

##### *Paragraph 1*

Signature by facsimile, etc., if usage so permits, should also be recognized.<sup>8</sup>

<sup>6</sup> "Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character AND THE PRECAUTIONS TO BE TAKEN. Where dangerous goods are shipped without the carrier having knowledge of their nature and character AND THE PRECAUTIONS TO BE TAKEN, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment." (para. 2 as amended).

<sup>7</sup> "Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character AND THE PRECAUTIONS TO BE TAKEN, become [a] AN ACTUAL danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any." (para. 3 as amended).

<sup>8</sup> "The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law OR USAGE of

##### *Paragraph 1 (k)*

The word "freight" should read "freightage" because "freight" ordinarily means the goods transported while "freightage" means the cost of transportation of the "freight".

##### *Paragraph 1 (l)*

Subparagraph (l) may be deleted because it is merely a repetition of paragraph 3 of article 23. If subparagraph (l) is deleted, proposed subparagraph (m) may be subparagraph (l).

##### *Paragraph 1 (m)*

A new subparagraph (m) should be added: "The invoice or estimated value of the goods". This is important so that it may conform with the proposed amendment to article 6, that the liability of the carrier, in case of total loss, shall be limited to the value stated by the shipper in the bill of lading.

##### *Paragraph 3*

While the omission of any particulars required to be stated in the bill of lading may not affect its validity, yet in order to oblige the carrier to issue a bill of lading with all the required particulars, he should be made to suffer some punishment for his omission; that is, he shall not be entitled to the benefits of limited liability in case of loss of the goods provided for in article 6.<sup>9</sup>

#### *Article 16*

##### *Paragraph 4*

"Freight" should read "freightage" for the reasons already explained in the comments on article 15.

#### *Article 21*

##### *Paragraph 3*

The last sentence of paragraph 3 should be deleted as it may give rise to conflicting orders issued by different courts of the contracting states. The court first acquiring jurisdiction of the case should have the power to issue provisional or protective measures.

#### *Article 25*

##### *Paragraph 1*

This paragraph should be deleted as being in conflict with the provisions of article 23 of this draft convention. In so far as carriage of goods by sea from one port to another in different states is concerned, the provisions of this Convention shall exclusively apply, to avoid conflict of applicable law.

Or, above paragraph 1 may be allowed to remain if the words "not in conflict with the provisions of this Convention" will be added, such that said paragraph 1 will read as follows:

"1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents provided for in international conventions or national law relating to the limitation of

the country where the bill of lading is issued so permits;" (para. 1 (j) as amended).

<sup>9</sup> "The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading[, BUT SHALL DEPRIVE THE CARRIER OF THE BENEFITS PROVIDED FOR IN ARTICLE 6." (para. 3 as amended).



liability of owners of sea-going ships NOT IN CONFLICT WITH THE PROVISIONS OF THIS CONVENTION."

SIERRA LEONE

[Original: English]

Article 1

Paragraph 1

The definition of carrier seems to cover the contracting party or his agent. If so, why is it necessary to use "agents" outside the meaning of "carrier", as for example in article 5, paragraph 1? If the definition of carrier in article 1, paragraph 1 is not intended to cover an "agent", then add "and on whose behalf" after "whom".

Article 5

Paragraph 1

See comment on article 1, paragraph 1.

Paragraph 4

Since the carrier is always invariably the owner or master of the ship, should the burden of proof of due care not be on the carrier who will have the facts surrounding the circumstances of the fire rather than it being for the claimant to prove fault or negligence? It is considered that the common law doctrine of *res ipsa loquitur* should apply here. See article 5, paragraphs 5 and 7, where the burden of proof is cast on the carrier.

Paragraph 6

This article adopts the common law concept of particular average. It remains silent on general average thus leaving the shipper or consignee without remedy under the convention in respect of a general average act done by the carrier. It is not sufficient to leave the issue of general average to provisions in individual contracts of carriage or national laws. If the convention seeks the interest of the carrier by exempting him from liability in the case of particular average, it should also consider the interest of the shipper or consignee who may not be as conversant with shipping laws as the carrier in making adequate provisions for general average.

Article 6

Alternative E is preferred.

Article 20

Paragraph 1

The limitation period under this article should be two years.

Article 22

Paragraph 4

It is considered that this clause should be deleted. The provisions for arbitration under the convention should apply only where the parties have remained silent on arbitration. The parties should be given freedom to determine *beforehand* how best their dispute can be arbitrated when it arises. Article 22, paragraph 5, does not affect the issue as it speaks of an arbitration agreement made *after* a dispute has arisen.

Article 23

Paragraph 1

It is considered that this article should be deleted. Individual contracts should be permitted to opt out of the provisions of the convention.

Paragraph 3

The convention should apply automatically to a bill of lading which makes no mention of the convention and which does not contain provisions contrary to those of the convention.

SWEDEN

[Original: English]

GENERAL OBSERVATIONS

Ever since the initiative for revision of the 1924 Convention<sup>1</sup> first was taken in UNCTAD and UNCITRAL the Swedish Government has followed with utmost interest the development of a new international régime governing carriage of goods by sea. It is with great satisfaction that the Swedish Government notes that the detailed examination of this question carried out within the UNCITRAL working group on international shipping legislation has resulted in a draft for a new convention which from a substantive as well as a systematic point of view is in line with modern international regulation of other modes of transport. The Swedish Government finds the rules of the draft convention in general acceptable and would welcome a new international convention based thereon.

The Swedish Government recognizes that the draft convention on many vital issues is the result of carefully elaborated compromises. Since it is of paramount importance that the convention, when adopted, will be able to gain the same amount of world-wide support as the 1924 Convention presently has, it is to be hoped that the balance thus achieved will not get lost during the coming deliberations on the draft.

SPECIFIC COMMENTS

Article 5

One of the crucial issues in the draft convention is the liability régime established in the draft, in particular in article 5. From a legal point of view these rules definitely constitute an improvement as compared with the liability régime of the 1924 Convention. The mandatory period of responsibility has been extended to cover the entire period when the goods are in the custody of the carrier, his servants or agents. Article 5 sets out a presumption of fault system with vicarious liability for the carrier in respect of his servants and agents and does not include those exemptions of the 1924 Convention which are peculiar to sea carriage. The present uncertainty as to carriers' liability for delay in delivery has been resolved in an affirmative manner. The present ambiguities concerning liability for unseaworthiness of the vessel have been removed. The ratio for the burden-of-proof rule relating to fire in article 5, paragraph 4, may be questioned. It is, however, the opinion of the

<sup>1</sup> International Convention for the Unification of Certain Rules relating to Bills of Lading, done at Brussels, 25 August 1924.

Swedish Government that this rule should be retained since it is an important part of the compromise solution.

The economic consequences of the proposed liability régime are — due to lack of accurate data — difficult to assess with any certainty. A significant part of compensation for cargo loss or damage which has hitherto been absorbed by marine cargo insurance will under the proposed system in the end be covered by carriers' P & I insurance. This will not make marine cargo insurance superfluous. Cargo owners will for a number of reasons continue to cover their risks by way of cargo insurance. But recourse claims by marine cargo insurers against P & I insurers will increase, something which from a purely economic point of view has its disadvantages. As a result, cargo insurance premiums can be estimated to decrease while P & I insurance premiums will increase, an increase which probably will be reflected in the freight. According to estimates made by the Swedish insurance industry it can hardly be expected that the decrease of marine insurance premiums will totally outweigh the increase of P & I premiums.

On the basis of the foregoing it seems probable that the reallocation of risks will have as a result some increase in over-all transportation costs, at least until sufficient experience of the new system has been gained by the insurance industry. However, it should be pointed out in this context that estimates relating to the possible net effect of a reallocation of risks along the lines proposed in the draft show that the increase of over-all transportation costs would not be more than 0.5 to 1 per cent of the freight. It should also be mentioned that recent studies carried out in the United States relating to United States imports and exports of liner cargo indicate that *all* costs for cargo loss or damage (costs incurred by cargo-owners, carriers and their insurers as well as administrative costs for recourse procedures) amount to less than 0.5 per cent of the value of the goods.

Having evaluated the advantages from a legal point of view of the proposed liability system as well as the possible economic disadvantages thereof and bearing in mind the desirability of getting world-wide support for the new convention the Swedish Government finds that it can support the liability system contained in the draft. There is also another important consideration to be taken into account in this context. To an increasing extent international carriage of goods is nowadays effectuated by several modes of transport. By removing the peculiarities of the legal régime at present governing carriage by sea and aligning it with the ones governing other modes of transport one will pave the way for the establishment of a uniform system for multimodal transport of cargo.

#### Article 6

The last-mentioned aspect is of importance also as regards the system of limitation of liability contained in article 6. Conventions governing other modes of transport use the concept of limitation per kilo with regard to loss of or damage to cargo. With regard to delay, the Warsaw Convention concerning air carriage<sup>2</sup> uses the same concept of kilo limitation, while the rail-

way and road conventions use the concept of limitation related to freight.

A limitation system based on the weight of cargo lost or damaged has distinct advantages from the point of view of clarity and logic. It removes the present ambiguities concerning the "unit" concept which still gives rise to much uncertainty and litigation. In addition, it seems obvious that the limitation amount should be the same whether the goods have been packed in one large box or in 100 small boxes. For these reasons and in order to make the new convention conform to the system established for other modes of transport the Swedish Government supports alternative A and, in the second place, alternative B of draft article 6.

The limitation amount is suggested to be expressed in gold francs (so-called Poincaré francs). However, since the time when the Working Group concluded its work it has become evident that it is no longer feasible to express limitation amounts in gold units. The Swedish Government therefore proposes that the limitation amount should be expressed in Special Drawing Rights as defined by the IMF. This was the solution adopted in September 1975 at the diplomatic conference convened by ICAO for the revision of the Warsaw Convention.

#### Article 20

With regard to the limitation period (article 20, para. 1) the draft contains two alternatives. The Swedish Government is in principle in favour of a two-year period. Experience shows that the present one-year period often is too short for negotiations and the instituting of legal proceedings. Although the possibility of extension of the period exists (cf. para. 3) cargo-owners or their insurers sometimes have experienced difficulties in obtaining extension of the period from the carrier or his insurer. On the other hand, the very limited effect of the non-delivery of notice of loss, damage or delay (cf. article 19, para. 1) sometimes leads to abuses on the part of cargo-owners who may not inform the carrier of the claim until one of the last days of the limitation period. For these reasons the Swedish Government suggests that UNCITRAL should consider to couple a two-year period with provisions requiring that the cargo-owner, in order to retain his right of action against the carrier, must inform the carrier of his claim within a shorter period of time, when facts still can be ascertained and evidence secured.

#### Article 21

Article 21 relating to jurisdiction only allows proceedings to be brought in Contracting States. In particular during the time immediately following the entry into force of the Convention, this provision will produce negative effects unless the number of ratifications required for the entry into force are set at a very high number. Apart therefrom, if proceedings are brought in non-contracting States, it will be tempting for the court in question to disregard the rules of the convention if this requires the case to be abandoned even when the contract of carriage has a clear connexion with that State (e.g. the place of destination is located in that non-contracting State). For these reasons, the Swedish Government suggests that the word "contracting" be deleted in the second line of paragraphs 1, 2 (a) and 3 respectively.

<sup>2</sup> Convention for the Unification of Certain Rules relating to International Carriage by Air, done at Warsaw, 12 October 1929.

## UKRAINIAN SOVIET SOCIALIST REPUBLIC

*[Original: Russian]*

The unification of the rules of international law relating to the carriage of goods by sea is one of the tasks entrusted to the United Nations Commission on International Trade Law by the General Assembly. The text of the draft Convention on the Carriage of Goods by Sea, as adopted by the UNCITRAL Working Group, is to be regarded as constituting a practical step in this direction.

It would appear that the text of the draft Convention, as well as the comments and observations thereon which are to be submitted by the Governments of States Members of the United Nations, may be used as a basis for further elaboration of the draft at future sessions of the United Nations Commission on International Trade Law. At the same time, a number of comments should be made on certain provisions of the draft.

*The title of the draft Convention*

The draft Convention, particularly article 2, paragraph 4, which stipulates that the provisions of the Convention shall not be applicable to charter-parties, makes it clear that the sphere of application of the Convention will be limited to some extent, in other words, that the Convention will not regulate all matters relating to the carriage of goods by sea. It would seem that this should be reflected in the title of the draft Convention. Perhaps this could be done by adding the words "on the unification of certain rules relating to" to the present title.

*Article 1*

In the definition of the term "contract of carriage" (para. 5), a phrase should be added to the effect that such a contract is to be concluded in writing. This would help to obviate misunderstandings which might arise in interpreting this term.

*Article 5*

The provision stipulating that the carrier is not liable for loss of goods resulting only from *reasonable* measures to save property at sea (para. 6) raises a number of questions from the standpoint of practical application both directly at sea and in settling specific disputes, since the criterion of "reasonableness" is inadequately defined and unclear.

*Article 6*

It is suggested that alternative D, variation X, should be taken as a basis for further consideration of the question of limits of liability.

*Article 8*

It is suggested that, in both sentences of the article, the words "or recklessly and with knowledge that such damage would probably result" should be deleted, since the term "recklessness" is in effect equivalent to the term "negligence" and the words "with knowledge that such damage would probably result" can only create various problems of interpretation.

*Article 9*

It would be useful to add the words "of the country of the port of loading" at the end of paragraph 1. This

would help to clarify precisely which rules or regulations are to be applied.

*Article 15*

Paragraph 2 of this article should state that the fact of the goods being kept on deck must be reflected in the bill of lading. In case of dispute, such an entry might be of critical importance.

*Article 19*

The words "completion of delivery" in paragraph 2 of this article should be replaced by the words "transfer of the goods to the consignee". This would more accurately reflect the commencement of the time-limit for the consignee's notice in writing to the carrier.

*Article 21*

Since the problem of jurisdiction is very complex and goes beyond the scope of the draft Convention, it is suggested that this article should be deleted from the draft Convention, bearing in mind that such matters will be settled under the relevant national legislation.

*Article 22*

This article provides for a variety of places at which arbitration proceedings may be held, thus giving the plaintiff wide discretion in selecting a specific site. This may seriously impede arbitration proceedings for the settlement of disputes relating to the carriage of goods by sea. It would therefore be appropriate to delete this article from the draft Convention and simply include a reference to the arbitration clauses specifically included in the treaty on maritime transport.

## UNION OF SOVIET SOCIALIST REPUBLICS

*[Original: Russian]**Title of the Convention*

The fact that the Convention deals not with all but only with some, although of course some of the most fundamental, questions concerning the carriage of goods by sea should be reflected in the title; its present wording is too broad.

*Article 1*

(a) The statement in paragraph 4 that "goods" includes "live animals" is superfluous, particularly if article 5, paragraph 5 (see below), is retained in one form or another, as it deals specifically with the characteristics of carriage of goods of that kind.

(b) Paragraph 5 should indicate that the contract of carriage is to be concluded in writing (for example, "contract of carriage" means a contract in writing . . .).

*Article 2*

At the end of the second sentence of paragraph 4 the following phrase should be added: "if he (the holder of the bill of lading) is not the charterer".

*Article 4*

The definition of the "period of responsibility" of the carrier ("carriage of goods") as it stands could give rise to doubts as to whether the carrier is responsible for goods taken over by him for carriage not at the "port of loading" but at some other place, or for goods

at a port of trans-shipment (allowable under articles 10 and 11), and so forth.

To avoid such doubts, the last part of the sentence, beginning with the words "at the port of loading . . .", should perhaps be deleted from paragraph 1, since basically the period of the carriage of goods, i.e., the period during which the goods are in the charge of the carrier, is defined in paragraph 2.

#### Article 5

(a) Paragraph 5 is unnecessarily complicated and indeed hardly necessary at all; if damage results from "special risks" inherent in the carriage of live animals, obviously the carrier will be relieved of liability on the basis of the general principle (para. 1) because there was no fault on his part.

(b) The rule stated in paragraph 6 that the carrier shall not be liable for damage to goods resulting only from *reasonable* measures to save property could in practice lead to various disputes as to the criteria for determining whether measures were "reasonable" or for distinguishing between the saving of human lives, on the one hand, and the saving of property on the other, and, lastly, it could have an adverse effect on compliance by captains of ships carrying goods with the traditional rules of shipping for coming to the aid of other ships in distress at sea.

(c) At its forthcoming session UNCITRAL is to consider the question of whether to retain in the new Convention the existing rule of shipping legislation concerning so-called "error in navigation", and to making certain amendments to eliminate the ambiguities which have hitherto led to serious complications in applying the rule: the rule as amended could provide that "the carrier shall be relieved of liability for loss of or damage to goods or delay in delivery if he proves that they have been caused by an error in navigation".

Clearly, complete rejection of the rule would mean a considerable increase in the degree of risk for the carrier, a sharp rise in the cost of shipping, and so forth; so far, however, the economic consequences of such a redistribution of risks have not been properly studied.

#### Article 6

(a) Of the various alternatives proposed in the draft, the best basis for discussion is alternative D (with variation X: "the freight").

(b) It would be useful to include in article 6 (along the lines of article 4, paragraph 5, of the 1924 Brussels Convention or article 2 of the 1968 Brussels Protocol) a reservation referring to cases where the nature and cost of the goods was declared by the shipper and included in the bill of lading or other document evidencing the contract of carriage.

#### Article 8

Under the draft the condition for non-application of the rules on limitation of the liability of the carrier is not only an act committed by him with intent to cause damage, but also an act "done recklessly and with knowledge that damage would probably result". Basically, the word "recklessness" means the same thing as "negligence". As for the "knowledge that damage would probably result", in practice it would be extremely diffi-

cult to prove that the probability of damage was beyond the "knowledge" or foresight of the carrier. In practice this could lead to a situation where the rules for limiting the carrier's liability arising from his negligence (article 5, para. 1) would not be applicable precisely because of his negligence.

Accordingly, the words "or recklessly and with knowledge that such damage would probably result" should be deleted from article 8.

#### Article 9

(a) In paragraph 1 of this article (or in article 15) it should be provided that if goods are carried on deck that fact should be noted in the bill of lading; that provision would be important to the relationship between the carrier and the cargo owner, and also to the relationship between the shipper (seller) and consignee (buyer), particularly in connexion with insurance of the goods, settlements through banks and so forth.

(b) Paragraph 1 should also indicate which country's legislation is referred to (for example: "the country of the port of loading").

(c) The wording of paragraph 3 is not sufficiently clear; in particular, it should be redrafted so as to express more clearly the main idea of the first sentence, which, as far as can be understood, is that the provisions of article 6 (together with the provisions of article 8) are also applicable in cases where the goods are improperly carried on deck and the loss, damage or delay in delivery is exclusively a result of the fact that the goods were carried on deck.

#### Article 11

For a clearer indication of what situations are covered by this article and by article 10, it could be specified at the beginning of paragraph 1 of article 11 that the article refers to cases where the contract of carriage contains a *special reservation* (instead of "provides"), and that the carrier shall perform only the *specifically stipulated* part of the carriage (instead of simply "part" of the carriage).

#### Article 16

Paragraph 1 implies, but does not explicitly state, the right of the carrier to include in the bill of lading under certain circumstances a reservation in respect of those particulars concerning the goods the accuracy of which he had grounds to suspect or which he could not check. A clear statement should therefore be added at the end of the paragraph that under those circumstances "the carrier may include in the bill of lading the *appropriate reservation* along with special note of these grounds or inaccuracies or of the absence of reasonable means of checking".

#### Article 17

Paragraphs 3 and 4 of this article should be deleted, since the questions dealt with in paragraph 3 may, without prejudice to the objective of unification, be settled in conformity with the norms of national legislation, and the questions dealt with in paragraph 4 may be settled entirely satisfactorily on the basis of article 8.

#### Article 19

(a) Paragraphs 1, 2 and 5 of this article use different times for calculating the beginning of the period within

which the shipper is to give notice in writing to the carrier: in paragraphs 1 and 5 the time is "the time the goods are handed over to the consignee", and in paragraph 2 it is the time of "completion of delivery".

In view of the different meanings attributed to these concepts in the draft Convention (see article 4), it would be correct for paragraph 2 also to refer to "the time the goods are handed over to the consignee".

(b) Paragraph 6 should specify that notice given to the carrier shall also have effect in respect of the actual carrier who participated in the carriage.

#### Article 20

Paragraph 3 should be worded along the lines of article 22, paragraph 2, of the 1974 Convention on the Limitation Period which reads: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed."

#### Article 21

Under this article there would be many jurisdictions in different countries before which action could be brought in respect of a contract of carriage, and the choice would lie exclusively with the plaintiff, which would give rise to considerable uncertainty for the other party, the defendant.

Such a provision is obviously not in accordance with the principle of the equality of the parties and the proper balancing of their rights and interests.

Moreover, such a provision would be contrary to international agreements concluded by a number of countries containing binding rules on jurisdiction over disputes between organizations of those countries, including disputes relating to the carriage of goods by sea (for example, the 1972 Convention on arbitration, already ratified by eight members of the Council for Mutual Economic Assistance).

If the specific rule in paragraph 2 relating to the arrest of vessels is retained, it will be necessary to include a very clear reservation that the rule may not be applied to State vessels.

Accordingly, and in view of the fact that the problem of jurisdiction ("limits of international competence"), which is a separate and very complex problem, goes beyond the scope of the matter which is the subject of regulation by the draft convention, it would be advisable not to include this article and to leave the problem, without prejudice to the objective of unification, to be settled in accordance with the norms of national legislation.

Alternatively, it could be provided that the rule on jurisdiction in paragraph 1 (a) to (d) is applicable where the contract of carriage does not specify the competent court.

#### Article 22

Several of the comments on article 21 (see above) also apply to article 22 on arbitration. Moreover, the rules in article 22 on the multiplicity of places in which arbitration proceedings could be instituted create even more scope for arbitrary selection by the plaintiff than

does article 21 on jurisdiction (in respect of the actual place at which arbitration proceedings would be carried out, the form they would take—"ad hoc" or institutional arbitration—and so forth).

In practice the adoption of article 22 could lead to refusal to use arbitration in respect of contracts of carriage by sea although the value of arbitration procedures is widely recognized today—within the United Nations as well as elsewhere—and, moreover, it is more efficient, simpler and involves considerably less delay and expenditure than court proceedings.

Accordingly, this article should be deleted from the draft entirely or else restricted to recognition of arbitration clauses contained in the contract of carriage by sea.

#### UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

#### GENERAL

(1) The United Kingdom Government recognizes the extensive efforts which have been made by all parties to achieve a draft text which in its present form removes most of the obstacles to the conclusion of a convention.

(2) However, a number of problems do remain. Commercial circles in the United Kingdom consider that any increase in freight arising from a system which imposes a more "strict" liability is unlikely to be compensated by a corresponding fall in the price of cargo insurance. Cargo interests have recognized the validity of this observation and have indicated strongly that they would prefer their claims to be met by underwriters and not shipowners. They also regard it as essential that their insurance outgoings should be properly quantifiable and fear that this may not be possible if their premiums become effectively part of the freight.

Furthermore, it is thought that the imposition of a more "strict" liability on the carrier (in particular the removal of the defence of "nautical fault") is likely to be against the interests of nascent cargo insurance industries in developing countries. This point of view seems to be confirmed by recent UNCTAD studies on multimodal transport (TD/B/AC.15/7 of 28 August 1974) and marine cargo insurance (TD/B/C.3/120 of 9 May 1975).

(3) Attention is also drawn to the fact that the new distinction drawn in the draft text between liability for loss and damage and liability for delay will further complicate recovery actions, and create problems in settling claims, in that cargo underwriters will proceed for the former and cargo interests for the latter.

#### Article 1

##### Paragraph 4

It is thought desirable that the definition of "goods" should expressly include luggage not accompanying passengers. See also comments on article 25 below.

##### Paragraph 5

The words "where the goods are to be delivered" at the end of this paragraph are probably superfluous and could be deleted.

## Article 2

## Paragraph 1

As drafted, this paragraph will apply the convention to all contracts for the carriage of goods by sea and the only way of avoiding this will be to enter into charter parties. There will be cases—e.g. special or experimental cargoes—where this course would not be desirable. The parties should therefore be permitted to disapply the convention. This result could be achieved by the inclusion of the paragraph suggested by the drafting party at the sixth session of the Working Group (cf. A/CN.9/88 of 29 March 1974, para. 48).<sup>1</sup> It will be noted that this provision safeguards the special status of bills of lading as negotiable documents while allowing a sufficient degree of flexibility in special cases.

## Article 4

## Paragraph 2

Subparagraph (a) does not sufficiently cover cases (which are now frequent) where the carrier may undertake to deliver (by land or sea) outside the port of discharge and this is now important in view of the meaning of delivery assigned by article 5, paragraph 2. In such cases it is essential that the period of responsibility of the carrier under this convention should be clearly defined, to allow the parties to agree to the liability régime for the land-based transport stages of the contract and to avoid conflict or overlap with other conventions which may apply. This point could be dealt with by the addition (after the word "consignee" in subparagraph (a)) of the words "at the port of discharge," and then a new sentence "Where the goods are handed over to the consignee outside the port of discharge delivery shall be deemed to have taken place at the port of discharge." Subject to this, a more logical order for subparagraphs (a), (b) and (c) would be (c), (a) then (b).

## Article 5

## General

The one major change effected by the present text of article 5 is the removal of the defence of nautical fault which appeared in article 4 (2) (a) of the 1924 Rules. As intimated in earlier general comments, all commercial interests in the United Kingdom, shipowners, shippers and their respective insurers, are united in wanting the retention of the defence of nautical fault. Furthermore, the transfer of risk to the carrier entailed in the deletion of this defence will inevitably change the pattern of insurance in maritime commerce away from cargo insurance and to the disadvantage of developing countries. For these reasons it is recommended that serious consideration be given to reinstating the defence of nautical fault (in the narrow sense, excluding fault in the management of the ship): this could be done in a new paragraph following paragraph 3, on the lines of the text set out in the annex. It will be noted that

<sup>1</sup> This paragraph is as follows:

"Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper." (UNCITRAL Yearbook, Vol. V: 1974, part two, III, 1.)

the defence is available to the carrier only where he has taken all reasonable measures.

## Paragraph 6

The measures envisaged by this paragraph may give rise to a claim in general average, e.g. where some of the cargo carried is jettisoned to save the rest. In such cases the carrier should continue to be liable to make a general average contribution to the cargo loss (which he would not be under this paragraph in its present form). This could be achieved by the addition of the words "except in general average and salvage", after "liable" in the first line.

## Article 6

In the absence of any discussion on quantitative limits it is not possible to make a final choice of the bases of liability set out in alternatives A-E. In principle, the simplest version in A, based on weight and without separate treatment of liability for delay, is preferred.

As a matter of United Kingdom practice, when the cargo interest has paid salvage and seeks to recover from the carrier because of his fault, the claim will be subject to unit limitation. This is the case in some, but not all, legal systems. It is therefore suggested that provision be made either in article 6 or in the article dealing with general average and salvage so that cargo interests may recover in full.

## Article 7

Notwithstanding the language of article 10, paragraph 2, explicit reference to the actual carrier should perhaps be made in both these articles. As a general matter of drafting, references to the actual carrier should be harmonized throughout the Convention: at present there is potential conflict between article 10, paragraph 2, and, e.g., articles 13 and 14.

## Article 8

The loss of right to limit liability as provided for under article 6 relates to loss, damage and delay and it is thus suggested that these words be inserted in place of "damage" where it occurs in this article.

## Article 13

## Paragraph 1

It is submitted that the words "wherever possible" in the fourth line make for ambiguity and will cause difficulty in practice. The obligation to mark or label dangerous goods should not be qualified and thus these words should be removed. This reflects the views of cargo interests in the United Kingdom. Where, as a matter of fact, it is physically impossible to comply with this requirement the matter will fall to be determined by national law.

## Article 17

## Paragraph 1

The words "inaccuracies of such particulars" in the second sentence should read "inaccuracies in such particulars".

## Article 20

## General

Great concern has been expressed that the time bar in this article should not apply to claims in general aver-



age. The matter is dealt with in comments on article 24 (below).

#### Paragraph 1

Of the two alternatives, a one-year time bar is thought to be essential. It is pointed out that in the circumstances covered by subparagraph 1 (b) a claimant would be time-barred where a vessel was held up for a period longer than the limitation period and the goods were lost after the vessel was released.

#### Article 21

##### Paragraph 2 (a)

The words in the first sentence "an action may be brought before the courts of any port in a contracting State at which..." are misleading: the court's jurisdiction is rarely limited to a port area. The words "an action may be brought before the courts of a contracting State in any of whose ports" should be substituted. It is also suggested that the fora for actions under the convention should be extended by providing in this subparagraph that proceedings may be brought also in any court in a contracting State where any sister ship of the carrying vessel may have been legally arrested. This would only have effect where the arrest of the sister ship was subject to the jurisdiction of a separate court.

#### Article 24

This article remains unsatisfactory in a number of important respects, and the United Kingdom at the eighth session of the Working Group indicated that it would wish to return to this provision. As drafted article 5 (General rules on the liability of the carrier) does not apply to loss which is attributable to liability in general average, and it was thought necessary to introduce a provision (which now appears as article 24) applying the convention to claims in general average.

(1) Article 24 does not derogate from the terms of the convention and therefore a more appropriate place for it in the text is part II (liability of the carrier) where it should appear as part of article 5 or (preferably) as a separate article.

(2) It is important that the time-bar in article 20 should not apply to defeat a counter-claim by the cargo interest against the carrier where the former seeks an indemnity from the latter to cover liability which would otherwise be incurred to make a contribution in general average in respect of loss resulting from the carrier's fault. This situation occurs where general average adjustment is not completed until after the end of the limitation period. Similarly, article 6 should not apply to cargo claims in respect of general average contribution and salvage.

(3) The other method by which the cargo interest may resist making a general average contribution is to plead the "equitable defence" that the carrier may not profit from a wrong done by it in benefiting from a general average contribution from the cargo interest. This second method of protecting the interests of the cargo owner is not reflected in the present wording of article 24 and, by implication, may be excluded.

(4) Two other changes are required in article 24 to take account of the fact (a) that the "provisions in the contract of carriage or national law regarding general average" to which the convention applies relate

not to the principle of general average but to the *adjustment* of general average; and (b) that this article should also apply to claims in salvage, where similar factors obtain.

Attached to this note is an annex setting out a revised text in place of article 24 which would meet the points made in (2), (3) and (4) above, and in the second paragraph of the comments on article 6 above.

#### Article 25

##### Paragraph 2

It is suggested that a new article 25, paragraph 2, be inserted providing that no liability shall arise under the convention where the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea applies. This convention, when it enters into force, will apply to luggage accompanying a passenger—that is, "luggage" and "cabin luggage" as defined in article 1, paragraphs 5 and 6. (In comments on article 1, para. 4, above, a specific provision is requested applying this convention to unaccompanied luggage.)

#### Annex

##### A. Suggested new article 5, paragraph 3

"Notwithstanding the provisions of paragraph 1, provided the carrier has taken all measures that could reasonably be required he shall not be liable for loss, damage or expense resulting from errors in navigation."

##### B. Suggested revised text of article 24

###### "General average and salvage"

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average."

"With the exception of articles 6 and 20 the Rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may recover or refuse contribution in general average or salvage."

#### UNITED STATES OF AMERICA

[Original: English]

The Government of the United States of America welcomes the opportunity to comment on the draft convention on the carriage of goods by sea prepared by the UNCITRAL Working Group on International Legislation on Shipping in the course of eight sessions. The success of the Working Group in reaching agreement on a text to replace the Brussels Convention of 1924<sup>1</sup> and the Brussels Protocol of 1968<sup>2</sup> by a new convention is attributable to the spirit of goodwill shown by all delegations. The Government of the United States expects that such a spirit will continue to prevail during the discussion of the draft convention at the ninth session of UNCITRAL with the result that UNCITRAL will be in a position to recommend a text to the General Assembly to serve as the basis for adoption at a diplomatic conference.

In the view of the United States the draft adopted by the Working Group represents a substantial improve-

<sup>1</sup> International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, 25 August 1924.

<sup>2</sup> Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

ment over the 1924 Convention. In the main, it constitutes a satisfactory basis for further work. There are, however, a few articles which should be changed and others which are susceptible of improvement. Identification of those articles and a discussion of changes that should or might be made follow:

#### Article 1. Definitions

In paragraph 1 the definition of "carrier" or "contracting carrier" might make liable a person "in whose name", but without whose authority, a contract for carriage of goods had been concluded. We propose that "in whose name" be changed to "by whose authority".

The definition of "contract of carriage" in paragraph 5 would apply only to contracts for carriage "against payment of freight" and to contracts for the carriage of "special goods from one port to another where the goods are to be delivered". The application of the convention could, arguably, be avoided simply by not "specifying" the goods. The convention would also be inapplicable if the contract covered transportation beyond the discharging port, or if the goods were not "to be delivered" but to be transhipped at the discharging port. It is suggested that the words, "specified goods from one port to another where the goods are to be delivered" should be deleted.

The definition of "bill of lading" in paragraph 6 appears to exclude a straight bill of lading; that is, a non-negotiable document which need not be surrendered against delivery of the goods. We are concerned that this common form of documentation would thereby seem to be excluded from the convention. There are two alternatives for solving this problem.

The first alternative is to amend the definition of "bill of lading" to include the non-negotiable document that need not be surrendered. The amended text would read:

"'Bill of lading' means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods. *The bill of lading may include a condition to deliver only against surrender of the document.* A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such a *condition*."

The second alternative is not to change the definition of bill of lading in article 1 but to rely on article 18 to cover the case of the straight bill of lading which, although not a bill of lading within the definition in article 1, would be a "document other than a bill of lading issued to evidence the contract of carriage". Adoption of that course would bring the straight bill of lading within the ambit of the convention and permit it to continue to serve the function now assigned to it in commercial practice. If the latter course is preferred, the decision to rely on article 18 for this purpose should be clearly reflected in the record.

#### Article 4

Paragraph 2 of this article establishes the time at which the responsibility of the carrier terminates. Sub-paragraph (c) specifies that such responsibility ceases when the carrier has delivered the goods by handing

them "to an authority or a third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over". The draftsmen of this provision had in mind the situation in which goods are handed over to customs agents. At many ports of loading analogous situations may arise where local law or regulations impose mandatory controls or checks (e.g., the handing over to public weighers, mandatory chemical analysis or other types of physical testing, or fumigation of cargo) before loading. Article 4 should be amended to provide that in such circumstances the carrier's liability does not operate in such cases while the goods are in the charge of the intermediary. To accomplish this purpose the United States proposes that the introductory language of paragraph 2 be amended by inserting after the words "taken over the goods" the words "from the shipper or any third party, including an authority, having custody or control of the goods". The amended text would read:

"For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods *from the shipper or any third party, including an authority having custody or control of the goods, until the time the carrier has delivered the goods.*"

#### Article 5

We recommend that in paragraph 6 "and" in line 2 of the text should be replaced by "or".

#### Article 6. Limitation of liability

The United States has carefully considered the five alternatives set out by the Working Group. If, as appears to be the case, a majority of States favour alternative D, the United States would be prepared to accept that alternative with variation Y.

#### Article 11. Through carriage

In the United States the Harter Act establishes a strong public policy in favour of carrier liability until the time of proper delivery. A similar policy was thought to be the aim of the liability scheme established in the draft convention. Yet article 11, paragraph 2, would permit a carrier to insert a wide exculpatory clause in a bill of lading in circumstances in which the shipper would not know in advance that the contracting carrier will use additional facilities to carry the goods to the port of destination named in the bill of lading. In the view of the United States the simplest way to resolve this problem would be to delete paragraph 2.

Another alternative would be to limit the scope of paragraph 2 by amending it to require that the actual carrier be named in the contract of carriage before a contracting carrier could rely on the exoneration in paragraph 2. Although this solution would not be entirely compatible with the public policy provision in American law against contracting carrier exoneration it would at least call the attention of the shipper to the possibility that the contracting carrier might exonerate himself under article 11 and allow the shipper to consider whether in such case he would be satisfied with a remedy against the actual carrier.

#### Article 13. Special rules on dangerous goods

On the whole, this article seems to be satisfactory. To avoid possible ambiguity it is suggested that in both

sentences in paragraph 2 the word "dangerous" should be inserted before the phrase "nature and character". It is recalled that in reporting this article the drafting party attached a foot-note indicating that some representatives had pointed out that paragraph 1 of article 13 imposed upon the shipper who hands dangerous goods to the carrier the obligation not only to inform the carrier of the nature of the goods and the character of the danger but also of the precautions to be taken. Paragraph 2 of article 13 contains no reference to "precautions to be taken". The United States supports the views of those members of the drafting party who felt that a certain parallelism on this matter should exist between paragraphs 1 and 2. Accordingly, we would propose that the second sentence of the second paragraph of article 13 should be amended to read as follows:

"Where dangerous goods are shipped without the carrier having knowledge of their *dangerous* nature or character or *precautions to be taken*, the shipper shall be liable . . .".

Furthermore the United States considers that the convention would be clearer if a definition of dangerous goods along the following lines were to be included:

"'Dangerous goods' means explosives, flammable goods, or such other goods, in any form or quantity, which are considered dangerous or hazardous to life, health or property under international agreements, the laws or regulations of the flag of the vessel or the laws or regulations of the country of the port of loading or port of discharge."

#### Article 15

For purposes of clarity, it is proposed that in paragraph 1 (j) the final clause "if the law of the country where the bill of lading is issued so permits" be amended to read "if not prohibited by the law of the country where the bill of lading is issued". The intent is to eliminate the ambiguity that might arise if the law of the country covered neither expressly authorizes or prohibits signatures of the type specified.

Further, the United States continues to support including a provision in the draft convention that specifically states the entire bill of lading may be made by computer or other electronic or automatic data-processing systems.

#### Article 16. Bills of lading, reservations and evidentiary effect

While this article is generally satisfactory, at least one question might arise under the present formulation of paragraph 1; that is, whether a carrier had "reasonable means of checking" the particulars on a bill of lading accompanying a sealed container. It is believed that a reasonable means of checking does not include opening and counting contents of a sealed container. The text could be clarified on this point by inserting the words "as in case of a sealed container," immediately following the word "particulars" in the second conditional clause. The proposed amended text follows:

"If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods

which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a 'shipped' bill of lading is issued, loaded, or if he had not reasonable means of checking such particulars, *as in case of a sealed container*, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking."

#### Article 17. Guarantee by the shipper

The United States is not satisfied with this article. Once it is decided to include a letter of guarantee in the convention it becomes essential to insure protection of the consignee from the danger of fraud by collusion of the shipper and the carrier. This objective is attained in various ways in different national laws, usually by remitting the question to general civil law rather than seeking to handle the matter in the context of maritime law. Paragraph 3 of article 17 as it presently stands fails to protect against such fraudulent practices, and the debate on the paragraph suggests that, in view of the complicated issues that arise, it is doubtful that international legislation can achieve full protection of the consignee from fraud. For these reasons, the United States proposes deletion of paragraph 3 of article 17.

#### Article 20. Limitation of actions

The United States considers that this article requires reconsideration since it was clearly not the intention of the Working Group to cover actions against the carrier for other than cargo loss or damage. The present formulation was adopted at a time when the scope of the convention was limited to bills of lading. When the scope was changed to include all contracts of carriage article 20 should have been changed to exclude non-carriage causes of action, such as those for breach of contract to carry where the issue is whether the carrier had an obligation to carry the goods. Such issues fall outside the convention and should be governed by the civil law of contract.

The United States continues to support a one-year period of limitation for cargo loss or damage as well as for delay.

#### Articles 20-22

The United States wishes to call attention to inconsistencies in the use of terms in these articles. For example, it is not clear whether a difference in meaning is intended between the terms "plaintiff" and "claimant". The following specific changes are proposed:

In article 21, paragraph 1 (e) should be amended to read "*such additional place as may be designated for that purpose* in the contract of carriage".

In article 21, paragraphs 3 and 4, the words "paragraphs 1 and 2" should read "paragraph 1 or 2" in both sections. As written, no proceedings could be brought unless the carrying vessel had been arrested, which, of course, is not the intention.

Article 22, paragraph 2 (b) should be amended to read "*any additional place that may be designated for that purpose* in the arbitration clause or agreement".

### III. Comments by specialized agencies

#### INTERNATIONAL CIVIL AVIATION ORGANIZATION

[Original: English]

No specific comments are made on the draft articles prepared by the Working Group, but sent herewith for your information are copies of the four Protocols for the amendment of the Warsaw Convention of 1929 and that Convention as amended at The Hague (1955) and Guatemala City (1971) which were adopted by the International Conference on Air Law held under the auspices of ICAO at Montreal from 3 to 25 September 1975.<sup>1</sup> These instruments were adopted by a majority of more than two thirds of the Conference which was composed of delegations of 67 States.

The Montreal Protocol No. 4 may be of particular interest for the Working Group since it deals primarily with the carriage of cargo by air. The basic features of that instrument are:

(a) Simplification of the documentation permitting substitution of the air waybill by "any other means which would preserve a record of the carriage to be performed" thus permitting use of electronic and computerized data processing (article III);

(b) Introduction of the régime of "strict liability" of the carrier with limited deferences (article IV);

(c) The limit of liability for cargo was not increased; however, the limit is not expressed in a gold clause but in special drawing rights of the International Monetary Fund; nevertheless, States which are not members of the International Monetary Fund may declare that in judicial proceedings in their territories the limits of liability will be expressed in the traditional Poincaré franc consisting of 65.5 milligrammes of gold of millesimal fineness 900 (article VII).

Extract from the Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air. Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955.

THE GOVERNMENTS UNDERSIGNED  
CONSIDERING that it is desirable to amend the Convention ...  
HAVE AGREED as follows:

#### CHAPTER I

#### AMENDMENTS TO THE CONVENTION

##### Article I

...

##### Article II

...

<sup>1</sup> The full texts of the Protocols are found in the following ICAO publications: Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955. Signed at Guatemala City on 8 March 1971. ICAO, 1971, Doc 8932. Additional Protocol No. 1..., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9145. Additional Protocol No. 2..., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9146. Additional Protocol No. 3..., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9147. Montreal Protocol No. 4..., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9148.

#### Article III

In Chapter II of the Convention:

Section III (articles 5 to 16) shall be deleted and replaced by the following:

"Section III. Documentation relating to cargo

##### "Article 5

"1. In respect of the carriage of cargo an air waybill shall be delivered.

"2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

"3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this article does not entitle the carrier to refuse to accept the cargo for carriage.

##### "Article 6

"1. The air waybill shall be made out by the consignor in three original parts.

"2. The first part shall be marked 'for the carrier'; it shall be signed by the consignor. The second part shall be marked 'for the consignee'; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

"3. The signature of the carrier and that of the consignor may be printed or stamped.

"4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

##### "Articles 7-16

..."

#### Article IV

Article 18 of the Convention shall be deleted and replaced by the following:

##### "Article 18

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

"2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage sustained took place during the carriage by air.

"3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

"(a) Inherent defect, quality or vice of that cargo;

"(b) Defective packing of that cargo performed by a person other than the carrier or his servants or agents;

"(c) An act of war or an armed conflict;

"(d) An act of public authority carried out in connexion with the entry, exit or transit of the cargo.

"4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier,

whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

"5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

#### Articles V-VI

...

#### Article VII

In article 22 of the Convention:

- (a) In paragraph 2 (a) the words "and of cargo" shall be deleted.
- (b) After paragraph 2 (a) the following paragraph shall be inserted:

"(b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination."

- (c) Paragraph 2 (b) shall be designated as paragraph 2 (c).
- (d) After paragraph 5 the following paragraph shall be inserted:

"6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

"Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2 (b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned."

#### Articles VIII-XXV

...

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Protocol.

DONE AT MONTREAL on the twenty-fifth day of September of the year One Thousand Nine Hundred and Seventy-five in four

authentic texts in the English, French, Russian and Spanish languages. In the case of any inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail.

#### INTERNATIONAL LABOUR ORGANISATION

[Original: English]

In the ILO's opinion, the combination of articles 5 and 7 of the draft Convention provides the protection for the servants and agents of the carrier which, in the case of conventions of this kind, the ILO has always endeavoured to ensure.

#### IV. Comments by other intergovernmental organizations

##### CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT

[Original: French]

##### A. SUBSTANTIVE COMMENTS

##### Article 5, paragraph 1

We suggest that these provisions should be worded as follows:

"1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to goods, if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article 4; he shall also be liable for loss, damage or expense resulting from delay in delivery.

"The carrier shall be relieved of liability if he proves that he, his servants and agents took all measures that could reasonably be required to avoid the loss, damage or expense."

##### Reasons

Apart from other considerations it would seem pointless to make the carrier's liability for delay *a priori* subject to "the occurrence which caused the delay in delivery took place while the goods were in his charge as defined in article 4".

First of all, the person who claims that the carrier is liable for a delay might find it difficult to prove *in concreto* what occurrence caused the delay since he is unable to verify the transport process; secondly, if the delay was caused by an occurrence which took place before the carrier took charge of the goods, the carrier will always be free to prove that he, his servants and agents took all measures that could reasonably be required to avoid the loss, damage or expense caused by the delay.

Furthermore, in the Warsaw Convention, which, to some extent, served as a model for the provisions in question, the basic rule on carrier liability for delay also calls for no such condition as the one in article 5, paragraph 1, of the draft.

It would be better to have one clause dealing with the liability of the carrier and a separate clause setting forth the conditions in which the carrier can be relieved of liability.

## Article 5

We suggest the inclusion of the following clause as paragraph 2 (new):

"When it is proved that the loss or damage to the goods occurred during the carriage or that there was a delay in a delivery, it may be presumed, failing proof to the contrary, that the occurrence which caused the loss, damage or delay took place while the goods were in the charge of the carrier as defined in article 4."

Should our suggestion regarding article 5, paragraph 1 above be adopted, the text would have to be restricted to cases of loss and damage and would have to be worded as follows:

"When it is proved that the loss or damage to the goods occurred during carriage, it may be presumed, failing proof to the contrary, that the occurrence which caused the loss or damage took place while the goods were in the charge of the carrier as defined in article 4."

## Reasons

According to the general rule of evidence "*asserenti incumbit probatio*", the person claiming liability on the part of the carrier, i.e., the claimant, should prove not only that loss, damage or delay occurred, but also that the occurrence which caused the loss, damage or delay took place while the goods were in the charge of the carrier as defined in article 4.

Although the claimant cannot verify the transport process and usually does not know what occurrence caused the loss, damage or delay, production of the above-mentioned proof will occasion him no particular difficulties where he is able to show that the loss, damage or delay occurred during carriage. In fact, more often than not, the occurrence causing the damage and the consequences of the occurrence (i.e., loss, damage or delay) take place simultaneously.

In rarer cases, where such a coincidence is not immediately apparent from the circumstances of the case, the claimant could have serious difficulty in establishing proof. It would therefore seem fairer to have a presumption placing on the carrier, who is far better informed about the transport process, the burden of proof that the occurrence which caused the damage or delay did not take place during carriage. For example, when livestock die of poisoning during carriage it would be unfair to make the claimant prove that the poisoning took place during carriage rather than prior to shipment.

## Article 6

We suggest adopting alternative B, in principle. However, the provision in paragraph 1 (b) should be amplified as follows:

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not, in the case of loss or damage other than that specified in subparagraph (a), exceed double the freight."

## Reasons

It seems that, in principle, a separate (and generally lower) compensation limit should be set for damage

caused by delay, since the carrier should be expected to take greater care to keep the goods in good condition than to meet the delivery date. However, this argument would seem to be less applicable in the case of the carriage of perishable foods.

The wording of the provision in paragraph (a) of alternative B gives the impression that the limitation set on liability applies in cases where the loss or damage was caused by delay in delivery. If our information is correct, that was the intention of the Working Group. However, the text of subparagraph (b) could be interpreted as meaning that the limitation provided therein applies to any loss or damage caused by delay.

The wording suggested would make it possible to avoid disputes over this very important question.

The adoption of alternative B would also make for somewhat greater consistency with the CIM and CMR Conventions.

## Article 20, paragraph 1

We suggest prescribing a time-limit of one year.

## Reasons

A period of limitation of one year would seem to be quite sufficient, particularly as paragraph 3 of this article makes provisions for the possibility of extending it.

Furthermore, the adoption of a period of limitation of one year would make for greater uniformity in the transport laws governing different methods of transport (the general period of limitation according to CIM and CMR is one year).

## B. COMMENTS ON DRAFTING POINTS

## Article 1, paragraph 4

The French words "*une unité de transport similaire*" should be replaced by the words "*un engin de transport similaire*".

## Reasons

The term suggested is closer to the English term "similar article of transport"; furthermore in the French text of alternatives C, D and E of article 6 of the draft the English words "similar article of transport" are translated as "*engin*" (it would certainly be better, in these texts as well, to speak of "*engins de transport*").

## Article 4, paragraph 2 (b)

It would seem better to replace the words "*aux usages particuliers à ce commerce*" by the words "*aux usages particuliers au commerce considéré*".

## Reasons

The text suggested is closer to the English text; furthermore, it is not clear what the word "*ce*" refers to in the existing text.

## Article 5, paragraph 1

(a) The word "*dommage*" should be replaced by the word "*avarie*".

## Reasons

All the other transport conventions speak of the liability of the carrier for loss and "*avarie*":



CIM, article 27, paragraph 1;

CMR, article 17, paragraph 1;

Warsaw Convention, article 18, paragraph 1.

Article 105 of the French commercial code also uses this term.

The word "*avarie*" is also used in article 11, paragraph 2, of the draft convention.

If this suggestion is accepted, all similar passages should be changed accordingly.

(b) The word "*préjudice*" should be replaced by the words "*la perte, le dommage (l'avarie) ou le retard à la livraison*".

#### Reasons

In the English text the words "loss or damage to the goods, as well as from delay in delivery" are used here. The suggested translation corresponds exactly to the terms used in English.

We also feel that delay in delivery cannot be considered *a priori* a "*préjudice*"; "*préjudice*" may result, but need not necessarily result.

The English text makes a clear distinction between three concepts:

The *occurrence* which caused the loss, damage or delay in delivery;

*Loss, damage or delay in delivery;*

Loss, damage or expense *resulting* from loss, damage or delay in delivery;

and we see no good reason for not reproducing these concepts in the French text exactly as they appear in the English text.

#### Article 5, paragraph 4

We suggest the following wording:

"In case of fire, the carrier shall only be liable provided the claimant . . .".

#### Reasons

The liability of the carrier for damage caused by fire is in any case implicit in the general rule laid down in paragraph 1 of this article. The suggested wording makes it clearer that an exception to the general rule is invoked here.

#### Article 5, paragraph 5

The last part of the French text of this paragraph does not exactly correspond to the English text. It should be amplified to read as follows:

"... Il est présumé que la perte, le dommage ou le retard a été ainsi causé à moins qu'il n'y ait preuve que la perte, le dommage ou le retard résulte, *totale*ment ou *partiellement*, d'une faute ou d'une négligence du transporteur, de ses préposés ou mandataires".

#### Article 5, paragraph 7

The word "*préjudice*" (in the French text) should be replaced in three places by the words "*la perte, le dommage (l'avarie) ou le retard à la livraison*".

#### Reasons

In the English text the wording "*loss, damage or delay in delivery*" is used in three places and the text we

suggest corresponds exactly to this English text. It would be better to be consistent in the use of terminology in the English and French texts. Furthermore, delay in delivery does not always cause "*préjudice*" (see also our comment on article 5, paragraph 1 (b)).

#### Article 6, Alternative B

The French text of paragraph 1 (a) seems to be more comprehensive than the English text. In our opinion the English text should be amplified to read as follows:

"(a) The liability of the carrier for *loss, damage or expense resulting from loss or damage to the goods* according . . ."

#### Article 7

The French text of paragraph 1 should be amplified to read:

"1. *Les exonérations et limitations de la responsabilité prévues . . .*"

#### Reasons

To bring it into line with the English text, which is more complete.

#### Article 8

We suggest replacing the word "*dommage*" by the word "*préjudice*" in three places.

We also feel that, in the English text, the words "*loss, damage or expense*" should be used instead of "*damage*".

We consider these changes necessary in order to ensure uniformity of terminology throughout the convention.

#### Article 9, paragraph 1

We suggest that the close of this paragraph should read as follows:

"... aux usages particuliers au commerce considéré ou aux règlements en vigueur".

#### Reasons

The suggested text is closer to the English text; furthermore, it is not clear what the word "*ce*" refers to in the existing text.

#### Article 13, paragraph 1

The words "*leur caractère dangereux*" should be replaced by the words "*la nature du danger*".

#### Reasons

The suggested text is closer to the English text, which would seem to be more accurate.

#### Article 15, paragraph 1

We suggest that the introductory sentence should read as follows:

"1. Le connaissance doit contenir *notamment* les indications suivantes:"

#### Reasons

The proposed wording seems more flexible.

*Article 15, paragraph 1 (f)*

We suggest the following wording:

"(f) le port de chargement en vertu du contrat de transport et la date de prise en charge des marchandises par le transporteur au port de chargement".

*Reasons*

For the sake of consistency with the English text.

*Article 16, paragraph 1*

(a) The words "*d'unité*" should be replaced by the words "*de pièces*".

*Reasons*

For the sake of consistency with the terminology of article 15, paragraph 1 (a).

(b) We suggest that the French text should be brought into line with the English text as follows:

"... prise en charge ou mise à bord, lorsqu'un *connaissance 'embarqué'* a été délivré, ou qu'il n'a pas eu les moyens..."

*Article 17, paragraphs 1, 2 and 4*

The words "*de toutes pertes, dommages ou dépenses*" should be replaced by the words "*de tout préjudice*".

*Reasons*

To ensure uniform terminology throughout the convention (see the text of article 5, para. 1, for example).

*Article 21, paragraph 2 (b)*

We suggest the following wording:

"Le Tribunal du lieu de la saisie statuera sur le point de savoir si la garantie est suffisante *ainsi que sur toutes autres questions relatives à la garantie.*"

*Reasons*

The present French text does not correspond exactly to the English text.

## V. Comments by other international organizations

### INTERNATIONAL CHAMBER OF SHIPPING

[Original: English]

#### PREAMBLE

The proposed revision will have effects in a number of spheres:

#### A. Economic

What is proposed is a substantial extension of the liability of the carrier which in effect means a shift from the cargo underwriter to the liability insurer of the carrier. The cost yardstick must be borne in mind when examining the effect of the shift as well as the effect of such a shift on world insurance arrangements. Placing a high liability on the carrier will increase the carrier's costs and ultimately freight rates. It is quite clear from all the studies that have been undertaken that no commensurate decrease in cargo insurance costs can be ex-

pected. In this connexion the study by the UNCTAD secretariat on marine cargo insurance, document TD/B/C.3/120 issued on 9 May 1975 should be consulted and in particular part one, chapter 8, paragraph 176:

"Last but not least, entrusting carriers with purchase of the entire insurance cover for cargo loss or damage—and bearing in mind that the majority of shipowners are from a few developed market economy countries—would result in a further concentration of marine cargo insurance in the hands of the insurance markets of the developed countries concerned. Such a result would be harmful to the emerging insurance markets of the developing countries and would clearly be at variance with recommendations 42/III adopted by the third Conference (Santiago, May 1972), according to article 1 of which developing countries should take steps to enable their domestic insurance markets to cover in these markets—taking into account their national economic interests as well as the insured interests—the insurance operations generated by their economic activities, including their foreign trade, as far as is technically feasible."

The abolition of the defences of fire and error in navigation and the specific inclusion of liability for delay coupled with changes in the burden of proof will bring about a situation approaching that of strict liability. All studies show this to be uneconomic and undesirable. It will also not merely militate against but actually reverse the trend towards the development of local insurance markets as the burden placed on carriers will mainly be covered in traditional international markets.

#### B. Legal

In the detailed commentary a number of cases will be pointed out in which it is clear that the new revision will cause extensive and expensive litigation. It introduces unsolved questions of law as well as extraordinarily difficult questions of proof which will defeat the object of simplification and clarity. This could only be justified if it can be demonstrated that substantial economic benefits can be obtained.

#### C. Practical difficulties

In a number of instances carriers see practical reasons why the new rules would be difficult to implement and would be liable to restrict innovation in commercial documentation and this would hamper the development of more efficient transport services.

It must be recognized that a convention of this type would probably have a considerable effect on documentation for many years to come.

#### Article 1

##### Paragraph 4<sup>1</sup>

This definition includes live animals as goods whereas they were specifically excluded under the 1924 Convention. Carriers may well find themselves unwilling to carry animals unless they are permitted to do so under

<sup>1</sup> For corresponding provisions, see article 1 (c) of the International Convention for the Unification of Certain Rules relating to Bills of Lading, done at Brussels, 25 August 1924 (hereinafter referred to as "the Brussels Convention, 1924" or "the 1924 Convention").

the terms of a special contract. The following points must be considered:

1. Control of the animal is frequently in the hands of an attendant.
2. There are special risks, particularly with regard to the care that must be exercised for extremely valuable animals, e.g. special diet and water. The behaviour of animals in crowded shipboard conditions cannot be foreseen.
3. It is extremely unlikely that an innocent third party would suffer, as title would rarely, if ever, be transferred by endorsement of a bill of lading.
4. Proof of care is difficult. *Post mortem* facilities do not exist.
5. To compel the shipper, in practical terms, to insure these risks via the carrier will be the least economical method. It will also mean that all animals will be insured in this way, whether the shipper wishes it or not. In some cases shippers probably prefer to ship uninsured as the cost of insurance by whatever method is probably not economically justified.

In order to avoid any overlap with the Athens Convention, passengers' luggage should also be excluded. The first phrase should therefore read: "Goods means any kind of goods, excluding live animals and passengers' luggage, liability for which is governed by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, done at Athens on 13 December 1974".

#### Paragraph 5<sup>2</sup>

There seems to be no justification for including contracts which are negotiated at arm's length in an open market where the shipper is in at least as strong a position as the carrier. Items such as personal effects, second-hand cars, experimental cargoes and vehicles on ferries are not carried on Hague Rules terms.

Values in these cases are subjective or otherwise difficult to ascertain making insurance rating so difficult that charges will always contain a substantial element for uncertainties. These uncertainties the shipper can resolve for himself.

There is also some doubt as to whether volume contracts are included.

It is recommended that these categories be excluded. This could be effected by the proposal under article 2.

#### Article 2

##### (a) *The article as a whole*<sup>3</sup>

The effect of this article will be to reduce to a very small number the cases where general cargo carried under a bill of lading will be carried otherwise than

<sup>2</sup> The comments that are made in relation to this paragraph are also applicable to article 2 of the draft convention on the carriage of goods by sea. For corresponding provisions, see articles 1 (b) and 6 of the Brussels Convention, 1924.

<sup>3</sup> For corresponding provisions, see article 10 of the Brussels Convention, 1924, and article 5 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels 25 August 1924, 23 February 1968 (hereinafter referred to as the Brussels Protocol, 1968).

under a Hague Rules type of bill. Carriers are in principle prepared to offer Hague Rules conditions where a bill of lading is the appropriate document but application to all contracts for carriage of goods by sea seems to place an unnecessary restriction on innovation in commerce. It is wrong to assume that in all cases the shipper is in need of and desires protection.

For example, volume contracts, experimental cargoes and goods of no commercial value are carried outside the Hague Rules to the advantage of all concerned. It is therefore recommended that the following paragraphs be restored to the text:

"Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper.

"For the purpose of this article, contracts for the carriage of certain quantity of goods over a certain period of time shall be deemed to be charter-parties."

##### (b) *Paragraph 4*<sup>4</sup>

It is urged that the words "not being the charterer" be added at the end of article 2, paragraph 4 in order to remove any ambiguity in cases where a bill of lading form is used as a receipt under a charter-party.

#### Article 4

##### Paragraph 1<sup>5</sup>

This article greatly increases the liability of the carrier. Under the old rules, the carrier accepted responsibility from ship's tackle on loading to ship's tackle on discharge. He would now be obliged to accept liability from the time he takes over the goods until he delivers them. Basically, the effect of this will be a change from cargo insurer to ship's liability insurer. It will also undoubtedly bring about a state of uncertainty and considerable expensive litigation in the future. It is by no means certain that all the litigation in the various countries will produce the same result and the prudent cargo owner will, in all probability, have to insure as though the existing rules remained in force. Consequently, the cargo will be doubly insured for a considerable part of the transit time, which will undoubtedly increase costs.

##### Paragraph 2

In a substantial number of cases the shipowner, "having taken over the goods" is not the person "in charge of the goods". He may well be obliged to hand them over to a port or warehouse authority at the port of loading or at an intermediate port and cease to have custody or control.

This is another instance where the insurance placement will be taken out of the hands of the traditional cargo insurer and placed on the shipowner whose overall exposure will be increased. This will lead to higher insurance costs for the carrier which will ultimately be reflected in increased freight rates. It should also be noted that it will impose liability on the carrier in cir-

<sup>4</sup> For corresponding provisions, see articles 5 and 6 of the Brussels Convention, 1924.

<sup>5</sup> For corresponding provisions, see article 1 (e) of the Brussels Convention, 1924.

cumstances where he has no control and in which, therefore, additional liability will not improve performance.

Litigation may be reduced by defining "taken over the goods" as clearly as "delivery". The first sentence of paragraph 2 of article 4 should therefore be amended to read:

"For the purpose of paragraph 1 the carrier shall be presumed, in the absence of evidence to the contrary, to be in charge of the goods from the time he has taken them into his custody within the port area until he has delivered them:

"(a) By handling them . . . etc."

#### Article 5

##### Paragraphs 1, 2 and 4<sup>6</sup>

A burden of proof is placed upon the carrier to show that he took all measures that could reasonably be required to avoid the occurrence and its consequences.

Carriers could accept that some tightening of the burden of proof might be justified in cases where the cause lies principally within the knowledge of the carrier himself. The proposed wording is, however, an over-correction and leads to a new type of liability approaching strict liability.

A reduced defence of fire remains (see para. 4 of article 5 of the draft convention) but error in navigation and fault in management are no longer available as defences to the shipowner. Again, this will largely be a matter of shifting the insurance burden.

The interest of the shipper is served by placing upon the shipowner sufficient liability to ensure that he acts responsibly towards the goods. In the case of fire and error in navigation this is sufficiently ensured by the carrier's self-interest. If the burden placed upon him does not produce better performance but concentrates risk to a degree where cover becomes difficult to obtain and very expensive, nothing has been gained and the cost of world trade will increase. The number of imponderables makes it virtually impossible to quantify this increase on an international basis. What can be said is that the presence of uncertainties inevitably leads to higher rates.

It should be noted that shippers, carriers and underwriters all oppose the proposal.

The Commission should carefully examine the economic aspects of these changes and satisfy itself that the proposed changes will not have the effect of increasing freight rates with little or no compensatory reduction in cargo insurance premiums. If unable to so satisfy itself the defences available under the 1924 Convention should be retained to the extent necessary to avoid this danger.

It has taken several decades of litigation to establish the meaning of "due diligence to make the vessel seaworthy" and the words are still interpreted differently in various jurisdictions. Only lawyers will not regard with apprehension the litigation which will be involved in establishing the meaning of "all measures that could

reasonably be required to avoid the occurrence and its consequences".

It is recommended that the following provisions be inserted in place of paragraphs 1 and 2 of article 5:

"Article 5, paragraph 1. The carrier shall be liable for loss, damage or expense resulting from loss or damage to the goods, if the occurrence which caused the loss or damage took place while the goods were in his charge, as defined in article 4, and was due to the negligence of the carrier, his servants or agents.

"Negligence of the carrier or his servants or agents shall be presumed unless the contrary is proved if the damage or loss arose from or in connexion with shipwreck, collision, stranding or explosion or from defect in the ship.

"Article 5, paragraph 2. Notwithstanding the provisions of paragraph 1 of this article the carrier shall not be responsible for loss, damage, or expense resulting from any neglect or default in the navigation of the ship, or from fire, unless it is proved that the occurrence giving rise to such loss, or damage, or expense has been caused by the actual fault or privity of the carrier."

##### Paragraph 3

Cargo whose whereabouts is known can sometimes not be delivered within 60 days. It is recommended that the following sentence be added: "If at the expiry of the 60 days the carrier can establish the whereabouts of the goods a further period of 60 days shall elapse before the person entitled may treat the goods as lost".

##### Paragraph 5

If the case for amendment of paragraph 4 of article 1 is not accepted it will still be necessary to alter the wording of paragraph 5 of article 5 to remove a number of ambiguities. The following text is proposed:

"The carrier shall be relieved of his liability for live animals if loss or damage results from:

"(a) Any special instructions, or lack thereof, given by the shipper.

"(b) Special risks inherent in the carriage of animals. It shall be presumed in the absence of evidence to the contrary that any loss or damage resulted from these special risks."

##### Paragraph 6<sup>7</sup>

The defence of reasonableness applies only to measures taken to avoid an occurrence or its consequences. If a delay is caused by diversion of a ship to land an injured seaman whose life is in no danger but who requires prompt medical help the carrier will not be exonerated by this clause. If a carrier fails to divert he will in many jurisdictions be liable for denial of medical attention and will be open to criticism on humanitarian grounds.

Reasonable measures to avoid an occurrence reasonably apprehended would not appear to be covered.

Delay resulting in physical damage can be caused by industrial action. If the argument is conducted in

<sup>6</sup> For corresponding provisions, see articles 3 and 4 of the Brussels Convention, 1924.

<sup>7</sup> For corresponding provisions, see article 4(4) of the Brussels Convention, 1924.

moral terms neither carrier nor shipper is normally responsible. (An interesting but expensive case could be fought on the question of whether a carrier had taken all reasonable measures to avoid a seamen's strike.) If the argument is conducted in practical terms, liability for delay will be one more instance of an impractical extension of shipowner's liability, leading to higher costs.

It is therefore recommended that the words of paragraph 6 of article 5 be amended as follows:

"The carrier shall not be liable for loss, damage or delay resulting from:

"(a) Measures to save life or preserve health.

"(b) Reasonable measures to save property at sea.

"(c) Labour disputes."

#### Article 6<sup>8</sup>

Final comment cannot be made until the final proposals are known. The following general statements can, however, be made:

1. The issue should be decided on purely practical considerations. Under the 1924 Convention the shipper had the option of declaring a higher value in return for which the carrier could demand a higher freight rate. This option has seldom been exercised as the rates demanded by carriers were higher than could be obtained from cargo insurers. (The shipboard risks form only a part of the cargo insurer's exposure—the carrier's liability cover is almost entirely concerned with these risks.) If a high limitation is imposed the proportion to be borne by the carrier's liability insurance will be greater. The experience of the marine insurance industry is that this is the more expensive way to buy the additional insurance and the cost of goods will, therefore, in the long-term, rise.

2. If a high limitation is imposed the shipper of low value goods will be subsidizing the shipper of high value goods.

3. A high limit will raise the carrier's over-all exposure and cause the carrier's liability insurer to re-insure at a high price in international markets thus usurping part of the normal function of the shipper.

4. The UNCTAD secretariat study TD/B/C.3/120, paragraph 189, reads as follows:

"In conclusion, while it seems absolutely necessary to create a clear pattern of shipowner's liability both easily applicable and reducing litigation to a minimum—as regards the amounts of carrier's liability per package, unit or kilo—there is no need to introduce limits which would be higher than the real value of the ordinary cargo. As already explained in other chapters of the present study, liability insurance cover provided globally for a relatively high total amount is generally more expensive than property insurance cover for the exact value of each individual consignment. Hence the need to maintain the global liability "per ship's bottom" within reasonable insurance limits. By doing so, the aggregate cost of cargo insurance, plus carrier's liability cover, reaches its most economic level."

<sup>8</sup> For corresponding provisions, see article 4(5) of the Brussels Convention, 1924, and article 2 of the Brussels Protocol, 1968.

#### Article 7

##### Paragraph 1<sup>9</sup>

The phrase "in contract or in tort" is well understood in commercial circles but is not of universal application. It is recommended that the words "or otherwise" be added at the end of this clause.

#### Article 9

##### Paragraph 1<sup>10</sup>

It is generally understood that it is the usage in all container trades to carry containers on deck. To avoid possible litigation the following should be added at the end of paragraph 1 of article 9:

"Shipment in containers shall be deemed to constitute agreement to carriage on deck."

##### Paragraph 4

It would be possible for goods to be carried on deck without the degree of recklessness required in article 8. The paragraph should be deleted.

#### Article 13

##### Paragraph 1

Carriers have experienced cases where hazardous and polluting substances have been shipped without disclosure of their contents and it is submitted that these substances should be treated in the same way as dangerous goods.

The words "if necessary" and "whenever possible" should be deleted as they provide loop-holes for any negligent or dishonest shipper.

It is recommended that paragraph 1 of article 13 be amended to read as follows:

"When the shipper hands dangerous goods, which for the purpose of this article shall be deemed to include hazardous or polluting substances, to the carrier he shall inform the carrier of the nature of the goods and indicate the character of the danger and the precautions to be taken. The shipper shall mark or label in a suitable manner such goods as dangerous."

#### Article 14

##### Paragraph 1<sup>11</sup>

For clarity this should be amended to read: "When the goods are received into the custody of the carrier within the port area..." to accord with paragraph 2 of article 14.

#### Article 15

##### Article 15 as a whole, and paragraph 1 thereof<sup>12</sup>

It is desirable to insert requirements based on current practice which is constantly under review. Commercial requirements of shippers and banks will determine the contents of a bill of lading. Article 16 gives

<sup>9</sup> For corresponding provisions, see article 3 of the Brussels Protocol, 1968.

<sup>10</sup> For corresponding provisions, see article 1 (c) of the Brussels Convention, 1924.

<sup>11</sup> For corresponding provisions, see article 3 (3) of the Brussels Convention, 1924.

<sup>12</sup> For corresponding provisions, see article 3 (3) (a) and 3 (3) (c) of the Brussels Convention, 1924.

the shipper the protection he requires. The entire article 15 should be deleted.

In certain instances the requirements are, in any event, unworkable. In particular subparagraph (f) could not be complied with in the case of a consignment received over a number of days, nor would it be appropriate for a "shipped" bill of lading. Subparagraph (h) implies that there may be more than one original. The present aim is to reduce the number of bills of lading with only one original. Subparagraph (k) could create difficulties and mean extra documentation if the cargo were resold.

#### Paragraph 2<sup>18</sup>

For reasons stated under paragraph 1 of article 15 "the date or dates of loading" should be deleted.

#### Article 16

##### Paragraph 4

The second sentence contains an illogical conclusion, particularly in charter-party cases where charterer and shipper are one and the same and where thus the bill of lading at issuance was a receipt only and the non-mentioning of freight may have been charterer's legitimate wish. The more reasonable presumption to apply at the time of the later negotiation of the bill of lading—a transaction to which the carrier is not a party—is that carriers do charge freight for their services and that there must exist a debt for which carrier's lien ought to be preserved. Therefore, deletion of this paragraph is suggested in order to retain the present situation where the carrier forfeits his lien solely by an explicit receipt—the "freight prepaid" note on the bill of lading.

#### Article 17

##### Paragraph 3

We find it undesirable and unnecessary that the relationship between the shipper and carrier in connexion with letters of indemnity should be dealt with in this convention. The paragraph should be deleted.

##### Paragraph 4

The carrier in such a case will either be the innocent victim of a dishonest employee or will already be debarred from limitation under article 8. The paragraph should therefore be deleted.

#### Article 18

If article 4 be not amended as recommended this article should be amended to read:

"When a carrier issues a document other than a bill of lading to evidence the receipt of goods under a contract of carriage such document shall be *prima facie* evidence of the taking into custody in the port area of the goods as therein described."

#### Article 19

##### Paragraph 5

It is recommended that if there is to be liability for delay at least the words "his servants or agents" be added at the end of this paragraph.

<sup>18</sup> For corresponding provisions, see article 3 (7) of the Brussels Convention, 1924.

#### Article 20

##### Paragraph 1<sup>14</sup>

Commercial necessity demands an early end to disputes: "one year" is to be preferred, in line with the CIM<sup>15</sup> and CMR<sup>16</sup> Conventions.

#### Article 21

Whilst appreciating the desire of those proposing this article it does again seem to be an over-correction. It is recommended that (b), (c) and (d) be deleted or if this be not acceptable at least two of them as the present drafting would lead to "forum shopping" and consequent uncertainties leading in the long run to increased insurance costs.

#### Article 23

##### Paragraph 3

This provision is unnecessary and should therefore be deleted.

#### Article 25

##### Paragraph 2<sup>17</sup>

It is recommended that the words "the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material done at Brussels on 2 December 1971, or ..." be added.

#### INTERNATIONAL MARITIME COMMITTEE (COMITE MARITIME INTERNATIONAL—CMI)

[Original: English]

In order to enable the CMI as such to consider the amendments to the present 1924 Brussels International Convention on Bills of Lading as well as the 1968 Protocol thereto, some important matters of substance were discussed by the XXXth Hamburg Conference of the CMI which resulted in its so called "Hague Rules Recommendations". These Recommendations, apart from recommending the immediate ratification of the 1968 Protocol, dealt with the following questions:

- Period of responsibility
- Basis of liability
- Delay in delivery
- Limitation of liability
- Time bar

During the work by the UNCITRAL Working Group, the CMI has previously recommended to the Working Group in writing that the subject of letters of indemnity ("back-letters") should not be dealt with in the Convention. The CMI feels that the suggested provisions may indirectly be understood as a legal recognition of the use of such letters of indemnity and, apart from this, that the provision proposed in arti-

<sup>14</sup> For corresponding provisions, see para. 4 of article 3 (6) of the Brussels Convention, 1924, and article 1 (2) of the Brussels Protocol, 1968.

<sup>15</sup> International Convention Concerning the Carriage of Goods by Rail, done at Berne, 25 October 1962.

<sup>16</sup> Convention on the Contract for the International Carriage of Goods by Road, done at Geneva, 19 May 1956.

<sup>17</sup> For corresponding provisions, see article 4, Brussels Protocol, 1968.



cle 17, paragraph 3, barring the carrier's recourse against the shipper, is undesirable, primitive and unjust.

The CMI and the International Chamber of Commerce (ICC), in 1974, set up a special Working Group for the purpose of studying the possible effects of changes in the carrier's liability system on "risk" costs and a report on the findings of that Working Group has been made on 8 October 1975. It should be noted that the findings of the Working Group closely correspond with the observations by UNCTAD's Committee on Marine Cargo Insurance in its meeting in Geneva in October-November 1975 (see in particular the draft resolutions contained in documents TD/B/C.3 (VII)/SC/L.2, para. 3 and TD/B/C.3 (VII)/SC/L.5, para. 3 as well as the draft report TD/B/C.3 (VII)/SC/L.6, para. 15).

#### *The Hague Rules Recommendations*

adopted by the CMI at its XXXth Hamburg Conference

At the CMI Hamburg Conference 1-5 April 1974, where experts in maritime law from some 30 countries took part, some of the main issues presently under consideration in the UNCITRAL Working Group on Shipping Legislation were discussed. The National Associations of the CMI had earlier been invited to declare their views and the International Sub-Committee in August 1973 had submitted a reply to the UNCITRAL Working Group with respect to some questions (i.e., the carrier's liability for delay).

The present Recommendations are intended to express the general views of the shipping community. They reflect a synthesis of interests of carriers and shippers. Efforts have been made to suggest simplifications of the present rules to the benefit of all parties. A shifting of the risk allocation from the carrier to the shipper has not been considered worth while *per se*. There is, of course, an interrelation between the distribution of the risk and the freight. A fundamental change of the risk allocation to the detriment of the carrier will therefore inevitably lead to increased transportation costs.

#### *Ratification of the 1968 Protocol*

The rules and practices of shipping are subject to constant change and quite rightly. When unification of law is achieved in this respect by means of international conventions special considerations are required to broaden the scope of the application of the rules and to safeguard that the international uniformity that does exist at present is not jeopardized. It is necessary to ascertain that any proposal for amendments of the present law is well-founded and supported by a great number of countries.

At the Conference it was considered that the 1968 Protocol to amend the 1924 Bills of Lading Convention contains important improvements which should be adopted without further delay. Hence, the 1968 Protocol contains provisions removing some of the difficulties met by applying the unit limitation to container traffic by introducing a "container formula" making the packages within the container rather than the container itself the relevant units provided they have been enumerated in the bill of lading. Further, the position of claimants is considerably improved with respect to heavy units by the per kilo limitation (30 francs Poin-

caré) supplementing the unit limitation. The rules entitling the servants of the shipowner to the same exemptions from and limitation of liability as the shipowner himself are equally well warranted and urgently needed as well as the rules clarifying the position of bona fide transferees of bills of lading. Further, the provisions with respect to the possibility of prolonging the time for the prescription of claims as well as the specific three month's limit for the prescription of recourse actions are needed to remove the present uncertainty in some convention countries and thus facilitate the settling of claims. For these reasons the CMI adopted the following recommendation:

#### *Considering*

That further amendments to the Hague Rules beyond those included in the 1968 Protocol are warranted;

That it will necessarily require some time before international agreement to further amendments can be achieved, and

The urgent need of international commerce to obtain the benefit of the 1968 Protocol, the CMI

RECOMMENDS that the 1968 Protocol be ratified as soon as possible.

#### *Period of Responsibility<sup>1</sup>*

The principle of the Hague Rules that the period of responsibility is limited to the time from loading to discharge (the so-called "tackle-to-tackle" principle) may be adequate in tramp shipping where the carrier will often have no facilities of his own to store the goods before loading or after discharge. However, the situation may be quite different in liner trade, particularly when the carrier himself has not parted with the goods at the moment when the Hague Rules cease to apply. There is considerable doubt what rules then apply with respect to the carrier's liability and to what extent the carrier is entitled to exempt himself from liability under various national laws. For these reasons and for the purpose of achieving better uniformity the CMI, in principle, agreed with the present draft provision prepared by the UNCITRAL Working Group on International Shipping Legislation and adopted the following recommendation:

*Considering* that, in principle, the period of liability should cover the entire period whilst the goods are in the custody of the carrier, and that, therefore, an extension of the carrier's responsibility beyond the present period covered by the Hague Rules ("tackle-to-tackle") is required, the CMI

RECOMMENDS that the period of responsibility be extended to cover the period during which the goods are in the custody of the carrier at the port of loading, during the carriage, and at the port of discharge, provided, however, that, *in particular*, the goods shall not be deemed to be in the custody of the carrier

*at the port of loading*

prior to actual receipt by the carrier for shipment or

*at the port of discharge*

<sup>1</sup> Article 4 of the draft convention on the carriage of goods by sea.

if the goods, according to law or usage, have been handed over to an authority or to an appropriate third party which cannot be controlled by the carrier.

### *Basis of Liability<sup>2</sup>*

Following the aim to suggest only such amendments which work to the benefit of all parties involved and to refrain from changes which may produce unwarranted economic effects, the CMI agreed to *narrow* the present defence of the carrier for error in the navigation or the management of the ship but to *maintain* the defence in so far as it relates to pure navigational errors.

The deletion of the latter half of the defence—the management of the ship—is suggested. Difficulties have been experienced in several convention countries to determine exactly what is meant by “management of the ship” as distinguished from “care and custody of the cargo”. It is felt that the deletion of this part of the defence will greatly facilitate the settling of claims and avoid litigation. On the other hand, a deletion of the defence for error in navigation would imply a fundamental change of the present risk allocation between the carrier and the cargo-owner. It should also be borne in mind that an express provision subjecting the carrier to a liability for delay would accentuate the change even more. Similarly, a deletion of the fire defence would have a significant effect on the present risk allocation. The “compromise” suggested by the UNCITRAL Working Group to delete the fire defence and to place the burden of proving negligence on the part of the carrier on the cargo-owner would not counter-balance the change of the risk allocation. This being so, it is certain that the premiums for the carrier’s Protection and Indemnity insurance will rise and, owing to a number of factors, there will be no corresponding reduction of the premiums for cargo insurance. Cargo underwriters recover from carriers no more than between 10 and 20 per cent of the amounts paid out to the cargo-owners. The difficulties to estimate the increased possibilities to institute recourse actions that will follow from the deletion of the carriers’ traditional defences (i.e. error in the navigation and fire) will prevent the cargo underwriters from reducing the present premiums, at least until definite experience has been gained on the effects of the change. Hence, a deletion of the defences will cause a *higher total of insurance costs* to the detriment of all parties involved.

Further, in order to make clear that no fundamental change of the risk allocation is intended, it is necessary to spell out in any “general liability formula” that it is based on the concept of negligence so as to avoid the impression that the basis is more or less of the type “strict liability with exceptions”. For these reasons, the CMI suggested the following recommendation:

#### 1. *Considering*

That the expression “management of the ship” has proved difficult to interpret and has therefore given rise to much litigation, and

<sup>2</sup> Article 5 of the draft convention on the carriage of goods by sea.

That its deletion would not have any serious economic effects, the CMI

RECOMMENDS that the defence of error “in the management of the ship” be deleted.

2. *Considering* that the deletion of the defence of error “in the navigation of the ship” would result in higher over-all transportation costs, since an increase of the carrier’s liability would lead to higher freight rates without corresponding decrease in cargo insurance costs, the CMI

RECOMMENDS that the defence of error “in the navigation of the ship” be retained.

3. *Considering* that the deletion of the “fire defence” would result in higher over-all transportation costs, since an increase of the carrier’s liability would lead to higher freight rates without corresponding decrease in cargo insurance costs, the CMI

RECOMMENDS that the “fire defence” be retained.

#### 4. The CMI further

RECOMMENDS that, if the present liability provisions of the Hague Rules were to be altered, it be expressly stated in any such new provisions that the liability of the carrier be based on fault or negligence.

### *Delay in Delivery<sup>3</sup>*

The question whether the present Hague Rules include a liability of the carrier for delay is much debated. In any event, it is clear that, in determining whether there is a liability for delay, due consideration must be paid to the uncertainties with respect to the duration of a sea voyage as compared with air and land transportation. The reasons for making the sea carrier mandatorily liable for delay may widely differ according to the type of trade, the length of the voyage and other circumstances. While such liability may seem perfectly natural in modern short sea liner trade, it is questionable whether there should be a mandatory liability for delay in transoceanic tramp shipping, where the difficulties for the carrier are often accentuated by his lack of control of the facilities ashore. Nevertheless, the mere fact that the States which are parties to the Hague Rules in their present wording do not agree on the proper interpretation of the Rules in this respect is sufficient to warrant a clarification of the matter in any forthcoming revision of the Hague Rules. And, in view of the fact that the Courts of some Convention States have already accepted a mandatory liability of the “Hague Rules carrier” for delay—a principle which in some States has already been embodied in the national legislation implementing the Hague Rules—the CMI suggested the following recommendation:

*Considering* that the present wording of the Hague Rules does not include any specific provision on liability for delay in delivery but that, in some countries, the Hague Rules are interpreted as covering such liability, the CMI

RECOMMENDS that the Hague Rules be supplemented with express provisions relating to delay in

<sup>3</sup> Article 5, paras. 1 and 2, of the draft convention on the carriage of goods by sea.

delivery, following the same rules of liability as apply to loss of or damage to goods, but that compensation for delay should always be limited to such direct and reasonable loss as, at the time of entering into the contract, could reasonably have been foreseen by the carrier as a probable consequence of the delay and, further, limited to an amount not exceeding the freight charge. However, in no case should the aggregate liability of the carrier for loss, damage or delay exceed the limit that would apply for total physical loss of the goods in respect of which liability was incurred.

#### *Limitation of Liability<sup>4</sup>*

It is a well-known fact among practitioners of maritime law that the present wording of the limitation provisions of the Hague Rules tends to produce litigation whereby the claimants—often quite unsuccessfully—seek to “break” the limitation. This gives rise to costs to the benefit of no one and creates uncertainty with respect to the carrier’s maximum exposure with ensuing difficulties to establish the necessary insurance coverage. The CMI therefore favoured a new text for the purpose of clarifying the issue and suggested the following recommendation:

*Considering that the primary purpose of limitation provisions is to establish clearly the carrier’s maximum liability exposure and thus to constitute a firm basis for the insurance of such liability, the CMI*

**RECOMMENDS** that the carrier should always be entitled to limit his liability, unless the loss, damage or delay has been caused by his own personal act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.

#### *Time Bar<sup>5</sup>*

Provisions relating to prescription of claims are always unfortunate for claimants as they tend to cut off their remedies even when actions, apart from the time bar, could have been successfully pursued. This, however, is a necessary consequence of any rule relating to prescription. The *ratio* behind prescription rules as such is not questioned, but the rules should be clear and easy to handle in practice. An *extension* of the present period for the bringing of a suit is no guarantee that the claimants will always be in time; on the contrary, a change of the present one year period may create uncertainty in other fields—e.g. national legislation—as to the correct period. Further, the fact that a longer period than one year may be necessary for the settlement of claims does not require an extension of the legal period for prescription as that period may be extended by agreement between the parties. This is often done in practice. To avoid any uncertainty on this point the 1968 Protocol to amend the Hague Rules expressly provides that such an agreement is possible.

<sup>4</sup> Articles 6 and 8 of the draft convention on the carriage of goods by sea.

<sup>5</sup> Article 20 of the draft convention on the carriage of goods by sea.

The CMI therefore suggested the following recommendation:

*Considering the benefit of maintaining the well-established one-year limitation of time for the bringing of suit, the fact that a one-year period is not so short as to have caused difficulty in practice, and the possibility of extending the period by agreement between the parties as expressly provided for in the 1968 Protocol, the CMI*

**RECOMMENDS** that the one-year period for the bringing of suit be retained.

#### REPORT BY THE JOINT CMI/ICC WORKING GROUP ON LIABILITY AND INSURANCE

##### 1. *Introduction*

The above Working Group was set up by the CMI and the ICC in 1974 for the purpose of undertaking a statistical study on the possible effects of changes in the carrier’s liability systems on “risk” costs (see ICC Doc. 301/261, 1974-03-18). The Working Group was instructed initially to deal with maritime transport only.

Professor Jan Ramberg, Chief Legal Officer of the CMI, was elected as Chairman and the following experts have participated in the meetings of the Working Group: Messrs K. Schalling and J. C. Macé (International Union of Marine Insurance—IUMI), Mr. Descours (Shippers), Mr. C. W. Rees (ICC), Mr. G. B. Brunn (Deutscher Transport Versicherungs-Verband e.v.), Mr. R. M. F. Duffy (International Chamber of Shipping—ICS), Mr. N. M. Hudson (Institute of London Underwriters), Miss Claire Legendre (Syndicat des Sociétés Françaises d’Assurances Maritimes).

The Working Group has met on 12 March 1974 and 8 October 1975 at the ICC headquarters in Paris. At the meeting on 12 March 1974 it was decided that the study, as a first step, should be limited to an appreciation of the effect of the deletion of the sea carrier’s particular defences of error in navigation and management of the ship and fire. Since, subsequently, the final draft of the UNCITRAL Working Group on International Shipping Legislation has appeared, the study has been focused on the new liability provision contained therein (article 5), whereby the deletion of the said defences is suggested but with a modified burden of proof-rule to the benefit of the carrier with respect to damages caused by fire.

##### 2. *Statistical information*

It has been suggested—i.e. in the CMI 1974 Hamburg Hague Rules Recommendations where the *retention* of the defences of error in navigation (but not including the “management of the ship” defence) and fire is proposed—that such a changed risk distribution between carrier and cargo-owner would lead to a *higher total* of “risk” costs. It is expected that the carrier’s premiums for Protection and Indemnity (P and I) insurance will go up but that the premiums for cargo insurance will not be reduced to a corresponding degree. This is primarily due to the fact that the *net* amount recovered by cargo interests never equals the *gross* amount paid out by carriers and their insurers. The difference between the gross and the net comprises

overhead expenses and external costs for lawyer's fees, arbitrators etc. on both sides.

The Working Group has requested P and I and cargo insurers to substantiate the above assumption with statistical data but has received the answer that it is impossible to provide true statistical information based on an entirely hypothetical situation. It is not until settlements of the claims have been made on the basis of a new liability rule that one could substantiate by true statistical information that the change would lead to a higher total of insurance costs. However, the information had been received from various quarters that the amount paid by cargo insurers for so-called FPA risks (that is risks primarily connected with collisions, strandings and fire as well as general average which frequently results therefrom) amounted to about one fifth of the total amount paid for all risks. This means that a deletion of the carrier's defences of error in navigation and fire most certainly would shift the risk on to the carrier to a considerable extent and also lessen the motivation for the cargo-owner to cover himself by cargo insurance for FPA risks.

### 3. The optimal liability rule

The Working Group, at this stage, did not wish to enlarge on the general question of how a liability rule in the law of carriage of goods should be designed in order to produce the best result from an economical viewpoint. However, with respect to the proposed deletion of the defences of error in navigation and fire the Working Group wishes to make the following statements:

#### 3.1. Reasonableness

The question of *reasonableness* is wholly irrelevant, since it is easy to translate an increase of the risk into a cost factor. Ultimately the cargo-owner—directly or indirectly—would have to pay for the cost increase following from an increase of the carrier's liability.

#### 3.2. Loss prevention

It is not expected that the proposed change would have any "disciplinary" effect so as to lead to a reduction of loss or damage to cargo, since errors in navigation and fire inevitably will engage the carrier's own property which would be quite a sufficient deterrent.

#### 3.3. Harmonization of the law of carriage of goods

The deletion of the defences of error in navigation and fire would lead to a better harmonization of the law of carriage of goods by sea with other branches of transport law. Such a simplification would be of particular value in situations where the carrier undertakes to transport goods with different modes of transport. However, it is difficult to assess what *economic* advantages could follow from such a simplification.

#### 3.4. Coverage of the risk for loss of or damage to goods by carrier's liability or by cargo insurance

There is definitely an international consensus that the risk for loss of or damage to goods should, at least primarily be covered by cargo insurance. By no means should a cargo-owner be forced by mandatory legislation to buy himself protection for such risk from the

carrier only. A cargo-owner, who wishes to protect himself by an "insured bill of lading" offered to him by the carrier should of course have the opportunity to do so but he should not—directly or indirectly—be forced to use this as the only way to get the desired protection. This is also observed in the recent study by UNCTAD on marine cargo insurance (TD/B/C.3/120 dated 9 May 1975) where it is particularly stressed that the developing countries should have a greater control of the insurance of such risks than they have had so far.

#### 3.5. Is there a need for protecting cargo insurers' recourse actions by mandatory legislation?

The Working Group did not wish to make any general statement as to the desirable scope of mandatory carrier's liability legislation but emphasized the danger that an increase of recourse actions may well lead to increased total "risk" costs to the detriment of cargo interests. Forthcoming international conventions on the law of carriage of goods should be drafted in such a manner as to avoid the "dual" coverage through the carrier's liability and his insurance as well as through the cargo-owner's own insurance. Technically, this may be achieved by permitting the cargo-owner to *lessen* the carrier's liability in cases where he is protected by cargo insurance.

#### 3.6. Does the proposed deletion of the carrier's defences promote the trend towards a "full carrier's liability"?

Inevitably, the additional burden placed on sea carriers by the suggested change of the liability would give new arguments to those who profess a system of "full carrier's liability". As long as such an extended liability is *optional* for the cargo-owner it may be acceptable but the Working Group can see no advantage for the cargo-owner if he were to be *forced* into such a system by way of mandatory legislation increasing the present risk of the carrier and thereby inducing him to take on the additional risks up to the level of a "full carrier's liability".

#### 3.7. International uniformity of the law of carriage of goods by sea

The Working Group wishes to stress the danger of a destruction of the present international uniformity of the law of carriage of goods by sea which has been achieved by the 1924 Brussels Bill of Lading Convention (The Hague Rules). By all means, it has to be avoided that some States ratify a new convention while other States refrain from doing so. This would lead to endless complications, disputes as to the applicable law and jurisdiction and to a kind of "forum shopping", whereby claimants would try to select a place for the institution of legal proceedings where they believe that their interests are best preserved. This would be detrimental for all. The Working Group therefore considers that the suggested change of the risk distribution should *not* be accepted unless there is an adequate guarantee that a new convention containing such a new liability rule will be accepted at least to the same extent as the present Hague Rules.

## INTERNATIONAL SHIPOWNERS' ASSOCIATION

## Article 5

[Original: English]

## Article 1

## Paragraph 1

The contract of carriage of goods by sea on the bill of lading basis is not always concluded by the shipper. In cases when booking of ship's space precedes surrender of cargo to the carrier, in the sale and purchase FOB or FAS transactions, the contract of carriage of goods by sea is concluded by the consignee. This is why mentioning the shippers as the only contractors of the carrier seems not quite exact. It is desirable to use the term "cargo disponent" instead of "shipper", otherwise to give a definition of what the term "shipper" means for the purpose of this convention.

Paragraph 4<sup>1</sup>

If such definition is accepted, then the carrier shall be liable not only for the loss of the cargo, but also for damage to and wear and tear of its packaging. Meanwhile, the packaging could be of the kind that in the process of transportation is inevitably exposed to damage and natural amortization. The carrier must not be liable for damage to, or wear and tear of, the packaging.

Carrier's liability for packaging is possible only when durable packaging, like containers, pallets or similar articles are used for transportation. In this connexion it is desirable to word paragraph 4 of article 1 as follows:

"'Goods' means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar durable article of transport or packing, such article of transport or packing, if supplied by the shipper, is meant as 'goods'."

Paragraph 5<sup>2</sup>

As set forth above (see remarks on para. 1 of this article) the contractor to the contract of carriage of goods by sea is not always the shipper.

## Article 2

## Paragraph 3

This provision has no practical value. It goes without saying that any of the contracting States may apply provisions of the convention to the relations within domestic trades. And there is no need to set forth such a right in the convention aimed at governing the international trades.

<sup>1</sup> The text of para. 4, with emphasis added to the words with special reference to which the comment is made, is as follows:

"'Goods' means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if supplied by the shipper."

<sup>2</sup> The text of para. 5, with emphasis added to the words with special reference to which the comment is made, is as follows:

"'contract of carriage' means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered."

## Paragraph 1

Occurrences which may cause the loss of or damage to the goods or delay in its delivery are mentioned twice in this paragraph. The carrier could be exonerated from responsibility if he proves that he or his servants or agents took all reasonable measures to avoid such occurrences and their results. If such wording is retained, then the carrier has to prove that the damage was caused by particular occurrence which occurred not because of his fault, and for prevention of which he, his servants or agents took all reasonable measures. Consequently, if a particular cause of the loss of, or damage to, the goods or delay in their delivery is not found, the carrier could not be relieved from his responsibility even provided that he performed his duties properly. Since this provision puts the carrier into a very hard position, it is desirable to work out some other wording of this rule to the effect that the carrier could be exonerated from liability by proving that he took all reasonable measures to avoid losses or damage to the goods or expense resulting from delay in delivery, i.e. proving to the cargo-owner the fact of the proper execution of the carrier's duties. The fact of the proper execution of such duties being proved, the carrier is exonerated from liability, even if particular causes of loss of, or damage to the goods, or delay in their delivery have not been found.

Approximately on these lines the basic principles of exoneration of the air carrier from liability are worded (see articles 18 and 20 of the Warsaw Convention, 1929).<sup>3</sup>

In this light it is worth mentioning that the basic rule of shipper's liability is worded in such a way that in order to relieve him from responsibility it is sufficient to prove that the damage has not resulted from the fault or negligence of the shipper, his servants or agents.

Therefore it is desirable that article 5, paragraph 1, should read as follows:

"The carrier shall be liable for loss, damage or expense resulting from the loss of or damage to the goods, as well as from delay in delivery which took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid such loss, damage or expense."

## Paragraph 2

In case the ship's capacity was not fully utilized by the cargoes contracted, the carrier cannot be deprived of the right to complete the cargo by filling the free space left during the voyage. Consequently time spent on such a completion in the ports en route should not be regarded as "delay".

Analogically the shipper whose goods constitute a part of the ship's cargo only, parallel to the goods of other shippers, cannot demand that his goods should be transported directly to the destination, disregarding the goods of other shippers. Also in that case, the time

<sup>3</sup> Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, 12 October 1929, 137 League of Nations, *Treaty Series* 11.

spent at the ports en route for discharge of goods carried by one ship together with other goods cannot be regarded as "delay in delivery" of the latter, for which "delay" the carrier could bear liability.

Therefore it is necessary to add at the end of paragraph 2 the following:

"The term 'delay' does not include the time used during voyage for loading or discharging the goods."

#### *Paragraph 5*

The rule on a special risk inherent in carriage of live animals offers a very complicated solution of the division of burden of proof between the carrier and the cargo-owner. First, the carrier has to prove that he has complied with any special instructions given to him by the shipper respecting the animals, and that in the circumstances of the case the loss, damage or delay in delivery could be attributed to the risks inherent in that kind of carriage. Then enters to light the presumption that the loss, damage or delay in delivery was so caused. The burden of disproof is transferred to the cargo-owner. It is especially hard to make a division between facts providing that the damage to the cargo-owner could be attributed to the risks inherent in the carriage of live animals (the burden of proving those facts lies on the carrier) and presumed facts evidencing that the loss, damage or delay in delivery results from such circumstances. If the carrier must prove that the loss, damage or delay in delivery could be attributable to the risks inherent in carriage of animals, then there remains not much space for the application of the aforesaid presumption. In other words, at such division of duties it is almost impossible to set forth where the duty of the carrier in proving ends, and where begins the presumption the duty of disproving which lies on the cargo-owner. Practical application of this rule seems to cause great difficulties. In order to avoid these, it is desirable to relieve the carrier from the burden of proving that the loss, damage or delay in delivery are attributed to the risks inherent in carriage of live animals. Assuming that, after the carrier proves that he complied with every special instruction of the shipper respecting the animals, the presumption that the damage has resulted from special risks inherent in carriage of live animals would appear. Thus it is proposed to delete the words "... and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks ...".

#### *Paragraph 6*

The provision that only reasonable measures to save property at sea are the basis to relieve the carrier from liability is not acceptable. It is difficult to find in practice any criteria for dividing reasonable measures to save property at sea from unreasonable ones. In particular, this problem could not be solved on the basis of comparing the value of the goods subjected to risk and that of the property being saved. These amounts are not subjected to exact count until the salvage operation is accomplished. Moreover, starting such operation the carrier is not always fully aware whether his efforts are directed on salvage of goods or life (in the latter case he is relieved from liability by virtue of para. 6). In such situation the carrier has no right to abstain from taking salvage measures, even if they result in salvaging property of less value than that subjected to risk.

Thus it seems feasible to delete the word "reasonable" after the words "measures to save life and from" ... in paragraph 6. However, if this wording appears to be unacceptable to the majority of the participants at the UNCITRAL session, we would propose as an alternative to lay on the cargo-owner the burden of proving that measures taken by the carrier to save property were deliberately unreasonable. This fact being proved the carrier would not be relieved from responsibility. If this proposal is accepted, then the wording of paragraph 6 after the words "... measures to save life ..." would read: "... and from measures to save property at sea if there is no proof that in salvaging the property the carrier acted deliberately unreasonably".

#### *General remarks on article 5*

It seems reasonable to provide in article 5 a regulation relating to exoneration of the carrier from liability for the loss of, or damage to, the goods or delay in their delivery resulting from errors in navigation, unless it is proved that such loss of, or damage to, the goods or delay in their delivery resulted from the fault of the carrier himself. Retaining of a modified wording of the navigational error regulation seems justified in virtue of a number of reasons. Sea voyages continue to involve high risks. The shipowner does not have continuous effective contact with the captain, the crew, pilots and sometimes is not in the position to carry on effective control over them. Progress in shipbuilding resulted in advanced technical equipment of ships, the great increase in their size and cost of their devices. In connexion with the increase of ship's cost her owner suffers tremendous losses. It leads to the increase of insurance premiums paid by shipowners. The elimination of the exception relating to the errors in navigation would result in considerably higher insurance premia for carriers, which in turn would cause an increase in freight rates. This is why the real economic effect of the elimination of this exception is at the present time unknown and incalculable.

#### *Article 6*

Article 6 offers five alternatives for settling the problem of limiting the carrier's liability. A unified system of limitation of the carrier's liability regarding all the claims when liability of the carrier is limited with a determined amount per kilo of the goods appears to be inadequately flexible. Under a comparatively low limit the owners of low weight but highly valuable cargoes will not be able to cover their losses to a considerable extent. This is why one can imagine that this issue alone would make cargo-owners obtain a limit of liability as high as possible. If the limit is very high, it would not be applicable to the comparatively cheap cargoes. In fact the damage caused to such cargoes while carrying would be reimbursed according to their actual cost.

The system of limitation of liability for the loss, damage or expenses related to them when liability is limited with determined amounts per package of any other shipping unit or per kilo of gross weight, takes to greater extent into consideration the differences in properties and costs of carried cargoes and therefore looks more flexible.

Moreover, using one and the same limit of liability for the loss of or damage to the goods, as well as for



delay in their delivery would mean in practice that the carrier bears unlimited liability for delays in delivery since this limit in the claims arising out of delays would be too high. Limitation of liability for the losses caused by delays in delivery of the goods has to be based on other principles than that for the loss of or damage to the cargo. It seems more reasonable to limit the liability of the carrier for damage caused by delay in delivery with the amount of freight due to the carrier. Thus the best solution of all the issues involved could be achieved if alternative D is accepted provided that the liability for delay is limited with the regular amount of freight.

Nevertheless one must mention that the solution given in alternative D cannot be taken as ideal. In particular, some difficulties may arise in interpretation of paragraph 1 (a) of alternative D. In cases where some packages or other shipping units of different weight are lost or damaged, it is not quite clear, whether in determining the highest limit of liability to take into account each separate package or shipping unit or the aggregate lost or damaged goods. This item has to be clarified by way of a corresponding addition to paragraph 1 (a) of alternative D. Besides, in order to extend the right of limitation of liability to the servants or agents of the carrier acting in the frames of their duties, it is reasonable to insert the words "his servants or agents" in the first line of paragraph 1 (a) of alternative D after the words "... the carrier".

#### Article 9

##### Paragraph 1

The wording of this paragraph evokes confusion, since it is not clear whether it is necessary for the carrier in any case to obtain agreement of the shipper for on-deck carriage or whether it will be sufficient for the carrier to fulfil one of the three requirements mentioned, i.e. making an agreement, or complying with the usage in the particular trade, or complying with statutory rules or regulations.

#### Article 12

The general rule on the liability of the shipper should be rather worded in the positive mood by mentioning that the shipper is liable for the loss or damage sustained by the carrier, the actual carrier or the ship except when such loss or damage was not caused by the fault or neglect of the shipper, his servants or agents. The positive wording of this rule on the liability of the shipper would be in harmony with that of the carrier (article 5, para. 1 of the draft convention).

The rule set forth in article 12 is worded in such a way that in order to be exonerated from the liability it is sufficient for the shipper to prove the absence of his fault, or of his servants or agents. In other words, the shipper is not burdened with proving that the damage was caused by circumstances of the case to prevent which the shipper took every reasonable measure. In a case where there is no fault the shipper is exonerated from the liability even if the real causes of the loss or damage have not been found. As set forth above, in virtue of the basic rule on the liability of the carrier (article 5, para. 1 of the draft convention), to be relieved from liability, the latter has to prove that the damage had been caused by circumstances of the case

which he could not prevent by reasonable measures taken by him.

Such a divergence between the rules on liability of the carrier and the shipper seems to be not justified. In order to eliminate that, the rule on the liability of the carrier has to be modified as proposed above (cf. remarks on article 1, para. 5 of the draft convention).

#### General remarks on chapter III

It is advisable to add to part III of the draft convention a regulation governing the relations among the carrier, shipper and consignee in case the latter has not accepted the goods in the port of delivery and setting forth the legal consequences of such fact. In the corresponding article it would be desirable to specify that in case the consignee does not claim the goods or refuses to take delivery thereof, the carrier may, after having notified the shipper, discharge the cargo and place it in custody in a warehouse or at some other suitable place at the consignee's risk and expense.

#### Article 13

##### Paragraph 1

It would be reasonable to word this paragraph as follows:

"When the shipper, his servants or agents hand dangerous goods to the carrier, they shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper, his servants or agents shall, whenever possible, mark or label in the suitable manner such goods as dangerous."

##### Paragraphs 2 and 3

Each of these paragraphs stipulates the right of the carrier to unload, destroy or render innocuous dangerous goods "as the circumstances may require". One may conclude that in both mentioned cases the carrier has the right to dispose of the dangerous goods when they become a danger to the ship or other cargo, but not only in the case set forth in paragraph 3. In this situation the manner of disposal has to be based on the circumstances of the case. It stems from here that if a claim arises, the carrier has to prove that the manner of disposal of the dangerous goods chosen by him correlates with the circumstances of the case. This fact being proved, the carrier sustains all the related unfavourable consequences, in particular the payment of the corresponding compensation to the cargo-owner.

The requirement of correlation of disposal of the dangerous goods with the circumstances of the case is not always possible to comply with, but the legal consequences of the case for the carrier arising from the infringement of this requirement are very strict. The carrier is not always in a position to determine the extent of the danger connected with carriage of a particular cargo and therefore is practically deprived of the possibility to choose the adequate manner of disposal of the cargo. One cannot require that from the carrier in the really dangerous situations threatening the ship or other cargo. Therefore it would be quite desirable to retain in the convention the principle of freedom of choosing by the carrier the manner of disposal of the cargo which becomes a danger.

In order to avoid the regulation set forth in paragraph 2 looking like a sanction for solely the fact of loading dangerous goods without the knowledge of the carrier, we would propose to add to paragraph 2 after the words "... where they have been taken in charge by him without knowledge of their nature and character" the words "and such goods become a danger for the ship or other cargo". The words "as the circumstances may require" should be deleted from paragraphs 2 and 3 in order that the carrier would not be limited in choosing the manner of disposing with the cargo when such danger arises.

The draft convention does not deal at all with the right of the carrier for the payment of freight in cases where the dangerous goods are unloaded earlier than at the place of destination, destroyed or rendered innocuous. The solution of this problem would have to be interdependent on whether the carrier had the knowledge of the nature of the cargo and of precautions to be taken. In the former case, the carrier had been aware that the carriage was connected with a definite danger and received a higher freight for that. Therefore, if in this case the result of the carriage has not been achieved or was achieved only partially, it would be reasonable to admit that the carrier has the right to the freight in the amount proportional to the distance in fact covered by the ship with that cargo.

In the latter case, the carrier when entering a contract of carriage was not aware of the danger connected with carriage of the cargo taken care of by him. Consequently, if as a result of a danger which could not be foreseen by the carrier, the cargo cannot be delivered to the port of destination, the carrier retains his right to the freight received, and where the freight has not been received in the port of loading, he can recover it in full. These rights of the carrier have to be stipulated in the rules on dangerous goods.

#### Article 15

##### Paragraph 1 (b)

As set forth above the definition of "goods" requires some revision since this term should not include the packaging (see remarks on para. 4 of article 1 of the draft convention). If the corresponding modification is introduced into the definition of goods, paragraph 1 (b) of this article has also to be revised. Speaking of the packed goods one should mean not the condition of the goods themselves, but that of their packaging. Therefore, the wording of paragraph 1 (b) of this article ought rather to read as follows: "the apparent condition of the goods or their packaging".

#### Article 16

##### Paragraph 1

This paragraph does not directly stipulate the right of the carrier to make reservations. Such right is just meant here. But in the whole, the rule set forth in paragraph 1 relates only to the obligations of the carrier to specify the grounds on which he suspects the particulars of the bill of lading inaccurate or which he has no reasonable possibility to check.

Such wording of the paragraph does not fully correspond with paragraph 3 of this article which stipulates

a reference to reservations set forth in paragraph 1 and means reservations of the carrier concerning the particulars of the goods. In fact, paragraph 1 does not read anything about such reservations. In this connexion it is preferable to set forth directly in the convention the right of the carrier to make notes of the cargo on the bill of lading.

As for the obligation imposed on the carrier in virtue of paragraph 1 of this article to specify the grounds for which he suspects the particulars of the bill of lading inaccurate or has no means of checking them, this regulation is not fixed in every legal system. As stated in the fourth report of the Secretary-General on responsibility of ocean carriers for cargo (para. 37),<sup>4</sup> the practical application of this regulation would meet considerable difficulties.

The requirement to specify the grounds for which the carrier suspects the particulars of the bill of lading to be inaccurate or has no means of checking them, would in practice lead to elaboration by the carrier of some standard or unified reservations which he would introduce in bills of lading. If the holder of the bill of lading being a third person disagrees with such reservations he has to disprove them. Thus, a burden of proving discrepancy of the motives noted by the carrier with the circumstances of the case is cast on the holder of the bill of lading. If a holder of the bill of lading manages to prove such discrepancy, then the carrier's reservations concerning particulars stipulated in the bill of lading would have no legal effect. In other words, notwithstanding the availability of a reservation, the bill of lading has to be admitted as clean. However, if groundlessness of the motives shown by the carrier has not been proved and the bill of lading is not consequently clean, then its holder has to prove that the loss of, or damage to, the cargo occur in the period when the cargo had been taken care of by the carrier. Consequently the process of proving for the holder of the bill of lading is divided here into two parts. First, he disproves the motives given by the carrier, and then their groundlessness being not proved (such fact has to be fixed by a court or arbitration body) tries to prove that the loss of, or damage to, the cargo occurred in the period when the cargo has been taken care of by the carrier. Thus because of setting forth in the convention of the requirement to show the grounds for which the carrier suspects that the particulars of the bill of lading are inaccurate or that he had no means of checking them, proving this fact for the court or arbitration body becomes considerably difficult.

##### Paragraph 2

Here, after the words "apparent condition of the goods" used twice, it is desirable to add correspondingly twice "... or its packaging" (cf. remarks on article 15, para. 1 (b) above).

##### Paragraph 3 (b)

Mentioning that the notion of the holder of the bill of lading—third party—includes any consignee in good faith, is superfluous.

<sup>4</sup> A/CN.9/96/Add.1; UNCITRAL Yearbook, Vol. V: 1975, part two, IV, 2.

*Paragraph 4*

The rule stipulated in this paragraph puts the carrier into a desperate situation by depriving him of the right for the lien on the cargo when the freight has not been paid by the shipper and the bill of lading by any reason has no indication that the freight should be payable by the consignee. It should be better to delete this rule from the draft convention.

*Article 17**Observations common to paragraphs 2, 3 and 4*

Everywhere in all these texts there is no need to add "including any consignee" after the words "... third party".

*Paragraph 3*

This provision puts the carrier into a very hard position. Receiving a letter of guarantee from the shipper and issuing in exchange a clean bill of lading always means a refusal from some reservations concerning particulars of the bill of lading. Such refusal quite naturally gives rise to an assumption of the intention to defraud a third party. From that easily comes the conclusion about the letter of guarantee being void for the shipper as well.

The provision set forth in paragraph 3 puts the carrier in a position unequal to that of the shipper. The latter in case of issuance of a letter of guarantee with the intention to defraud a third party bears practically no responsibility, although he is the initiator of the fraud. Therefore it would be much better to let the corresponding national legislations and legal and arbitral practice regulate the validity and importance of letters of guarantee as regards shippers.

*Paragraph 4*

The draft convention stipulates a general rule on the loss of right to limit the liability of the carrier (article 8). In order to avoid discrepancies in the contents of the convention, only the criteria set forth in that article should be taken into consideration in settling the problem whether the provisions on limitation of the liability are applicable or not. Therefore, the provision of paragraph 4 dealing with a particular case of loss by the carrier of his right to limit the liability is better omitted.

*Article 18*

The pure fact of concluding the contract of carriage is not equal to taking over the goods by the carrier. In other words, the contract of carriage cannot constitute by itself any evidence of such taking over of the goods. Consequently the provision of this article should refer only to the documents other than bills of lading, evidencing not only the contract of carriage (e.g. charter-party, booking note), but also taking over the goods by the carrier. Therefore the wording of article 18 is to be amended in the following way:

"When a carrier issues a document other than a bill of lading to evidence a contract of carriage and receipt or acceptance of the goods, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described".

*Article 19**Paragraphs 2 and 5*

In order to avoid ambiguities in interpretation of the word "days" (consecutive days, working days, etc.) an indication that in both cases the consecutive days are meant is preferable.

*Article 20**Paragraph 1*

The limitation period for actions for indemnity against the carrier seems to be one year. Such period is quite sufficient for foundation and bringing up an action against the carrier. On the other hand, a year's period permits to settle up a claim without unnecessary delays. Moreover, one more thing in support of a year's period is that in accordance with paragraph 3 of this article this period may be extended.

*Article 21*

The provisions on jurisdiction set forth in this article seem not to be acceptable for a number of reasons. If these provisions were adopted and included in the convention it would mean a flat denial of many years' practice in settling the problem of jurisdiction on the basis of the agreement of the parties.

The content and construction of paragraph 1 reveal that although it provides the possibility to bring an action in the place designated in the contract of carriage, it does not exclude for the claimant the possibility to choose any place of the four listed in the paragraph, i.e. the port of loading, the port of discharge, the principal place of business of the defendant or the place where the contract was made. Practically, this gives the claimant the possibility to reject unilaterally the agreed place for settling the claim and in fact makes the importance of such an agreement null.

Giving the claimant the right to bring the action in the place where the contract was made would practically mean that the legal proceedings arising out of the contract of carriage could be brought in courts situated far away both from the principal place of the carrier's business and from the ports of loading or discharge.

Paragraph 2 of this article provides the possibility to bring up an action at the place of the arrest of the carrying vessel. This paragraph is not acceptable in general for the countries which follow the principle of the sovereign immunity of vessels owned by State bodies and assert the impossibility of their arrest.

One should also bear in mind that according to the legislation of a number of States, bringing up actions *in rem* is impossible.

The above considerations make the provisions of the draft convention on jurisdiction unacceptable in the whole. It is preferable to give up the intention to include in the convention any provision on jurisdiction giving thus the parties the right to choose the place of bringing up actions and the legislation to apply by means of corresponding agreements at their option.

*Article 22*

The provisions on arbitration give rise to mainly the same objections as set forth in connexion with the preceding article.

The option given to the parties to designate the place of the arbitration proceedings in the arbitration clause or agreement (para. 2) (b) does not prevent the plaintiff from enjoying his right to choose the place of institution of the arbitration proceedings given to him in virtue of paragraph 2 (a) (para. 4). This provision devaluates the importance of the agreement of the parties about the place of arbitration proceedings and introduces doubt in the purposefulness of such agreements.

The complicated provision on arbitration, limitation of the parties' choice of the place of institution of arbitration proceedings may make shipowners give up the inclusion of arbitration clauses in bills of lading.

Bearing in mind the aforesaid considerations one has to admit that the inclusion of the arbitration provisions in the convention is not justified. Much better would be to give the right to the parties to settle the problem of arbitration proceedings by mutual agreement and by way of introducing corresponding clauses and agreements into the contracts of carriage.

#### INTERNATIONAL UNION OF MARINE INSURANCE

*[Original: English]*

##### GENERAL OBSERVATIONS

First, IUMI wants to draw attention to the fact that the shipping legislation as enacted in the 1924 Brussels Convention, the Hague Rules, has been generally adopted by trading nations in the world and has created a high degree of stability as far as the liability of shipowners for goods is concerned. The bill of lading based on this legislation may still be considered as one of the most important commercial documents in international trade. As it takes a considerable time before an international convention is generally adopted, and in the case of the 1924 Brussels Convention this state was reached only after World War II, a redrafting should be based on careful considerations of the achievements that could be made.

It should also be taken into consideration that shipping legislation is a field which concerns international trade and principally parties who are directly engaged in such trade with a perfect knowledge of the risk-takings involved.

The Hague Rules compromise of 1924 laid down a certain allocation of the risks between the carrier and cargo. The risks particularly allocated to cargo, especially those of nautical fault and fire, were listed in the Convention. Compensation in case of loss or damage under these risks is ensured by cargo insurance. Risks that are allocated to the carrier are compensated for under the carrier's liability insurance (P and I). This explicit allocation of the risks to the two parties of the freight contract has helped international trade to create an adequate protection of the goods against loss and damage in transit. Though experience has shown that the borderline between the risks attributed to the carrier and those borne by cargo is not perfectly clear, the allocation nevertheless has effectively contributed to limit the number of litigations.

The draft proposed by UNCITRAL would change the fundamental relationship that presently exists between the carrier and cargo. There will be a consider-

able transfer of the risk to the carrier with consequences in the insurance arrangements. The situations where the carrier may be exempted from liability will be less precise. Basing the comments on its experience and knowledge in the field of insurance protection of goods in transit, IUMI will lay particular emphasis on the consequences of this transfer of the risks.

In conclusion, it is the considered opinion of IUMI that world trade is better served under the system set out in the current Hague Rules than would be the case under the proposed draft convention. It is recognized, however, that this view may not be acceptable to the delegates dealing with the next stage of the revision. Accordingly IUMI draws attention also to certain specific matters in the draft.

##### SPECIFIC COMMENTS

###### Article 1

###### Paragraph 4

The proposed definition of goods in the draft implies that the carrier would assume the same liability for cargo carried under deck and on deck considering however the particular prescriptions in article 9 concerning deck-cargo. IUMI finds this new formula satisfactory and in line with modern transport technique.

###### Article 2

IUMI has no objection to the new criteria for the scope of application which conform in principle with the technique of other conventions in the field of transport. In carriage between two States one of which is a contracting State the new rules will have full effect, however, only if legal proceedings take place in the contracting State. The non-contracting State will of course not be bound by the rules of the Convention.

###### Article 4

The new wording regarding the period of responsibility means that the tackle-to-tackle coverage under the present Hague Rules is replaced by a coverage from the moment when the carrier has taken the goods in charge at the port of loading until delivery of the goods at the port of discharge. IUMI believes that this change would be workable. It is also in conformity with practice developing in certain liner trades.

###### Article 5

The new text under this article means a fundamental change of the present allocation of risks between the carrier and the cargo. The list of exonerations in the Hague Rules is replaced by a general formula which means that the carrier shall be liable unless he proves that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". The new formula would leave a wide field open for interpretations which would require extensive litigation. The Hague Rules-catalogue on the other hand has the advantage of being well known and clarified by a number of interpretations in court, which means that litigation nowadays is needed only in few cases.

The new formula would also mean a transfer of risks from the cargo to the carrier. The consequence would

be a considerable increase in the premium for the carriers' liability insurance protection. It is clear that this higher premium will be passed on to the cargo owner through an increased freight charge. The cargo owner would nevertheless be in need of his cargo insurance on a "warehouse to warehouse" basis in order to be sure that he will be compensated in case of loss or damage to the goods in transit. Bankers and other credit institutions would also, under the new formula, require a cargo insurance when advancing money under a letter of credit or a documentary proceeding.

There would be an increase of recovery actions taken by cargo insurers against ocean carriers. On the one hand the greater liability of the carrier ought, in theory, lead to a reduction of the premium for the cargo insurance, but on the other hand it is to be expected that this reduction will only be limited due to the costs involved in recovery actions, as it is a well-established fact that recovery actions consume time, energy and money. The over-all effect would be an increase of costs for the cargo owner.

The risk allocation as proposed under the present draft would, in the long run, reduce the over-all capacity of the cargo insurance system by shifting the risk from the cargo to the carrier. This would no doubt make it more difficult to assume under the cargo insurance the very high risks that come under consideration today.

The draft also introduces a liability for delay in delivery. Though such a liability on a contractual basis seems to correspond to certain trends in modern transport, IUMI will question whether it is advisable to introduce a liability for delay in shipping legislation.

If a particular time-limit has not been expressly agreed upon between the shipper and the carrier, the application of the formula of "the time which it would be reasonable to require of a diligent carrier" seems to lay the way open to litigation. The most complicated issue in relation to delay, however, will be what kind of damages should be compensated for. If the problem of the time-limit is clear, it would be natural to accept damage to the goods due to delay, which in fact already is an accepted interpretation of the Hague Rules in certain countries. What is much more complicated is the determination of consequential losses due to delay. If such a liability would be included IUMI strongly urges that it should be limited to what could reasonably be foreseen by the carrier as a probable consequence of the delay.

IUMI holds the view that the main purpose of shipping legislation should be to define as clearly as possible the obligations of the parties to the freight contract. This purpose seems to be fulfilled to a higher degree under the current Hague Rules than it is under the draft convention. IUMI is thus in favour of maintaining the present allocation of risks between the carrier and cargo. For a more extensive argument in this field reference is made to the IUMI brochure on "The Essential Role of Marine Cargo Insurance in Foreign Trade" which will be published in the next few weeks.

#### Article 6

As no limits of liability have been proposed under this article, IUMI will only suggest that the limits be as

reduced as possible in order not to stimulate any further recourse actions from cargo insurers. It should also be borne in mind that, if article 5 of the draft convention is accepted, the carrier in most cases will be liable for total loss of the cargo. This implies that he must have an insurance protection which covers the maximum limitation of a full cargo carried on board the ship. Any amount exceeding the limits laid down in the Visby Rules would lead to excessive exposure particularly for modern ships designed to carry general cargo.

The various alternatives put forward seem rather confused, particularly as far as limitation in case of delay is concerned. If such a liability is accepted, it should in the opinion of IUMI be limited to the amount of freight in all cases where there is no physical loss or damage to the cargo. It has to be decided, however, whether freight means the freight for the whole cargo or for the whole bill of lading or for the cargo delayed. The latter alternative seems to be more in conformity with a possible limitation per kilo of gross weight of the goods lost or damaged.

In discussing the limitation it should also be taken into consideration what will be the over-all limit of liability for the sea-carrier under the 1957 Convention.<sup>1</sup>

#### Article 8

When a limit of liability once has been agreed upon, it would be to the advantage of all parties concerned if it be applied to all loss and damage irrespective of circumstances. The proposed wording seems to meet this view. It would be acceptable, however, in accordance with the draft, if the right of limitation is lost when the damage is intentionally or recklessly caused with knowledge that such damage would probably result.

#### Article 9

IUMI has no objection to the new formula under which the carrier shall be entitled to carry the goods on deck, if this is in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations. Particularly in container transports on ships designed for this purpose it is already general practice in most countries to insure the cargo under the same conditions whether it is carried in container on or under deck. It is not entirely clear, however, what would be the situation in a deviation, where the carrier gives an under-deck bill of lading and then stows the cargo on deck. Even if paragraphs 3 and 4 purport to take care of the quantum of damages, the common law of deviation has not been excluded.

#### Article 10

By introducing the concept of the contracting carrier in the convention there is also a possibility to introduce a second level of carriers' liability, that is if the contracting carrier uses his prerogative to assume obligations not imposed by the convention. It may be questioned whether it is necessary to deal with the contracting carrier-concept in the convention. It may be left entirely to solutions in private contract.

<sup>1</sup> International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, done at Brussels, 10 October 1957.

*Article 15*

With the current world moves to simplification of shipping documents IUMI feels that there are too many mandatory particulars proposed in this article. Only those items which are commercially necessary should be specified in the bill of lading.

*Article 17*

IUMI suggests that paragraphs 2, 3 and 4 of this

article dealing with letters of guarantees be deleted. This does not mean that IUMI favours the use of letters of guarantee. On the contrary, IUMI has on many occasions taken a firm attitude against the fraudulent use of letters of guarantee. Considering, however, the very complicated issues in this connexion, IUMI fears that the present wording of the paragraphs in question could lead to difficult litigations. It would therefore be better not to deal with this question in the convention.

**2. Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (addendum): additional comments by international organizations (A/CN.9/109/Add.1)\***

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**CENTRAL OFFICE FOR INTERNATIONAL RAILWAY  
TRANSPORT**

*[Original: French]*

We acknowledge receipt of document A/CN.9/109\*\* of 29 January 1976 entitled "Comments by Governments and international organizations on the draft convention on the carriage of goods by sea", for which we thank you warmly.

It is clear from this document that several States and some international organizations are critical of article 5 of the draft convention, which no longer provides for "nautical fault", one of the traditional defences under the law relating to maritime transport. In our view, it would be unfortunate if the calls for the reinstatement of that defence were heeded. In the first place, the omission of that defence, as advocated by the majority of States concerned, would make it easier to take account of the necessary legal considerations concerning the carrier's responsibility; secondly, it would contribute to the harmonization of laws relating to transport at the international level.

**INTERNATIONAL CHAMBER OF SHIPPING**

*[Original: English]*

The International Chamber of Shipping<sup>1</sup> has read with interest the report of the UNCTAD Working Group on International Shipping Legislation<sup>2</sup> dealing with the draft convention on the carriage of goods by sea prepared by the UNCITRAL Working Group on International Legislation on Shipping.

ICS has already sent its comments on the draft convention and its views are unchanged.

When commenting on the draft convention, ICS did not comment on article 8 because it was broadly ac-

ceptable. The UNCTAD Working Group report recommends that consideration be given to the extent to which the concept of the carrier might be broadened to include servants or agents, in the light of the limit of liability to be inserted in article 6, paragraph 1. It is submitted that any such consideration should produce the same result as that arrived at in the UNCITRAL Working Group and reflected in the draft convention as the effect of weakening in any way the carriers right to limit can only have a most serious lowering effect on the amounts which could be inserted in draft article 6, paragraph 1. Further it would constitute a shift which could only be considered as radical, not merely in its effect on the relative insurance burdens borne by cargo insurers and carriers liability insurers, but in its effect on insurance costs. The formula developed through international compromise in the 1961 Carriage of Passengers Convention,<sup>3</sup> the 1969 Luggage Convention<sup>4</sup> and the 1974 Athens Convention on the Carriage of Passengers and their Luggage<sup>5</sup> and incorporated in the draft Convention on the Limitation of Liability in respect of Maritime Claims cannot be swept aside in relation to cargo claims without affecting the position with regard to those conventions.

For these reasons it is strongly urged that article 8 be not amended.

The ICS view on article 5 remains as stated in the comments already tabled. Those opposed to reinstatement of the defence of error in navigation at the UNCTAD Working Group meeting mainly based their arguments on one of three premises:

<sup>3</sup> International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, Brussels, 29 April 1961.

<sup>4</sup> International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea, Brussels, 27 May 1967.

<sup>5</sup> Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Athens, 13 December 1974.

\* 30 March 1976.

\*\* Reproduced in this volume, part two, IV, 1, *supra*.

<sup>1</sup> Hereinafter abbreviated as ICS.

<sup>2</sup> TD/B/C.4/ISL/21.



(1) The effect of the shift of the insurance burden resulting from the draft convention would not affect existing insurance arrangements to an extent which would be considered as "radical" by the UNCTAD Committee on Invisibles, Trade and Finance. This is at the very least debatable.

(2) There is a substantial shift, and, if this were not so, there would be little point in having a new convention.

(3) If there is a radical shift it will not have an adverse effect on smaller insurance markets as new sources of liability insurance will appear. In this connexion it is interesting to note that the UNCTAD secretariat report on liability and cargo insurance cover under international multimodal transport operations (TD/B/AC.15/14, dated 14 January 1976, at para. 76) states categorically that "the possibility that the insurance markets of less developed countries will soon become suppliers of extensive liability cover to carriers

(especially to ocean carriers) and to MTOs is extremely remote".

None of these, at times conflicting, views outweighs the arguments in favour of retention of the defence. There will clearly be a shift away from cargo insurance to liability insurance which can only be to the detriment of cargo insurance markets which are unable to benefit from any increase in liability insurance. The cumulative effect of abolition of the existing defences, specific imposition of liability for delay and change in burden of proof will certainly bring about an increase in carriers' costs which will be reflected in higher freight rates. No significant benefit for anyone has been established. ICS therefore strongly recommends:

(a) That the defence of error in navigation be reinstated.

(b) That article 8 be retained as drafted by the UNCITRAL Working Group.

### 3. Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (addendum) (A/CN.9/109/Add.2)\*

#### LIBYAN ARAB REPUBLIC

Before making our comments on the text of the draft Convention article by article, we would like to point out that the Libyan Arab Republic has not acceded to the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924, as amended by the Brussels Protocol of 1968. However, the Libyan Arab Republic has incorporated the provisions of this Convention into its own maritime law issued in 1953.

#### Article 1

A. Paragraph 1 does not indicate that the carrier should own or rent a vessel in order that he may implement the contract of carriage. This contradicts article 1, paragraph 1, of the Brussels Convention of 1924.

B. Paragraph 2 made reference to the "actual carrier", and it defined "actual carrier" as any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods. We believe that the provisions on "carrier", "contracting carrier", and "actual carrier" will raise many ambiguities in determining liability. We are of the opinion that it would be a better solution to use the term "carrier" contained in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

C. The definition of consignee in paragraph 3 is ambiguous and calls for additional details. The definition fails to clearly indicate according to which regulations or point of reference a person is entitled to take delivery of the goods.

"Consignee" could be defined in the same manner as in the French Act of 31 December 1966 concerning contracts of leasing of vessels and of maritime carriage. In this Act, "consignee" is defined as follows: "Con-

signee means a person who is entitled to receive goods according to the contract of carriage; he is the person whose name is registered in the bill of lading when it is nominal, or who presents the bill of lading upon arrival when the bill has been issued to bearer, or the last endorser when the bill is promissory."

D. Paragraph 4 extends the definition of "goods" to include live animals and goods carried on deck, contradicting article 1, paragraph C of the 1924 Brussels Convention.

We believe that the definition of goods should clearly include luggage not accompanied by passengers.

E. Paragraph 5 defines "contract of carriage". It is possible to omit the last phrase of this paragraph, which reads "where the goods are to be delivered", for it serves no purpose.

It seems necessary to add "consignee" to the definition of contract of carriage; only the shipper and the carrier are mentioned in the definition. The consignee should be enabled to invoke the contract of carriage to which he is not a party. If a bill of lading, which is a document that evidences the goods, did not exist, the consignee would not be able to exercise the rights of the shipper unless he was enabled to utilize them under the provisions of national legislations recognizing such right. In most, if not all countries, there are no such provisions in national legislations; there is no provision enabling a consignee to exercise the shipper's rights.

To avoid recourse to national legislations, it is desirable that the International Convention should include a definition of contract of carriage that establishes the rights of shippers and carriers and indicates the consignee's rights. It is necessary to determine the consignee's rights in case there is no bill of lading.

In addition to the foregoing, it should be explicitly provided that the carrier acquires, under the contract

\* 5 October 1976. The comments reproduced in the present document were received after the ninth session of UNCITRAL.

of carriage, the right to pursue on behalf of the consignee a claim developing from the contract, especially in reference to the payment of freight charges.

On the basis of the above, the following phrase should be added to article 1, paragraph 5: "Under this contract, the consignee shall be entitled to exercise the shipper's rights and be bound by his obligations."

F. Paragraph 6 defines "bill of lading" as a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of this document.

Actually, this definition needs to be reconsidered, as it raises questions concerning the following:

1. The bill which the carrier surrenders before loading the goods (bill on fee of loading).
2. Does this definition mean that the commitment to loading will always fall on the carrier?
3. The text allows the bill of lading to be made out to the bearer. Some national legislations show a tendency to abolish "the bill of lading to bearer" (the new Greek maritime legislation) on the ground that it is inconsistent with the fact that the bill evidences rights of financial value. This is why these national legislations prefer to confine references to nominal bills and promissory bills.

#### Article 2

A. In paragraph 1 (d) and (e), it is not necessary to add the phrase "or other document" after "the bill of lading". It is preferable to mention "the bill of lading", only to avoid confusion regarding the document which provides the foundation for the applicability of the Convention.

B. Paragraph 4. It should be made clear that the Convention shall not be applicable in case a bill of lading has been issued on the basis of charter agreement when the holder of the bill of lading is at the same time a vessel leaseholder and a party to the agreement. Jurists throughout the world unanimously agreed on this principle, on the basis of 1924 Brussels Convention relating to bills of lading.

This paragraph may also raise apprehensions that, as a result of any endorsement in favour of one of the shipper's agents, the terms of the agreement might not be carried out as long as a bill of lading was issued, because the holder of the bill of lading should not be the shipper or one of his representatives. Accordingly, it is preferable to replace the phrase "the holder of the bill of lading" with the phrase "the non-holder of the bill of lading in good faith".

#### Article 4

A. Paragraph 2. We think it proper to add the phrase "at the port of discharge" after "the consignee", and to add a new sentence which reads as follows: "When the goods have been delivered to the consignee outside the port of discharge, delivery shall be deemed to have been made at the port of discharge."

B. To be logical, subparagraphs of paragraph 2 should be rearranged in the following order: (c), (a), (b), instead of the present order.

#### Article 5

A. It should be understood that "fault in navigation" is used in the narrow sense of this expression. Therefore, faults which might occur in "the commercial administration of the vessel" should be excluded from the frame of "fault in navigation".

B. Paragraph 4 concerns exemption from liability in case of fire. We believe that the text should be made clearer. This paragraph concerns one of the cases set forth in article 4, paragraph 2, of the 1924 Convention. The new text is incompatible with the new system of liability, based on evidence of fault on the part of the carrier, and has no parallels in other conventions on carriage. We suggest that the text should read as follows: "In case of fire, the carrier shall be liable, unless he proves that the vessel had its own devices for the prevention of fire, and that when the fire arose, his servants or agents took reasonable measures to prevent it or to reduce its effects, unless the claimant proves the fault or negligence of the carrier, his representatives or his servants."

C. The inclusion in article 5 of the principle of liability for delay is considered an essential amendment of the principles of liability.

D. The measures provided for in article 5, paragraph 6, may constitute a reason for claim in the case of general losses when some of the shipped goods are discarded in order to save the remainder. In this case, the carrier should remain responsible for participating in the general loss with respect to the discarded goods.

We suggest the addition of this phrase: "except for general losses, assistance and rescue".

#### Article 6

We think that the method of limiting the liability of the carrier on the basis of parcel or of unit and weight according to the provisions of the 1968 Protocol is more efficient than limiting or calculating liability on the basis of weight only.

It is preferable to opt for a system for limiting liability in case of delay calculated on the basis of the amount of the freight charges, rather than to limit liability for delay in the same way that liability is limited in cases of loss or damage.

We also suggest that further ways should be established to limit the basis of the currency into which the liability is converted.

#### Article 8

This article is concerned with the removal of the right to invoke the limitation of liability in respect of the carrier or his servants. We think it proper to add after "the carrier" the phrase "or his servants or representatives who act within the limits of their functions".

#### Article 9

This article deals with goods on deck. To avoid ambiguity, there is no need to refer to "or other documents evidencing the contract of carriage". (See comment on article 2 above.)

*Article 10*

A. The entire article should be re-examined within the framework of the comments presented on article 1 concerning the definition of "carrier". Therefore, the word "contracting" should be deleted wherever it is mentioned in the article as well as from the title of the article.

B. We suggest that the following should be added to paragraph 3: "Nevertheless, the carrier remains bound by the obligations and concessions resulting from such special agreement, the non-fulfilment of which shall be considered an act or omission on the part of the carrier according to article 8."

*Article 11*

A. The same comment about "contracting" applies.

B. Paragraph 2 is utterly unacceptable. To enable the carrier to exonerate himself from liability for any damage in delivery caused by events occurring while the goods are in the charge of the actual carrier contradicts the text of article 10. We think that paragraph 2 of this article should be deleted.

*Article 14*

The same comment as above about the need to delete the word "contracting".

*Article 16*

It seems that the phrase "including any consignee" is redundant. We think it is preferable to include the text which is designed to protect others, and which appears in article 1 of the 1968 Protocol, which amended article 3, paragraph 4, of the 1924 Convention. This text reads as follows:

"At any rate, it is not admissible to prove the contrary when the bill of lading has been transferred to a person who did not act in good faith."

*Article 17*

For the reasons mentioned above in the comment on article 16, the phrase "including any consignee" should be deleted from article 17, paragraphs 2, 3 and 4.

*Article 19*

We think it proper to delete the phrase "if any", because we are talking about an existing "document of carriage". Without such a document it is not possible to make a valid claim concerning the state of the goods at the time they are handed over to the carrier.

*Article 20*

We think that the period of one year should be kept, as provided for in the 1924 Convention and in many national legislations. The one-year period also prevents disputes with the carrier being unresolved for lengthy periods of time.

*Article 21*

A. We object to paragraph 2. We think that article 17 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, contains an acceptable provision. This same comment applies to article 22, paragraph A (3).

B. The second sentence of paragraph A (2) contradicts article 7 of the 1952 Brussels Convention for the Unification of Certain Rules relating to the Arrest of Vessels, to which many States have acceded.

*Article 23*

It is preferable to refer to "any document of carriage" after the reference to "bill of lading", because the phrase "any other document evidencing the contract of carriage" as mentioned in the text causes duplication with "the contract of carriage" referred to in the first line. On the other hand, the phrase "any other document of carriage" refers to the cases in which no bill of lading has been issued.

*Article 24*

It is our view that this article should be redrafted in such a way that it does not prejudice the application of the York-Antwerp Rules concerning general average settlement.

*Article 25*

The comment on article 2, paragraph 1, also applies to paragraph 2 of this article.

#### 4. Report of the Secretary-General: analysis of comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (A/CN.9/110)\*

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### I. Introduction

1. In accordance with a decision of the Commission taken at its seventh session (13-17 May 1974), the text of the draft convention on the carriage of goods by sea adopted by the Working Group on International Legislation on Shipping at its eighth session (10-21 February 1975) was transmitted to Governments and interested international organizations for their comments. All comments received by the Secretariat as at 27 January 1976 are reproduced in document A/CN.9/109.\*\*

2. At its seventh session, the Commission also requested the Secretariat to prepare an analysis of such comments for consideration by the Commission at its ninth session. The present document contains such an analysis.

3. In compiling the analysis, all comments on a single article have been collated, and then arranged according to the paragraphs or subparagraphs of the article to which the comments refer. Where the comments concerned the article as a whole, and not a particular paragraph of an article, they were analysed under the heading "article as a whole". Where appropriate, the analysis of comments under "article as a whole" contains a summary of the main comments on that article.

4. Where a proposal for the modification of the existing text of the draft convention set forth a draft text to effect such modification, the analysis only re-

produces the proposed draft text if it involved a modification of substance. Mere drafting suggestions are neither reproduced nor described in the analysis; however, the name of the Government or organization which made the drafting suggestion is noted at the end of the discussion of the article or paragraph of an article to which the drafting suggestion pertained. The exact nature of the proposal can be ascertained by reference to the comments of the respondent concerned appearing in document A/CN.9/109.\*\*

### Abbreviations

5. The names of the international organizations which commented on the draft convention are abbreviated as follows:

OCTI	Central Office for International Railway Transport, Berne
ICS	International Chamber of Shipping
CMI	International Maritime Committee
CMI/ICC Working Group	Joint Working Group of International Maritime Committee/International Chamber of Commerce on Liability and Insurance***
INSA	International Shipowners' Association
IUMI	International Union of Marine Insurance.

\* 25 February 1976.

\*\* Reproduced in this volume, part two, IV, 1, *supra*.

\*\*\* The report of this Working Group was submitted by CMI and is reproduced in A/CN.9/109 as part of the comments of CMI.

6. The comments often refer to certain international transport conventions. In the analysis, the titles of these Conventions are abbreviated as follows:

Brussels Convention of 1924	International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924. (League of Nations, <i>Treaty Series</i> , Vol. CXX, p. 157; UNCITRAL <i>Register of Texts of Conventions and Other Instruments Concerning International Trade Law</i> , Vol. II, chap. II)
Brussels Protocol of 1968	Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968. (UNCITRAL <i>Register of Texts of Conventions and Other Instruments Concerning International Trade Law</i> , Vol. II, chap. II)
Warsaw Convention of 1929	Convention for the Unification of Certain Rules relating to International Carriage by Air. Warsaw, 12 October 1929. (League of Nations, <i>Treaty Series</i> , Vol. CXXXVII, p. 11)
Hague Protocol of 1955	Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. The Hague, 28 September 1955. (United Nations, <i>Treaty Series</i> , vol. 478, p. 371)
Montreal Protocol No. 4	Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955. Montreal, 25 September 1975. (ICAO Document 9148)
CMR Convention	Convention on the Contract for the International Carriage of Goods by Road. Geneva, 19 May 1956. (United Nations, <i>Treaty Series</i> , vol. 399, p. 189)
CIM Convention	International Convention Concerning the Carriage of Goods by Rail. Berne, 25 October 1962. (United Nations, <i>Treaty Series</i> , vol. 241, p. 336)
Athens Convention of 1974	Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974. Athens, 13 December 1974. (IMCO document, Sales No. 75.03.E)

## II. Analysis of comments

### A. COMMENTS ON THE DRAFT CONVENTION AS A WHOLE

1. The majority of the respondents who commented on the draft convention as a whole expressed the view that its provisions were, in general, acceptable (Afghanistan, Austria, Belgium, Czechoslovakia, Den-

mark, Finland, German Democratic Republic, Germany, Federal Republic of, Hungary, Norway, Niger, Sweden, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland and United States of America). With the exception of Afghanistan, however, all these respondents indicated that particular problems still existed which were not resolved by the draft in its present form, and suggested appropriate solutions to resolve those problems.<sup>1</sup>

2. The following reasons were given by the respondents mentioned above for their general approval of the draft convention:

(a) That the draft convention as a whole reflected a balanced and carefully elaborated compromise between the sometimes conflicting interests of the parties to a contract for the carriage of goods by sea (Belgium, Denmark, Finland, Hungary, Norway and Sweden);

(b) That the rules contained in the draft convention relating to the issues dealt with therein were, in general, an improvement on the corresponding rules contained in the Brussels Convention of 1924 (Austria, Belgium, Finland, Germany, Federal Republic of, Norway and United States).

(c) That the provisions of the draft convention accorded with the international rules regulating the carriage of goods by other means of transport, and thus facilitated the harmonization of rules regulating the international carriage of goods (Austria, German Democratic Republic, Hungary and Sweden).

(d) That the draft convention would facilitate international trade both by resolving certain legal problems currently encountered in the carriage of goods by sea, and by containing provisions capable of accommodating new developments in transport technology (Afghanistan, German Democratic Republic, Germany, Federal Republic of and Hungary).

(e) That the draft convention constituted a suitable basis for the adoption of a new convention regulating the carriage of goods by sea (Denmark, Norway, Sweden and United Kingdom).

(f) That in the formulation of the draft convention, due consideration had been given to the guidelines for the revision of the Brussels Convention of 1924 set forth in the resolution dated 15 February 1971 of the UNCTAD Working Group on International Shipping Legislation (TD/B/C.4/86, annex I)<sup>2</sup> Czechoslovakia).

3. Some respondents stated their reservations regarding the acceptability of the draft convention as the basis for the formulation of a new convention to replace the Brussels Convention of 1924, and expressed the view that a new convention, if it were based on the provisions of the draft convention, would have an adverse effect on international trade (Netherlands, ICS and IUMI). Although sometimes expressed in general terms, the main reservations shared by these respondents concerned the legal régime for the liability of carriers established by article 5. These reservations are noted in the analysis of the comments on that article.

<sup>1</sup> These observations are noted below, under the respective articles of the draft convention to which they pertain.

<sup>2</sup> This resolution is also reproduced in UNCITRAL Yearbook, Vol. II: 1971, part two, III, annex II.

## B. COMMENTS ON PROVISIONS OF THE DRAFT CONVENTION

### PART I. GENERAL PROVISIONS

#### Article 1. Definitions

##### *Article as a whole*

1. Mexico proposed that the draft convention contain a definition of "shipper", since the draft convention already defined the other parties who had a direct interest in the contract of carriage, i.e. "carrier" or "contracting carrier" (article 1, para. 1), "actual carrier" (article 1, para. 2), and "consignee" (article 1, para. 3).<sup>3</sup> Mexico suggested that the definition of the term "shipper" could read as follows: "Shipper" means any person who in his own name or in the name of another, concludes with a carrier a contract for carriage of goods by sea".

2. The Philippines proposed that the draft convention should also define the term "charterer", particularly with a view to clarifying whether the term "carrier" included a "charterer".<sup>4</sup> The Philippines proposed the following definition of the term "charterer":

"Charterer" is a person who hires or acquires the use of a ship or vessel or a portion thereof to carry goods by sea from one port to another in consideration of payment of freightage, for his account or for the account of others."

3. Czechoslovakia expressed the view that the term "carriage by sea" should be defined in article 1 in such a manner that it also covered carriage on inland waterways accessible to sea-going vessels.

4. The United States suggested that for the sake of clarity the draft convention should include the following definition of "dangerous goods":

"Dangerous goods" means explosives, flammable goods, or such other goods, in any form or quantity, which are considered dangerous or hazardous to life, health or property under international agreements, the laws or regulations of the flag of the vessel or the laws or regulations of the country of the port of loading or port of discharge."

##### *Article 1, paragraph 1*

##### *Definition of "carrier" or "contracting carrier"*

5. Hungary expressed its agreement with the definition of "contracting carrier" and approved the distinction drawn between that term and the term "actual carrier".

6. Canada and France proposed that the reference to the "contracting carrier" be deleted. Canada stated that this reference might lead to a construction placing more responsibility on freight forwarders (ship's agents) and might cast doubt on the right of shippers, exercised often in Canada, to conclude contracts of transport directly with carriers who will themselves carry the goods. France noted that deletion of the reference to "contracting carrier" would correspond to the terminology employed in the Athens Convention of 1974 and proposed the following language for paragraph 1:

<sup>3</sup> It may be noted that INSA also suggested that the term "shipper" be defined, if its proposal to redraft article 1, para. 1 by replacing "shipper" with "cargo disponent" were not adopted.

<sup>4</sup> The Federal Republic of Germany proposed that a definition of the term "charter-party" be included in article 2, para. 4. See the discussion below of comments on article 2, para. 4.

"Carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper, whether the carriage is in fact performed by the carrier or by an actual carrier."

7. The Philippines proposed that "carrier" should be defined separately from "contracting carrier" and "actual carrier" and that the term "carrier" could be defined as follows:

"Carrier" is a person who, for compensation, agrees to undertake to carry goods by sea."

8. Sierra Leone noted the necessity for clarifying whether the term "carrier" also covered agents of the carrier, since the present language of the definition seemed to imply that agents were in fact covered.

9. The United States proposed that the phrase "in whose name" be replaced in this paragraph by the phrase "by whose authority", in order to make it clear that a person acting on behalf of a "carrier" or "contracting carrier" in concluding a contract of carriage must have been authorized to act in such manner.

10. Since on occasion a consignee may conclude a contract of carriage by booking ship's space, INSA suggested that the term "shipper" be replaced by the term "cargo disponent".

##### *Article 1, paragraph 2*

##### *Definition of "actual carrier"*

11. Hungary expressed its agreement with the definition of "actual carrier" and with the distinction drawn between that term and the term "contracting carrier".

12. Canada proposed deletion of the definition of "actual carrier" on the ground that the legal consequences of a carrier's entrusting to another person the actual carriage of the goods in whole or in part should be left to national law and commercial practice.

13. The Netherlands proposed that "actual carrier" be defined as "the owner of the ship carrying the goods", in order to facilitate identification of the "actual carrier", particularly in cases where there was a chain of consecutive time—and/or voyage charters or where the contracting carrier arranged with a third person the transport of the goods and that person retained yet another person to actually carry the goods.

14. As a consequence of its proposal to delete from paragraph 1 the reference to "contracting carrier", France proposed the following language for the definition of "actual carrier":

"Actual carrier" means any person to whom the carrier has entrusted the performance of all or part of the contract for carriage of goods."

##### *Article 1, paragraph 3*

##### *Definition of "consignee"*

15. The Philippines proposed that the definition of "consignee" be completed by a specific reference to the grounds on which such person was "entitled to take delivery of the goods", so as to exclude a sheriff taking delivery of the goods under a court order. The Philippines proposed the following wording:



"'Consignee' means the person who, under the terms of the contract of carriage or the bill of lading, is entitled to take delivery of the goods."

16. France proposed that the definition should be made more complete and precise, and suggested the following definition based on the 1966 French law on charter-parties and contracts for carriage by sea:

"'Consignee' means the person entitled to take delivery of the goods by virtue of the contract of carriage; it is the person whose name is indicated in the bill of lading when the bill of lading is made out to a named person, the person who presents the bill of lading on the arrival [of the goods] when the bill of lading is made out to bearer, and the last endorsee when the bill of lading is made out to order."

17. Canada was of the view that the term "consignee" should cover both persons who were in a position to surrender the bill of lading and persons who, possibly on some other basis, were "entitled to take delivery of the goods". The following definition was proposed:

"'Consignee' means the person named in a bill of lading or the endorsee thereof or the person entitled to take delivery of the goods."

#### *Article 1, paragraph 4*

##### *Definition of "goods"*

18. The Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and Canada proposed that the words "including live animals" be deleted from the definition on the ground that they were unnecessary. The USSR stated that such a reference was superfluous in the light of article 5, paragraph 5, of the draft convention, which governed in detail the liability of carriers in connexion with the carriage of live animals. ICS advocated an express provision excluding live animals from the definition of "goods" and, consequently, from the coverage of the draft convention. In the view of ICS, carriers may only be willing to undertake carriage of live animals on the basis of special contracts that recognize the unique problems inherent in the transport of live animals. Finland reserved its position as to whether live animals should be considered as "goods" for the purpose of the draft convention.

19. The Netherlands, Canada and ICS advocated modification of the definition of the term "goods" so that passenger luggage, covered by the Athens Convention of 1974, was expressly excluded. The United Kingdom expressed its support for a definition under which "goods" also included luggage not accompanying passengers, since this type of shipment did not fall within the scope of the Athens Convention of 1974.

20. Japan proposed that the definition of "goods" should not extend either to packaging or to containers and similar articles of transport. Several respondents (Canada, Japan as an alternative suggestion, and INSA) expressed the view that only durable, marketable, reusable packaging such as containers should be considered as "goods"; they noted that the carrier should not be held liable under the draft convention for the wear and tear of other types of packaging, which could occur even in the absence of any damage to the packed

goods. In this connexion, Canada proposed the following definition:<sup>5</sup>

"'Goods' means anything to be carried under a contract of carriage, excluding passenger luggage, and where the goods are consolidated in a container, pallet or similar article of transport, such article of transport."

INSA suggested the following definition:

"'Goods' means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar durable article of transport or packing, such article of transport or packing if supplied by the shipper, is meant as 'goods'."

21. The Philippines proposed that the words "if supplied by the shipper" be deleted from the definition, since packaging should be considered as forming part of the "goods" regardless of who had supplied it.

22. The Niger suggested that, if the definition of "goods" contained in article 1, paragraph 4, were retained, provisions should be added specifying that in respect of the calculation of freight charges for goods shipped in containers the deadweight of such containers should be excluded.

##### *Drafting suggestions*

23. Suggestions of a drafting nature regarding the text of article 1, paragraph 4 were made by the Philippines, and by OCTI concerning only the French text.

#### *Article 1, paragraph 5*

##### *Definition of "contract of carriage"*

24. Finland expressed agreement with the definition of "contract of carriage", whereby the draft convention would apply also in cases where no bill of lading was issued. Canada, however, proposed a redraft of the definition under which the term "contract of carriage" would only cover "a contract evidenced by a bill of lading".<sup>6</sup>

25. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed that the paragraph should require that a "contract of carriage" be in writing.

26. France proposed that the definition be completed so as to state that "by virtue of this contract, the consignee may exercise the rights of the shipper and be subject to his obligations". It was noted that in the absence of such a provision, in a case where no bill of lading was issued, the legal position of the consignee depended on the differing rules in national laws.

27. ICS proposed that the definition should exclude certain special contracts that were usually negotiated "at arms' length", such as volume contracts and contracts for the shipment of personal effects, vehicles and experimental cargo. ICS noted that in the latter category of cases it was difficult to establish valuation for insurance purposes by the carrier, and that, there-

<sup>5</sup> This text also reflects the comments by Canada on this paragraph, referred to at paras. 18 and 19 above.

<sup>6</sup> The full text of the Canadian redraft of article 1, para. 5, which also included the proposals mentioned at paras. 29, 30 and 32 below, reads as follows:

"'Contract of carriage' means a contract evidenced by a bill of lading whereby a carrier agrees with a shipper to carry goods by water, against payment of freight, from one place to another."

fore, the best course was to let the shipper decide on the amount of protection he needed in the contract and through insurance coverage.

28. The United States expressed the view that the phrase "specified goods from one port to another where the goods are to be delivered" should be deleted since it cast doubt on whether the definition of "contract of carriage" covered instances where the goods were not "specified" or were to be transported by the carrier beyond the port of discharge.

29. Canada proposed that in the definition the term "port" be replaced by "place", and the Netherlands that "port" be replaced by "port or place". The Netherlands stated that the modification it proposed was intended to ensure that the definition of "contract of carriage" covered those cases where, although the main part of the performance under the contract took place on sea, some part of the performance was to occur on inland waterways.

30. Canada, the Philippines and the United Kingdom proposed that the phrase "where the goods are to be delivered" should be deleted. The United Kingdom held that the phrase was superfluous, while the Philippines observed that a "contract of carriage" may have as its object the exposition, rather than the delivery of goods.

31. INSA favoured replacement of the term "shipper" by the term "cargo disponent", since it was not always the shipper who concluded the contract of carriage.<sup>7</sup>

#### *Drafting suggestions*

32. Suggestions of a drafting nature were made by Canada and the Philippines.

#### *Article 1, paragraph 6*

##### *Definitions of "bill of lading"*

33. Canada stated that the definition of "bill of lading" should show that the bill of lading served at the same time as a receipt for goods shipped, as a document of title and as evidence of the contract of carriage in the absence of a formal contract of carriage. Accordingly, and to stress that the contract of carriage and the bill of lading were different, Canada suggested the following definition:

"'Bill of lading' means a document of title, a receipt for goods and a document which evidences the contract of carriage."

34. The United States noted that the present definition might exclude a straight bill of lading, which was a non-negotiable document that did not have to be surrendered upon delivery of the goods. The United States proposed the following definition to ensure that it covered straight bills of lading:

"'Bill of lading' means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods. The bill of lading may include a condition to deliver only against a surrender of the document. A provision in the document that the goods are to

be delivered to the order of a named person, or to order, or to bearer, constitutes such a condition."<sup>8</sup>

35. The Philippines proposed that, at the end of the first sentence of the paragraph, the words "against surrender of the document" be replaced by the words "to the consignee", since in cases when the bill of lading was lost the carrier may deliver the goods to the consignee against a signed receipt and/or against a bond indemnifying the carrier for any possible liability for wrongful delivery.

#### *Article 2. Scope of application*

1. The two main questions dealt with in the comments on this article were:

(a) The scope of application of the new convention, and

(b) Whether parties should have the power to exclude its applicability in appropriate cases.

##### *(a) Scope of application*

###### *(i) Summary of comments*

2. Many respondents approved of the scope of application as currently defined by this article. However, some respondents noted that to restrict the application of the new convention to carriage of goods "between ports" might make the convention inapplicable in cases where the carriage of goods began or ended at a place other than a port, e.g. when multimodal transport was involved. The majority of respondents who commented on the exclusion of charter-parties from the scope of application of the draft convention approved such exclusion, and suggested the addition of language designed to ensure that the draft convention would not apply to a bill of lading issued by a carrier pursuant to a charter-party when the holder of such a bill of lading was either the charterer or an agent of the charterer.

###### *(ii) Specific comments*

3. Hungary and IUMI approved the scope of application of the draft convention as defined in article 2 for the following reasons:

(a) The scope of application is wider than that of the Brussels Convention of 1924 and is clearly defined (Hungary);

(b) The criteria regulating the scope of application conform in principle with those employed in other international transport conventions (IUMI).

4. Canada stated that in general,

(i) It was opposed to a broadening of the scope of application of the convention into areas of national jurisdiction;

(ii) The convention should apply to the carriage of all goods by sea; and

(iii) The word "port" should be replaced by the word "place" wherever it appeared in the article.

<sup>8</sup> As an alternative, the United States proposed leaving the definition of "bill of lading" as it now reads but making it clear in the record that a straight bill of lading was "a document other than a bill of lading [issued] to evidence a contract of carriage" covered by article 18 of the draft convention.

<sup>7</sup> See also the discussion of comments by INSA at para. 10 above.

5. IUMI noted that the Convention would be given the scope of application defined by article 2 only in the courts of States parties to the Convention; the courts of non-Contracting States would not be bound by the provisions of the Convention.

6. Japan observed that the scope of application of the draft Convention was wider than that of the Brussels Convention of 1924 as modified by the Brussels Protocol of 1968. Conflicts of application could therefore arise between a State party to the new convention and a State party to the Brussels Convention of 1924 as modified by the Protocol of 1968. It suggested that appropriate provisions should be included in the final clauses of the new Convention to eliminate such conflicts.

(b) *Power to exclude the Convention*

(i) *Summary of comments*

7. Some respondents accepted the mandatory application of the Convention under this article to all contracts for the carriage of goods by sea. Others expressed the view that the Convention should mandatorily apply only where a bill of lading or other document of title was issued; if no bill of lading was issued, the parties should be given the power to exclude the application of the Convention under specified circumstances.

(ii) *Specific comments*

8. Japan, the United Kingdom and ICS expressed the view that the mandatory application of the Convention to all contracts for the carriage of goods by sea was undesirable. They noted that there were cases, such as volume contracts, shipments of goods of no commercial value and of special or experimental cargoes, where the shipper neither needed nor desired the protection afforded by the Convention, and where it would be appropriate to allow parties to exclude the application of the Convention. The United Kingdom and ICS suggested that this result might be achieved by:

- (i) The addition to this article of paragraph (a) set forth below (the United Kingdom);
- (ii) The addition to this article of both paragraphs (a) and (b) set forth below (ICS):

“(a) Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper.”

“(b) For the purposes of this article, contracts for the carriage of certain quantity of goods over a certain period of time shall be deemed to be charter-parties.”

*Article 2, paragraph 1*

*Introductory clause of the paragraph*

9. Finland and Hungary approved the application of the Convention to all contracts for the carriage of goods by sea, including contracts which were not evidenced by bills of lading.

10. Australia stated that the provisions regarding the scope of application should be clarified to ensure

that the Convention applied to the sea-leg of a multi-modal transport of cargo, and not merely to conventional port to port carriage.

11. Canada suggested that the opening words of this paragraph should be redrafted as follows:

“This Convention shall apply to all contracts of carriage by water between places in two different states if . . .”

12. The Philippines suggested the deletion of the word “two”, since carriage of goods by sea may involve ports in more than two States.

*Subparagraph (c)*

13. Canada considered this subparagraph unnecessary in the light of subparagraph (b) of this article and suggested its deletion.

*Subparagraphs (d) and (e)*

14. In conformity with its proposal that “contract of carriage” be defined in article 1, paragraph 5 as a contract evidenced by a bill of lading, Canada suggested that:

- (i) The words “or other document evidencing the contract of carriage” be deleted from subparagraphs (d) and (e) of this paragraph. Under the Canadian proposal the bill of lading would be the primary document evidencing the contract of carriage, and the terms in the bill of lading would prevail over any contradictory terms found in other documents of transport (e.g., mates receipts and dock receipts).
- (ii) Subparagraph (e) should be redrafted as follows:

“(e) The bill of lading provides that this Convention or the legislation of any State giving effect to it are to govern the contract of carriage.”

15. The Federal Republic of Germany proposed that subparagraph (d) be deleted. Since the Convention applied to all contracts for the carriage of goods by sea, irrespective of whether a bill of lading or other document evidencing the contract of carriage was issued, the applicability of the Convention should not depend on the place where a bill of lading or other document evidencing a contract of carriage was issued.

*Drafting suggestion*

16. A suggestion of a drafting nature, affecting only the French text of article 2, paragraph 1, was made by France.

*Article 2, paragraph 2*

17. Czechoslovakia proposed that the term “actual carrier” should be added after “carrier” since, under the definitions contained in article 1, the term “carrier” did not cover the “actual carrier”.

18. Canada observed that, if the nationality of the ship and of the persons listed in paragraph 1 had no relevance to the applicability of that paragraph, such nationality should also have no relevance to the applicability of any of the other provisions of the draft convention. Since this paragraph might be considered as suggesting that nationality was a factor in determining the applicability of other provisions of the draft convention, Canada proposed that it should be deleted.

*Article 2, paragraph 3*

19. Canada stated that this paragraph was acceptable.

20. INSA proposed that this paragraph should be deleted because:

(a) It was clear that a State would have the power conferred by the paragraph even if the paragraph were deleted, and

(b) It was inappropriate to include it in a draft Convention which regulated the international, commercial carriage of goods by sea.

*Article 2, paragraph 4*

*Exclusion of the charterer and his agents from the scope of the term "holder of the bill of lading"*

21. The Byelorussian SSR, the Netherlands, the USSR and ICS proposed that the second sentence of this paragraph should be modified to exclude expressly the application of the draft Convention to a bill of lading issued by a carrier pursuant to a charter-party where the holder of the bill of lading was the charterer. It was noted that in such a case the bill of lading did not govern the relations between charterer and carrier (Netherlands), and might be issued only as a receipt under the charter-party (ICS). It was proposed that the following words should be added at the end of the second sentence of the paragraph to secure this result:

- (a) "Not being the charterer" (Netherlands and ICS).
- (b) "Unless such holder is a charterer" (Byelorussian SSR).
- (c) "If he (the holder of the bill of lading) is not the charterer" (USSR).

22. France observed that the term "holder of the bill of lading" should not cover the charterer or his agents and proposed that this term should be replaced by the term "third party holding in good faith".

*Other comments*

23. The German Democratic Republic observed that while the title of the draft convention suggested that it applied to all carriage of goods by sea, charter-parties were expressly excluded by this paragraph from its scope of application. The German Democratic Republic suggested that this inconsistency should be eliminated by bringing charter-parties within the scope of application of the draft convention.

24. Canada noted that the term charter-party was not defined. The Federal Republic of Germany proposed that the language of the first sentence of the paragraph might be modified to incorporate a definition of a charter-party as follows:

"The provisions of this Convention shall not be applicable to contracts by which the carrier assumes the obligation to let the carrying capacity of a distinct vessel wholly or partially for a distinct time (time-charter) or for one or several distinct voyages (voyage-charter) at the disposal of the shipper."

25. Canada observed that it was not unknown for the charterer to be also the shipper and the consignee, and this created conflict of interest situations.

26. France expressed concern that the present wording of paragraph 4 could lead to the result that, by means of an endorsement of a bill of lading issued pursuant to a charter-party in favour of an agent of a shipper, the provisions of the charter-party could be made not subject to challenge.

*Article 3. Interpretation of the Convention*

1. Canada noted that this article was modelled on article 7 of the Convention on the Limitation Period in the International Sale of Goods and stated that it had no objection to the inclusion of this article.

## PART II. LIABILITY OF THE CARRIER

*Article 4. Period of responsibility**Article as a whole*

1. The chief issue which concerned the respondents who commented on this article was whether the extension under this article of the period of responsibility of the carrier for the goods beyond the period of responsibility specified under the Brussels Convention of 1924 was justified. Most respondents approved of this extension. However, the view was also expressed that the exact points of time at which carrier responsibility began and ended under this article needed clarification.

2. It was also observed that provisions should be added to the article relieving the carrier of responsibility during any period of time when, at the port of loading, he was legally required to place the goods in the custody of a third person (e.g. an authority certifying weight or quality).

3. Finland, the German Democratic Republic, Hungary, Sweden, CMI and IUMI approved of the extension of the period of carrier responsibility under this article as compared with the period under article 1 (e) of the Brussels Convention of 1924. The following reasons were given:

(a) The extended period of responsibility conformed with the period of responsibility stipulated under international conventions dealing with the carriage of goods by other means of transport (Hungary and CMI) and with the practice developing in certain liner trades (IUMI);

(b) The period of responsibility established in the Brussels Convention of 1924 had adverse consequences for the shipper, since damage to goods often took place when the goods were in the charge of the carrier before their loading or after their discharge (German Democratic Republic and Hungary);

(c) In the liner trade in particular, goods were often in the charge of the carrier before loading or after discharge, and there was at present considerable uncertainty regarding the extent of carrier liability for loss or damage occurring during these periods (CMI);

(d) Such extension accorded with a suggestion made in the resolution on bills of lading adopted at the second session of the UNCTAD Working Group on International Shipping Legislation (Czechoslovakia).

4. ICS expressed disagreement with the extension of the period of carrier responsibility on the following grounds:

(a) The extension of the period of carrier responsibility would result in insurance being taken out by the carrier, and not by the cargo owner as under the Brussels Convention of 1924, against the risks incurred during the additional periods of carrier responsibility. This transfer of the insurance burden would lead to increased transportation costs and would adversely affect the interests of the cargo owner;<sup>9</sup>

(b) The change in the period of responsibility would result in a state of uncertainty as to the extent of carrier liability, leading to expensive litigation;

(c) As a result of the state of uncertainty as to the extent of carrier liability, a prudent cargo-owner would continue to insure his goods as if the period of carrier responsibility under the Brussels Convention of 1924 remained in force. Since the carrier would also take out insurance for the additional periods during which he was made responsible under this article, the goods would be doubly insured, and this would lead to increased transport costs.

5. Canada approved of the fact that under this article the carrier was denied the power to vary his period of responsibility.

#### *Drafting suggestion*

6. The Philippines made a drafting proposal regarding the title of this article.

#### *Article 4, paragraphs 1 and 2*

7. The United States, CMI and ICS noted that under paragraph 1 and 2 the carrier was responsible for the entire period that elapsed between his first taking over the goods and their delivery. In relation to *delivery*, it was noted that, if the law or regulations applicable at the port of discharge required that the goods be handed over to an authority or other third party, the responsibility of the carrier would, under subparagraph 2 (c), terminate upon the handing over of the goods to such authority or other third party. However, the article did not relieve the carrier from responsibility if, in the course of *loading*, the law or regulations applicable at the port of loading required that the goods be handed over to such an authority or other third party for some purpose (e.g. for checking their weight or quantity).

8. The following proposals were made for modifying the introductory language of paragraph 2 so as to relieve the carrier from responsibility for the period during which the goods were in the custody of such third party.

(a) "For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods from the shipper or any third party, including an authority having custody or control of the goods, until the time the carrier has delivered the goods." (the United States).

(b) "For the purpose of paragraph 1 the carrier shall be presumed, in the absence of evidence to the contrary, to be in charge of the goods from the time he

has taken them into his custody within the port area until he has delivered them." (ICS).

9. The Byelorussian SSR and the USSR observed that the words "at the port of loading" appearing in paragraph 1 created uncertainty as to the period of carrier responsibility in cases where the carrier had taken over the goods not at the port of loading, but at some other place (e.g. inland) or at a port of transshipment. They proposed that this uncertainty could be removed by deleting the words "at the port of loading, during the carriage and at the port of discharge" from paragraph 1, leaving the period in which the goods are in the charge of the carrier to be defined solely by paragraph 2.

10. The United Kingdom stated that subparagraph 2 (a) did not adequately provide for cases where the carrier had undertaken to deliver the goods outside the port of discharge. Under the present wording, it was uncertain whether the draft convention regulated the liability of the carrier during transit from the port of discharge to the place of final delivery. In order to avoid the possibility of conflict with other transport conventions which might also apply to this stage of the transit, and to grant the parties the power to agree as to the extent of liability, the United Kingdom proposed the following modification to subparagraph (a):

"(a) By handing over the goods to the consignee at the port of discharge. Where the goods are handed over to the consignee outside the port of discharge delivery shall be deemed to have taken place at the port of discharge."

11. Canada proposed that the provisions of paragraphs 1 and 2 could be clarified or amplified as follows:

(a) The commencement of the period of carrier responsibility could be clarified by adopting the following as the introductory language of paragraph 2:

"For the purposes of paragraph 1 of this article, a carrier shall be deemed to be in control of the goods from the time he takes possession of the goods until he has delivered the goods:"

(b) Subparagraph 2 (b) should be clarified by defining *delivery*, in the cases therein mentioned, in more specific terms. Under its present wording, the subparagraph would permit the insertion of terms in the contract overriding subparagraph (a) by defining *delivery* in terms other than the handing over of goods to the consignee;

(c) The words "this paragraph applies *mutatis mutandis* to the receipt of the goods by the carrier" should be added to paragraph 2.

#### *Article 4, paragraph 3*

12. Canada proposed that the meaning given under this paragraph to the terms "carrier" and "consignee" should be modified by redrafting the paragraph as follows:

"In paragraphs 1 and 2 of this article, reference to the carrier or the consignee shall include the servant or agent of the carrier or consignee, respectively."

<sup>9</sup> For a fuller explanation of the possible adverse effects of a transfer of the insurance burden, see the analysis of comments on this issue under article 5.

*Article 5. General rules (on the liability of the carrier)  
Article as a whole*

1. Respondents were agreed that article 5, which lays down the basic rules regarding the liability of the carrier, constituted the most important change from the provisions of the Brussels Convention of 1924 covering this issue.

*Support for article 5*

2. Several respondents while not addressing themselves specifically to article 5, noted that the draft convention was an acceptable and workable compromise that took into account the interests of both shippers and carriers, and the technological advances in the carriage of goods by sea (Austria, Czechoslovakia, German Democratic Republic, Norway and United States).

3. Several respondents stated that they accepted the compromise that article 5 represented as to the allocation of the risks of carriage and the burden of proof between the carrier and the cargo interests, since they recognized that the draft convention could only attain wide acceptance by means of such a carefully worked out compromise (Denmark, Finland, Hungary and Sweden).

4. It was noted that the rules on carrier liability in article 5 were in closer harmony with the international legal régimes established for other international modes of transport than the provisions in the Brussels Convention of 1924 had been, and that therefore the adoption of article 5 would facilitate the development of uniform rules for international multimodal transport (Federal Republic of Germany, Sweden and CMI/ICC Working Group).

5. Several respondents expressed their support for the general principle for burden of proof in article 5, whereby the carrier, unless he presented evidence to the contrary, was presumed to be liable for loss of or damage to the goods in his charge, as well as for delay in delivery (France, Hungary and Mexico).

6. Nevertheless, certain concerns were voiced by some of the respondents supporting article 5 regarding particular effects of the compromise:

(a) Denmark noted that a heavier burden would now be placed on carriers;

(b) Finland noted that article 5 would lead to increased insurance by carriers against liability (Protection and Indemnity insurance) and that there was no P and I insurance industry in Finland;

(c) Sweden noted that it favoured the compromise incorporated in article 5, even though it was likely to result in an over-all increase in transportation costs in the range of 0.5 per cent to 1 per cent of the freight charges.

7. Australia noted its reservation in respect of the provisions of article 5, since it was in the process of examining the economic consequences of these provisions.

*Criticisms of article 5*

8. There was virtual unanimity, even among respondents criticizing the allocation of the risks of carriage between the carrier and cargo interests in article 5,

that the long list of exemptions from liability in article 4, paragraph 2 of the Brussels Convention of 1924 need not be retained, and that, in particular, the defence of fault "in the management of the ship" could be deleted. Only IUMI favoured the retention without change of the allocation of risks as contained in the Brussels Convention of 1924.<sup>10</sup> The CMI/ICC Working Group stated that it opposed the increased allocation of the risks of sea transport to the carrier under article 5, unless it was clear that the draft convention would be as widely ratified as the Brussels Convention of 1924, since otherwise there would be forum shopping and recurrent disputes concerning jurisdiction and applicable law. Criticisms directed at specific points in the legal régime established by article 5 are discussed at paragraphs 9 through 17 below.

*A. Defence of "error in navigation"*

9. Several Governments and organizations advocated that article 5 retain for the carrier the exemption from liability based on "error in navigation", found in article 4, paragraph 2 (a) of the Brussels Convention of 1924 (Belgium, Netherlands, United Kingdom, USSR, CMI, CMI/ICC Working Group, ICS and INSA). They noted that their concern extended only to "errors in navigation" taken in a strict sense and that they did not favour retention of the more general defence of "error in the management of the ship". The Federal Republic of Germany and Japan stated that deletion of the traditional defences, such as "error in navigation" and "fire", should be re-examined carefully, particularly with a view to ascertaining that no increase would result in the over-all transportation costs borne by shippers.

10. The United Kingdom, the USSR, ICS<sup>11</sup> and INSA proposed draft texts, to be incorporated in article 5, preserving for carriers the defence of "error in navigation":

(a) The United Kingdom proposed the addition to article 5 of the following new paragraph 2 *bis*:

"Notwithstanding the provisions of paragraph 1, provided the carrier has taken all measures that could reasonably be required he shall not be liable for loss, damage or expense resulting from errors in navigation";

(b) The USSR proposed that article 5 should retain the exemption for "error in navigation" by employing the following language:

"The carrier shall be relieved of liability for loss of or damage to goods or delay in delivery if he proves that they have been caused by an 'error in navigation'";

(c) INSA proposed that article 5 be redrafted so that it would provide for

"... Exoneration of the carrier from liability for the loss of, or damage to, the goods or delay in their delivery resulting from errors in navigation, unless

<sup>10</sup> The position of IUMI is set forth in detail in a brochure entitled "The Essential Role of Marine Cargo Insurance in Foreign Trade" published by IUMI in October 1975.

<sup>11</sup> The draft text by ICS, reproduced at para. 12, below, was also designed to retain the defence of "fire" as found in the Brussels Convention of 1924 and to ease the general burden of proof placed on carriers.



it is proved that such loss of, or damage to, the goods or delay in their delivery resulted from the fault of the carrier himself."

#### B. Defence of "fire"

11. Belgium, the Federal Republic of Germany, the Netherlands, CMI, CMI/ICC Working Group and ICS favoured retention of the "fire defence" found in article 4, paragraph 2 (b) of the Brussels Convention of 1924, whereby the carrier was exonerated from liability if the loss or damage arose from "fire, unless caused by the actual fault or privity of the carrier". These respondents expressed concern over the increased burden of risk placed on carriers as a consequence of the modified defence of "fire" in article 5, paragraph 4 of the draft Convention.

12. ICS proposed that the following text should replace article 5, paragraph 1, in order to preserve for carriers the traditional defences of "error in navigation" and "fire", as well as to ease the burden of proof placed on carriers:

"1. The carrier shall be liable for loss, damage or expense resulting from loss or damage to the goods, if the occurrence which caused the loss or damage took place while the goods were in his charge, as defined in article 4, and was due to the negligence of the carrier, his servants or agents.

"Negligence of the carrier or his servants or agents shall be presumed unless the contrary is proved if the damage or loss arose from or in connexion with shipwreck, collision, stranding or explosion or from defect in the ship.

"2. Notwithstanding the provisions of paragraph 1 of this article the carrier shall not be responsible for loss, damage or expense resulting from any neglect or default in the navigation of the ship, or from fire, unless it is proved that the occurrence giving rise to such loss, or damage, or expense has been caused by the actual fault or privity of the carrier."

#### C. Delay in delivery

13. ICS and IUMI expressed their opposition to the provisions in article 5 holding carriers liable for losses, damages and expenses due to delay in delivery. IUMI argued that the establishment of mandatory (i.e. non-contractual) liability of carriers for delay would lead to considerable litigation, because of the vagueness of the definition of "delay in delivery" in article 5, paragraph 2, i.e. non-delivery "within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case" and the difficulty of deciding on the kinds of damages resulting from delay for which the carrier is to be held liable.

14. It may be noted that the redraft of article 5, paragraph 1, proposed by ICS and reproduced at paragraph 12, above, calls for the deletion of all references to "delay in delivery" in article 5, including the deletion of the present article 5, paragraph 2, defining the term "delay in delivery".

#### D. Burden of proof placed on carriers

15. Some respondents voiced their concern that the general burden of proof rule in article 5, presuming the liability of the carrier unless evidence to the contrary

was provided, tended toward the imposition of strict liability on the carrier and that the test in article 5, paragraph 1 for determining whether the carrier met his burden ("... unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences") would probably give rise to a great deal of litigation (CMI, ICS, INSA, IUMI and OCTI).

16. CMI proposed that if article 5 were adopted, an express provision should be added stating that carrier liability would only be based on fault or negligence. ICS proposed a redraft of paragraph 1 of article 5, modifying the substance of the burden of proof rule, as well as stating that carrier liability was based on negligence and preserving for the carrier the defences of "error in navigation" and "fire".<sup>12</sup>

17. INSA and OCTI accepted the basis for the burden of proof rule found in article 5, i.e. that to be exonerated from liability the carrier must prove that he, his servants and agents had not been negligent. However, in their view, the focus of the rule should be on whether the carrier, his servants and agents took all reasonably required measures "to avoid the loss, damage or expense", since this was what the carrier would be held liable for if he failed to carry his burden of proof. For this reason, INSA proposed that the clause describing the burden of proof placed on the carrier should read "unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid such loss, damage or expense", noting that this wording was modelled on articles 18 and 20 of the Warsaw Convention of 1929. Similarly, OCTI proposed that the following sentence be added to article 5, paragraph 1:

"The carrier shall be relieved of his liability if he proves that he, his servants and agents took all measures that could reasonably be required to avoid the loss, damage or expense."

#### E. Possible harmful consequences

18. Critics of article 5, while noting that precise economic and statistical data would only become available after the convention had been in force for some time, stated that adoption of article 5 would be likely to lead to some or all of the following consequences:

(a) The increased liability imposed on carriers would force them to take out increased liability insurance (P and I insurance), which would be reflected in increased freight costs (Germany, Federal Republic of, Japan, Netherlands, United Kingdom, USSR, CMI, ICS, INSA and IUMI);

(b) Total transportation costs of shippers would increase, as cargo insurance rates would decrease only to a considerably lesser extent than the increase in the rates for the carrier's liability insurance, because of the cost of recovery actions against the carrier or his liability insurer and the legal uncertainties resulting from the reallocation of risks between carriers and cargo interests (Germany, Federal Republic of, Japan, Netherlands, Sweden, United Kingdom, CMI, CMI/ICC Working Group, ICS and IUMI);

<sup>12</sup> The text of this proposal by ICS is reproduced at para. 12 above.

(c) Cargo interests would still take out cargo insurance as they preferred to deal with and be reimbursed by their own insurers directly (Germany, Federal Republic of, Netherlands, Sweden and United Kingdom) or for complete protection "warehouse to warehouse" (IUMI);

(d) Under article 5 the shipper was in effect obligated to take out insurance coverage through the carrier, because the carrier would protect himself against his increased liability through additional liability insurance, the cost of which he would include in the freight charge; it would be preferable if the shipper could decide whether to take out cargo insurance and if yes, how much coverage, at what cost and from which cargo insurer (Belgium, Germany, Federal Republic of, Netherlands, United Kingdom, and CMI/ICC Working Group);

(e) Article 5 would not, by removing e.g. the defence of "error in navigation", cause carriers to be more careful in their handling of cargo, as the danger of loss or damage to the carrier's own property was already a sufficient deterrent (Netherlands, CMI/ICC Working Group and ICS);

(f) The shift from cargo insurance to liability insurance of carriers was likely to hurt the nascent cargo insurance industries in many countries, particularly since carrier liability insurance was concentrated in a small number of maritime countries (Germany, Federal Republic of, Netherlands, United Kingdom, CMI and ICS);

(g) Article 5 did not take into account the special conditions of carriage of goods by sea, i.e. the operation of ships without continuous effective control by the shipowner over the captain, the crew and others servicing the ship (Belgium, Japan and INSA).

#### *Proposed additions to article 5*

19. Canada suggested that the convention provide that the rights and liabilities of carriers also be extended to their servants and agents. The German Democratic Republic proposed that a general rule be added making carriers liable for the acts and omissions of their servants and agents.

20. Canada noted that it had no objection to the expanded definition of the term "goods" in article 1, paragraph 4 of the draft convention, which included "live animals". Canada was of the view, however, "that the carrier be required to provide a proper ship and to exercise proper care for the goods".

#### *Article 5, paragraph 1*

21. Most comments directed specifically at the provisions contained in this paragraph were concerned with the following issues:

(a) Use of the terms "loss, damage or expense" to describe the extent of carrier liability;

(b) The provision that "the carrier shall be liable... if the occurrence which caused the loss, damage or delay took place while the goods were in his charge...";

(c) The particular problems connected with the imposition of carrier liability for "delay in delivery".

#### *Kinds of damage for which carrier is liable*

22. Several respondents noted that practical difficulties were likely to arise, on account of the terminology employed and the distinctions drawn, from the phrase "the carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery..." (Belgium, Canada, Netherlands, United Kingdom).

23. The United Kingdom observed that the distinction drawn between carrier liability for loss of or damage to the goods and for delay in delivery (in article 5, paragraph 1, and in alternatives B, D and E in article 6) would complicate both the settlement of claims and recovery actions.

24. In order to establish a uniform terminology for the convention and to clarify that carrier liability extended both to physical loss of or damage to the goods and to any consequential financial loss, Canada suggested that the phrase at the beginning of paragraph 1 be recast as follows: "the carrier shall be liable for loss of or damage to the goods as well as expense arising from such loss or damage..."<sup>13</sup>

25. With a view to preserving the terminology employed in the Brussels Convention of 1924 and conforming to the corresponding provisions in other international transport conventions, Belgium proposed that paragraph 1 of article 5 should commence: "The carrier shall be liable for any loss or damage to the goods and for any harm (loss, damage or expense) resulting from delay in delivery..."<sup>14</sup> Similarly, the Netherlands proposed the following language based on article 17 of the CMR Convention: "The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery..."

#### *Carrier liable if occurrence causing the loss, damage or delay took place while goods were in his charge*

26. Canada, INSA and OCTI expressed doubts regarding the provision in paragraph 1 of article 5 making the carrier liable "if the occurrence which caused the loss, damage or delay took place while the goods were in his charge". It was noted that sometimes it would prove difficult to determine when a particular occurrence took place, or which one of a number of occurrences "caused the loss, damage or delay".

27. INSA proposed that the reference to "the occurrence which caused the loss, damage or delay" be deleted, so that only the time at which the loss, damage or expense was incurred would be relevant. Accordingly, INSA proposed that article 5, paragraph 1 commence as follows:

"The carrier shall be liable for loss, damage or expense resulting from the loss of or damage to the goods, as well as from delay in delivery which took place while the goods were in his charge..."<sup>15</sup>

<sup>13</sup> Canada also suggested, *inter alia*, that carrier liability for "delay in delivery" be dealt with in a separate paragraph; see discussion and draft proposed by Canada at para. 31, below.

<sup>14</sup> Belgium also suggested a consequential drafting change in the French text of the paragraph.

<sup>15</sup> INSA further proposed an amendment of article 5, para. 1 as to the burden of proof placed on carriers in order to exonerate themselves from liability. See the discussion above on article 5 as a whole, at para. 17.

28. Canada also proposed the elimination, in article 5, paragraph 1, of the reference to "the occurrence which caused the loss, damage or delay", but proposed further that the time at which loss, damage or expense was incurred should be relevant only in cases where there was loss of or damage to the goods:

"The carrier shall be liable for loss of or damage to the goods as well as expense arising from such loss or damage if such loss or damage occurred while the goods were in his control..."<sup>16</sup>

29. OCTI was of the view that the reference in article 5, paragraph 1 to "the occurrence which caused the loss, damage or delay" should be limited to instances of loss of or damage to the goods. OCTI stated that otherwise cargo interests would have serious practical problems in trying to establish the particular "occurrence" that caused a delay in delivery. Furthermore, in cases where the delay in delivery was caused by an occurrence prior to the time the carrier took charge of the goods, the carrier could still exonerate himself from liability by showing that he, his servants and agents had taken all reasonably required preventive measures.

30. Since, in most cases, where goods are lost or damaged during their transport, the occurrence causing such loss or damage also takes place in the course of such transport, OCTI further proposed that a presumption to this effect be incorporated in a new paragraph 2 of article 5. OCTI explained that in the rare case where the occurrence causing the loss of or damage to the goods did not take place during the carriage, it was reasonable to place the burden of proving this fact (i.e. to rebut the above presumption) on the carrier rather than on the cargo interests who were not in a position to know the details of the carriage. The draft text proposed by OCTI reads as follows:

"1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to goods, if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article 4; he shall also be liable for loss, damage or expense resulting from delay in delivery.

"... 17

"2. When it is proved that the loss (of) or damage to the goods occurred during carriage, it may be presumed, failing proof to the contrary, that the occurrence which caused the loss or damage took place while the goods were in the charge of the carrier as defined in article 4."<sup>18</sup>

<sup>16</sup> Canada further proposed that liability for delay in delivery be dealt with in a separate paragraph and that the time at which the delay took place should not as such be decisive in the determination of carrier liability for delay in delivery. See the discussion at para. 31 below.

<sup>17</sup> OCTI further proposed at this point an amendment of article 5, para. 1, as to the burden of proof placed on carriers in order to exonerate themselves from liability. See the discussion above on article 5 as a whole, at para. 17.

<sup>18</sup> OCTI proposed the following *prima facie* evidence rule as an alternative, in case its suggestion, discussed at para. 29 above, were not adopted:

"When it is proved that the loss (of) or damage to the goods occurred during the carriage or that there was a delay in a delivery, it may be presumed, failing proof to the contrary, that the occurrence which caused the loss, damage or delay took place while the goods were in the charge of the carrier as defined in article 4."

#### *Carrier liability for delay in delivery*

31. Canada proposed that the liability of carriers for delay in delivery should be dealt with in a separate paragraph of article 5, specifying the types of damage resulting from delay in delivery for which carriers would be held liable and laying down a special rule for the exoneration of carriers from liability:

"2. The carrier shall be liable for delay in delivery of the goods as well as expense arising from such delay unless the carrier proves that he took all measures reasonably necessary to avoid the delay".

32. CMI, while favouring the imposition of carrier liability for delay in delivery, stated that compensation on this ground should be limited to direct and reasonable losses that the carrier could reasonably have foreseen at the time he concluded the contract of carriage. IUMI, opposed to the creation of carrier liability for delay in delivery, noted that if such liability were included in the new convention, it should be limited to losses that the carrier could reasonably foresee as probable consequences of the delay in delivery.

#### *Other comments*

33. Austria noted expressly its support for the general burden of proof rule contained in this paragraph.

34. Canada and Sierra Leone noted that if the definition of "carrier" in article 1, paragraph 1, encompassed the servants and agents of the carrier, then there was no need to refer to them in article 5, paragraph 1.<sup>19</sup>

#### *Drafting suggestions*

35. Suggestions of a drafting nature were made by Canada, and by OCTI affecting only the French text of this paragraph.

#### *Article 5, paragraph 2*

36. Canada proposed that this paragraph should be redrafted so as to clarify whether or not it encompassed frustration of the contract of carriage by an extended delay in the delivery of the goods, and so as to add a special rule covering cases where the location of the delayed goods was known.

37. Canada and IUMI expressed their concern that the definition of "delay in delivery" in terms of non-delivery "within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case", would, in the absence of an agreement in writing regarding the time of delivery, lead to litigation. Canada proposed the following new text for this paragraph:

"3. For the purpose of paragraph 2<sup>20</sup> of this article, delay in delivery occurs when the goods have not been delivered at the place of discharge in accordance with the provisions of the contract of carriage within the time specified therein."

38. INSA stated that this paragraph should make it clear that the carrier was permitted to call at ports

<sup>19</sup> It may be noted that Canada advocated the addition of a general rule to the convention whereby the rights and liabilities of carriers were also extended to their servants and agents (see discussion above of proposed additions to article 5, at para. 20).

<sup>20</sup> This reference is to the new paragraph proposed by Canada to deal with carrier liability for delay in delivery (see the discussion above, on article 5, para. 1, at para. 31).

en route to take on or discharge cargo without incurring liability for delay in the delivery of the goods of any particular shipper. INSA therefore proposed that the following sentence be added at the end of article 5, paragraph 2:

"The term 'delay' does not include the time used during voyage for loading or discharging the goods."

#### Article 5, paragraph 3

39. Canada stated that the paragraph was acceptable. Nigeria suggested that the person entitled to take delivery of the goods should be able to treat the goods as lost only after the delay in delivery amounted to 90 days, instead of 60 days as now provided for in this paragraph.

40. ICS proposed the addition of the following sentence at the end of this paragraph, in order to deal with the special case where, although the goods could not be delivered within a period of 60 days after the due date for delivery, their whereabouts were known to the carrier:

"If at the expiry of the 60 days the carrier can establish the whereabouts of the goods, a further period of 60 days shall elapse before the person entitled may treat the goods as lost."<sup>21</sup>

41. Japan proposed the addition of a provision, requiring the person who had treated the goods as lost pursuant to this paragraph to give to the carrier any necessary assistance to dispose of the goods on reasonable terms if it should subsequently turn out that the goods were not in fact lost.

#### Article 5, paragraph 4

42. The comments on this paragraph fell into one of the following general categories:

(a) Some respondents accepted the paragraph as constituting part of the over-all compromise on carrier liability incorporated in article 5 (Denmark, Finland, Hungary and Sweden);<sup>22</sup>

(b) The basic principle in this paragraph, that the carrier is liable only if "the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents", was, by implication, accepted by Canada, the German Democratic Republic and OCTI when they only proposed modifications of this paragraph not affecting this basic principle;

(c) Some respondents favoured retention of the defence of "fire" found in the Brussels Convention of 1924 (Belgium, Germany, Federal Republic of, Netherlands, CMI, CMI/ICC Working Group, ICS and IUMI);<sup>23</sup>

<sup>21</sup> It may be noted that Canada, while finding article 5, para. 3 acceptable, suggested that the special case of non-delivered goods whose whereabouts were known should be dealt with in the paragraph of article 5, defining "delay in delivery". See the discussion above on article 5, para. 2, at para. 36.

<sup>22</sup> The comments accepting the article 5 compromise as to the allocation of risks between carrier and shipping interests are considered in the discussion above on article 5 as a whole, at paras. 3-4.

<sup>23</sup> The comments advocating retention of the "fire" defence in the Brussels Convention of 1924 for the exoneration of carriers from liability are considered in the discussion above on article 5 as a whole, at paras. 11-12.

(d) Some respondents took the view that carrier liability for fire should be governed by the general rule in article 5, paragraph 1 (Austria, Czechoslovakia and Mexico) or by a modified article 5, paragraph 4, placing the basic burden of proof on the carrier (France, Nigeria, Philippines and Sierra Leone).

#### *Inclusion of carrier liability for fire in the general rule on carrier liability in article 5*

43. Criticism of article 5, paragraph 4, focused on the special burden of proof rule contained therein, whereunder the carrier is held liable for loss or damage from fire only if "the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents". Several respondents noted that this rule placed an excessive burden on shippers and consignees which they would generally find impossible to meet in practice, since they were not aboard the ship at the time of the fire and could not know when and how the fire developed (Austria, Czechoslovakia, France, Mexico and Nigeria). It was further noted that the carrier knew and had control over the events that occurred on board the ship, and that therefore it would be more equitable to require that in order to be exonerated from liability for loss or damage from fire the carrier had the burden of proving that due care had been exercised (Austria, Mexico, Nigeria, Philippines and Sierra Leone).

44. Accordingly, Austria, Czechoslovakia and Mexico proposed that this paragraph be deleted and that carrier liability for fire should be governed by the general rule in article 5, paragraph 1, stating that to be freed from liability the carrier had the burden of proving "that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

45. In the same vein, though not suggesting deletion of article 5, paragraph 4, Nigeria and Sierra Leone proposed its amendment so that, in the case of fire, the carrier had the burden of proving that due care had been exercised by him, his servants and agents. Similarly, the Philippines proposed that this paragraph read as follows:

"In case of fire, the carrier shall be liable unless he proves that he, his servants or agents took all necessary measures to prevent the fire."

46. France proposed retention of the basic compromise incorporated in article 5, paragraph 4, as to the burden of proof, with the addition, however, of a provision requiring the carrier to show that the ship was properly equipped for fire prevention and that all necessary steps were taken to avoid the fire and to reduce its consequences. France proposed the following wording for article 5, paragraph 4:

"In case of fire the carrier shall be liable, unless he proves that the ship had appropriate means of averting it and that, when the fire occurred, he, his servants and agents took all reasonable measures to avert it or to limit its consequences, except where the claimant proves the fault or negligence of the carrier, his agents or servants."

#### *Other comments*

47. Canada proposed that the opening phrase of the paragraph should read: "In case of damage, loss

or delay caused by fire," instead of "In case of fire", since the carrier incurred liability for fire only if loss of or damage to the goods, or delay in delivery, occurred as a consequence of the fire. In order to stress that this paragraph constituted an exception to the general rule on burden of proof found in article 5, paragraph 1, OCTI proposed the modification of the opening phrase in paragraph 4 to read "In case of fire, the carrier shall only be liable . . .".

48. The German Democratic Republic suggested consideration of the addition in this paragraph of a reference to the "actual carrier".

#### *Article 5, paragraph 5*

49. The Byelorussian SSR, Canada and the USSR proposed the deletion of this paragraph. They were of the view that the paragraph was unnecessary, since in cases where there was loss, damage or delay during the carriage of live animals attributable to the "special risks inherent in that kind of carriage," the carrier would be freed from liability pursuant to the general rule in article 5, paragraph 1, as the carrier would be able to prove "that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". However, Canada proposed the addition of a provision to article 5, paragraph 1, requiring that the carrier furnish a ship properly equipped to carry the particular cargo and that he exercise due care for the goods.

50. Hungary proposed deletion of the second sentence in this paragraph, which establishes a special burden of proof rule and presumption regarding carrier liability for loss, damage or delay in the carriage of live animals. Thus, although paragraph 5 would still relieve the carrier from liability if the loss, damage or delay resulted from the special risks inherent in the carriage of live animals, the carrier would bear the burden of establishing this fact under the general burden of proof rule in article 5, paragraph 1.

51. INSA proposed modifying the second sentence of paragraph 5 so that if the carrier proved compliance with special instructions given by the shipper concerning the live animals, it would then be presumed that any loss, damage or delay in the delivery of the live animals was due to the "special risks inherent in that kind of carriage" and that therefore the carrier was not liable. Paragraph 5 as modified by INSA reads as follows:

"With respect to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents."

52. While ICS was of the view that the Convention should not regulate the carriage of live animals,<sup>24</sup> it proposed that in case the Convention did cover the carriage of live animals, article 5, paragraph 5 should be reworded as follows:

<sup>24</sup> See the discussion above on article 1, para. 4, at para. 18.

"The carrier shall be relieved of his liability for live animals if loss or damage results from:

"(a) Any special instructions, or lack thereof, given by the shipper;

"(b) Special risks inherent in the carriage of animals. It shall be presumed in the absence of evidence to the contrary that any loss or damage resulted from these special risks."<sup>25</sup>

#### *Drafting suggestion*

53. OCTI proposed a drafting change affecting only the French text of the paragraph.

#### *Article 5, paragraph 6*

54. The comments on this paragraph were concerned primarily with the provision that the carrier was only freed from liability for "reasonable measures to save property at sea" and with the effect of the paragraph on the possible obligation of the carrier to make a general average contribution.

#### *Carrier exemption from liability for "reasonable measures to save property at sea"*

55. The Byelorussian SSR, Canada, the Ukrainian SSR, the USSR and INSA expressed reservations regarding the rule in this paragraph exonerating carriers from liability only for "reasonable measures" taken to save property at sea. They stressed that there would be serious practical difficulties in endeavouring to determine whether particular measures taken at sea were or were not "reasonable", with the consequence that the issue would often be litigated.

56. The USSR and INSA noted that, at the time he decided upon the measures to be taken, the master of a cargo vessel would often not know whether he would be saving lives or only property. INSA observed further that it was only after the rescue operation was completed that the value of the cargo risked by the carrier could be compared with the value of the property saved. The Byelorussian SSR and the USSR stated that this provision would have an adverse effect on compliance by masters of cargo vessels with the traditional rules of navigation calling for assistance to ships in distress.

57. The Byelorussian SSR and the Ukrainian SSR noted the need for clearly delineating the criteria that were to be used to determine whether a measure taken to save property at sea was "reasonable" for the purpose of article 5, paragraph 6. INSA proposed that the word "reasonable" be deleted from this paragraph. INSA further proposed, as a less preferable alternative, that in order to recover, the shipper or the consignee should be required under this paragraph to prove that the measures taken by the carrier to save property at sea were "deliberately unreasonable", and proposed the following wording:

"The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from measures to save property at sea if

<sup>25</sup> It may be noted that the redraft of article 5, para. 5 suggested by ICS makes no reference to carrier liability for delay in delivery. For the position of ICS opposing the imposition of carrier liability for delay in delivery, see the discussion above on article 5 as a whole, at paras. 13-14.

there is no proof that in salving the property the carrier acted deliberately unreasonably."

58. ICS proposed that under paragraph 6 the carrier should also be exempted from liability for the consequences of labour disputes and of delay resulting from time taken to provide needed medical attention for ill or injured persons on board the cargo ship, even if their lives were not in danger. ICS recommended that article 5, paragraph 6 should read as follows:

"The carrier shall not be liable for loss, damage or delay resulting from:

"(a) Measures to save life or preserve health;

"(b) Reasonable measures to save property at sea;

"(c) Labour disputes."

*Effect on general average or salvage contribution by carrier*

59. The United Kingdom observed that the present wording of paragraph 6 seemed to free the carrier from his obligation to make a contribution in general average or salvage when the type of loss or damage to the cargo interests for which the carrier was normally obligated to make a contribution in general average or salvage resulted from "measures to save life" or "reasonable measures to save property at sea". To make it clear that in such a case the carrier remained bound to make the appropriate general average or salvage contribution, the United Kingdom proposed that this paragraph should commence:

"The carrier shall not be liable, except in general average and salvage, for loss, damage . . ."

60. Sierra Leone stated that the convention should contain a provision ensuring that shippers and consignees were protected against the consequences of general average acts by carriers. It noted that such mandatory protection in the convention was preferable to leaving to the terms of the contract of carriage or to national law the possible obligation of the carrier to contribute in general average.

#### *Drafting suggestion*

61. The United States suggested a drafting change for this paragraph.

#### *Article 5, paragraph 7*

62. The Federal Republic of Germany proposed the deletion of this paragraph, since it was of the view that specific international agreements, such as the 1910 Brussels Convention on Collisions,<sup>26</sup> or the principles of the applicable national law should govern the inter-relationship of claims that the cargo interests may have against the carrier under this Convention and of claims that they may have against other persons.

#### *Drafting suggestions*

63. Suggestions of a drafting nature regarding the text of article 5, paragraph 7 were made by Canada, and by OCTI affecting only the French text of this paragraph.

<sup>26</sup> International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, Brussels, 23 September 1910.

### *Article 6. Limits of liability*

#### *Article as a whole*

1. The majority of respondents preferred formulation of the limits on the liability of carriers in terms of the single criterion of the weight of the goods (i.e. alternatives A and B) rather than in terms of the dual criteria of weight and "package or other shipping unit" (alternatives C, D and E). Among respondents preferring alternative A or B, the majority preferred alternative A, and among respondents preferring alternative C, D or E, the majority preferred alternative D.

2. Some respondents observed that a final choice among the alternatives could not be made until the monetary amounts for the limits of liability had been determined.

3. Many respondents proposed that the monetary limits of liability should be defined in terms of the special drawing rights of the International Monetary Fund, rather than in terms of "gold francs".

#### *Alternative A*

4. Denmark, Finland, Fiji, Hungary,<sup>27</sup> Norway, Sweden<sup>28</sup> and the United Kingdom expressed a preference for alternative A, for the following reasons:

(a) The method contained in alternative A was simple (Denmark, Finland and the United Kingdom), particularly in that it established the same limits for all cases of carrier liability, including liability for delay (Hungary and the United Kingdom), and specified only the single criterion of weight for setting the limit (United Kingdom);

(b) The criterion of weight for setting the limit had been adopted in certain other transport conventions, i.e., the CIM, CMR and Warsaw Conventions. Its adoption in the convention would lead to uniformity, and lessen difficulties in formulating uniform rules for combined transport (Norway and Sweden);

(c) The additional criterion of the "package or other shipping unit" for setting the limit contained in alternatives C, D and E was unclear, and had been given differing interpretations in national laws and judicial decisions (Norway and Sweden). The criterion of weight gave rise to fewer disputes (Fiji);

(d) The criterion of "package or other shipping unit" could produce differing, unexpected and arbitrary limits of liability in respect of the same consignment of goods depending on the way the goods were packed (Finland, Norway and Sweden), and in many countries the application of this criterion to goods carried in containers was still unsettled (Norway);

(e) The objection that adoption of the criterion of weight would result in the shipper or consignee of cargo with low weight but high value receiving inadequate compensation could be met by:

(i) The insurance of such goods (Finland); or

(ii) A provision such as article 10 (3) of the draft TCM convention<sup>29</sup> which reads as follows: "The minimum gross weight of such goods shall be deemed to be . . . kilos." (Norway);

<sup>27</sup> Hungary expressed an equal preference for alternative C.

<sup>28</sup> Sweden expressed a second preference for alternative B.

<sup>29</sup> E/CONF.59/17.



(f) Inquiries among interested commercial circles in Scandinavia had shown that adoption of the criterion of weight for setting the limits of carrier liability would resolve most problems connected with damage to general cargo, and that the increase in price to be paid in the form of insurance would be negligible (Norway).

#### Alternative B

5. Austria, the German Democratic Republic,<sup>30</sup> Japan<sup>31</sup> and OCTI expressed a preference for alternative B, for the following reasons:

(a) The limit of carrier liability for delay in delivery should in general be less than the limit in the case of liability for loss of or damage to goods, and alternative B provided a separate and appropriate limit for delay in delivery (Austria and OCTI);

(b) Adoption of alternative B, and the criterion of weight contained therein, would be in harmony with other transport conventions, e.g. the CIM and CMR Conventions (Austria and OCTI);

(c) Adoption of the single criterion of weight for setting the limits of liability was simple and practical (Japan);

(d) If the criterion of "package or other shipping unit" was used for setting the limits of liability, the limit of liability could vary depending on the number of shipping units within which a consignment of goods was packed (Austria);

(e) The objection that adoption of the criterion of weight would result in the shipper or consignee of cargo with low weight but high value receiving inadequate compensation could be met by the incorporation of a provision under which the shipper could exclude the limits of liability by declaring the nature and value of the goods (e.g. as under article 4, para. 5, of the Brussels Convention of 1924) (Japan).

6. France observed that, despite its preference for alternative D, it would have no serious objection to the adoption of alternative B, if it appeared that the majority favoured a method of defining the limits of liability solely by reference to the criterion of weight. It noted that alternative B was acceptable since it contained a special limitation in regard to liability for delay defined by reference to the freight.

7. On the issue as to whether the limit of carrier liability for delay under subparagraph (b) should be the freight or double the freight, Austria observed that there were precedents for both, and that therefore either limit would be acceptable.

8. Sweden noted that its second choice was alternative B.<sup>32</sup>

9. OCTI proposed that subparagraph (b) of alternative B should be redrafted in order to clarify that the limit of liability set under that subparagraph did not apply to cases of loss of or damage to the goods occasioned by delay; all cases of loss of or damage to the goods would be covered solely by the limit set

under subparagraph (a). The following new text of subparagraph (b) was proposed:

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not, in the case of loss or damage other than that specified in subparagraph (a), exceed double the freight."

10. OCTI observed that the French text of paragraph (a) of alternative B was more detailed than the corresponding English text, and suggested that the English text should be redrafted to accord with the French text, as follows:

"1. (a). The liability of the carrier for loss, damage or expense resulting from loss or damage to the goods according . . ."

#### Alternative C

11. Hungary expressed a preference for alternative C,<sup>33</sup> for the reason that this alternative established the same limits for all cases of carrier liability, including liability for delay in delivery.

12. Mexico noted that alternative C gave rise to problems in the calculation of the limits of liability.

#### Alternative D

13. The Byelorussian SSR, France, the Federal Republic of Germany, the Ukrainian SSR, the USSR, the United States,<sup>34</sup> and INSA expressed a preference for alternative D. In regard to the two variants for the limit of liability under subparagraph (b) of this alternative, the United States preferred variant Y, and the other respondents mentioned above preferred variant X.

14. The following reasons were given for the preference of alternative D:

(a) Adoption of the criterion of weight alone did not produce satisfactory results (France). If the monetary limit per kilo of gross weight of the goods lost or damaged were fixed at a comparatively low figure, shippers or consignees of cargo of high value but low weight would receive inadequate compensation (Germany, Federal Republic of, and INSA). If the monetary limit were fixed at a high figure, liability would be unlimited in the case of low value cargoes. The adoption of dual criteria, such as in alternative D, produced fairer results (INSA);

(b) By adopting dual criteria for setting the limits of liability, alternative D maintained the compromise achieved by article 2 of the Brussels Protocol of 1968 between the adoption of the criteria of weight alone (as in certain conventions regulating other modes of transport) and the adoption of the criterion of package or unit (as in article 4, para. 5, of the Brussels Convention of 1924) (France). The dual criteria also resulted in more equitable compensation being awarded where cargo was lost or damaged, since both the weight of the cargo and the value of the units of cargo could be relied on by claimants (INSA);

(c) Alternative D was preferable to alternative C in that it set a special limit for carrier liability for delay in delivery defined by reference to the freight (France

<sup>30</sup> The German Democratic Republic was of the view that the rules contained in alternative B should be supplemented by the rule contained in alternative C, para. 2 (a) which provides for the case where a container, pallet or similar article of transport is used to consolidate goods.

<sup>31</sup> Japan also expressed a preference for alternative E.

<sup>32</sup> The first choice of Sweden was alternative A.

<sup>33</sup> Hungary expressed an equal preference for alternative A.

<sup>34</sup> The preference by the United States was expressed in the light of its belief that the majority of States favoured alternative D.

and INSA). The limit of liability for delay should be based on principles different from those on which the limit of liability for loss of or damage to the goods was based (INSA).

15. The Federal Republic of Germany observed that its preference for alternative D was based on the assumption that the monetary limit per kilo to be adopted would not be very much higher than the 30 francs Poincaré specified in article 2 (a) of the Brussels Protocol of 1968. It noted that, although alternative A was preferable on the grounds of its simplicity, it would be acceptable only if a much higher monetary limit per kilo was adopted. Since no final choice of a method of limitation could be made until the monetary limits had been determined, and since the monetary limits were likely to be finally determined only at the diplomatic conference which would consider the draft convention, the Federal Republic of Germany suggested that all the alternatives should be retained in the draft and placed before the diplomatic conference.

16. INSA made the following proposals in regard to paragraph 1 (a) of alternative D:

(a) The language should be modified in order to clarify whether, when some packages or shipping units of different weight in the same consignment were lost or damaged, in determining the limits of liability account should be taken separately of each package or unit, or only of the aggregate of the goods lost or damaged;

(b) The words "his servants or agents" should be added after the word "carrier" in order to extend the limits of liability to the servants and agents of the carrier acting within the scope of their duties.

17. Mexico noted that alternative D gave rise to problems in the calculation of the limits of liability.

#### *Alternative E*

18. Japan,<sup>86</sup> Mexico and Sierra Leone expressed a preference for alternative E.

19. Mexico gave the following reasons for its preference:

(a) The provisions contained in this alternative were, in contrast to those contained in alternative A, comprehensive; and

(b) Unlike the provisions of alternatives C and D, the provisions contained in this alternative did not give rise to difficulties in the calculation of the actual amounts of liability.

#### *Paragraphs applying to all alternatives under article 6*

##### *Definition of limits in terms of special drawing rights*

20. Belgium, Denmark, Fiji, Finland, Germany, Federal Republic of, the Netherlands, Norway and Sweden proposed that the monetary limits of liability should be defined in terms of the special drawing rights of the International Monetary Fund, and not in terms of "gold francs" as was currently the case. Belgium, the Federal Republic of Germany, Sweden and the International Civil Aviation Organization (ICAO) drew attention to the fact that article VI of the Montreal Protocol No. 4 to amend the Warsaw Convention of

1929 defined the limits of liability of the air carrier in terms of special drawing rights. ICAO also noted that the Montreal Protocol No. 4 permitted States not members of the International Monetary Fund to declare that the limit of liability was to be fixed in terms of Poincaré francs. It was noted that definition in terms of special drawing rights would have the following advantages:

(a) It would prevent fluctuations in the monetary limits of liability arising from fluctuations in the price of gold (Fiji and Norway);

(b) It would prevent difficulties arising from the disappearance of an official gold price, the working of the unit of account as a numeraire, and the calculation of exchange rates in the absence of official parties (the Netherlands).

##### *Definition of limits in terms of "gold francs"*

21. Hungary and the Philippines approved the definition of the monetary limits of liability in terms of "gold francs" as defined in these paragraphs. Hungary observed that definition in such terms eliminated the effect of inflation in reducing the limits of liability.

##### *Conversion of the unit of value into national currency*

22. The following proposals were made in regard to the rules for converting the "gold franc" into a national currency:

(a) Fiji proposed that the conversion of the "gold franc" into a national currency should be made on the basis of the official value of that currency in relation to the "gold franc" as at the time the loss occurred. If the conversion were made, as under the rule set forth at present, on the date of a judgement or arbitral award, delays in legal or arbitration proceedings would affect the amount recoverable;

(b) The German Democratic Republic proposed that this paragraph should be redrafted in order to cover the case where a dispute as to loss or damage did not proceed to litigation or arbitration, but was settled between the parties. The following text was proposed for this purpose:

"The amount referred to in paragraph 1 of this article shall be converted into the national currency of the state of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the preceding paragraph of this article on the date of the judgement or arbitration award or on the date of the agreement on the party concerned."

23. Japan noted that clarification was required of the formula for conversion of the international standard into national currencies.

##### *Observations not addressed to a specific alternative*

###### *A. The level of the monetary limits of liability*

24. ICS and IUMI proposed that the monetary limits of carrier liability should be set at a low level, for the following reasons:

(a) If the monetary limits were set at a high level, a greater proportion of the insurance of the cargo would be covered through the liability insurance of the carrier rather than through the cargo insurance of the shipper. However, carrier liability insurance for a relatively high total amount was more expensive than cargo insurance

<sup>86</sup> Japan also expressed a preference for alternative B.

for the exact value of each consignment of cargo. The result would therefore be a rise in transportation costs (ICS, citing UNCTAD secretariat study TD/B/C.3/120, para. 189);

(b) The setting of a high monetary limit in this context would result in excessive exposure of the carrier to liability (ICS and IUMI). The likelihood of a high monetary limit leading to such excessive exposure was accentuated by the rules of liability contained in article 5, under which the carrier would be held liable for the total loss of the goods in many cases (IUMI);

(c) A high monetary limit would result in the shipment of low value goods subsidizing the shipment of high value goods (ICS);

(d) A low monetary limit would reduce recourse actions by cargo insurers (IUMI);

(e) A high monetary limit would raise the carrier's over-all exposure and cause the carrier's liability insurer to reinsure at a high price in international markets, thus usurping part of the normal function of the shipper (ICS).

25. Hungary and the United Kingdom noted that a final choice among the alternatives could not be made until the precise amounts of the monetary limits of liability in the various alternatives had been decided. Finland regarded the limits contained in the Brussels Protocol of 1968 as appropriate. The Federal Republic of Germany observed that a figure of 30 Poincaré francs, or a slightly higher figure, would be acceptable, but that the final figure should be left to be decided by the diplomatic conference which would consider the draft convention. Norway also suggested that the final figure should be left to the determination of the diplomatic conference.

#### B. *The formulation of limits of liability when goods are carried in containers*

26. Czechoslovakia proposed that provision should be made regulating the limits of carrier liability where goods were transported in containers, pallets, or similar articles of transport.

27. Hungary observed that, if a method of defining the limits of liability adopting the criteria of "package or other shipping unit" were made applicable when goods were carried in containers, it would be necessary to ensure disclosure of the number of shipping units within a container, since the aggregate number of the units within a container might be considerable. However, this problem would not arise if a limitation based on the criterion of weight were adopted.

28. The Niger noted that it preferred those alternatives which dealt with the problems which arose when goods were carried in containers, since such carriage was of special importance to a land-locked State.

29. CMI noted that some of the difficulties encountered in using the criterion of package or unit for the purpose of limiting carrier liability when goods were carried in containers could be resolved by making the packages within the container rather than the container itself the relevant units, provided such packages were enumerated in the bill of lading.

#### C. *Declaration by the shipper of the nature and value of the goods*

30. Hungary, the Philippines and the USSR proposed that the rules contained in article 6 as to the limits of liability should include a provision similar to that contained in article 4, paragraph 5 of the Brussels Convention of 1924 or article 2 (a) of the Brussels Protocol of 1968 under which a shipper could exclude the prescribed limits of liability by declaring to the carrier the nature and value of the goods.

#### D. *Absence of choice between the various alternatives*

31. Belgium, Czechoslovakia and Nigeria deferred making a choice among the various alternatives to a later stage in the consideration of the draft convention. The Philippines stated that all the alternatives were void under Philippine law as being against public policy, since they limited the liability of the carrier to a fixed amount without any condition and without the consent of the shipper or consignee. However, it noted that a formulation which limited the carrier's liability to a specified amount would be valid under Philippine law, unless the shipper declared that the goods had a higher value and paid a higher freight rate. It therefore proposed the following formulation:

"The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost or damaged, or, in case of delay, to an amount not exceeding [double] the freightage paid or payable, unless the shipper declares a higher value and pays a higher rate of freightage based on the declared value."

Alternatively, the Philippines proposed the adoption of article 4, paragraph 5 of the Brussels Convention of 1924.

32. Canada expressed the view that none of the five draft alternatives were satisfactory in that they:

(a) Did not provide a satisfactory solution to the uncertainties of gold as a monetary unit of measure;

(b) Did not resolve the uncertainties created by various court decisions as to the meaning of "package" or of liability relating to a "unit of weight"; and

(c) Did not enable the carrier to grasp fully the scope of his liability at the time he concluded a contract of carriage.

Canada stated that it had given consideration to the possibility of using the insured value of the cargo, or a mandatory declared value of the cargo, as a limit of liability, but had found that this might require the shipper to reveal information to the carrier which the shipper regarded as confidential. Canada suggested that, in regard to goods of undeclared value, a formula relating the limits of liability to the amount paid as freight deserved further examination.

33. Belgium noted that the Belgian maritime interests were not opposed to a simpler limitation formula than the one containing the double criteria of unit and weight adopted in the Brussels Protocol of 1968, provided that the simpler formula did not substantially increase the limits of liability.

34. The Netherlands proposed that a provision for calculating the value of the goods, such as the one contained in article 2 (b) of the Brussels Protocol of 1968, should be added to article 5 or 6.

35. The United Kingdom proposed that provision should be made either in article 6 or article 24 that, when the cargo interest had paid salvage, and sought to recover from the carrier because of the carrier's fault, the recovery should not be subject to the limits of liability prescribed in this article.<sup>86</sup>

36. The CMI observed that a provision defining the limits of liability should have the following features:

(a) The definition of such limits should be clearer than the definition at present contained in the Brussels Convention of 1924 and should establish the limits of liability in a manner preventing disputes and litigation;

(b) The criterion of "package or unit" should be supplemented by the criterion of weight in the method adopted to set the limits of liability in order to improve the position of claimants in regard to heavy units;

(c) Liability for loss arising from delay in delivery should always be limited to such direct and reasonable loss as, at the time of entering into the contract of carriage, could reasonably have been foreseen by the carrier as a probable consequence of the delay in delivery, and should in any event be limited to an amount not exceeding the freight;

(d) The aggregate liability of the carrier for loss, damage or delay should be restricted to the limit that would apply for total physical loss of the goods in respect of which liability was incurred (e.g. as in alternative B, para. 1 (c), alternative D, para. 1 (c), and alternative E, para. 1 (c)).

37. IUMI observed that:

(a) If a liability for delay in delivery were imposed, that liability should be limited to the amount of the freight in all cases where there was no physical loss of or damage to the cargo. However, clarification was needed as to whether "freight" means the freight for the whole cargo, for all the goods covered by the bill of lading, or for the cargo delayed. IUMI suggested that the interpretation that "freight" in this case meant only freight for the cargo delayed appeared to be more in conformity with a possible limitation per kilo of gross weight of the goods lost or damaged;

(b) In considering the limits of liability, the overall limit of liability of the carrier under the International Convention relating to the Liability of Owners of Seagoing Ships, Brussels, 10 October 1957, should be examined.

#### *Article 7. Actions in tort*

##### *Article as a whole*

1. CMI and the International Labour Organisation expressed particular support for the provisions of paragraph 2 whereby, in actions brought against them, the servants and agents of the carrier were entitled to the same defences and limitations on liability as the carrier,

<sup>86</sup> This proposal is covered by the new text proposed by the United Kingdom for article 24. This new text is set forth in the discussion on that article, at para. 3.

provided that they acted within the scope of their employment.

2. The United Kingdom suggested that consideration be given to adding a reference to the "actual carrier" whenever the term "carrier" appeared in this article.

##### *Article 7, paragraph 1*

3. Canada and ICS observed that the phrase "whether the action be founded in contract or in tort" did not cover all classes of actions. In order to ensure that this paragraph applied to all possible classes of actions, Canada suggested replacement of the phrase "or in tort" by "or otherwise", while ICS proposed, for the same reason, that the words "or otherwise" be added at the end of the present text.

##### *Drafting suggestions*

4. Suggestions of a drafting nature, regarding the French text only of article 7, paragraph 1, were made by France and OCTI.

##### *Article 7, paragraph 2*

5. Canada noted that in this paragraph the person entitled to the same defences and limitations on liability as the carrier was identified as "a servant or agent of the carrier". Canada pointed out that, on the other hand, for the purpose of determining "the period during which the goods are in the charge of the carrier", article 4, paragraph 3, referred to "the servants, the agents or other persons acting pursuant to the instructions ... of the carrier". Canada proposed that the same wording should be used in both articles to refer to "servants or agents".<sup>87</sup>

##### *Article 7, paragraph 3*

6. Canada noted that this paragraph was acceptable.

#### *Article 8. Loss of right to limit liability*

##### *Extension of circumstances in which right to limit liability is lost*

1. France, the German Democratic Republic and Hungary proposed that this article should be modified to provide that, in addition to the case where the carrier lost the right to limit his liability under the first sentence of the article, he also lost the right to limit his liability when damage had been caused:

(a) By the act of a servant or agent of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result (the German Democratic Republic and Hungary);

(b) By the act of a servant or agent of the carrier acting within the scope of his employment, such act being done with the intent to cause the damage, or recklessly and with knowledge that the damage would probably result (France).

It was observed by France and Hungary that, since in most cases a carrier acted through servants or agents, acts by the carrier himself of the kind entailing loss of

<sup>87</sup> It may be noted that Canada proposed a redraft of article 4, para. 3, reading in the relevant part, "the servant or agent of the carrier". See the discussion above on article 4, para. 3, at para. 12.

the right to limit liability under this article would be very rare. Loss of the carrier's right to limit his liability would therefore in practice occur infrequently under the article as currently drafted, and the shipper would be insufficiently protected. France also noted that its proposed modification as to the loss of the carrier's right to limit his liability would be in accord with the rules contained in the Warsaw Convention of 1929 as modified by the Hague Protocol of 1955.

2. Austria observed that the very limited scope of the circumstances under which the right to limit liability was lost under this article was unfair to the person entitled to the goods. Austria proposed that:

(a) The carrier should lose the right to limit his liability when damage resulted from an act of gross negligence on his part, or an act of gross negligence on the part of his servants or agents; and

(b) The servants or agents of the carrier should lose the right to limit their own liability when damage resulted from an act of gross negligence on their part.

*Restriction of circumstances in which right to limit liability is lost*

3. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed that the words "or recklessly and with knowledge that such damage would probably result" should be deleted from:

(a) The first sentence of the article (the Byelorussian SSR);

(b) From both the first and the second sentence of the article (the Ukrainian SSR and the USSR).

The following reasons were given for this proposal:

- (i) "Recklessness" had basically the same meaning as "negligence". Since the liability of the carrier under article 5 was based on negligence, the result in practice might be that the carrier lost the right to limit his liability in every case that negligence was proved (the Ukrainian SSR and the USSR);
- (ii) Retention of the phrase "and with knowledge that such damage would probably result" would lead in practice to the loss by the carrier of the right to limit his liability in many cases, because it would be very difficult for a carrier to prove that the probability of damage was beyond his knowledge (the Byelorussian SSR and the USSR). The phrase would also create various problems of interpretation (the Ukrainian SSR).

*Other comments*

4. Canada, the United Kingdom and OCTI noted that this article provided that the carrier and his servants or agents lost the right to limit their liability when "damage" resulted from an act or omission on their part of the kind specified in the article. Since under article 5, paragraph 1, the carrier was liable not merely for "damage" to the goods, but "for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery", it was proposed that the two articles should be brought into harmony by substituting the words "loss, damage and delay" (the United Kingdom) or the words "loss, damage or ex-

pense" (OCTI) for the word "damage" where the latter word appeared in the English text of article 8. OCTI also suggested that the word "dommage" in the French text of article 8 should be replaced by the word "préjudice".

5. Canada proposed that the article should be re-drafted by deleting the second sentence thereof, and by modifying the first sentence so as to provide that both the carrier and his servants or agents lost the right to limit their liability if it were proved that the damage resulted from an act or omission on their part of the kind specified in the first sentence.

6. ICS and IUMI accepted the formulation in this article of the circumstances in which the right to limit liability was lost by carriers and by their servants and agents, i.e. when they caused the damage by an intentional or reckless act or omission.

*Article 9. Deck cargo*

*Article 9, paragraph 1*

1. The comments on this paragraph were concerned mainly with the definition therein of the circumstances under which the carrier was authorized to carry the goods on deck, and with the liability of the carrier when he carried goods on deck pursuant to such authorization.

2. Canada noted that carriers could be expected to establish lower freight rates or to offer discounts for authorized carriage on deck and observed that carriers would be able to give preferential treatment to large shippers, e.g. in the assignment of space under deck.

*Authorization for carrier to carry goods on deck*

3. ICS and IUMI expressed support for the three possible sources of carrier authorization to carry goods on deck that were mentioned in this paragraph. IUMI was of the view that paragraph 1 was sufficient to accommodate the existing insurance practice under which no distinction was made whether containers were carried on deck or below deck. ICS proposed that for the sake of clarity the following sentence should be added at the end of the present text of the paragraph: "Shipment in containers shall be deemed to constitute agreement to carriage on deck". INSA noted that clarification was needed as to whether the three sources of carrier authorization referred to in this paragraph were independent alternatives so that any one of them would be sufficient authorization for the carrier.

4. The German Democratic Republic proposed that this paragraph be changed so that carriage of goods on deck would require an express agreement of the shipper and the carrier to this effect in all cases except where the goods were carried in containers.

5. Hungary proposed that the meaning of the term "usage" be defined more precisely in this paragraph and noted that in the context of carriage on deck the term "binding custom" was often used. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed that, in order to clarify which were the applicable "statutory rules or regulations" referred to in paragraph 1, a phrase such as "of the country of the port of loading" be added at the end of the paragraph.

*Carrier liability for authorized carriage on deck*

6. Canada, Czechoslovakia, Hungary, Japan and the Netherlands proposed that article 9 should address itself to the possible liability of carriers for loss, damage or delay in the delivery of goods that the carriers had carried on deck in accordance with the provisions of article 9, paragraph 1. They noted that, under the present wording of article 9, carrier liability for authorized carriage on deck was unclear, particularly in the light of article 9, paragraph 3, which specifically dealt with carrier liability for unauthorized carriage on deck.

7. Czechoslovakia, Hungary and the Netherlands proposed that the general rules of articles 5, 6 and 8 on the liability of carriers should also apply to authorized carriage of goods on deck. Czechoslovakia noted further that if it were intended that carrier liability be modified in the case of authorized carriage on deck, such modification should be spelled out clearly in article 9.

8. Japan proposed that a provision be added to article 9, paragraph 1, stating that in the case of authorized carriage on deck the carrier was relieved of liability for loss, damage or delay in delivery that resulted from the special risks inherent in carriage on deck, if he proved that the loss, damage or delay in delivery could be attributed to these special risks.

*Drafting suggestions*

9. Suggestions of a drafting nature regarding the text of article 9, paragraph 1, were made by Canada, and by OCTI as to the French text only.

*Article 9, paragraph 2*

10. The Byelorussian SSR and the USSR proposed that in all cases where goods were carried on deck pursuant to an authorization under article 9, paragraph 1, the bill of lading should indicate that the goods were being carried on deck, since this fact was of great interest to shippers and consignees. They noted that this requirement could be added either to article 9 or to article 15.

11. Canada expressed uncertainty as to the meaning of the word "statement" in article 9, paragraph 2, referring to an agreement by the shipper and the carrier to carry goods on deck, but assumed that it did not include printed clauses. Canada proposed deletion of the reference in this paragraph to "other document evidencing the contract of carriage" since it doubted the enforceability against third parties of a statement in such document.

*Article 9, paragraph 3*

12. The Byelorussian SSR, Canada, Hungary, the Netherlands, the USSR and IUMI observed that this paragraph was drafted in an unclear manner and should therefore be redrafted.

13. In the view of the Byelorussian SSR and the USSR, the redraft should make articles 6 and 8 on the limitation of carrier liability applicable also to carrier liability for loss, damage or delay in delivery attributable solely to the unauthorized carriage of the goods on deck. On the other hand, the Netherlands assumed that, in addition to the general rules on the limitation of carrier liability in articles 6 and 8, this paragraph imposed a separate liability on carriers for loss, damage or delay in delivery resulting from the special risks of carriage on

deck in cases where the carrier lacked authorization to carry the goods on deck.

14. Hungary expressed its opposition to an interpretation or formulation of article 9, paragraph 3, which would free the carrier from liability resulting solely from the special risks of carrying cargo on deck. IUMI stated that the legal consequences of a carrier issuing an under-deck bill of lading and then carrying the goods on deck, particularly in the light of the common law of deviation, would be uncertain.

*Article 9, paragraph 4*

15. Canada, the Netherlands and ICS proposed that this paragraph be deleted.

16. In the view of Canada and the Netherlands, the general principle of article 8 on loss of the carrier's right to limit his liability was adequate to cover the case where goods were carried on deck despite an express agreement by the shipper and the carrier for carriage under deck.

17. ICS observed that the presumption in this paragraph, that "carriage of goods on deck contrary to express agreement for the carriage under deck" always involved the intention or degree of recklessness required under article 8, was not justified.

*Article 10. Liability of contracting carrier and actual carrier**Article as a whole*

1. The German Democratic Republic and Hungary approved of the provisions of article 10. The German Democratic Republic, while approving in particular of the provisions relating to the joint liability of contracting carriers and actual carriers contained in this article, proposed that these provisions should be further clarified.

2. France proposed that the term "contracting carrier", appearing in the title and the body of the article, should be replaced by the term "carrier" in order to make the article conform to the definition of "carrier" proposed by France for article 1, paragraph 1.<sup>88</sup>

3. Canada made the following observations:

(a) That the premises formulated by it for evaluating the draft Convention led to the view that an international convention on the carriage of goods by sea should contain no reference to third parties to whom the carrier, under national contract law, may choose to delegate some of his obligations under a contract of carriage. Accordingly, Canada proposed that the article be deleted;

(b) That even if reference to delegation to actual carriers of performance of the carriage were deleted, a provision should be included making the carrier personally liable notwithstanding the fact that he had not personally performed part or all of the carriage;

(c) That if the reference in the draft Convention to both contracting carriers and actual carriers were, however, retained, the provisions of this article would result in the following benefits:

<sup>88</sup> For the definition of "carrier" proposed by France, see the discussion above on article 1, para. 1, at para. 6.



- (i) Recourse by cargo interests against carriers would be simplified, since one party (the contracting carrier) was responsible under this article for the entire carriage;
- (ii) As a consequence of (i) above, the contracting carrier would be likely to reach a prompt settlement with a claimant;
- (iii) An indemnity which a contracting carrier, against whom a claim had been made, might seek from an actual carrier was likely to be determined more easily because of the direct contractual relationship between them.

#### *Article 10, paragraph 1*

4. Czechoslovakia and Hungary stated that the relationship between this paragraph and article 11, paragraph 2, needed reconsideration. Hungary stated that the two paragraphs appeared to be in conflict, and proposed that article 11, paragraph 2, should therefore be deleted.

5. The Netherlands proposed that the first sentence of this paragraph should be redrafted to bring it into conformity with the definition of "actual carrier" as "the owner of the ship carrying the goods", proposed by the Netherlands in relation to article 1, paragraph 2.<sup>39</sup> The sentence as redrafted would read as follows:

"Where the contracting carrier is not the actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention."

#### *Article 10, paragraph 2*

6. The Netherlands proposed that, for the reason given at paragraph 5 above in support of its proposal to redraft paragraph 1 of this article, paragraph 2 should be redrafted by replacing the words "for the carriage performed by him" by the words "for the carriage by his ship".

#### *Article 10, paragraph 3*

*Voluntary assumption by carrier of obligations not imposed by the convention*

7. Czechoslovakia and France observed that, where a carrier had by special agreement with the shipper assumed obligations not imposed by the convention, these obligations should be binding even if the goods were carried by an actual carrier. Czechoslovakia proposed that the article should require the carrier to ensure that the actual carrier also assumed such additional obligations. France proposed that the non-performance of such obligations by the actual carrier should entail the loss of the carrier's right to limit his liability, and that the following language should accordingly be added at the end of paragraph 3:

"3. ...the carrier shall nevertheless remain bound by the obligations or waivers resulting from such a special agreement, failure to fulfil which shall be considered as an act or omission of the carrier within the meaning of article 8."

8. IUMI noted that paragraph 3 expressly contemplated the case where the contracting carrier assumed,

<sup>39</sup> For the definition of "actual carrier" as "the owner of the ship carrying the goods" proposed by the Netherlands, see the discussion above on article 1, para. 2, at para. 13.

by special agreement with the shipper, obligations not imposed by the convention. IUMI proposed that the convention should not deal with this issue, which should be left to be resolved by contract.

#### *Article 10, paragraph 4*

9. Czechoslovakia proposed that consideration should be given to the possibility of extending the joint and several liability of the contracting carrier and the actual carrier to cases where it was not possible to ascertain whether the loss, damage or delay occurred during carriage performed by the contracting carrier, or by the actual carrier.

#### *Article 11. Through carriage*

##### *Article as a whole*

1. Several respondents expressed reservations regarding paragraph 2 of this article, which permitted the contracting carrier to escape liability "for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier" (Czechoslovakia, France, the German Democratic Republic, Hungary and the United States). It was noted that article 11, paragraph 2, may not be consistent with article 10, paragraph 1, under which the contracting carrier remained responsible for the entire carriage.

2. Canada proposed that article 11 be deleted, because of its conflict with the provisions of article 10 and because of the practical problems inherent in gaining jurisdiction over and enforcing judgements against actual carriers. Canada noted that the problem which article 11 sought to resolve could in any event be dealt with by means of consecutive contracts of carriage covering the different contemplated segments of the carriage by sea.

3. The Netherlands proposed introduction of the term "successive carrier" to identify the person who may be entrusted with performance of part of the carriage, pursuant to the provisions of article 11, paragraph 1. The Netherlands proposed the following new text for article 11, distinguishing the "successive carrier" from the "actual carrier" already referred to in article 10:

"1. Where the contract of carriage provides that the contracting carrier shall perform only part of the voyage covered by the contract, and that the rest of the voyage shall be performed by a person other than the contracting carrier (the successive carrier), the responsibility of the contracting carrier and of the successive carrier shall be determined in accordance with the provisions of article 10.

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

"3. The provisions of article 10 regarding the responsibility of the actual carrier shall apply correspondingly to the parts of the voyage mentioned in paragraph 1 of this article."

4. France proposed that wherever the term "contracting carrier" appeared in this article, it should be

changed to "carrier", in order to make the article conform to the definition of "carrier" proposed by France for article 1, paragraph 1.<sup>40</sup>

#### *Article 11, paragraph 1*

5. The Byelorussian SSR and the USSR proposed that the scope of this paragraph be clarified by stressing that it was only applicable to cases where the contract of carriage contained an express stipulation by the contracting carrier that he shall be obligated to perform only a specifically designated part of the carriage and that the other parts of the carriage shall be performed by one or more actual carriers. The USSR accordingly proposed that article 11, paragraph 1, should commence as follows: "Where a contract of carriage contains a special reservation that the contracting carrier shall perform only a specifically stipulated part of the carriage covered by the contract, ...".

#### *Article 11, paragraph 2*

6. France, the German Democratic Republic, Hungary and the United States proposed the deletion of this paragraph, and Czechoslovakia suggested its reconsideration, on the grounds that article 11, paragraph 2, was contradictory to the rule in article 10, paragraph 1, under which the contracting carrier was responsible for the whole carriage even if part or all of the carriage was entrusted by him to one or more actual carriers.<sup>41</sup> France noted that to permit the contracting carrier to avoid his liability for the whole carriage by simply stipulating in the contract of carriage that he will in fact only perform part of the carriage would render article 10 ineffective.

7. As a less preferable alternative to the deletion of article 11, paragraph 2, the United States proposed that this paragraph be amended so that the contracting carrier could only escape from his responsibility for the whole carriage if the actual carrier who was to perform part of the carriage was named in the contract of carriage.

### PART III. LIABILITY OF THE SHIPPER

#### *Article 12. General rule*

1. Japan proposed that this article should provide that a shipper was obliged to indemnify a carrier for any loss, damage or expense incurred by the carrier as a result of the consignee's failure to take delivery of the cargo within a reasonable time.

2. Canada observed that, if the Convention imposed on the shipper the duty specified in the sixth premise formulated by Canada for evaluating the draft Convention,<sup>42</sup> it was opposed to the addition to this article of a detailed provision regarding the liability of the shipper.

3. INSA observed that the rule on the liability of the shipper contained in this article was formulated

<sup>40</sup> For the definition of "carrier" proposed by France, see the discussion above on article 1, para. 1, at para. 6.

<sup>41</sup> It may be noted that Canada proposed deletion of article 11 as a whole. (See the discussion at para. 2 above.)

<sup>42</sup> This premise reads as follows: "The shipper should have a duty to inform the carrier of the true nature of the goods to be carried, of any special vice inherent in them and of any special characteristics of the goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged." Canada observed that article 17, para. 1, possibly gave effect to this premise.

differently from the rule on the liability of the carrier contained in article 5, paragraph 1, in the following two respects:

(a) Article 12 stated negatively that the shipper was not liable for loss or damage sustained by the carrier, actual carrier or ship, unless "fault or neglect" was proved on the part of the shipper or his servants or agents. Article 5, paragraph 1, however, stated positively that the carrier was liable for loss or damage to the goods, unless the carrier proved an absence of negligence on his part. INSA therefore proposed that the rule on shipper liability contained in this article should be formulated in the same manner as the rule on carrier liability contained in article 5, paragraph 1;

(b) Under article 12, the shipper could avoid liability by proving absence of "fault or neglect" on his part, or on the part of his servants or agents. In particular, in the course of proving absence of "fault or neglect", the shipper was not obliged to identify the particular occurrence causing the loss or damage to the carrier. Under article 5, paragraph 1, however, the carrier could avoid liability only by proof that he had not been negligent in taking measures to avoid the particular occurrence which had caused the loss, damage or expense, and to avoid the consequences of that occurrence; i.e. he had to identify the particular occurrence causing the loss or damage. INSA therefore proposed that article 5, paragraph 1, be redrafted to conform with article 12.<sup>43</sup>

4. Canada proposed that this article be redrafted as follows:

"Neither the shipper nor his servants or agents shall be liable for loss of or damage to the goods nor for expense arising from such loss or damage unless such loss or damage was caused by the fault or neglect of the shipper, his servants, or agents."

#### *Article 13. Special rules on dangerous goods*

##### *Article as a whole*

##### *Definition of the term "dangerous goods"*

1. Canada and the United States were of the view that the Convention should contain a definition of the term "dangerous goods". Canada proposed that "dangerous goods" should be defined with reference to the London Convention for the Safety of Life at Sea of 1960.

2. The United States proposed the following definition:

"'Dangerous goods' means explosives, flammable goods, or such other goods, in any form or quantity, which are considered dangerous or hazardous to life, health or property under international agreements, the laws or regulations of the flag of the vessel or the laws or regulations of the country of the port of loading or port of discharge."

3. ICS proposed that, in order to protect carriers in cases where hazardous or polluting substances were shipped without disclosure by the shipper of their true nature, hazardous or polluting substances should, for

<sup>43</sup> The new draft proposed by INSA for article 5, para. 1, is set forth in the discussion on that article, at para. 27.

the purposes of article 13, be treated as dangerous goods.<sup>44</sup>

*Proposed additions to article 13*

4. The Netherlands proposed that this article include a provision dealing with the scope and limits of the liability of actual carriers (and successive carriers<sup>45</sup>) when the contracting carrier fails to disclose to such other carriers information that he has regarding the dangerous nature and character of the goods or the precautions that are to be taken.

5. INSA proposed the introduction of provisions delineating the carrier's right to freight when dangerous goods are disposed of, prior to their arrival at the port of destination, in accordance with the provisions of article 13. INSA favoured a scheme under which the carrier, in cases where he was aware of the danger at the time he concluded the contract of carriage, would only be entitled to the proportion of the freight that corresponded to the distance the goods had in fact been carried prior to their disposal; in cases where the carrier lacked such knowledge at the time of contracting, he would be entitled to recover the freight in full. INSA observed that such a distinction in the carrier's right to the freight was justified, since the carrier could knowingly assume the risk involved in the carriage of dangerous goods and allow for this risk when setting the freight rate only if he was aware of the dangerous character of the goods.

6. The United Kingdom suggested that consideration be given to whether reference should be made in this article not only to the "carrier", but also to the "actual carrier".

*Article 13, paragraph 1*

*The requirement that the shipper always mark dangerous goods as such*

7. Finland, the United Kingdom and ICS proposed that this paragraph be modified so that an absolute, unqualified obligation was placed on the shipper to mark dangerous goods as such. It was suggested that this aim could be attained by deleting the phrase "when-ever possible" in the second sentence of this paragraph, a phrase which in any event was difficult to apply in practice.

8. Finland observed that under the IMCO regulations governing the transport of dangerous goods,<sup>46</sup> shippers were always obligated to label dangerous goods so as to identify their dangerous character. The United Kingdom noted that resolution of questions concerning the shipper's failure to mark dangerous goods as such, on the basis of allegations that under the particular circumstances it was physically not possible or feasible to so mark them, should be left to the applicable national law.

9. Canada proposed deletion of the second sentence in this paragraph, dealing with the shipper's obligation to specially mark dangerous goods, since in its view

<sup>44</sup> For the redraft of article 13, para. 1, by ICE incorporating this proposal, see the discussion below article 13, para. 1, at para. 12.

<sup>45</sup> For the proposal by the Netherlands to introduce the concept of "successive carrier", see the discussion above on article 11 as a whole, at para. 3.

<sup>46</sup> IMCO International Maritime Dangerous Goods Code.

the paragraph should focus on the obligation of the shipper to advise the carrier of the particular characteristics of the dangerous goods which could have a bearing upon the proper manner of transporting them.<sup>47</sup>

*The requirement that the shipper always inform the carrier of the precautions to be taken*

10. Canada and ICS proposed that article 13, paragraph 1, should require that in every case the shipper inform the carrier of "the precautions to be taken" when he placed dangerous goods in the charge of the carrier. Accordingly, they proposed deletion of the phrase "if necessary" from the first sentence in this paragraph.

11. Canada pointed out the uncertainties engendered by the phrase "if necessary" appearing in this paragraph; it was not clear whether the "if necessary" qualification of the shipper's duty to inform the carrier of the precautions to be taken related to the character of the danger, the experience of the shipper, the experience of the carrier, or the customs of the trade. Canada proposed the following text for article 13, paragraph 1:

"The shipper shall, before the goods come under the control of the carrier, inform the carrier of the nature of the dangerous goods to be carried and of any special characteristics of the dangerous goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged, as provided in article 4."

12. In order to protect carriers against negligent or dishonest shippers, ICS proposed that article 13, paragraph 1, should read as follows:

"When the shipper hands dangerous goods, which for the purpose of this article shall be deemed to include hazardous or polluting substances, to the carrier he shall inform the carrier of the nature of the goods and indicate the character of the danger and the precautions to be taken. The shipper shall mark or label in a suitable manner such goods as dangerous."

13. INSA proposed the following new language for the paragraph in order to clarify that it also applied to the shipper's servants and agents:

"When the shipper, his servants or agents hand dangerous goods to the carrier, they shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper, his servants or agents shall, whenever possible, mark or label in the suitable manner such goods as dangerous."

*Drafting suggestion*

14. OCTI made a suggestion of a drafting nature affecting only the French text of the paragraph.

*Article 13, paragraph 2*

*Imposed duty on shipper to inform carrier of precautions to be taken*

15. For the purpose of harmonizing this paragraph with paragraph 1 of article 13, the Netherlands, the

<sup>47</sup> For a redraft of article 13, para. 1, suggested by Canada and incorporating this proposal, see para. 11 below.

Philippines and the United States proposed that the shipper, in order to be exonerated from liability for damages or expenses attributable to his shipment of dangerous goods, be obligated to advise the carrier of the necessary precautions to be taken in connexion with the transport of such goods. It may be recalled that under article 13, paragraph 1, the shipper has the duty to "inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken".

16. The Philippines proposed a redraft of both sentences in paragraph 2, the Netherlands and the United States redrafts of its second sentence only, all designed to reach the result indicated under paragraph 15 above:

(a) The Philippines; new text for article 13, paragraph 2:

"Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character and the precautions to be taken. Where dangerous goods are shipped without the carrier having knowledge of their nature and character and the precautions to be taken the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment."

(b) The Netherlands; new text for beginning of second sentence of article 13, paragraph 2:

"Where dangerous goods are shipped without the carrier having knowledge of their nature or dangerous character or of the precautions to be taken, the shipper shall be liable..."

(c) The United States; new text for beginning of second sentence of article 13, paragraph 2:

"Where dangerous goods are shipped without the carrier having knowledge of their dangerous nature or character or precautions to be taken, the shipper shall be liable..."

*Carrier may dispose of dangerous goods only when they pose danger to ship or other cargo*

17. Canada and INSA proposed that the carrier's right under paragraph 2 of article 13 to dispose of dangerous goods, without any obligation to pay compensation, be restricted to cases where these goods in fact posed a danger to the ship or to other cargo or property. They noted that a similar restriction was already contained in article 13, paragraph 3, for cases where the carrier knew of the dangerous nature and character of the goods when he accepted them for shipment.

18. Canada proposed the following language for article 13, paragraph 2, which would permit the carrier to dispose of dangerous goods which endangered life or property regardless of any knowledge of the dangerous nature or character of these goods on the part of the carrier:

"The carrier may at any time unload, destroy or render innocuous, as the circumstances may require, any dangerous goods under his control which have become a danger to life or property whether or not

the carrier had knowledge of the nature or character of such dangerous goods."<sup>48</sup>

19. INSA proposed that, in addition to limiting the right of the carrier to dispose of dangerous goods without incurring any liability to cases where these goods presented a danger to the ship or to other cargo, article 13, paragraph 2, should be modified by deleting the phrase "as the circumstances may require" from its first sentence. In the view of INSA the carrier should be left free to decide upon the manner of protecting the ship and other cargo when disposing of the goods posing an acute danger to them. INSA disagreed with any rule requiring that the manner of disposing of dangerous goods correspond to the actual, objective circumstances of the case, since, when acting in an emergency situation, the carrier might not always be able to assess accurately the protective measures that "the circumstances may require".

#### *Drafting suggestion*

20. The United States made a drafting suggestion regarding this paragraph.

#### *Article 13, paragraph 3*

21. Parallel with its proposal to modify article 13, paragraph 2, the Philippines proposed the addition of the phrase "and the precautions to be taken" to the provision in paragraph 3 describing the requisite knowledge on the part of the carrier that would bring paragraph 3 into operation. In order to emphasize that the carrier enjoyed only a limited immunity under paragraph 3, since when he accepted the goods for shipment he knew that they were dangerous goods, the Philippines further proposed that the carrier should be able to dispose of such goods under the protection of this paragraph solely if the goods posed an "actual" danger. Article 13, paragraph 3, as redrafted by the Philippines, reads as follows:

"Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character and the precautions to be taken, become an actual danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any."

22. INSA proposed that the phrase "as the circumstances may require" be deleted from this paragraph, for the reasons advanced by INSA when it proposed that this phrase be deleted from article 13, paragraph 2.<sup>49</sup>

23. Canada proposed that article 13, paragraph 3, should be redrafted to provide that the carrier, his servants or agents shall not incur liability for disposing of dangerous goods, unless the necessity for disposing of such goods was attributable to their failure to observe the needed precautions indicated by the shipper or to an act or omission covered by article 8.

<sup>48</sup> It should be noted that Canada also suggested amendment of article 13, para. 3, making the carrier liable in certain cases when he unloaded, destroyed or rendered innocuous dangerous goods. See the discussion below on article 13, para. 3, at para. 23.

<sup>49</sup> See the discussion above on article 13, para. 2, at para. 19.

*Proposed addition to part III of the draft convention*

24. INSA proposed the addition to part III of the draft convention of a provision regulating the relations between the carrier, shipper and consignee in cases where the consignee failed to accept the goods at the port of discharge, and setting forth the legal consequences of such non-acceptance. INSA stated that such provision should specify that, in cases where the consignee did not claim the goods or refused to take delivery, the carrier may, after having notified the shipper, discharge the cargo and place it in a warehouse or other suitable place at the consignee's risk and expense.

## PART IV. TRANSPORT DOCUMENTS

*Article 14. Issue of bill of lading**Article as a whole*

1. France proposed that the term "contracting carrier" appearing in paragraphs 1 and 2 be replaced by the term "carrier" in order to make the article conform to the definition of "carrier" proposed by France for article 1, paragraph 1.<sup>50</sup>

*Article 14, paragraph 1*

2. Canada proposed that this paragraph should be redrafted as follows:

"When the carrier takes control of the goods as provided in article 4, he shall issue to the shipper on demand a bill of lading showing among other things the particulars referred to in article 15."

3. ICS proposed that the words "When the goods are received in the charge of the contracting carrier or the actual carrier..." should be replaced by the words "When the goods are received into the custody of the carrier within the port area...", in order to bring the article into harmony with the modification to article 4, paragraph 2, proposed by ICS.<sup>51</sup>

*Article 14, paragraph 2*

4. Canada proposed that the first sentence of this paragraph be deleted since article 15, paragraph 1 (j), already covered the issue dealt with in that sentence. It proposed that paragraph 2 should consist of the second sentence of this paragraph, redrafted as follows:

"A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been issued on behalf of the carrier."

*Article 15. Contents of bill of lading**Article as a whole**Detailed list of required particulars in bill of lading*

1. ICS proposed deletion of the whole of article 15, because in its opinion the content of bills of lading should be left to the constantly changing commercial requirements, and shippers and consignees were sufficiently protected by the provisions of article 16 of the draft convention. It added that adoption of article 15 would restrict innovation in shipping and commercial documentation.

<sup>50</sup> For the definition of "carrier" proposed by France, see the discussion above on article 1 at para. 6.

<sup>51</sup> See the discussion above on article 4, para. 2, at para. 8.

2. Japan was of the view that the long list in article 15, paragraph 1, of particulars that had to appear on every bill of lading was unnecessary and that existing commercial practice should determine the content of bills of lading. IUMI stated that article 15, paragraph 1, called for too many particulars in bills of lading and suggested that only particulars that were commercially necessary should be required.

*Permissive flexibility in documentation*

3. The United States favoured inclusion in the convention of a provision that the bill of lading may be prepared by computer or by means of some other system of electronic or automatic data processing.

4. It may be noted that the Montreal Protocol No. 4 amending the Warsaw Convention of 1929, in its article III,<sup>52</sup> permits the substitution for the standard air waybill of "any other means which would preserve a record of the carriage to be performed".

*Article 15, paragraph 1**Proposed additions to the list of required particulars in bills of lading*

5. The Byelorussian SSR, Mexico, the Ukrainian SSR and the USSR proposed that the bill of lading be required to contain an appropriate indication whenever the goods were carried on deck. It was noted that knowledge of the fact that the goods were being carried on deck was important for shippers and consignees, particularly because article 9 of the draft convention established special rules regarding carrier liability for carriage of goods on deck. Mexico proposed that the requirement that the bill of lading indicate any on-deck carriage of the goods be added to this paragraph as subparagraph (m); the Ukrainian SSR proposed incorporation of this requirement in article 15, paragraph 2; and the Byelorussian SSR and the USSR proposed that this requirement could appear either in article 9 or in article 15.

6. Czechoslovakia proposed that article 15, paragraph 1, should require that the bill of lading contain an appropriate indication if the goods were carried in containers, pallets or similar articles of transport.

7. The Philippines proposed the addition of a new subparagraph (m) to this paragraph, requiring that the following information also appear on bills of lading: "The invoice or estimated value of the goods". The Philippines noted that this proposal was related to the amendment proposed by it for article 6.<sup>53</sup>

*Proposed amendment to subparagraph (a)*

8. The Federal Republic of Germany proposed that under subparagraph (a) the carrier be given the choice of including in the bill of lading either "the number of packages or pieces" or "the weight of the goods". It observed that often the carrier could not reasonably check the weight of the goods and that in such a case, under the present wording of subparagraph (a), the carrier either would not insert any notation as to weight in the bill of lading or would include the weight as

<sup>52</sup> The text of article III is reproduced in the ICAO comment appearing in document A/CN.9/109 (reproduced in this volume, part two, IV, 1, *supra*).

<sup>53</sup> For the amendment of article 6 suggested by the Philippines, see the discussion above on article 6, at para. 31.

furnished by the shipper, accompanied, however, with a reservation pursuant to article 16, paragraph 1. The Federal Republic of Germany noted further that both the omission from the bill of lading of any indication as to weight and the addition of a reservation authorized under article 16, paragraph 1, might render a bill of lading "unclean" for documentary credit purposes.

*Proposed amendment to subparagraph (b)*

9. INSA suggested that, if its proposal to modify the definition of the term "goods" in article 1, paragraph 4, so as to exclude packaging other than containers<sup>54</sup> were adopted, subparagraph (b) of article 15 should be redrafted to read: "The apparent condition of the goods or their packaging". It explained that the change was designed to clarify that, in the case of packed goods, the carrier was only obligated to note the apparent condition of the packaging.

*Proposed amendments to subparagraph (f)*

10. Canada and ICS expressed doubts regarding subparagraph (f), under which the carrier was required to indicate on the bill of lading "the date on which the goods were taken over by the carrier at the port of loading", and they suggested its deletion. Canada observed that a carrier could attempt to reduce his period of responsibility under the convention by inserting a later date for his having taken over the goods than was actually the case. ICS noted that the carrier could not comply with this provision when he received a consignment over a number of days or when he was issuing a "shipped" bill of lading.

11. Fiji proposed that under subparagraph (f) the carrier should also be required to indicate the place where he had taken over the goods, so that the subparagraph would read:

"The port of loading under the contract of carriage and the date and place on which the goods were taken over by the carrier at the port of loading."

*Proposed amendment to subparagraph (h)*

12. ICS observed that subparagraph (h), by implying that there may be more than one original bill of lading, ran counter to the current trend in shipping practice towards issuing only one original of the bill of lading.

*Proposed amendment to subparagraph (j)*

13. The Philippines and the United States were of the view that subparagraph (j), in permitting the carrier to sign the bill of lading in one of the ways listed therein only "if the law of the country where the bill of lading is issued so permits", was unduly restrictive. The Philippines proposed that the carrier should be able to utilize one of the listed methods for signature if that method was permitted by "the law or usage of the country where the bill of lading is issued." The United States proposed that the carrier be permitted to sign the bill of lading in a manner specified in subparagraph (j) "if not prohibited by the law of the country where the bill of lading is issued."

*Proposed amendment to subparagraph (k)*

14. ICS noted that subparagraph (k) could create difficulties in practice if the cargo were resold.

*Proposed deletion of subparagraph (l)*

15. The Philippines proposed deletion of subparagraph (l) since it merely repeated the obligation for the inclusion of a statement in the bill of lading that was imposed by article 23, paragraph 3.

*Drafting suggestions*

16. Suggestions of a drafting nature regarding the text of article 15, paragraph 1, were made by France, the Philippines and OCTI. Drafting suggestions affecting only the French text were made by OCTI as to the introductory clause of article 15, paragraph 1, and as to subparagraph (f), and by France as to subparagraph (k). The Philippines made a drafting suggestion concerning subparagraph (k).

*Article 15, paragraph 2*

17. ICS proposed that the words "and the date or dates of loading" appearing at the end of the first sentence in this paragraph be deleted, since in the case of a "shipped" bill of lading it was not appropriate to inquire about the loading date.

18. The Ukrainian SSR proposed that article 15, paragraph 2, should require the carrier to note on the bill of lading that the goods would be carried on deck.<sup>55</sup>

*Article 15, paragraph 3*

19. Japan stated that the consequences under this paragraph of the omission of one or more of the particulars that the carrier had to include in the bill of lading pursuant to the provisions of article 15, paragraph 1, needed clarification.

20. The Philippines proposed that this paragraph include, as sanction against a carrier who issued a bill of lading which did not contain all the particulars required under article 15, paragraphs 1 and 2, a provision denying to such a carrier the article 6 limitation on carrier liability. The Philippines proposed the following language for article 15, paragraph 3:

"The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading, but shall deprive the carrier of the benefits provided for in article 6".

*Article 16. Bills of lading: reservations and evidentiary effect*

*Article as a whole*

1. The United States observed that the article was, in general, satisfactory, subject to its observation on paragraph 1 thereof.

2. Canada noted that, although the article provided a penalty for failure to comply with the provisions of article 15, paragraph 1, subparagraphs (b) and (k), it was not possible to decide whether the penalty was sufficient because of the unclear drafting of the article.

*Article 16, paragraph 1*

3. The Byelorussian SSR, the USSR and INSA noted that this paragraph implied, but did not expressly provide, that the carrier was entitled to enter a reservation on the bill of lading as to those particulars concerning the goods the accuracy of which he had reason-

<sup>54</sup> See the discussion above of comments on article 1, para. 4, at para. 20.

<sup>55</sup> For proposals that the bill of lading should be required to indicate that the goods were carried on deck, see the discussion above of comments on article 15, para. 1, at para. 5.



able grounds to suspect, or which he had no reasonable means of checking. They therefore proposed that the paragraph should clearly provide that the carrier had the right to enter a reservation in such a case.

4. Belgium and INSA noted that the imposition of an obligation on the carrier to make special note of any reasonable grounds for suspecting that the particulars concerning the goods contained in the bill of lading did not accurately represent the goods, and to make special note of the absence of reasonable means of checking such particulars, was undesirable for the following reasons:

(a) It would make documentation complex, and delay the dispatch of goods (Belgium);

(b) The concept of "grounds for suspicion" in terms of which the obligation was formulated seemed to lack clarity and would be difficult to apply in practice (INSA, citing the fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading, A/CN.9/96/Add.1, para. 37);\*

(c) In order to satisfy this obligation, carriers would in practice draft standard sets of reservations which they would insert in bills of lading. A cargo interest making a claim against a carrier would thus have, in addition to the burden of proving that the loss or damage occurred while the goods were in the charge of the carrier, the burden of disproving such reservations and the grounds or inaccuracies noted by the carrier (INSA).

5. The United States proposed a modification to paragraph 1 in order to clarify that, in the case of particulars contained in a bill of lading covering shipment of goods in a sealed container, opening and counting the contents of the container could not be regarded as a reasonable means of checking such particulars. It proposed the following modified text for paragraph 1:

"If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a 'shipped' bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, *as in case of a sealed container*, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking."

6. The Netherlands proposed that, since a reservation such as "weight unknown" would often be inserted in bills of lading because the carrier frequently had no means of checking the weight as stated by the shipper, it would be desirable if a pre-printed reservation such as "weight unknown" were considered a "special note" under paragraph 1.

7. Canada observed that the sanctions imposed under this paragraph on a carrier who failed to comply with its provisions were unclear.

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 2.

#### *Drafting suggestions*

8. OCTI made two drafting suggestions concerning the French text of this paragraph.

#### *Article 16, paragraph 2*

9. INSA proposed that the phrase "... or its packaging" should be added after the phrase "apparent condition of the goods" in the two instances where the latter phrase appeared in this paragraph. It observed that this addition would harmonize the language of this paragraph with the modification, proposed by INSA to the language of article 15, paragraph 1 (b).<sup>56</sup>

#### *Article 16, paragraph 3*

##### *Subparagraph (b)*

10. France and INSA proposed that the words "including any consignee" should be deleted from subparagraph (b) for the following reasons:

(a) The words were unnecessary (France and INSA), particularly because it was not important that the term "third party" in that subparagraph cover the final endorsee of an "order" bill of lading, or the bearer of a bearer bill of lading (France);

(b) In the case of a non-transferable bill of lading, a consignee named on the bill of lading could not be considered a third party since he could exercise the rights of the shipper on the bill of lading (France);

(c) In the case of a non-transferable bill of lading with a named consignee, the consignee might be the same person as the shipper. It was undesirable to accord such a shipper-consignee the rights given to a "third party" under this subparagraph (France).

France therefore proposed the adoption of the following wording contained in article 1, paragraph 1 of the Brussels Protocol of 1968:

"However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

#### *Article 16, paragraph 4*

11. Japan, ICS and INSA proposed the deletion of this paragraph. The following reasons were given for this proposal:

(a) The provisions of the paragraph depriving the carrier of his lien over the cargo for unpaid freight, for the sole reason that the bill of lading did not indicate that freight was payable, were unduly harsh (INSA);

(b) The second sentence of the paragraph had unsatisfactory results in certain cases, e.g. where a bill of lading was issued as a receipt pursuant to a charter-party and did not set forth the freight at the express wish of the charterer. If such a bill of lading was later transferred to a third party by the charterer, it would be reasonable to allow the carrier to recover the freight from such third party and to exercise a lien over the cargo for unpaid freight (ICS). ICS proposed the retention of the present rule under which the carrier only lost his right to the freight through a "freight prepaid" notation on the bill of lading.

<sup>56</sup> For the modification proposed by INSA, see the discussion above on article 15, para. 1 (b), at para. 9.

*Drafting suggestion*

12. A suggestion of a drafting nature concerning this paragraph was made by the Philippines.

*Article 16, paragraphs 2, 3 and 4*

13. Canada observed that these paragraphs would be acceptable if the article also provided that the issue of a bill of lading by the carrier constituted an undertaking by him to deliver the goods as specified therein.

*Article 17. Guarantees by the shipper**Article as a whole**Regulation of letters of guarantee*

1. The comments on this article were primarily concerned with the question of whether the draft convention should contain provisions regulating the use of "letters of guarantee" (also known as "letters of indemnity"), given by shippers to carriers in order to induce them to issue "clean" bills of lading. Canada, Hungary, Japan, the United States, USSR, CMI and IUMI expressed their dissatisfaction with the régime established by article 17 for governing the legal effect of such letters of guarantee.

2. It was proposed by Canada, Hungary, CMI and IUMI that the convention should not deal with letters of guarantee and that therefore paragraphs 2, 3 and 4 of this article be deleted. Canada observed that, since letters of guarantee were intended to bring about the issue of bills of lading which would be misleading to subsequent holders of those bills of lading as to the condition of the goods, such letters would be held invalid in most cases as being in violation of public policy (*ordre public*). CMI noted that paragraphs 2, 3 and 4 could be taken as legal recognition of letters of guarantee, while Hungary and IUMI noted that these provisions would lead to a great deal of litigation. Hungary further noted that the convention could not preclude claims by shippers based on guarantees in other international rules designed to ensure that the carrier would issue a "clean" bill of lading.

3. Japan and the USSR proposed deletion of paragraphs 3 and 4 of article 17. Japan was of the view that these two paragraphs were contrary to established commercial practice concerning letters of guarantee and would make it more difficult for shippers to obtain financing by means of documentary credits. The USSR suggested that the questions dealt with in paragraph 3 of article 17 should be left to national law and that those dealt with in paragraph 4 should be left to the general rule in article 8 on loss of the carrier's right to limit his liability.

*Deletion of phrase "including any consignee"*

4. France and INSA proposed deletion of the phrase "including any consignee" wherever it appeared in paragraphs 2, 3 and 4 of article 17.<sup>67</sup>

*Article 17, paragraph 1*

5. Canada observed that the interrelationship between this paragraph and article 16, paragraph 1, deal-

ing with reservations by the carrier on the bill of lading needed clarification. In the view of Canada, article 17, paragraph 1, was intended to govern relations between the carrier and the shipper, while article 16 paragraph 1 was concerned with relations between the carrier and the holder of the bill of lading.

*Drafting suggestions*

6. Suggestions of a drafting nature were made by the United Kingdom regarding the English text and by OCTI regarding the French text of article 17, paragraph 1.

*Article 17, paragraph 2**Drafting suggestions*

7. Suggestions of a drafting nature, affecting only the French text of article 17, paragraph 2, were made by France and OCTI.

*Article 17, paragraph 3*

8. The Byelorussian SSR, Japan, the United States, the USSR, CMI, ICS and INSA proposed the deletion of this paragraph.

9. The following reasons were given in support of deletion:

(a) The relationship between the carrier and a shipper giving a letter of guarantee to the carrier should be left to be determined by the applicable national law (Byelorussian SSR, the United States, USSR and INSA);

(b) The provisions in paragraph 3 were unjust and undesirable since they placed the shipper who initiated the deception of the third party holder of the bill of lading in a better position than the carrier (CMI and INSA); furthermore, when the carrier issued a "clean" bill of lading in reliance upon a letter of guarantee from the shipper, it might be assumed that as a rule the intent was to defraud a third party holder of the bill of lading, so that under the provisions of this paragraph letters of guarantee would not be valid against shippers (INSA);

(c) The paragraph did not sufficiently protect consignees against fraudulent collusion between the shipper and the carrier (the United States);

(d) The paragraph was contrary to well-established commercial practice and was likely to cause problems for shippers seeking documentary credit financing (Japan).

*Article 17, paragraph 4*

10. The Byelorussian SSR, Japan, the USSR, ICS and INSA proposed that this paragraph be deleted.

11. The Byelorussian SSR, the USSR, ICS and INSA were of the view that the special case dealt with in this paragraph was already adequately covered by the general rule in article 8 regarding loss by the carrier of the right to limit his liability under the Convention. ICS observed that the only case covered by article 17, paragraph 4, and not covered by article 8, involved the situation where the carrier was the innocent victim of his dishonest employee.

12. Japan noted that paragraphs 3 and 4 of article 17 were contrary to established commercial prac-

<sup>67</sup> France and INSA also suggested that the phrase "including any consignee" be deleted from the text of article 16, paragraph 3 (b). For the reasons advanced by France in support of its proposal to delete this phrase, see the discussion above on article 16, paragraph 3, at paragraph 10.

tice and would cause difficulties for shippers endeavouring to obtain financing.

#### Drafting suggestion

13. OCTI made a suggestion of a drafting nature affecting only the French text of article 17, paragraph 4.

#### Article 18. Documents other than bills of lading

1. The German Democratic Republic proposed that the provisions of this article should apply only to the case where a document other than a bill of lading was issued *at the request of the shipper*, and proposed that the article should be re-drafted as follows:

"When a carrier issues a document other than a bill of lading by request of the shipper, such document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

2. The German Democratic Republic also proposed that, in order to take account of developments in international transport, the article should be supplemented by provisions covering the legal effect of documents other than bills of lading, as follows:

"(a) The carrier shall be obliged for delivering goods to the consignee as named in this document at the port of destination.

"(b) The shipper retains the right to dispose of the goods until they have reached the port of destination, unless he has transferred this right beforehand in writing and without any reserve to the consignee or to a third person and has informed the carrier of such a transfer.

"(c) If this document makes reference to carriage conditions, these are valid if and when they are made known or otherwise accessible."

3. Canada proposed that this article be deleted, because:

(a) It created uncertainty as to the validity of the "other documents" contemplated therein, and the status of such documents in relation to the Convention; and

(b) The issue dealt with under this article was already adequately covered under article 23, paragraph 3.

4. ICS proposed that, if article 4, paragraph 2 of the draft Convention were not amended as proposed by it,<sup>58</sup> article 18 should be redrafted as follows:

"When a carrier issues a document other than a bill of lading to evidence the receipt of goods under a contract of carriage such document shall be *prima facie* evidence of the taking into custody in the port area of the goods as therein described."

5. INSA observed that the issuance of a document evidencing the conclusion of a contract of carriage, and the taking over of goods by a carrier under such a contract, were separate acts, and that the conclusion of a contract did not by itself constitute evidence of the taking over of goods. It therefore proposed that the scope of the article should be restricted to cases where the document issued evidenced not only the contract of carriage, but also the taking over of goods by the carrier, and proposed the following modified text:

<sup>58</sup> For the proposed amendment by ICS to article 4, para. 2, see the discussion above on article 4, para. 2, at para. 8.

"When a carrier issues a document other than a bill of lading to evidence a contract of carriage and receipt or acceptance of the goods, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

#### PART V. CLAIMS AND ACTIONS

#### Article 19. Notice of loss, damage or delay

##### Article 19, paragraph 1

1. Canada and Finland expressed reservations concerning the requirement that, to enjoy the benefit of the rebuttable presumption set forth in this paragraph, the consignee must give written notice to the carrier of the loss or damage "not later than at the time the goods are handed over to the consignee". Finland was of the view that this time period may be too short to protect adequately the interests of consignees.

2. Canada proposed that article 19, paragraph 1, be modified as follows, so as to clarify that it became applicable only when the carrier delivered the goods in one of the ways specified in article 4, paragraph 2:

"Unless notice of loss or damage specifying the general nature of such loss or damage is given by the consignee or such other person authorized to receive the goods, to the carrier, his servants or agents at the time when the carrier, his servants or agents deliver the goods as provided in paragraph 2 of article 4, such delivery shall be *prima facie* evidence of the condition of the goods as described in the bill of lading."

3. France proposed deletion of the words "if any" appearing at the end of this paragraph, since the presumption as to the condition of the goods when taken in charge by the carrier could arise only if a document of transport describing the goods was in fact issued.

##### Article 19, paragraph 2

4. The Byelorussian SSR, Fiji, the Ukrainian SSR and the USSR expressed their disagreement with the use of the phrase "completion of delivery" to denote the commencement of the period within which the consignee was obliged to give to the carrier written notice of non-apparent loss or damage.

5. The Byelorussian SSR, the Ukrainian SSR and the USSR observed that in paragraph 5 of article 19 the commencement of the time period for giving notice, and in paragraph 1 of article 19 the end of such period, were identified in terms of the "handing over" of the goods to the consignee. They therefore proposed that in article 19, paragraph 2, the phrase "after the completion of delivery" be replaced by the phrase "after the handing over of the goods to the consignee".

6. Fiji proposed that article 19, paragraph 2 be clarified so as to make it clear that, as a rule, the notice in writing required therein had to be given by the consignee within 10 days after his acceptance of the goods from the carrier. Fiji noted that the only exception to this rule should be the case where, pursuant to article 4, paragraph 2 (c), the carrier handed over the goods to a port authority or other third party.

7. Finland expressed the view that the 10-day period specified in article 19, paragraph 2, for giving

written notice might be too short to protect adequately the interests of consignees.

8. INSA proposed that, to avoid possible ambiguity, a provision be added clarifying that in this paragraph the term "days" denoted "consecutive days."

9. Canada stated that the provisions of article 19, paragraph 2, were acceptable.

#### *Article 19, paragraph 3*

10. Canada stated that the provisions of article 19, paragraph 3, were acceptable.

#### *Article 19, paragraph 4*

11. Canada stated that the provisions of article 19, paragraph 4, were acceptable.

#### *Article 19, paragraph 5*

12. Canada and Finland approved of the provision in this paragraph making liability to pay compensation for delay in delivery conditional upon the giving of written notice by the consignee to the carrier "within 21 days from the time that the goods were handed over to the consignee".

13. ICS, which was opposed to imposition under the draft Convention of carrier liability for delay in delivery,<sup>59</sup> suggested that if such liability were retained, the words "servants or agents" should be added at the end of paragraph 5.

14. INSA proposed that, to avoid possible ambiguity, a provision be added clarifying that in this paragraph the term "days" denoted "consecutive days".

#### *Article 19, paragraph 6*

15. Canada proposed that this paragraph be deleted so as to avoid any inconsistency with the provisions contained in article 19, paragraphs 1 to 5.

16. The Byelorussian SSR and the USSR proposed modification of article 19, paragraph 6, with a view towards making a timely written notice given by the consignee to the contracting carrier equally effective as to an actual carrier who performed part of the carriage.

### *Article 20. Limitation of actions*

#### *Article as a whole*

#### *Nature of the claims to be covered by the provisions on limitation of actions*

1. The United States proposed that the provisions on limitation of actions contained in this article should be made applicable only to claims against the carrier for cargo loss or damage, and not to non-carriage causes of action, because non-carriage causes of action fell outside the scope of the Convention and should be governed by the applicable national law.

2. The United Kingdom proposed that the provisions on limitation of actions contained in this article should not apply to defeat a counter-claim by the cargo interest against the carrier where the former sought an indemnity from the latter to cover liability which would otherwise be incurred to make a contribution in general

<sup>59</sup> For the view of ICS regarding the imposition of carrier liability for delay in delivery, see the discussion above on article 5 as a whole, at paragraphs 13 and 14.

average in respect of loss resulting from the carrier's fault.<sup>60</sup>

3. Japan proposed that the provisions on limitation of actions contained in this article should be extended to cover claims against the carrier for misdelivery made in good faith in reliance upon a letter of guarantee issued by a bank.

#### *Drafting suggestion*

4. The United States proposed that articles 20 to 22 should be examined with a view to eliminating possible inconsistencies in the use of terms therein.

#### *Article 20, paragraph 1*

#### *Length of the limitation period*

5. Canada, France, Japan, the Netherlands, the United Kingdom, the United States, CMI, ICS, INSA and OCTI proposed that the period of limitation under this paragraph should be one year. The following reasons were given:

(a) If it became necessary in a particular case to extend the period of one year, e.g. for the purpose of continuing discussions between the parties for the settlement of the dispute, under the provisions of paragraph 3 the period could be extended (CMI, INSA and OCTI);

(b) The period of one year, which currently prevailed under article 3, paragraph 6 of the Brussels Convention of 1924, had not created difficulties (France and CMI);

(c) A one-year period would promote the prompt resolution of disputes, which was desirable in commercial relations (France and ICS);

(d) The period of one year was sufficient for cargo interests either to negotiate a settlement with a carrier, or to institute legal or arbitral proceedings against him (INSA);

(e) Adoption of the period of one year would bring the Convention into harmony with the CMR and CIM Conventions in regard to the limitation period (ICS and OCTI);

(f) The adoption of a limitation period longer than one year would provide no guarantee that claimants would act within such longer period (CMI).

6. Austria, Hungary, Mexico, the Niger, Sierra Leone and Sweden<sup>61</sup> proposed that the period of limitation under this paragraph should be two years. The following reasons were given:

(a) A two-year period provided greater protection to cargo interests (Mexico);

(b) Experience with the period of one year which currently prevailed under article 3, paragraph 6 of the Brussels Convention of 1924 had shown that a one-year period was often too short for the purposes of negotiation and the institution of legal proceedings (Sweden);

<sup>60</sup> This proposal is incorporated in the new text proposed by the United Kingdom for article 24. This new text is set forth in the discussion below on that article, at para. 3.

<sup>61</sup> The preference of Sweden was expressed subject to its further proposal on the limitation provisions noted at paragraph 7 below.

(c) Although under paragraph 3 the period of one year could be extended, cargo interests and their insurers had sometimes experienced difficulties in obtaining an extension in the manner specified in that paragraph (Sweden);

(d) The current solution of having a one-year period, with the possibility of extending that period, was unsatisfactory, since there were differences in national laws concerning the possibility of an extension, and the kinds of permissible extension (Hungary);

(e) Adoption of the period of two years would bring the draft convention into harmony with the Warsaw Convention of 1929 in regard to the limitation period. The period of limitation specified in the Warsaw Convention was of special relevance because of certain similarities between carriage of goods by sea and carriage of goods by air, e.g. the distances involved in the carriage (Hungary);

(f) Under subparagraph (b) of this paragraph, the period of limitation could commence to run on the ninetieth day after the contract was made. Since the contract might have been made long before the carriage commenced, a two-year period of limitation would be more satisfactory than a one-year period (Austria).

7. Sweden observed that the limited consequence of the non-delivery of notice of loss or damage under article 19, paragraph 1, of the draft Convention was sometimes abused by cargo interests who did not inform carriers of claims until the limitation period had almost ended. Sweden accordingly proposed that the adoption of a limitation period of two years should be qualified by a provision requiring cargo interests to inform carriers of their claims within a shorter period than two years in order to retain their rights of action.

8. Nigeria proposed the adoption of a limitation period of two years for the institution of arbitral proceedings.

#### *Subparagraphs (a) and (b)*

9. Canada observed that it preferred the wording of article 3, paragraph 6, of the Brussels Convention of 1924 to the wording of subparagraphs (a) and (b) of paragraph 1. It noted, however, that subparagraph (b) probably covered a type of action not covered by article 3, paragraph 6, of the Brussels Convention of 1924, e.g. failure by the carrier to perform the contract of carriage by not taking control of the goods.

10. Austria observed that, although subparagraph (b) was intended to cover a case of total loss of the goods, it was unclear how the words "... or, if he has not done so, the time the contract was made" could apply to a total loss. Austria noted that, if the carrier had not taken over the goods, there could be no total loss.

11. The United Kingdom noted that in the circumstances covered by subparagraph (b), a claimant would be time-barred where a vessel was held up for a period longer than the limitation period, and the goods were lost after the vessel was released.

#### *Article 20, paragraph 3*

12. The Byelorussian SSR and the USSR proposed that the language of this paragraph should be modelled

on the language of article 22, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods.<sup>62</sup>

13. CMI approved of the inclusion of a provision enabling the parties to extend the period of limitation by agreement.

#### *Article 20, paragraph 4*

14. Canada proposed that this paragraph should be deleted in conformity with its proposals for the deletion of article 1, paragraph 2,<sup>63</sup> and article 10.<sup>64</sup>

#### *Article 20, paragraph 5*

15. Austria proposed that this paragraph should be deleted for the following reasons:

(a) The rule contained in the second sentence of the paragraph, specifying a minimum period within which an action for indemnity could be brought, might be inconsistent with the obligations undertaken by a State under other international conventions. The second sentence should therefore be deleted;

(b) If the second sentence were deleted, the first sentence would only state a truism.

16. CMI approved of the minimum period specified under this paragraph for the bringing of an action for indemnity.

### *Article 21. Jurisdiction*

#### *Article as a whole*

##### *Proposals to delete article 21*

1. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed the deletion of article 21 since they were of the view that questions of jurisdiction should be left to national law for settlement. The USSR observed that article 21 created uncertainty for defendants by giving a number of options to plaintiffs in selecting a forum, and that its provisions might violate certain agreements between States concerning jurisdiction over disputes involving organizations in those States.

2. INSA proposed the deletion of article 21 in order to preserve the long-standing international practice of resolving problems of jurisdiction on the basis of the parties' agreement as to the proper forum. INSA observed that, under paragraph 1, the plaintiff was given the unilateral option of choosing any one of four other fora, even in cases where the parties had agreed in advance on a particular forum.

3. On the other hand, Canada expressed its support for the options given to plaintiffs under this article and observed that the article would satisfactorily resolve many jurisdictional disputes before various national courts.

<sup>62</sup> A/CONF.63/15. Article 22, para. 2 of that Convention reads as follows: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed."

<sup>63</sup> For the proposal of Canada to delete article 1, paragraph 2, see the discussion above on article 1, paragraph 2, at paragraph 12.

<sup>64</sup> For the proposal of Canada to delete article 10, see the discussion above on article 10, at paragraph 3 (a).

*Opposition to limiting jurisdiction to contracting States*

4. Finland and Sweden proposed that jurisdiction should not be limited to "contracting States." They observed that such a limitation would cause problems when only a small number of States were bound by the convention, e.g. immediately upon its entry into force. Sweden also noted that if an action was brought in a non-contracting State, that State could disregard the provisions of article 21, particularly if the contract of carriage had some clear connexion with that State. Accordingly, Sweden proposed that the word "contracting" be deleted where it appeared before the word "State" in paragraphs 1, 2 (a) and 3 of article 21.

*Proposed addition to article 21*

5. Austria suggested that consideration be given to the possible addition to article 21 of provisions dealing with the recognition and enforcement of judgements delivered by courts in contracting States having jurisdiction under the terms of this article.

*Drafting suggestion*

6. The United States proposed that the terminology used in articles 20, 21 and 22 be harmonized.

*Article 21, paragraph 1*

*To give options to plaintiff only if no competent court designated in contract of carriage*

7. The German Democratic Republic proposed that, generally, jurisdiction over disputes arising from a contract of carriage should be vested either in the court specified in that contract or in the court having jurisdiction over the dispute pursuant to an agreement between the States where the parties had their residence or place of business. In cases where the above general rule did not apply, the German Democratic Republic proposed that the plaintiff be given the option of choosing among the courts at the port of loading, at the port of discharge, and at the principal place of business of the carrier.

8. As a less preferable alternative to the deletion of article 21, the Byelorussian SSR and the USSR proposed that the options for the plaintiff listed in subparagraphs (a) to (d) of article 21 should be made applicable only if no competent court had been specified in the contract of carriage.

*To limit the options given to plaintiff*

9. ICS proposed that subparagraphs (b), (c) and (d) of paragraph 1, or at least two of these subparagraphs, be deleted, since their retention would create uncertainties for defendants and would lead to forum shopping.

*Proposals concerning the introductory clause of paragraph 1*

10. The Netherlands proposed replacement of the phrase "legal proceeding arising out of the contract of carriage" by the phrase "legal proceeding arising under this Convention", in order to clarify that disputes concerning the freight charges were not covered.

11. Japan proposed the addition of a provision to paragraph 1, specifying that when the plaintiff was authorized to "bring an action in a contracting State",

the action had to be brought in a court having jurisdiction over the place described in the applicable subparagraph of paragraph 1, under the procedural law of the State concerned.

*Proposals concerning particular subparagraphs*

12. Belgium and INSA observed that subparagraph 1 (b) could lead to judicial proceedings being brought in courts that were far from the ports of loading and discharge, or the principal place of business of the carrier. Belgium referred to the possibility that, under subparagraph 1 (b), a carrier who concluded a contract of carriage through an agency could be sued at a place where he merely had an agency and consequently could not properly protect his interests, and proposed that subparagraph 1 (b) be redrafted on the model of article 17 of the Athens Convention of 1974.<sup>65</sup>

13. The United States proposed the following new text for subparagraph 1 (e): "such additional place as may be designated for that purpose in the contract of carriage".

*Article 21, paragraph 2**Proposals to delete paragraph 2<sup>66</sup>*

14. The Netherlands proposed deletion of this paragraph, on the ground that it dealt with questions of procedural law which should be left to national legislation for resolution.

15. INSA observed that paragraph 2 would create difficulties both in States that recognized the sovereign immunity of State-owned vessels, and in States whose national legislation did not permit *in rem* actions.

*Scope of paragraph 2*

16. The United Kingdom proposed that the scope of this paragraph be expanded so as to confer jurisdiction also on the court of a contracting State which legally arrested a sister ship of the carrying vessel.

17. Canada and the United Kingdom doubted whether it was correct to describe the courts having jurisdiction under the first sentence of subparagraph 2 (a) as "the courts of any port in a contracting State". They noted that national courts were not always established with jurisdiction limited to a specific area within the State and that, in any event, the jurisdiction of courts was rarely restricted to port areas. Canada proposed that subparagraph 2 (a) be redrafted to provide that any court in a contracting State, which legally arrested the carrying vessel, thereby acquired jurisdiction. For the same reason, the United Kingdom proposed replacement of the above-quoted description by the words "the courts of a contracting State in any of whose ports...".

18. The USSR observed that if paragraph 2 of article 21 were retained, it should be made clear that State-owned vessels were excluded from its scope.

<sup>65</sup> The relevant provision in article 17, paragraph 1 (d) of the Athens Convention of 1974, reads as follows: "a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State."

<sup>66</sup> It may be recalled that several respondents proposed the deletion of article 21; see the discussion above on article 21 as a whole, at paras. 1-2.



*Delete provision in subparagraph 2 (a) on mandatory removal of actions*

19. Belgium and the Federal Republic of Germany proposed the deletion of the second sentence in subparagraph 2 (a) dealing with the mandatory removal of actions, commenced by the legal arrest of the carrying vessel, at the petition of the defendant provided specified conditions were met. They observed that this provision may be contradictory to article 7 of the Brussels Convention on the Arrest of Sea-Going Ships of 1952, which did not grant defendants the option of removing an action to another court. The Federal Republic of Germany also observed that, due to differences in national laws on procedure, removal of actions brought in one State to another State was not practicable.

*Other comments on provision in subparagraph 2 (a) on mandatory removal of actions*

20. Austria observed that the provision in the second sentence of subparagraph 2 (a), forcing the plaintiff to remove an action, properly commenced by the legal arrest of the carrying vessel, upon the petition of the defendant if the defendant furnished sufficient security, might cause procedural difficulties in some States.

21. Finland proposed the addition of provisions clarifying the method to be followed by plaintiffs in removing actions and the effect of such removals on the limitation of actions.

*Drafting suggestion*

22. OCTI made a suggestion of a drafting nature affecting only the French text of subparagraph 2 (b).

*Article 21, paragraph 3*

*Modifications of the language in the first sentence*

23. The Netherlands proposed replacement of the phrase "no legal proceedings arising out of the contract of carriage" by the phrase "no legal proceedings arising under this Convention", in order to clarify that disputes concerning the freight charges were not covered.

24. The United States proposed that the words "paragraphs 1 and 2 of this article" be modified so as to read "paragraph 1 or 2 of this article". The United States observed that the current language had the unintended result of limiting the applicability of the provision to instances where the carrying vessel had been legally arrested.

*Rule on possible provisional or protective measures*

25. The Philippines proposed the deletion of the second sentence in paragraph 3 concerning possible provisional or protective measures by courts other than the one having jurisdiction over the action pursuant to paragraph 1 or 2 of this article. The Philippines observed that this provision might result in the issuance of conflicting orders by courts in different contracting States.

26. Canada, while noting that it had no objection to the added measure of protection accorded to claimants by the second sentence of paragraph 3, observed that the scope of the "provisional or protective measures" referred to therein was unclear, and that this provision might be inconsistent with paragraph 4 of article 21, which was designed to eliminate multiple law suits between the same parties on the same grounds.

*Article 21, paragraph 4*

27. Canada proposed that this paragraph be deleted, since it involved questions that should be left to the applicable national law. Furthermore, the paragraph could create difficulties for plaintiffs if sufficient security could not be obtained in any one jurisdiction.

28. The United States proposed that the words "paragraphs 1 and 2 of this article", appearing in subparagraph 4 (a), be replaced by the words "paragraph 1 or 2 of this article". The United States observed that the current language had the unintended result of limiting the applicability of subparagraph 4 (a) to instances where the carrying vessel had been legally arrested.

*Article 21, paragraph 5*

29. Canada proposed the deletion of this paragraph, because it concerned issues that should be left to the applicable national law. Canada observed that this provision might be impossible to apply due to the existence of national laws on jurisdiction that did not permit modification by agreement of the parties.

*Article 22. Arbitration*

*Article as a whole*

1. The Byelorussian SSR, the Ukrainian SSR, the USSR and INSA proposed the deletion of this article.<sup>67</sup> They observed that paragraph 1 gave an excessive number of options to the plaintiff as to the place at which he could institute arbitration proceedings. The retention of this article would therefore result in a decline in the use of arbitration clauses in bills of lading, and in resort to arbitration for the resolution of disputes relating to carriage of goods by sea. Such a decline would be undesirable, since arbitration was simpler, speedier and less expensive than judicial proceedings.

2. As an alternative to the deletion of this article, the Ukrainian SSR and the USSR proposed that the article should be modified so as to provide that the options given to the plaintiff as to the place of arbitration would be subject to any terms contained in an arbitration clause or agreement contained in a contract of carriage.

3. Canada observed that this article was acceptable, but should be supplemented by provisions dealing with the following issues:

(a) Whether the institution of judicial proceedings constituted an absolute waiver of the right to institute arbitral proceedings; and

(b) Whether recourse to courts for obtaining security prior to the institution of arbitration proceedings was to be permitted.

*To give options to plaintiff only if no place specified in contract of carriage*

4. The German Democratic Republic proposed that the place at which arbitration proceedings might be instituted should be determined in accordance with its proposals for determining the court in which legal proceedings might be instituted, i.e. it should be the place specified in the contract of carriage, or the place determined pursuant to an agreement between the States where the parties had their residence or place of busi-

<sup>67</sup> The USSR and INSA noted that some of their comments on article 21 were also applicable to article 22.

ness. Where the above general rule did not apply, the plaintiff should only be given the option of choosing among the port of loading, the port of discharge, and the principal place of business of the carrier.

#### Article 22, paragraph 2

5. Belgium observed that subparagraph (a) (iii) could lead to arbitration proceedings taking place far from the ports of loading and discharge, or the principal place of business of the carrier. Belgium referred to the possibility that, under subparagraph (a) (iii), a carrier who concluded a contract of carriage through an agency could be forced to submit to arbitration at a place where he merely had an agency and consequently could not properly protect his interests. Belgium proposed that subparagraph (a) (iii) be redrafted on the model of article 17 of the Athens Convention of 1974.<sup>68</sup>

6. The United States proposed that subparagraph (b) should be redrafted as follows:

*"Any additional place that may be designated for that purpose in the arbitration clause or agreement".*

#### Article 22, paragraph 4

7. Sierra Leone proposed the deletion of this paragraph, on the ground that the Convention should not interfere with an agreement between the parties, prior to a dispute, as to the procedure for arbitration.

#### Drafting suggestion

8. The United States proposed that the terminology used in articles 20, 21 and 22 be harmonized.

### PART VI. DEROGATIONS FROM THE CONVENTION

#### Article 23. Contractual stipulations

##### Article 23, paragraph 1

1. Sierra Leone proposed that this paragraph be deleted, since the parties to a contract of carriage should be permitted to exclude by agreement some or all provisions of the Convention.<sup>69</sup>

2. Canada proposed that the final sentence in this paragraph, dealing with "clauses assigning benefit of insurance", be deleted. It noted the danger inherent in listing a single example of the cases covered by the general provisions contained in the first two sentences of this paragraph.

3. France proposed replacement of the words "any other document evidencing the contract of carriage" in the first sentence of paragraph 1 by the words "any other document relating to carriage", in order to avoid possible overlap in the scope of the terms used in that sentence.

##### Article 23, paragraph 2

4. Canada stated that it had no objection to this paragraph on the assumption that its scope would be limited to providing the carrier with the benefit of an economic or commercial opportunity.

<sup>68</sup> The relevant provision in article 17, para. 1 (d) of that Convention is reproduced in the discussion above on article 21, at para. 12, foot-note 1.

<sup>69</sup> For similar proposals to exclude certain contracts from the scope of application of the Convention, see the discussion above on article 2, at paras. 7-14.

#### Article 23, paragraph 3

5. Japan and ICS were of the view that this paragraph was unnecessary and therefore proposed its deletion. Canada, however, stated that it found the paragraph acceptable.

6. Sierra Leone proposed that this paragraph be supplemented by a provision establishing clearly that the convention applied to a bill of lading which made no reference to the convention and did not contain stipulations derogating from the provisions of the convention.

#### Article 23, paragraph 4

7. Canada and Japan proposed the deletion of this paragraph. Japan observed that its provisions would not prove to be of practical utility.

8. Canada observed that the second sentence of this paragraph, entitling the plaintiff to recover for costs incurred by him in exercising his rights under paragraph 4, gave rise to several problems:

(a) The scope of the costs for which the plaintiff was entitled to reimbursement was unclear;

(b) The provision that the costs "shall be determined in accordance with the law of the court seized of the case" would often result in no recovery of costs, since under a number of national laws legal costs could not be recovered by successful claimants;

(c) The provision seemed to foresee the deliberate insertion by carriers of clauses in bills of lading which were null and void while providing only a limited sanction, and even that only if the shipper or consignee instituted legal action;

(d) The provision appeared to infringe on the right of national courts to decide on the award of costs.

For these reasons, Canada proposed that paragraph 4 be deleted.

#### Article 24. General average

1. Belgium and the Netherlands proposed that this article should be redrafted to ensure that it did not override Rule D of the York-Antwerp Rules. The Netherlands proposed the following new text:

"1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average.

"2. The rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution in general average.

"3. The provisions of the foregoing paragraph shall not affect the obligation to contribute in general average in case the carrier has no answer for the event which may give rise to the sacrifice or expenditure."

2. Japan observed that the combined effect of the second sentence of this article and article 5, paragraph 1, would be to undermine a fundamental principle of general average by permitting a cargo interest to recover from a carrier a contribution to general average necessitated by the result of an error in naviga-

tion. Japan therefore proposed that the second sentence of this article be reconsidered.

3. The United Kingdom observed<sup>70</sup> that this article required modification for the following reasons:

(a) One method by which the cargo interest might resist making a general average contribution was to plead the "equitable defence" that the carrier should not profit from a wrong done by him through benefiting from a general average contribution from the cargo interest. This method of protecting the interests of the cargo owner was not reflected in the present wording of article 24 and might, therefore, by implication, be excluded;

(b) The article did not take account of the fact that:

- (i) The "provisions in the contract of carriage or national law regarding general average" to which the Convention applied related not to the principle of general average but to the *adjustment* of general average; and
- (ii) The provisions should also apply to claims in salvage.

The United Kingdom proposed the following new text:

*"General average and salvage"*

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

"With the exception of articles 6 and 20 the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may recover or refuse contribution in general average or salvage."

4. The United Kingdom also proposed that, since this article did not derogate from the Convention, it should be removed from part VI of the draft convention ("Derogations from the Convention") and be placed under part II ("Liability of the carrier"), either as a part of article 5, or, preferably, as a separate article.

5. Canada observed that:

(a) A convention on the carriage of goods by sea should not give greater prominence to general average than given to it by private law, and that article 24 would give it such greater prominence;

(b) As presently drafted, the article was not sufficient to protect a cargo owner's contribution in general average whenever there was no loss of or damage to his cargo, and while only suggesting that the carrier may be responsible for indemnifying the cargo owner,

<sup>70</sup> The proposal of the United Kingdom concerning the effect of the limitation provisions (article 20) on certain claims in general average is noted in the discussion above on article 20, at para. 2. The proposal of the United Kingdom that article 6 should not apply to cargo claims in respect of general average contribution and salvage is noted in the discussion above on article 6 at para. 35. The new text proposed by the United Kingdom for article 24 which is set forth at para. 3 also incorporates the above proposals on articles 6 and 20.

the article did limit the amount by which a carrier would indemnify a cargo owner;

(c) Although the view held in Canada was that there were no difficulties with the present wording of article 5 of the Brussels Convention of 1924,<sup>71</sup> the inclusion of the second sentence of article 24 seems to have been prompted by a contrary view.

*Article 25. Other conventions*

*Article 25, paragraph 1*

1. The Philippines proposed the deletion of this paragraph, since it was of the view that this Convention alone should govern carriage of goods by sea. Alternatively, the Philippines proposed that the scope of this paragraph be limited by adding at its end the words "not in conflict with the provisions of this Convention".

2. Canada expressed its opposition to the provision in this paragraph whereby the Convention was made subordinate to contrary provisions in international conventions dealing with limitations on the liability of owners of seagoing ships.

*Proposal for a new paragraph 1 bis*

3. The United Kingdom proposed that a new paragraph be added to article 25, providing that no liability arose under the Convention where the carriage was subject to the provisions of the Athens Convention of 1974. The United Kingdom noted that the latter Convention applied to luggage which accompanied passengers.

*Article 25, paragraph 2*

4. Canada stated that the provisions contained in this paragraph were acceptable.

5. ICS proposed that the Brussels Convention on Civil Liability in the Field of Maritime Carriage of Nuclear Material of 1971 be added to the conventions referred to in subparagraph 2 (a) and 2 (b).

6. Austria proposed that the phrase "provided that such law is in all respects favourable to persons who may suffer damage as either the Paris or Vienna Convention", appearing in subparagraph 2 (b), be deleted. Austria observed that it was sufficient to establish that the operator of a nuclear installation was liable in accordance with the applicable national law, since the comparison now called for under subparagraph 2 (b) was sometimes impossible to make and, in any event, the provisions of national law were always more favourable to the claimant than the provisions of the draft convention or of the international conventions referred to in paragraph 2.

*Drafting suggestion*

7. France made a suggestion of a drafting nature affecting only the French text of subparagraph 2 (a).

<sup>71</sup> The relevant part of article 5 of the Brussels Convention of 1924 reads as follows:

"Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average."

5. Report of the Secretary-General: draft Convention on the Carriage of Goods by Sea; draft provisions concerning implementation, reservations and other final clauses (A/CN.9/115)\*

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INTRODUCTION

1. At the eighth session (10-21 February 1975) of the Working Group on International Legislation on Shipping at which the text of the draft convention on the carriage of goods by sea was adopted, the Working Group requested the Secretariat to prepare draft final clauses for consideration by the Commission at its ninth session. The present report has been prepared in response to that request.

2. It will be noted that the article on "entry into force" makes such entry depend on States with a specified tonnage of merchant shipping becoming contracting States, the amount of tonnage of a contracting State being determined by reference to certain statistical tables contained in Lloyd's Register of Shipping. The Secretariat has communicated with Lloyd's Register of Shipping in regard to the method of compiling these tables, their format, and the date of publication of the Register, and has received the following information:

(a) The statistical tables are principally based on data recorded in the ship's registers, and supplemented by any published data on small ships. The data are held on a computer file and updated daily. Data are collected from all known reliable sources, including government authorities, shipowners and shipbuilders. The data are examined and evaluated to ensure their accuracy.

(b) Lloyd's Register of Shipping cannot be certain that the categories of merchant vessels currently set forth in table 2 will remain the same in future issues of the tables, since technological development in shipbuilding may necessitate changes. However, no radical changes in these categories is at present foreseen.

(c) The Register is published annually in October or November of each year. The figures contained in an issue are applicable as at 1 July in the year of publication.

DRAFT ARTICLES

Article [ ]. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

\* 1 March 1976.

[Article [ ]. Implementation]<sup>1</sup>

[1. If a Contracting State has two or more territorial units in which [, according to its constitution,] 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 shall 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.<sup>2</sup>

2. Declarations made at the time of signature are subject to confirmation upon ratification [acceptance or approval].

3. Declaration made under paragraph 1 of this article, and the confirmation of declarations made under paragraph 2 of this article, shall be in writing and shall be notified to the depositary.

4. Declarations shall state expressly the territorial units to which the Convention applies.

5. Declarations made under paragraph 1 of this article shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned, except for declarations of which the depositary only receives notification after such entry into force. The latter declarations shall take effect on the date the notification thereof is received by the depositary. If the notification of the latter declarations states that they are to take effect on a date specified therein, and such date is later than the date the notification is received by the depositary, the declarations shall take effect on such later date.

<sup>1</sup> This article is modelled on article 31 of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974. However, the Secretariat is not at present aware of any state which has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in the draft convention on the carriage of goods by sea.

<sup>2</sup> This paragraph is modelled on para. 1 of article 31 of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974, and the words "according to its constitution" enclosed in square brackets appear in the latter paragraph. However, the Commission may wish to consider whether these words are necessary for the purpose of this Convention.

6. If a Contracting State described in paragraph 1 of this article makes no declaration at the time of signature, ratification [acceptance, approval] or accession, the Convention shall have effect within all territorial units of that State.]

*Article [ ]. Date of application*

Each Contracting State shall apply the provisions of 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.

*Article [ ]. Signature, ratification, [acceptance, approval], accession*

1. This Convention shall be open for signature by all States until .....\* at the Headquarters of the United Nations, New York.

2. This Convention shall be subject to ratification, [acceptance or approval] by the signatory States.

3. After .....\*, this Convention shall be open for accession by all States which are not signatory States.

4. Instruments of ratification [, acceptance, approval] and accession shall be deposited with the Secretary-General of the United Nations.

*Article [ ]. Reservations*

1. Any State may, at the time of signature, ratification, [acceptance, approval] or accession, make one or more of the following reservations:

(a) .....

(b) .....

2. No reservations may be made to this Convention other than those set forth in paragraph 1 of this article.

3. Reservations made at the time of signature are subject to confirmation upon ratification [acceptance or approval].

4. Reservations made under paragraph 1 of this article, and the confirmation of reservations made under paragraph 3 of this article, shall be in writing and shall be notified to the depositary.

5. Reservations shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned.

6. Any State which has made a reservation to this Convention may withdraw it at any time by means of a notification addressed to the depositary. Such withdrawal shall take effect on the date the notification is received by the depositary. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date the notification is received by the depositary, the withdrawal shall take effect on such later date.

*Article [ ]. Entry into force*

*Alternative A*

1. This Convention shall enter into force on the first day of the month following the expiration of one year after the date on which not less than ..... States,

\* Same date to be inserted.

the combined merchant fleets of which constitute not less than ..... per cent of the gross tonnage of the world's merchant shipping, have become Contracting States to it in accordance with article [ ].<sup>3</sup>

*Alternative B*

1. This Convention shall enter into force on the first day of the month following the expiration of one year after the date on which not less than ..... States, including ..... States each with not less than ..... gross tons of merchant shipping, have become Contracting States to it in accordance with article [ ].<sup>4</sup>

2. For the purposes of the present article, the tonnage shall be deemed to be that [contained in Lloyd's Register of Shipping, Statistical Tables 197-, table 1, in respect of the merchant fleets of the world] [contained, in respect of a Contracting State, in the issue of Lloyd's Register of Shipping, Statistical Tables, table 1, in respect of the merchant fleets of the world, published most recently prior to the date on which that State became a Contracting State].<sup>5</sup>

<sup>3</sup> This provision is modelled on the approach taken in article 49 of the Convention on a Code of Conduct for Liner Conferences, Geneva, 1974, and article 17 of the International Convention on the Tonnage Measurements of Ships, London, 1969.

<sup>4</sup> This provision is modelled on the approach taken in article 13 of the Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968; article 11 of the International Convention relating to the Limitation of the Liability of Carriers of Seagoing Ships, Brussels, 1957; and article XV of the International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969.

<sup>5</sup> (1) This provision is modelled on the approach taken in article 49 of the Convention on a Code of Conduct for Liner Conferences, Geneva, 1974. Article 49 (1) reads as follows:

"(1) The present Convention shall enter into force six months after the date on which not less than 24 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with article 48. For the purpose of the present article the tonnage shall be deemed to be that contained in Lloyd's Register of Shipping, Statistical Tables 1973, table 2 'World fleets—analysis by principal types', in respect of general cargo (including passenger/cargo) ships and container (fully cellular) ships, exclusive of the United States reserve fleet and the American and Canadian Great Lakes fleets."

It may be noted that the statistics as to tonnage extracted from the Lloyd's Register of Shipping, 1973, Statistical Tables, table 2, "World fleets—analysis by principal types", together with an explanatory note, are set forth in the report of the Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, vol. II (TD/CODE/13/Add.1, part 2). A reference to these statistics as set forth in TD/CODE/13/Add.1, part 2 is given in a foot-note to article 49 of the Convention on a Code of Conduct for Liner Conferences.

(2) Certain conventions in respect of which the Secretary-General of the Intergovernmental Maritime Committee is the depositary (e.g. article 17, International Convention on the Tonnage Measurement of Ships, 1969) and certain ILO maritime conventions (e.g. article 15, Convention No. 133 of 1970: Convention concerning Crew Accommodation on Board Ship) contain provisions making entry into force depend on Contracting States having a specified tonnage of shipping, but do not state how such tonnage is to be determined. In response to inquiries made by the Secretariat, the secretariats of IMCO and ILO have stated that the tonnage is determined for the purposes of these provisions as to entry into force by reference to the statistical data contained in Lloyd's Register of Shipping.

(3) In response to an inquiry by the Secretariat from Lloyd's Register of Shipping as to the possible use of its statistical table to determine tonnage, Lloyd's Register of Shipping suggested that consideration might be given to determining the tonnage of shipping of a contracting State not

3. For each State which becomes a Contracting Party to this Convention during the course of, or after the expiration of, the one year specified in paragraph 1, this Convention shall enter 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.

#### *Alternative A*

4. A State which is a party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention), upon becoming a Contracting State to this Convention shall notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention, so that the 1924 Convention shall cease to have effect for that State simultaneously with the entry into force of this Convention with respect to that State. Prior to the date on which the last instrument of ratification [acceptance, approval] or accession required by paragraph 1 of this article for the entry into force of this Convention is deposited with the Secretary-General of the United Nations, for the purposes of this paragraph, a State may request the Government of Belgium to consider the notification by that State of its denunciation of the 1924 Convention to be received on the first day of the month following that date.

5. Upon the deposit of the last instrument of ratification [acceptance, approval] or accession required by paragraph 1 of this article for the entry into force of this Convention, the depositary of this Convention shall inform the Government of Belgium as the depositary of the 1924 Convention of the date of such deposit

by reference to table 1 ("Merchant fleets of the world") but by reference to table 2 ("World fleets—analysis by principal types"). Reference to table 2 may be appropriate if it were considered that only the tonnage of certain types of merchant vessels was to be relevant for calculating the tonnage of shipping of a State for the purposes of the provisions relating to entry into force. The Commission may wish to consider this suggestion.

and of the names of Contracting States to the Convention on that date.

#### *Alternative B*

4. A State which is a party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) upon becoming a Contracting State to this Convention shall notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention 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.

5. Upon the entry into force of this Convention under paragraph 1 of this article, the depositary of this Convention shall notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.

6. The provisions of paragraph 4 of this article shall apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

#### *Article [ ]. Denunciation*

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 shall take effect [one year] after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification has reached the depositary.

Done at . . . . ., in a single original, of which the Chinese, English, French, Russian and Spanish texts are equally authentic.



## V. TRAINING AND ASSISTANCE

### Note by the Secretary-General: training and assistance in the field of international trade law (A/CN.9/121)\*

1. In connexion with the eighth session of the United Nations Commission on International Trade Law, an international symposium on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law was held in Geneva from 14 to 18 April 1975.

2. At the close of the symposium, the first under the Commission's programme of training and assistance in the field of international trade law, the participants adopted a resolution which they requested should be put before the Commission. The text of that resolution appears as an annex to this note.

#### ANNEX

##### Resolution of the Symposium on International Trade Law

###### *This Symposium*

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law (UNCITRAL) for the work of the Commission and its secretariat in convening the Symposium, as well as to those Governments which have made voluntary contributions for the implementation of the proposal, whereby it has been made possible for the participants to come to Geneva to observe the work of the Commission and to discuss the role of universities and research centres in the teaching and dissemination and wider appreciation of international trade law;

2. *Expresses its view* that international trade law is an appropriate discipline for teaching and research in universities and research centres, whilst recognizing that there are differences between the needs and problems in relation thereto in the countries from which the participants have come;

3. *Expresses its wish* that its participants should be able to continue more detailed discussions of these needs and problems, and to exchange further information;

4. *Expresses its hope* that UNCITRAL will concur and co-operate in the attainment of these objectives by offering its resources and good offices

(a) To complete the programme of work undertaken by UNCITRAL in the preparation and circulation of bibliographies on international trade law;

(b) To continue to give the widest dissemination to its reports and deliberations;

(c) To request member governments of UNCITRAL to establish a fund to promote teaching and research in international trade law by encouraging, promoting, and assisting exchanges of scholars;

(d) To serve generally as a centre of exchange and communication between scholars engaged in teaching and research in the field of international trade law.

\* 31 March 1976.

## VI. ACTIVITIES OF OTHER ORGANIZATIONS

Report of the Secretary-General: current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/119)\*

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### INTRODUCTION

1. The United Nations Commission on International Trade Law, at its third session, requested the Secretary-General "to submit reports to the annual sessions of the Commission on the current work of international organizations in matters included in the programme of work of the Commission".<sup>1</sup>

2. In accordance with the above decision reports were submitted to the Commission at the fourth session in 1971 (A/CN.9/59), at the fifth session in 1972 (A/CN.9/71), at the sixth session in 1973 (A/CN.9/82),\*\* at the seventh session in 1974 (A/CN.9/94 and Add.1 and Add.2)† and at the eighth session in 1975 (A/CN.9/106).††

3. The present report, prepared for the ninth session (1976), is based on information submitted by international organizations concerning their current

work.<sup>2</sup> In many cases, this report includes information on progress with respect to projects for which background material is included in earlier reports.<sup>3</sup> Some of the international organizations, whose activities were described in the earlier reports to the Commission,

\* Information received from some international organizations has not been included because that information concerned activities unrelated to the work of UNCITRAL.

\*\* Background material may be found in the reports presented to the fourth session (A/CN.9/59), the fifth session (A/CN.9/71), the sixth session (A/CN.9/82); UNCITRAL Yearbook, Vol. IV: 1973, part two, V), the seventh session (A/CN.9/94 and Add.1 and 2; UNCITRAL Yearbook, Vol. V: 1974, part two, V), and the eighth session (A/CN.9/106; UNCITRAL Yearbook, Vol. VI: 1975, part two, VII) and in the following: *Digest of legal activities of international organizations and other international institutions*, published by the International Institute for the Unification of Private Law (UNIDROIT). Progressive development of the law of international trade, report of the Secretary-General (1966), *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, document A/6396, paras. 26-189, (UNCITRAL Yearbook, Vol. I: 1968-1970, part one, II, B). Survey of the activities of organizations concerned with harmonization and unification of the law of international trade, note by the Secretary-General, 19 January 1968 (A/CN.9/5); and replies from organizations regarding their current activities in the subjects of international trade within the Commission's work programme, note by the Secretariat, 1 April 1970 (UNCITRAL/III/CRP.2).

\* 23 March 1976.

† Report of the United Nations Commission on International Trade Law on the work of its third session, *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)*, para. 172 (UNCITRAL Yearbook, Vol. 1: 1968-1970; part two, III, A).

\*\* UNCITRAL Yearbook, Vol. IV: 1973, part two, V.

† UNCITRAL Yearbook, Vol. V: 1974, part two, V.

†† UNCITRAL Yearbook, Vol. VI: 1975, part two, V.

either did not submit statements as to their current activities or reported that they were not currently engaged in work related to the work programme of the Commission.

4. A subject-matter index is set out at the end of this report.

# I. UNITED NATIONS ORGANS AND SPECIALIZED AGENCIES

## A. UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (ECE)

### *International sale of goods*

#### (a) *General conditions of sale, standard contracts and standard trade terms*

5. The ECE Group of Experts on International Contract Practices in Industry held its eighth and ninth sessions in 1975. During both sessions the experts concentrated their attention on the draft Guide for drawing up contracts on industrial co-operation (see paragraph 10 below); they also noted the information contributed by certain experts, interested in participating in rendering assistance to the Asian-African Legal Consultative Committee (ALCC), about advice they had been tendering informally to the ECE secretariat in order to enable the latter to comment on the draft standard contracts and general conditions of sale developed by ALCC.

6. It will be recalled from the previous account of ECE's work (A/CN.9/106, para. 5)\* that ALCC is planning a consultation on the basis of these draft texts and that experts from organizations pursuing corresponding activities will be asked to participate. ALCC had also requested written comments before the end of 1975.

7. During the eighth and ninth sessions of the Group of Experts, participants from several ECE member countries showed an interest in this advisory function, which will contribute towards making the ECE General Conditions better known and, possibly, more widely accepted—one of the objectives of the Group of Experts. Through its efforts, and especially through the contributions of participants from Belgium, Federal Republic of Germany, Finland and Norway it was possible for the ECE secretariat to send comments as requested. It was, however, decided that the details of the ALCC drafts should not be analysed at the prevailing stage of the work; only some general comments should be distributed by the ECE secretariat while conveying the assurances of interested experts that they were willing to give further assistance, as required, when the ALCC work was further advanced.

8. The Group of Experts on International Trade Practices relating to Agricultural Products held its sixteenth and seventeenth sessions in 1975 and its eighteenth session in January 1976. Reference is made to document A/CN.9/106, para. 6, in which a list of the General Conditions and Rules of Survey elaborated by the Group of Experts is reproduced. The General Conditions and Rules of Survey for Dry and Dried Fruit (AGRI/WP.1/GE.7/53) were given a final

reading preceding publication at the first of these sessions.

9. At the seventeenth session, the second reading of the draft Rules of Arbitration was begun (AGRI/WP.1/GE.7/R.9/Rev.1 and (now) Rev.2). Several countries were represented at this session not only by experts familiar with the daily trade in the relevant products and with practical experience of arbitration in their respective fields but also by experts on commercial arbitration. Reference was made to corresponding work in UNCITRAL. In 1976 it is hoped that two sessions will be devoted to study of the draft rules on Arbitration.

10. At the eighteenth session in January 1976, work on harmonization of similar articles in the set of three General Conditions (for potatoes, for dry and dried fruit, for fresh fruit and vegetables) was initiated. It was decided to continue to keep separately the three instruments with the denomination "UN/ECE General Conditions of Sale for...".

#### (b) *Guide for drawing up different contracts*

11. As mentioned in paragraph 5 above, the Group of Experts on International Contract Practices in Industry continued in 1975 its work on the draft Guide for drawing up contracts on industrial co-operation. The text has now been agreed, but a final reading will be made when the Group of Experts meets in May 1976. At that session work on the next Guide will begin, i.e. the study of a preliminary text of a draft Guide for drawing up international consortium contracts.

#### (c) *Projects in areas related to international trade law*

##### *Facilitation of international trade procedures*

12. The Working Party on Facilitation of International Trade Procedures continued its work on the study of "Purpose and modalities of signature in international trade documents" as described in document A/CN.9/106, paragraph 11.\* Close co-operation was established with the newly formed ICC "Joint Working Party on the legal problems arising from the use of automatic data processing in international trade".

13. In this context, as in many others, members of the Working Group voiced their concern over the fact that too little was known about trade facilitation work by lawyers and government experts responsible for regulations affecting the flow of goods internationally. Measures are, however, now planned to remedy this situation, such as the production of a Facilitation Manual and the publication of a leaflet describing the work of the Working Party and its two Groups of Experts on Data Requirements and Documentation and on Automatic Data Processing (ADP) and Coding, respectively.

14. The background to the legal problems linked to the use of ADP for data flow in international trade is presented in ICC document No. 470/261-460/189.

##### *Standardization policies*

15. The Economic Commission for Europe at its thirtieth session in 1975, in its decision G (XXX) Standardization, invited Governments to give appropriate consideration to the implementation of the recommendations formulated by the Meetings of Government

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, V.

\* UNCITRAL Yearbook, Vol. VI: 1975, part two, VII.

Officials responsible for Standardization Policies. The decision covers the recommendation by the government officials on the method of "Reference to Standards" described in document A/CN.9/106,\* which is a new method of harmonizing certain parts of national legislation with corresponding parts of the legislation in existence in other countries. Some of the subsidiary bodies of the Commission have initiated investigations into the use of the method in fields where they are responsible for recommendations aiming at the harmonization of national legislation or for the drafting of conventions or other instruments for acceptance resulting in harmonization and sometimes also in the abolition of barriers to trade.

(d) *Customs Convention on the International Transport of Goods under cover of TIR Carnets*

16. The Customs Convention on the International Transport of Goods under cover of TIR Carnets (TIR Convention) (1959) was revised under the auspices of the ECE and the new text adopted at a conference convened in Geneva for the purpose in November 1975. The new TIR Convention, 1975 (ECE/TRANS/17) was opened for signature in Geneva on 1 January 1976 and will remain so until 31 December 1976, thereafter being deposited with the Secretary-General of the United Nations in New York. The purpose of the Convention is to facilitate the carriage of goods involving international carriage by road by providing for simplified customs transit formalities including a customs guarantee system.

B. UNITED NATIONS ECONOMIC COMMISSION  
FOR LATIN AMERICA (ECLA)

*Trade and transport facilitation*

17. The Economic Commission for Latin America carried out a study, at the request of the Bolivian and Chilean Governments, on transport and customs procedures and documentation affecting cargo in transit through the port of Arica destined to Bolivia. The corresponding report, entitled *Estudio de facilitación del tránsito de mercadería con destino a Bolivia a través del puerto de Arica* (E/CEPAL/L.116, January 1975), proposed an integrated transit system which was approved by both Governments and put into effect in August 1975.

18. ECLA has also been active in promoting co-ordination among regional organizations interested in trade and transport facilitation, such as the Latin American Free Trade Association (LAFTA), the Organization of American States (OAS), the Caribbean Community (CARICOM), the Board of the Cartagena Agreement (JUNAC) and the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA), and has assisted in forming national facilitation groups in Latin America. (See *Trade and transport facilitation in Latin America* (E/CEPAL/1005, 23 April 1975)). In order to give wider dissemination to facilitation efforts in Latin America and elsewhere, ECLA began publishing in August 1975 a bi-monthly bulletin called *FAL—Facilitación del comercio y el transporte en América Latina*.

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, V.

*International land transport*

19. In collaboration with the Latin American Association of Railways (ALAF), ECLA prepared a draft agreement on multinational railroad traffic to permit freer international circulation of railway cars in the southern zone of South America. The agreement was approved by the railroads of Argentina, Bolivia, Brazil, Chile and Paraguay during the XI General Assembly of ALAF in Montevideo in October 1975 and will go into effect when the complementary rules and regulations are completed.

20. Since mid-1975 ECLA has been engaged on a project to promote the establishment of highway freight transport services among Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela and to eliminate legal and administrative barriers which are hindering these services. The project is being carried out jointly with the Andean Development Corporation (CAF) in collaboration with JUNAC.

*International multimodal transport*

21. ECLA has continued to advise Latin American countries on the preparation of a convention on international multimodal transport and provided technical assistance in this regard to Chile, Cuba, Ecuador, Mexico and Peru during 1975.

22. A document on the civil liability of international multimodal transport operators, entitled *Sistemas de responsabilidad y seguros en el caso de contratos de transporte multimodal internacional* (E/CEPAL/L.123, 24 November 1975), was prepared for the First Meeting of Experts of the Andean Group on Transport Insurance, organized by JUNAC.

C. INTERNATIONAL CIVIL AVIATION ORGANIZATION  
(ICAO)

*Revision of the Warsaw Convention of 1929  
as amended by the Hague Protocol of 1955*

23. Prior stages of ICAO's work on the revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 were described in the reports submitted to UNCITRAL at its sixth (A/CN.9/82, para. 6)\* and eighth sessions (A/CN.9/106, para. 23).\*\*

24. An International Conference on Air Law convened by the Council of ICAO met from 3 to 25 September 1975 at the headquarters of ICAO in Montreal and, as a result of its deliberations, adopted and opened for signature the following Protocols:

(a) Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929;<sup>4</sup>

(b) Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on

\* Reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, V.

\*\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, V.

<sup>4</sup> ICAO document No. 9145.

12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955;<sup>6</sup>

(c) Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971;<sup>6</sup> and

(d) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955.<sup>7</sup>

25. The Conference also adopted a resolution with a view to consolidating the different instruments of the Warsaw system into a single convention.

26. On 19 November 1975, the Council, upon considering the said resolution, decided to amend the general work programme of the Legal Committee to include as item No. 1 the subject "Study of the Consolidation of the Instruments of 'Warsaw System' into a Single Convention"; to request the Chairman of the Legal Committee to establish a special sub-committee to study the above-mentioned subject; to convene a session of the Sub-committee from 17 May to 1 June 1976 in Montreal; and to convene the twenty-second session of the Legal Committee in Montreal from 19 October to 12 November 1976, in order to study the above-mentioned subject on the basis of the Sub-committee's report and comments received from States. Decision on the convening of the Diplomatic Conference in 1977 was reserved until the report of the twenty-second session of the Legal Committee is available.

#### D. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

##### *Activities of UNCTAD in the field of international shipping legislation*

###### *(a) International intermodal transport*

27. The 58-member Intergovernmental Preparatory Group on a Convention on International Intermodal Transport held its third session from 16 February to 5 March 1976. To assist the Intergovernmental Preparatory Group in its work the UNCTAD secretariat has prepared further in-depth studies on the technical, economic, legal and institutional implications of intermodal transport operations. The Intergovernmental Preparatory Group will hold its fourth session from 1-19 November 1976.

###### *(b) Charter-parties*

28. The Working Group on International Shipping Legislation, at its fourth session held on 27 January to 7 February 1975, requested the UNCTAD secretariat to carry out, in addition to its report "Charter Parties" (TD/B/C.4/ISL/13), two major studies, which are now in progress: (a) a comparative analysis of clauses based on three main time charter contracts and (b) a similar comparative analysis of clauses in voyage charter contracts.

<sup>6</sup> ICAO document No. 9146.

<sup>6</sup> ICAO document No. 9147.

<sup>7</sup> ICAO document No. 9148.

29. Based on these studies the UNCTAD secretariat will prepare additional material which will assist the Working Group to identify which of the main clauses on time and voyage charter-parties are susceptible to standardization, harmonization and improvement and to select areas in chartering activities that may be suitable for international legislative action.

###### *(c) Ocean bills of lading*

30. The Legal Counsel of the United Nations on behalf of the Secretary-General of the United Nations, in a letter dated 25 March 1975 and addressed to the Secretary-General of UNCTAD, transmitted the text of a draft Convention on the Carriage of Goods by Sea and invited UNCTAD to submit such comments on the draft Convention as it might wish to make.

31. The UNCTAD Working Group on International Shipping Legislation will hold its fifth session in two parts, first in January 1976 to consider the draft Convention prepared by the UNCITRAL Working Group, and secondly in July 1976 to consider the text elaborated by the ninth session of UNCITRAL.

32. In order to assist the UNCTAD Working Group to formulate an opinion as to the merits of the draft Convention, the UNCTAD secretariat has prepared a commentary together with recommendations for modification of the draft text which it considers to be desirable (TD/B/C.4/ISL/19 and Supps. 1 and 2).

###### *(d) Decisions of the Committee on Shipping, at its seventh session, relating to maritime law*

33. The Committee requested the UNCTAD secretariat, in accordance with Committee resolution 22 (VI), to give priority to an examination of the economic consequences for international shipping of the existence or lack of a genuine link between vessel and flag of registry as explicitly defined in international conventions in force.

34. The Committee considered a report by the UNCTAD secretariat on the treatment of foreign merchant vessels in ports (TD/B/C.4/136) and decided that the UNCTAD secretariat should follow the deliberations in IMCO on the preparation of a Convention on the Régime of Vessels in Foreign Ports, and report to the Committee at its eighth session, to which it might also present any other relevant information including comments that the Working Group on International Shipping Legislation might have on the subject.

###### *(e) Technical assistance*

35. The UNCTAD secretariat, as part of its programme of technical assistance and in co-operation with other bodies of the United Nations, participated in various programmes to assist developing countries in legal matters connected with maritime transport.

###### *(f) Multinational enterprises and restrictive business practices*

36. The Committee on Manufactures held its seventh session in Geneva from 23 June to 4 July 1975. At that session, the Committee adopted resolution 9 (VII) in which it decided to establish a second *Ad Hoc* Group of Experts on Restrictive Business Practices, with the following mandate:

"The Group should take into account the need for appropriate remedial measures at the national, regional, interregional and international levels with respect to restrictive business practices adversely affecting the trade and development of developing countries, and

"(a) Identify those practices which are likely to result in the acquisition and abuse of market power at the national and international levels;

"(b) Examine ways of improving the exchange of information on restrictive business practices between Governments of developed or developing countries;

"(c) Examine the elements of the formulation of a model law or laws for developing countries on restrictive business practices; and

"(d) Examine the possibility of formulating multilateral acceptable principles on restrictive business practices which aim at remedying those practices which adversely affect the trade and development of developing countries."

Furthermore, the Group was called upon to make recommendations in respect of the tasks assigned to it and to report to the seventh special session of the Trade and Development Board, which is scheduled to meet in March 1976. The Committee also requested the Secretary-General of UNCTAD to inform the Commission on Transnational Corporations of the content of the resolution and to ensure co-ordination between the work of UNCTAD and that of the Commission in order to assist both bodies in fulfilling their tasks.

37. The second *Ad Hoc* Group of Experts met in Geneva from 20-24 October 1975 but, in view of the fact that the Group was not able to complete its work at this session, it recommended to the Secretary-General of UNCTAD—in accordance with resolution 9 (VII) of the Committee on Manufactures—to reconvene the Group of Experts as early as possible in 1976 and, in this connexion, make provision for a session of two weeks' duration. The second session of the Group was held in Geneva from 16-27 February 1976.

38. It should also be recalled that the General Assembly, at its seventh special session, decided that "restrictive business practices adversely affecting international trade, particularly that of developing countries, should be eliminated and efforts should be made at national and international levels with the objective of negotiating a set of equitable principles and rules". This aspect is also being examined by the above-mentioned Group of Experts.

39. It should also be noted that the United Nations Conference on Trade and Development, at its fourth session in Nairobi in May 1976, will examine the question of a comprehensive strategy to expand and diversify the export trade of the developing countries in manufactures and semi-manufactures. An important aspect of this strategy is the role of transnational corporations in the trade of manufactures of developing countries and control of restrictive business practices generally. In this connexion the relevant documents being submitted to the Conference at this session are:

A comprehensive strategy to expand and diversify the export trade of manufactures and semi-manufactures . . . . . (TD/185)

The role of transnational corporations in the trade of manufactures and semi-manufactures of developing countries . . . . . (TD/185/Supp.2)

#### E. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

40. The Food and Agriculture Organization has been involved in two projects related to general conditions of sale, standard contracts and standard trade terms:

- (i) Definition of the terms used in the rice trade has been approved by the Intergovernmental Group on Rice in 1972;
- (ii) Model Ordinance on Cocoa Grading and Code of Practice was approved by a Working Party in 1969; and adopted by countries in national legislation, representing 80 per cent of world trade in cocoa.

#### F. INTERNATIONAL MONETARY FUND (IMF)

41. A preliminary draft uniform law on international bills of exchange (A/CN.9/67)\* was prepared and submitted to the fifth session of UNCITRAL. Thereafter, it was revised to include international promissory notes (A/CN.9/WG.IV/WP.2)\*\* and, pursuant to the request of UNCITRAL, was submitted to the Working Group on International Negotiable Instruments. The Working Group is continuing its review of the draft. Fund staff members have attended meetings held under UNCITRAL auspices in the preparation of questionnaires, the analysis of responses, and the consideration and drafting of provisions of the draft uniform law.

#### II. OTHER INTERGOVERNMENTAL ORGANIZATIONS

##### A. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE (ALCC)

- (a) *Uniform rules governing the international sale of goods*

42. This subject has been included in the programme of work of the Committee since 1969. The Uniform Law on the International Sale of Goods, together with the revisions thereto, proposed by the UNCITRAL Working Group on the International Sale of Goods, has been considered by a standing sub-committee at the annual sessions held at Accra (1970), Colombo (1971), Lagos (1972) and New Delhi (1973). The Committee's secretariat has since been following the work of the UNCITRAL Working Group, and will examine the Draft Convention on International Sale of Goods, when completed by the Working Group, for

\* Reproduced in UNCITRAL Yearbook, Vol. III: 1972, part two, II.

\*\* Reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.



submission of comments thereon to the member Governments of the Committee.

(b) *Prescription (limitation) in the international sale of goods*

43. The UNCITRAL draft convention on this subject was considered in detail by the standing Sub-Committee on the International Sale of Goods at the session held in New Delhi (1973) together with a study thereon prepared by the Committee's secretariat. The Sub-Committee generally approved the approach of the draft convention as a workable compromise, and submitted specific suggestions for its revision. The report of the Sub-Committee was circulated among member States for their comments and some member States generally approved the report.

(c) *Standard or model contracts and general conditions of sale*

44. The work already done, commencing with the session held in Accra (1970), has included preparation of three standard contracts and a set of general conditions of sale for use in international sale of goods which were approved by the Committee at its Teheran session (1975). The first contract is on FOB basis which is applicable to those commodities which are exported by Asian-African countries but excluding those where FAS terms would be more appropriate. The second contract is on FAS basis, and is applicable to perishable agricultural produce and commodities which are exported primarily by the Asian-African countries. The third contract is on CIF basis and is applicable in respect of light machinery and durable consumer goods which are primarily exported by the Asian-African countries. The General Conditions of Sale on CIF (maritime) basis have been formulated as an alternative to the CIF contract, referred to above. Although the standard contracts/general conditions have been prepared with particular reference to the commodities therein stipulated, these can be used for other commodities also with some modifications. The standard contracts/general conditions have been transmitted to all the Asian and African Governments as also to organizations and associations of trade in the region. A special conference will be convoked during July-August 1976 with the participation of governmental and trade representatives for adoption of these contracts and general conditions.

(d) *International commercial arbitration*

45. A detailed study on certain aspects of international commercial arbitration was prepared by the Committee's secretariat. This covered the following topics: (i) institutional arbitration and *ad hoc* arbitration; (ii) constituting the arbitral tribunal; (iii) venue of arbitration; (iv) the applicable law to determine the rights and obligations of the parties under the contract; (v) procedure in arbitration; (vi) arbitral awards; (vii) the enforcement of foreign arbitral awards. The study was placed before the Committee at its Tokyo session (1974) and considered in detail by a Sub-Committee. The report of the Sub-Committee with the recommendations contained therein was forwarded to UNCITRAL for its attention.

46. A further study on the subject was prepared by the Committee's secretariat for the session held in

Teheran (1975), but the Sub-Committee constituted at that session to consider trade law subjects could not discuss the matter for lack of time.

47. As a follow-up of the aforementioned study the Committee's secretariat has now formulated Draft Model Rules on Commercial Arbitration for use in commercial disputes arising between the buyers and sellers of the region and those of the developed countries. These Model Rules will be considered at the forthcoming Kuala Lumpur session to be held in June-July 1976.

(e) *International legislation on shipping*

(i) *Bills of lading*

48. In response to UNCITRAL questionnaires on certain topics relating to bills of lading, which were due to be considered by the UNCITRAL Working Group on International Legislation on Shipping, detailed answers to the questionnaires were prepared by the Committee's secretariat, and circulated to member Governments for their comments. The topics in question were also considered by a Sub-Committee at the Tokyo session of the Committee (1974) and the report of the Sub-Committee was forwarded to UNCITRAL for consideration by its Working Group.

49. Subsequently, a detailed study was prepared by the Committee's secretariat on certain aspects of bills of lading and circulated to member Governments and selected Asian and African Governments for their comments. The study covered the following topics: (i) Liability of ocean carriers for delay; (ii) Documentary scope of the proposed Convention; (iii) Geographic scope of the proposed Convention; (iv) Elimination of invalid clauses in bills of lading; (v) Carriage of cargo on deck; (vi) Carriage of live animals; and (vii) Definitions of "carrier", "contracting carrier", "actual carrier" and "ship". The study was also placed before the Teheran session of the Committee, but the Sub-Committee appointed at that session to consider trade law matters could not go into the study for lack of time.

50. Notes and comments on the Draft Convention on Carriage of Goods by Sea, the text of which has been finalized by the UNCITRAL Working Group at its eighth session, are under preparation for circulation to member Governments.

(ii) *A Code of Conduct for Liner Conferences*

51. A detailed study was prepared by the Committee's secretariat on the proposals which culminated in the holding of a United Nations Conference of Plenipotentiaries in November-December 1973 and March-April 1974 which adopted the Convention on the Code of Conduct for Liner Conferences. This was circulated to member Governments and other Governments of the region. The secretariat has prepared a further study for submission to member Governments in which it has examined the Convention to see whether its provisions are legally sound and in accordance with the interests of the Asian-African region. The object of this study is to assist member Governments in examining the question of ratification of the Convention.

## B. ASIAN DEVELOPMENT BANK

*Credit and security research project*

52. For the past five years the Asian Development Bank has been associated with the Law Association for Asia and the Western Pacific (LAWASIA) in a credit and security research project. This project involves a study of the security arrangements available to national development banks and similar financial institutions situated in the region.

## C. COUNCIL OF EUROPE

(a) *Draft European rules on extinctive prescription in civil and commercial matters*

53. It was decided to do no work on these draft rules for the time being. The subject is to be discussed once the work on the United Nations Convention on International Sale of Goods is completed.

(b) *Recognition and enforcement of foreign judgments in civil and commercial matters*

54. The definitive English text of the practical guide on this subject was issued by the Council of Europe in the United Kingdom in 1975 (publisher: Morgan-Grampian, Ltd.). A French version of the guide will be issued shortly.

(c) *Product liability in the event of injury and death*

55. A draft European convention on this subject drawn up by a committee of experts is now being thoroughly reviewed by the Governments of member States.

(d) *Penalty clauses in civil law*

56. A committee of experts has been instructed to prepare an international instrument on penalty clauses in civil law. Work on this subject will probably be completed towards the end of 1976.

(e) *Legal protection of consumers*

57. A committee of experts on legal protection of consumers has begun the preparation of a draft resolution and a draft explanatory manual the purpose of which is to protect consumers against unjust clauses in contracts for the provisions of goods or services.

## D. COMMISSION OF THE (EEC) EUROPEAN COMMUNITIES

(a) *Instalment sales*

58. In 1976 the Commission will continue its work on the implementation of the EEC's preliminary programme for a consumer protection and information policy, which was approved by the Council on 14 April 1975.

59. Draft directives relating to commercial contracts not concluded on commercial premises will be submitted to the Council in the course of 1976 together with, *inter alia*, a draft directive on instalment sales.

60. The legislation on the protection of consumers' interests is being harmonized with existing financial practices and regulations with a view to strengthening the security of commercial operations as well.

(b) *Guarantees*

61. In 1976 the Commission will endeavour to complete its work on preparing a draft directive on the harmonization of the law applicable to suretyship and guarantees.

62. This work covers all commercial or financial operations, private or public, which involve the use of a legal instrument or suretyship or non-specific guarantee.

(c) *Goods/patents/trade marks*

63. The Convention on the Community Patent, which was signed at Luxembourg on 15 December 1975, establishes a uniform law for the entire Community in this important field of economic law and will facilitate the free movement of patented products.

64. With regard to trade mark law, the Commission will publish during the first half of 1976 a memorandum on the establishment of a Community trade mark which will provide a basis for future work on harmonization in this sphere.

(d) *Multinational enterprises*

65. The Commission of the European Communities has not proposed to the Council and does not at present intend to prepare any directive or other legal instrument on the subject specifically of multinational enterprises. However, many of the Commissions' proposals in the field of company law are of direct interest to multinational enterprises and have as one of their aims the creation of a legal framework for European multinational enterprises. The problems of these enterprises have been described by the Commission in the Communication "Multinational undertakings and Community regulations" of 7 November 1973 (Bulletin of the European Communities, Supplement 15/1973).

(i) Amended proposal for a Fourth Council Directive for co-ordination of national legislation regarding the annual accounts of limited liability companies, submitted to the Council on 21 February 1974 (Bulletin of the EC, Supplement 6/74).

(ii) Proposal for a Fifth Council Directive for co-ordination of national legislation as regards the structure of public limited liability companies and the powers and obligations of their organs, submitted to the Council on 27 September 1972 (Official Journal of the EC, No. C 131, 13 December 1972).

(iii) The Commission has in order to facilitate the discussion on said proposal for a Fifth Council Directive on 12 November 1975 published a green paper on Employee participation and Company structure (Bulletin of the EC, Supplement 8/75).

(iv) The Commission has on 13 May 1975 submitted to the Council an amended proposal for a Statute for the European Company (Bulletin of the EC, Supplement 4/75).

(v) The Commission is preparing a proposal for a Council directive on take-over bids.

(vi) The Commission is preparing a proposal for a Council directive on consolidated accounts.

- (vii) The Commission is preparing a proposal for a Council directive on groups of companies.

(e) *Goods/product liability*

66. In 1975 the Commission of the European Communities completed its consultations with governmental experts of member States and, at the Community level, with the industrial, insurance and consumers' associations concerned on the subject of two preliminary drafts of a directive on the harmonization of legislation concerning product liability. The Commission plans to submit its draft directive to the Council of Ministers of the European Communities in the first half of 1976. The European Parliament and the Economic and Social Committee will probably discuss it during that year.

E. COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE (CMEA)

(a) *General Conditions of Delivery of Goods between Organizations of the CMEA Member Countries*

67. In June 1975, on the instructions of the Council's Executive Committee, the CMEA Standing Commission on Foreign Trade adopted a decision regarding the incorporation in the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (General Conditions of Delivery, 1968) of changes concerning the material responsibility of economic organizations for non-performance or unsatisfactory performance of mutual obligations. In connexion with the accession of the Republic of Cuba to the General Conditions of Delivery, 1968, the Commission on Foreign Trade adopted a decision in November 1975 concerning the incorporation in the General Conditions of Delivery, 1968, of clarifications regarding the deliveries of goods between organizations in the Republic of Cuba and those in other CMEA member countries. The Commission recommended that CMEA member countries amend the text of the General Conditions of Delivery, 1968/1975 to include all contracts concluded after 1 January 1976, on the understanding that the parties to a contract could agree also to apply the amended text to contracts concluded prior to that date.

(b) *Uniform legal regulations to govern the establishment and operation of international economic organizations in CMEA member countries*

68. The Legal Conference of representatives of CMEA member countries formulated and submitted for the consideration of the Council's Executive Committee a draft of uniform provisions concerning the establishment and operation of international economic organizations. The Executive Committee approved the uniform provisions in January 1976 and recommended that CMEA member countries and the Socialist Federal Republic of Yugoslavia should be guided by them when establishing new international economic organizations.

69. The document approved by the Executive Committee contains, *inter alia*, provisions concerning the characteristics of international economic associations, methods of establishing them and regulating their operation, the content of constituent documents, membership, organizational structure, property régime, economic activities and the supply of materials and machinery for

international economic associations, sale of products and the legal status of workers employed in international economic organizations.

(c) *Conditions for the execution of research, design and experimental work on a co-operative basis*

70. In 1975, the Conference of representatives of CMEA member countries drafted model conditions for treaties on the execution of research, design and experimental work on a co-operative basis. An appendix to the model conditions was adopted, consisting of a model treaty on the execution of scientific, design and experimental work on a co-operative basis. It is intended that these instruments should be used by the appropriate organs and organizations of CMEA member countries at their discretion. Work is continuing at the Legal Conference of representatives of CMEA member countries on the preparation of model treaties on the establishment and operation of international scientific and technical organizations and scientific production associations.

(d) *Agreement on the unification of requirements for the preparation and submission of applications concerning inventions*

71. At the Conference of heads of departments in CMEA member countries dealing with inventions, a draft was prepared of an agreement on the unification of requirements for the preparation and submission of applications concerning inventions. On 5 July 1975, the Governments of the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Republic of Cuba, the Mongolian People's Republic, the Polish People's Republic, the USSR and the Czechoslovak Socialist Republic signed an Agreement on the unification of requirements for the preparation and submission of applications concerning inventions.

(e) *Multilateral co-operation for the provision of technical and other assistance to vehicles used in international traffic*

72. In order to promote favourable conditions for the development of the international carriage of goods by road in the territories of Bulgaria, Hungary, the German Democratic Republic, Poland, Romania, the Russian Soviet Federative Socialist Republic, Czechoslovakia and Finland, through the adoption of a system of technical and other assistance on international routes between the appropriate ministries of the above-mentioned countries, a Protocol was concluded on 3 December 1975 concerning multilateral co-operation for the provision of technical and other assistance to vehicles used in international traffic. In accordance with this Protocol, the Contracting Parties are to co-operate by applying in their mutual relations certain provisions of the Agreement of 21 July 1973 concerning technical and other assistance to vehicles used in international traffic, concluded between the relevant ministries of the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Socialist Republic of Romania, the Russian Soviet Federative Socialist Republic and the Czechoslovak Socialist Republic.

# F. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

## (a) *The law applicable to agency*

73. This project aims at the preparation of a convention on the law applicable to agency. This includes the internal relationship between principal and agent, and the external relationships of both principal and agent with third contracting parties, arising as a result of the agent's activities. In all these fields international private relationships are created by persons acting as intermediaries, except that the subject is limited to the contractual aspects of agency. Vicarious liability for the purely tortious act of an agent is not covered by the projected convention.

74. The terms of reference are found in the Final Act of the Twelfth Session of the Conference, dated 21 October 1972, part C, item c of the secondary list. Under article 3 of the Statute of the Conference, the Netherlands Standing Government Committee on Private International Law makes the final decisions regarding the Conference's agenda.

75. Documents prepared in connexion with the project are: Preliminary Document No. 1, Report on the Law Applicable to Agency, by Mr. Michel Pelichet, First Secretary at the Permanent Bureau; Prel. Doc. No. 2, Questionnaire with Commentary on the Law Applicable to Agency; Prel. Doc. No. 3, Replies of the Governments to the Questionnaire; Prel. Doc. No. 4, Conclusions drawn from the discussions at the Special Commission on Agency; and Preliminary Draft Convention on the Law Applicable to Agency, adopted by the Special Commission on 26 November 1975. It is planned to prepare a definitive text of the Convention at the thirteenth session of the Conference, to be held 4-23 October 1976.

76. In addition to legal research and documentation, preparatory work has consisted of two Special Commission meetings held during the year 1975, at the latter of which the preliminary draft convention was adopted. Presently under preparation is a report by Mr. Ian Karsten (United Kingdom), Rapporteur of the Special Commission, which will be circulated prior to the thirteenth session of the Conference.

77. No other organizations or bodies are collaborating in this project. However, the Conference has had the benefit of attendance by observers representing, among others, the United Nations Commission on International Trade Law (UNCITRAL), the European Economic Community, the International Chamber of Commerce, and the *Comité européen des assurances*.

## (b) *Contracts and torts* (Preliminary study of the desirability of taking up a project covering these fields)

78. The terms of reference are to the Final Act of the Twelfth Session of the Conference dated 21 October 1972, part C, item d under the list of first priorities. The terms of reference expressly state that a questionnaire as to whether it is opportune to undertake studies on this subject should be addressed to the Member States and that the Standing Government Committee would decide in the light of the replies on the action to be taken. Under article 3 of the Statute of the Conference, the Netherlands Standing Government

Committee on Private International Law makes the final decisions regarding the Conference's agenda.

79. Documents prepared to date are: Conflicts Rules relating to Contracts and Torts, Questionnaire and Explanatory Memorandum, dated November 1973, prepared by the Permanent Bureau of the Conference; Replies of the Governments to the Questionnaire; Note concerning Contracts and Torts, Preliminary Document No. 1 of December 1975 for the attention of the Special Commission on Miscellaneous Matters.

80. Preparatory work done to date has related solely to a preliminary study of the desirability of undertaking a detailed study of this very broad set of subject areas. No final decision has yet been taken as to whether such a broad project should be undertaken. A Special Commission to be convened in late January 1976, will consider further the desirability of taking a decision to commence such a detailed study.

81. Since no decision has been taken to undertake this project at the present time, there is no arrangement for collaboration with other organizations or bodies. However, in the event that a decision should be made to take up this project, collaboration with a wide range of organizations, governmental as well as non-governmental, may be necessary in order to avoid duplication of effort and possible interference with current projects and in order to avoid abstract solutions which do not relate to current commercial practice.

82. No text has yet been prepared; nor is it clear whether a decision will be taken to prepare a text or, if so, what form that text might take.

## (c) *List of possible future projects*

83. The following subjects concerned with international trade law are listed as possible subjects for the future agenda of the Conference, but no decision has yet been taken, either adopting or rejecting them as projects:

1. The law applicable to negotiable instruments;
2. The law applicable to unfair competition;
3. The law applicable in the field of liability insurance;
4. The law applicable to the following matters in the field of international trade law—powers of attorney, bank guarantees and sureties, banking operations, licensing agreements and know-how.

# G. INTERNATIONAL BANK FOR ECONOMIC CO-OPERATION (IBEC)

84. During 1975 the International Bank for Economic Co-operation continued to concern itself with questions relating to the improvement of accounting systems in transferable roubles of the member countries of IBEC with the development of operations using convertible currency.

85. As a result of work done at the 40th meeting of the Council of the International Bank for Economic Co-operation, held on 9 April 1975, preliminary "Basic principles relating to the supply of credit by the Bank to international economic organizations established by member countries of the Council for Mutual Economic

Assistance" were adopted. This document was signed by the heads of delegations of member countries of IBEC in the Council of the Bank. The essence of these basic principles relating to the supply of credit can be summarized as follows:

(a) IBEC offers credit to international economic organizations established by interested member countries of CMEA. Such organizations should be legal entities, should have the statutory capital, should carry out economic activities in accordance with the principles of economic accounting, and should also have the right to receive credit from IBEC on the basis of the normative documents regulating activities of international economic organizations;

(b) Credit is offered both in transferable roubles and in convertible currency for periods of up to one year, at the decision of the Management of the Bank, and up to two or three years at the decision of IBEC.

#### H. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

##### (a) *Progressive codification of the general part of the law of contracts*

86. At its first meeting, held in Rome in 1974, a small steering committee, set up by the President of UNIDROIT to initiate work on the preparation of a uniform international trade code, decided to begin with the question of formation of contracts. In this context it instructed the secretariat of UNIDROIT to prepare a document containing the text of a draft elaborated by Prof. Popescu on the basis of the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods together with a questionnaire intended to find out the extent to which the above-mentioned draft might prove acceptable as a future uniform law governing the formation of international contracts in general. This document (Etudes: L—Doc. 8, UNIDROIT 1975) has already been sent to a large number of people and bodies, well known in the field of comparative private law studies, with a request for their assistance in this first stage of the work by communicating to UNIDROIT their observations, suggestions and point of view on the problems set out in the questionnaire.

87. Pending the arrival of the replies to the questionnaire, which will be carefully examined and then serve as the basis for further work on the formation of contracts, the Secretariat has commenced a preliminary study on the problems posed by the interpretation of international contracts. It was agreed by the above-mentioned steering Committee that these problems would be dealt with in the second chapter of the future code.

##### (b) *International sale of goods*

*Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables and*

*Draft Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods*

88. As already indicated in 1975 (see A/CN.9/106, para. 76),\* negotiations are under way with a

\* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, VII.

view to the submission of these two drafts to Diplomatic Conferences for adoption. Progress has been made in particular with regard to the convening by one of UNIDROIT's member States of a Diplomatic Conference for the adoption of the agency draft.

##### (c) *Leasing*

89. A small working group, composed of four members of the Governing Council of UNIDROIT (Ambassador Kearney, Professors Popescu, Sauveplanne and Wortley), met at the seat of UNIDROIT on 21 April 1975 to examine the feasibility of preparing uniform international rules on the leasing contract.

90. It was seized of a preliminary report on the leasing contract (Study LIX—Doc. 1, UNIDROIT 1975) prepared by the Secretariat and proceeded to a delimitation of the scope of future work on the subject. In this context it decided:

- (i) To exclude real estate leasing, first, because of what was felt to be the limited incidence of such operations on an international plane and, secondly, because of the obviously enormous difficulties obtruding in any attempt at unifying land law;
- (ii) To exclude the leasing of ships, because of the special nature of the type of contract involved, considered by the group to have more in common with charter-parties;
- (iii) To exclude the leasing of aircraft, also because of the special characteristics of the contract involved;
- (iv) Not to limit the scope of the present study just to the financial leasing operation, where there is a triangular relationship between manufacturer/supplier, finance lessor and the ultimate user, but, for the moment at least, also to envisage the bilateral type of leasing operation known as operating leasing;
- (v) Not to attempt, in view of the enormous difficulties involved, any uniformization of the national legal rules pertaining to exclusively internal leasing operations, but rather to tackle the question of specifically international leasing operations.

In the light of this, the working group decided that no further meetings should be convened for the time being, in order to enable the secretariat to seek out more information, in particular from the banks specializing in these operations, regarding the precise character of international leasing operations. It further authorized the secretariat to send out its preliminary report to experts in the field with a request for their comments and observations. In the light of these observations, the Governing Council will decide at its next session upon the nature of the future work to be carried out in this field.

##### (d) *Factoring*

91. The Secretariat will shortly complete a preliminary study on the contract of factoring which will be circulated to interested circles for comment. On the basis of these observations a revised version of the report will be submitted to the Governing Council at its next session.

(e) *Transport**Harmonization of the legal régimes relating to the liability of the carrier of goods and persons—Study of the gold-clause in international conventions*

92. The secretariat of UNIDROIT has temporarily suspended work on this question pending the decisions concerning the unit of account to be taken within the framework of a number of international organizations at present drafting or revising transport conventions.

*Legal status of air-cushion vehicles*

93. A committee of governmental experts has completed work on a preliminary draft convention on the registration and nationality of air-cushion vehicles. This draft, together with an explanatory report prepared by the secretariat of UNIDROIT, is contained in document Study LII—Doc. 10, UNIDROIT 1975. The Committee has also proceeded to a first reading of a preliminary draft convention relating to the international carriage of passengers and their luggage by sea and by inland waterway in air-cushion vehicles (see document Study LII—Doc. 13, UNIDROIT 1976). This draft, together with an explanatory report, will be examined by the Committee at its fourth session, to be held in June 1976. On this occasion the Committee will also examine the text of a preliminary draft convention on the tortious liability of owners and operators of air-cushion vehicles for damage caused to third parties, at present under preparation by the secretariat of UNIDROIT.

*Carriage by inland waterway*

94. Following the third meeting of the UNIDROIT Committee of Governmental Experts on the Contract for the Carriage of Goods by Inland Waterway, a revised text of the draft convention on this subject (CMN), has been prepared by Professor R. Loewe (document Study XXVII—Doc. 22, UNIDROIT 1975). This text, and especially a compromise formula on the question of the exoneration of the carrier from liability for fault in the navigation of the vessel, is at present under review by Governments and it is hoped that by mid-1976 it will be possible to decide whether hopes of further progress are sufficient to justify the convening of a fourth session of the Committee.

(f) *Tourism**The hotelkeeper's contract*

95. At its fifty-fourth session, held in Rome in April 1975, the Governing Council of UNIDROIT examined a preliminary draft convention on the hotelkeeper's contract. The Council was of the opinion that a number of aspects of the text required further attention and decided to resume consideration of the draft at its fifty-fifth session, to be held in Rome in September 1976.

## III. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

## A. INTERNATIONAL CHAMBER OF COMMERCE (ICC)

(a) *International sale of goods**Uniform Rules*

96. The ICC is continuing its contribution to the UNCITRAL work by attending as observers at sessions of the UNCITRAL Working Group.

*General conditions of sale*

97. The ICC has now nearly completed the work on the definition of trade terms additional to Incoterms 1953 which cover sales involving air and combined transport. In this context a term called "FOB AIRPORT... (NAMED AIRPORT OF DEPARTURE)" could be adopted this year. A complete revision of Incoterms 1953 is under consideration.

(b) *International payments**Negotiable instruments*

98. The ICC has confirmed its willingness to assist in every way possible UNCITRAL's work in this field, in particular by making inquiries amongst interested circles and in participating in the meetings of the UNCITRAL Study Group on International Payments.

*Documentary credits*

99. The ICC has presented the revised text of Uniform Customs and Practice for Documentary Credits, approved by the Executive Committee of the ICC on 3 December 1974 at the eighth session of the United Nations Commission on International Trade Law. The ICC appreciated UNCITRAL noting that the Uniform Rules constitute "a valuable contribution to the facilitation of international trade" and commending "the use of the 1974 revision, as from 1 October 1975, in transactions involving the establishment of documentary credit".\*

100. The ICC Commission on Banking Technique and Practice is currently preparing a revision of the ICC Standard Forms for the issuing of Documentary Credits, with a view to adapting them to the revised text of Uniform Customs and Practice for Documentary Credits.

*Collection of commercial paper*

101. The ICC has undertaken the revision of its Uniform Rules for the Collection of Commercial Paper.

*Guarantees*

102. In close co-operation with UNCITRAL, the ICC is continuing its work aimed at drawing up Uniform Rules for Contract Guarantees (tender, performance and repayment guarantees).

(c) *International arbitration*

103. The ICC has completed its work on a revised text of its Rules of Arbitration which came into force as from 1 June 1975.

104. The ICC Commission on International Arbitration is currently studying, in close co-operation with the Chambers of Commerce of the socialist countries, the setting up of an international system of technical expertise.

105. The opportunity of establishing special rules of arbitration for maritime arbitration is also under consideration.

(d) *Automatic data processing in international trade*

106. A Joint Working Party has been set up with a view to identifying the banking and commercial problems involved in the use of automatic data processing

\* A/10017, para. 41 (UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1).



(ADP) in international trade, in close co-operation with the competent intergovernmental organizations, particularly the United Nations Economic Commission for Europe, and UNCITRAL.

(e) *International regulation of shipping*

*Revision of the Hague Rules*

107. The ICC has participated regularly in the meetings of the UNCITRAL Working Group on International Shipping Legislation, devoted to a revision of the Hague Rules. Whenever necessary, the ICC has submitted observations on various aspects of that revision.

*Uniform Rules for a Combined Transport Document (ICC brochure 298)*

108. In July 1975, the ICC revised its Uniform Rules so that they could be more widely used by combined transport operators. The chief object of the revision was to make liability for delay subject to the "network" system.

B. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO)

109. ISO is not engaged in the preparation of legal texts as such, but the International Standards prepared by ISO are frequently used as a basis for international tendering and contracts. At the end of 1975 ISO had published 2,840 International Standards.

C. INTERNATIONAL UNION OF MARINE INSURANCE (IUMI)

*International legislation on shipping*

110. The International Union of Marine Insurance will follow closely the further development of the UNCITRAL draft Convention on the Carriage of Goods by Sea. In this connexion, IUMI published in October 1975 its pamphlet on "The Essential Role of Marine Cargo Insurance in Foreign Trade". This was prepared by the Carrier's Liability Committee and approved by the Council of IUMI at its September 1975 Conference in Tokyo, Japan.

*Combined transport*

111. IUMI also consulted with the ICC in the revision of the latter's brochure "Uniform Rules for a Combined Transport Document" (No. 298).

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## B. CHECK LIST OF UNCITRAL DOCUMENTS

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