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Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003)

Contents

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I. Introduction

1. At its twenty-ninth session, in 1996,[1] the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.[2]

2. At that session, the Commission had been informed that existing national laws and international conventions had left significant gaps regarding various issues. These gaps constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.[3]

3. At that session, the Commission also decided that the Secretariat should gather information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems, so as to be able to present at a later stage a report to the Commission. It was agreed that such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors.[4]

4. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.[5]

5. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.[6]

6. At that session, it was also reported that the CMI working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.[7]

7. At its thirty-third session, in 2000,[8] the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the Secretariat. It also heard an oral report on behalf of CMI. In cooperation with the Secretariat, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member

organizations. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

8. In conjunction with the thirty-third session of the Commission in 2000, a transport law colloquium, organized jointly by the Secretariat and CMI, was held in New York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions. On the occasion of that colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a sea waybill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing.

9. At its thirty-fourth session, in 2001,[9] the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to the request by the Commission. That report summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide how it wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

10. The report suggested that consultations conducted by the Secretariat pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission.

11. At its thirty-fourth session, the Commission decided to entrust the project to the Working Group on Transport Law.[10]

12. As to the scope of the work, the Commission, after some discussion, decided that the working document to be presented to the Working Group should include issues of liability. The Commission also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also

with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) should also be carefully taken into account. It was also agreed that the work would be carried out in close cooperation with interested intergovernmental organizations involved in work on transport law, such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS), as well as international non-governmental organizations.[11]

13. At its thirty-fifth session, in 2002,[12] the Commission had before it the report of the ninth session of the Working Group on Transport Law held in New York from 15 to 26 April 2002 at which the consideration of this project commenced (A/CN.9/510). At that session, the Working Group undertook a preliminary review of the provisions of the draft instrument on transport law contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.21). The Working Group had before it also the comments prepared by ECE and UNCTAD, which were reproduced in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.21/Add.1). Due to the absence of sufficient time, the Working Group did not complete its consideration of the draft instrument, which was left for finalization at its tenth session. The Secretariat was requested to prepare revised provisions of the draft instrument based on the deliberations and decisions of the Working Group (A/CN.9/510, para. 21). The Commission expressed appreciation for the work that had already been accomplished by the Working Group.

14. The Commission noted that the Working Group, conscious of the mandate given to it by the Commission (A/56/17, para. 345) (and in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations), had adopted the view that it would be desirable to include within its discussions also door-to-door operations and to deal with these operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments (for considerations of the Working Group on the issue of the scope of the draft instrument, see A/CN.9/510, paras. 26-32). It was also noted that the Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations. Consequently, the Working Group had requested the Commission to approve that approach (A/CN.9/510, para. 32).

15. With respect to the scope of the draft instrument, strong support was expressed by a number of delegations in favour of the working assumption that the scope of the draft instrument should extend to door-to-door transport operations. It was pointed out that harmonizing the legal regime governing door-to-door transport was a practical necessity, in view of the large and growing number of practical situations where transport (in particular transport of containerized goods) was operated under door-to-door contracts. While no objection was raised against such an extended

scope of the draft instrument, it was generally agreed that, for continuation of its deliberations, the Working Group should seek participation from international organizations such as the International Road Transport Union (IRU), the Intergovernmental Organisation for International Carriage by Rail (OTIF), and other international organizations involved in land transportation. The Working Group was invited to consider the dangers of extending the rules governing maritime transport to land transportation, and to take into account, in developing the draft instrument, the specific needs of land carriage. The Commission also invited member and observer States to include land transport experts in the delegations that participated in the deliberations of the Working Group. The Commission further invited Working Groups III (Transport Law) and IV (Electronic Commerce) to coordinate their work in respect of dematerialized transport documentation. While it was generally agreed that the draft instrument should provide appropriate mechanisms to avoid possible conflicts between the draft instrument and other multilateral instruments (in particular those instruments that contained mandatory rules applicable to land transport), the view was expressed that avoiding such conflicts would not be sufficient to guarantee the broad acceptability of the draft instrument unless the substantive provisions of the draft instrument established acceptable rules for both maritime and land transport. The Working Group was invited to explore the possibility of the draft instrument providing separate yet interoperable sets of rules (some of which might be optional in nature) for maritime and road transport. After discussion, the Commission approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.[13]

16. At its tenth session (Vienna, 16-20 September 2002), the Working Group continued to review the provisions of the draft instrument contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.21). The report of that session is contained in document A/CN.9/525. The Working Group considered draft articles 6, 9.4 and 9.5 of the draft instrument. Due to the absence of sufficient time, the Working Group deferred its consideration of draft article 4 and the remaining provisions of the draft instrument until its next session (A/CN.9/525, para. 123).

17. Working Group III on Transport Law, which was composed of all States members of the Commission, held its eleventh session in New York from 24 March to 4 April 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Russian Federation, Sierra Leone, Spain, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

18. The session was also attended by observers from the following States: Australia, Belarus, Denmark, Finland, Gabon, Lebanon, Marshall Islands, Netherlands, New Zealand, Niger, Norway, Philippines, Republic of Korea, Switzerland, Turkey, Venezuela and Viet Nam.

19. The session was also attended by observers from the following international organizations:

(a) **United Nations system**: the United Nations Conference on Trade and Development (UNCTAD);

(b) **Intergovernmental organizations**: Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) **International non-governmental organizations invited by the Commission**: Association of American Railroads (AAR), Center for International Legal Studies, Comité Maritime International (CMI), Institute of International Container Lessors (IICL), Instituto Iberoamericano de Derecho Marítimo, International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity Clubs, International Multimodal Transport Association (IMTA), International Union of Marine Insurance (IUMI), The Baltic and International Maritime Council (BIMCO) and Transportation Intermediaries Association (TIA).

20. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

21. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.III/WP.24);

(b) Preliminary draft instrument on the carriage of goods by sea: Note by the Secretariat (A/CN.9/WG.III/WP.21);

(c) Preliminary draft instrument on the carriage of goods by sea: Note by the Secretariat (A/CN.9/WG.III/WP.21/Add.1);

(d) Proposals by the Governments of Canada (A/CN.9/WG.III/WP.23), Italy (A/CN.9/WG.III/WP.25) and Sweden (A/CN.9/WG.III/WP.26) regarding the scope of the draft instrument;

(e) Comparative table of the provisions of the draft instrument and corresponding provisions in existing transport conventions (A/CN.9/WG.III/WP.27);

(f) Compilation of comments received by the Secretariat in relation to the preparation of the draft instrument (A/CN.9/WG.III/WP.28);

(g) Note by the Secretariat on the scope of the draft instrument (A/CN.9/WG.III/WP.29);

(h) Information document provided by the United Nations Conference on Trade and Development (A/CN.9/WG.III/WP.30).

22. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft instrument on the carriage of goods by sea.
4. Other business.
5. Adoption of the report.

II. Deliberation and decisions

23. The Working Group completed its first reading of the draft instrument contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.21), with the exception of those provisions of the draft instrument dealing with the use of electronic commerce techniques in transport documentation, which were left for consideration at a later stage. The deliberations and conclusions of the Working Group are reflected below. The Secretariat was requested to prepare a revised version of the draft instrument to reflect the decisions made by the Working Group. Where no such decision had been made, the Secretariat was requested to conduct its work bearing in mind the various views and concerns expressed in the course of the deliberations of the Working Group. The Working Group encouraged the Secretariat to exercise broad discretion in restructuring the draft instrument and redrafting its individual provisions to facilitate continuation of the discussion at a future session on the basis of options reflecting the spectrum of opinions that had been expressed at the ninth, tenth and eleventh sessions of the Working Group.

A. Consideration of draft articles

1. Draft article 8 (Transport documents and electronic records)

24. The text of draft article 8 as considered by the Working Group was as follows:

"8.1 Issuance of the transport document or the electronic record

Upon delivery of the goods to a carrier or performing party

(i) The consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic record evidencing the carrier's or performing party's receipt of the goods;

(ii) The shipper or, if the shipper so indicates to the carrier, the person referred to in article 7.7, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If pursuant to article 2.1 the carrier and the shipper have agreed to the use of an electronic record, the shipper is entitled to obtain from the carrier a negotiable electronic record unless they have agreed not to use a negotiable electronic record or it is the custom, usage or practice in the trade not to use one.

"8.2 Contract particulars

"8.2.1 The contract particulars in the document or electronic record referred to in article 8.1 must include

(a) A description of the goods;

(b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;

(c)

(i) The number of packages, the number of pieces, or the quantity, and

(ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods;

(d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;

(e) The name and address of the carrier; and

(f) The date:

(i) On which the carrier or a performing party received the goods, or

(ii) On which the goods were loaded on board the vessel, or

(iii) On which the transport document or electronic record was issued**.**

"8.2.2 The phrase "apparent order and condition of the goods" in article 8.2.1 refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record.

"8.2.3 Signature

(a) A transport document shall be signed by the carrier or a person having authority from the carrier;

(b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier's authorization of the electronic record.

"8.2.4 Omission of required contents from the contract particulars

The absence of one or more of the contract particulars referred to in article 8.2.1, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic record.

"8.3 Qualifying the description of the goods in the contract particulars

"8.3.1 Under the following circumstances, the carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 8.2.1 (b) or 8.2.1 (c) with an appropriate clause therein to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non-containerized goods

(i) If the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may include an appropriate qualifying clause in the contract particulars, or

(ii) If the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information;

(b) For goods delivered to the carrier in a closed container, the carrier may include an appropriate qualifying clause in the contract particulars with respect to

(i) The leading marks on the goods inside the container, or

(ii) The number of packages, the number of pieces, or the quantity of the goods inside the container,

unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container;

(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

(i) The carrier can show that neither the carrier nor a performing party weighed the container, and

(ii) The shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars.

"8.3.2 Reasonable means of checking

For purposes of article 8.3.1:

(a) A "reasonable means of checking" must be not only physically practicable but also commercially reasonable;

(b) A carrier acts in "good faith" when issuing a transport document or an electronic record if

(i) The carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and

(ii) The carrier has not intentionally failed to determine whether a material statement in the transport document or electronic record is

materially false or misleading because it believes that the statement is likely to be false or misleading;

(c) The burden of proving whether a carrier acted in good faith when issuing a transport document or an electronic record is on the party claiming that the carrier did not act in good faith.

"8.3.3 Prima facie and conclusive evidence

Except as otherwise provided in article 8.3.4, a transport document or an electronic record that evidences receipt of the goods is

(a) Prima facie evidence of the carrier's receipt of the goods as described in the contract particulars; and

(b) Conclusive evidence of the carrier's receipt of the goods as described in the contract particulars

[(i)] If a negotiable transport document or a negotiable electronic record has been transferred to a third party acting in good faith [or

(ii) If a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars].

"8.3.4 Effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 8.3.1, then the transport document will not constitute prima facie or conclusive evidence under article 8.3.3 to the extent that the description of the goods is qualified by the clause.

"8.4 Deficiencies in the contract particulars

"8.4.1 Date

If the contract particulars include the date but fail to indicate the significance thereof, then the date is considered to be:

(a) If the contract particulars indicate that the goods have been loaded on board a vessel, the date on which all of the goods indicated in the transport document or electronic record were loaded on board the vessel; or

(b) If the contract particulars do not indicate that the goods have been loaded on board a vessel, the date on which the carrier or a performing party received the goods.

"[8.4.2 Failure to identify the carrier

If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage which transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]

"8.4.3 Apparent order and condition

If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document or electronic record is either prima facie or conclusive evidence under article 8.3.3, as the case may be, that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party".

(a) Paragraph 8.1

25. The substance of paragraph 8.1 was found to be generally acceptable. It was pointed out that a purpose of paragraph 8.1 was to recall the traditional distinction between the evidentiary function served by a transport document as a receipt for the goods and the commercial function served by a negotiable transport document as representing the goods. Those two functions were reflected in subparagraphs (i) and (ii) respectively. With respect to subparagraph (i), a suggestion was made that the words "transport document" should be replaced by the word "receipt". While the term "transport document" was generally preferred for reasons of consistency in terminology, it was acknowledged that, since not all transport documents as defined under paragraph 1.20 served the function of evidencing receipt of the goods by the carrier, it was important to make it abundantly clear that, under subparagraph 8.1 (i), the transport document should serve the receipt function. Subparagraph (ii) was found particularly useful as a reflection of the practice under which the parties might agree to use non-negotiable transport documents. It was recalled that a third function of a transport document was traditionally to record the rights and obligations of the parties to the contract of carriage. It was not suggested that this contractual function should be reflected in the text of draft article 8.

26. A question was raised as to whether paragraph 8.1 might interfere with various existing practices regarding the use of specific types of transport documents such as "received for shipment" and "shipped on board" bills of lading. Concern was expressed that the draft instrument should not affect such practices, in particular in the context of documentary credit. It was stated in response that paragraph 8.1 had been drafted broadly to encompass any type of transport document that might be used in practice, including any specific type of bill of lading or even certain types of non-negotiable waybills. Thus the draft instrument remained neutral, in particular with respect to documentary credit practices.

(b) Paragraph 8.2

(i) Subparagraph 8.2.1

27. As a matter of drafting, it was suggested that the words "as furnished by the shipper before the carrier or a performing party receives the goods" contained in subparagraph 8.2.1 (c) (ii) should also apply to subparagraph 8.2.1 (c) (i). That suggestion was generally accepted by the Working Group.

28. In that connection, a concern was expressed that the words "as furnished by the shipper before the carrier or a performing party receives the goods" might be read as placing a heavy liability on the shipper, particularly if article 8 was to be read in combination with paragraph 7.4. It was pointed out in response that subparagraph 8.2.1 was not to be read as creating any liability for the shipper under

draft article 7. However, before issuing the transport document, the carrier should have an opportunity to verify the information provided by the shipper, a reason why that information should be provided before the goods were loaded on a vessel.

29. Another concern was expressed that, in certain practical cases, the combination of subparagraphs 8.2.1 (c) (i) and (ii) as cumulative elements to be included in the transport document might be excessively burdensome for the carrier. The example was given of a shipment of bricks, where it might be superfluous to indicate both the weight under subparagraph 8.2.1 (c) (ii) and the quantity under subparagraph 8.2.1 (c) (i). It was pointed out in response that, while the list of contract particulars contained in subparagraph 8.2.1 was more extensive than corresponding provisions in existing international instruments such as the Hague Rules, such contract particulars were to appear in the transport document only if the shipper so requested. Thus, subparagraph 8.2.1 was not to be regarded as establishing a general obligation on either the shipper or the carrier but rather as creating a way for the carrier to meet the commercial needs of the shipper.

(ii) Subparagraph 8.2.2

30. It was recalled that subparagraph 8.2.2 provided both an objective and a subjective component to the phrase "apparent order and condition of the goods". Under subparagraph 8.2.2 (a), the carrier had no duty to inspect the goods beyond what would be revealed by a reasonable external inspection of the goods as packaged at the time the consignor delivered them to the carrier or a performing party. Under subparagraph 8.2.2 (b), however, if the carrier or a performing party actually carried out a more thorough inspection (e.g. inspecting the contents of packages or opening a closed container), then the carrier was responsible for whatever such an inspection should have revealed (see A/CN.9/WG.III/WP.21, paras. 135-136).

31. The Working Group found the substance of subparagraph 8.2.2 to be generally acceptable.

(iii) Subparagraph 8.2.3

32. It was recalled that subparagraph 8.2.3 (a) was intended to reflect the provisions of the Uniform Customs and Practices for Documentary Credits (UCP 500) published by the International Chamber of Commerce, under which a transport document should be signed, and an electronic record should be comparably authenticated. Subparagraph 8.2.3 (b) was intended provide a definition of electronic signature based on the UNCITRAL Model Law on Electronic Signatures 2001, as specifically adjusted to bring its intended meaning within the scope of this provision. In that context, the Working Group agreed that the draft provision might need to be further discussed at a later stage with a view to verify its consistency with the Model Law. Subject to that agreement, the substance of subparagraph 8.2.3 was found to be generally acceptable.

(iv) Subparagraph 8.2.4

33. It was recalled that subparagraph 8.2.4 gave effect to the view that the validity of the transport document or electronic record did not depend on the inclusion of the particulars that should be included. For example, an undated bill of lading would

still be valid, even though a bill of lading should be dated. Subparagraph 8.2.4 also extends the rationale behind that view to hold that the validity of the transport document or electronic record did not depend on the accuracy of the contract particulars that should be included. Under this extension, for example, a misdated bill of lading would still be valid, even though a bill of lading should be accurately dated (see A/CN.9/WG.III/WP.21, para. 138).

34. The Working Group found the substance of subparagraph 8.2.4 to be generally acceptable.

(c) Paragraph 8.3

(i) Subparagraph 8.3.1

35. It was recalled that subparagraph 8.3.1 generally corresponded to existing law and practice in most countries (A/CN.9/WG.III/WP.21, para. 140). It was pointed out that, article III.3 of the Hague and Hague-Visby Rules contained language excusing the carrier from including otherwise required information in the transport document if the carrier had no reasonable means of verifying that the information furnished by the shipper accurately represented the goods. However, for commercial or other reasons, a carrier would typically prefer to issue a transport document containing a description of the goods, and protect itself by qualifying the description of the goods. Subparagraph 8.3.1 was intended to address that issue through a variety of rules to reflect the fact that commercial shipments could occur in different forms.

36. Various suggestions were made regarding possible improvements of subparagraph 8.3.1. One suggestion, aimed at broadening the freedom of the carrier to qualify the information contained in the transport document, was that the opening words of the paragraph, which referred to the information mentioned in subparagraphs 8.2.1 (b) and 8.2.1 (c) should also mention the information mentioned in subparagraph 8.2.1 (a). Another suggestion to the same effect was that language along the lines of subparagraph 8.3.1 (a) (ii) should be included also in subparagraph 8.3.1 (b) to address the situation where the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. With respect to subparagraph 8.3.1 (c), it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container.

37. Additional suggestions were made to complement the current provisions contained in subparagraph 8.3.1. One suggestion was that the carrier who decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification. The effect of such an obligation would be to avoid the use of general clauses along the lines of “said to be” or “said to contain”. Another suggestion was that the draft instrument should deal with the situation where the carrier accepted not to qualify the description of the goods, for example not to interfere with a documentary credit, but obtained a guarantee from the shipper. It was stated that it should be made clear that such a guarantee should not affect the position of third parties. Yet another suggestion was that, where the carrier acting in bad faith had voluntarily avoided to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

38. Questions were raised as to the standard of proof to be applied in the context of subparagraph 8.3.1 (c) (i). It was pointed out that, depending on that standard of proof, it might be difficult for the carrier to demonstrate that a performing party had not weighed the container. It was explained in response that the provision was not intended to create a very high standard of proof and that there generally existed records of the use of weighing facilities in ports.

39. A more general question was raised regarding the possible interplay between the draft instrument and any domestic law that would prohibit the use of certain qualifications such as "said to contain" clauses. It was stated in response that the draft instrument was not intended to interfere with such domestic law.

40. Another general question was raised regarding the manner in which the transport document would reflect a possible conflict between the information provided by the shipper and the assessment by the carrier of what constituted accurate information. It was stated in response that the shipper should always be entitled to a document reflecting the information it had provided. Should the carrier disagree with that information, it should also reflect its own assessment in the contract particulars.

41. After discussion, the Working Group came to the provisional conclusion that the above comments and suggestions should be borne in mind when preparing a revised draft of subparagraph 8.3.1 for continuation of the discussion at a future session.

(ii) Subparagraph 8.3.2

42. It was noted that this provision was intended to clarify the meaning of the terms used in subparagraph 8.3.1. It was pointed out that subparagraph 8.3.2 (a) clarified that "reasonable means of checking" in subparagraph 8.3.1 must be both physically practicable and commercially reasonable, and that subparagraph 8.3.2 (b) set out that the carrier acted in "good faith" when issuing a transport document or an electronic record if the carrier had no actual knowledge that any statement was materially false or misleading and that the carrier had not intentionally failed to make such a determination because it believed the statement was likely to be false or misleading. It was also noted that subparagraph 8.3.2 (c) assumed that the carrier was acting in good faith unless otherwise proven. In response to a question regarding the situation where a letter of indemnity was issued by the shipper, who requested a clean bill of lading even where the goods were damaged in order to fulfil the requirements of a bank, it was noted that subparagraph 8.3.2 did not address the issue of the enforceability of a letter of indemnity.

43. The Working Group found the substance of subparagraph 8.3.2 to be generally acceptable.

(iii) Subparagraph 8.3.3

44. It was explained to the Working Group that the concept of a transport document or an electronic record that evidences receipt of the goods constitutes prima facie and conclusive evidence of the carrier's receipt of the goods as described in the contract particulars was a concept included in the Hague-Visby and Hamburg Rules. It was noted that subparagraph 8.3.3 (a) set out this principle with respect to prima facie evidence, whilst subparagraph 8.3.3 (b) set it out with respect

to conclusive evidence. It was suggested that subparagraph 8.3.3 (b) (i) was not controversial because it dealt with the case of a negotiable transport document or a negotiable electronic record that had been transferred to a third party in good faith. It was further suggested that subparagraph 8.3.3 (b) (ii) was more controversial, and its inclusion in the draft instrument would have to be considered carefully, since it could include the situation where there was good faith reliance on the description of goods in a non-negotiable transport document.

45. Opposition was expressed to the inclusion of subparagraph 8.3.3 (b) (ii) because it introduced a novel use for non-negotiable documents that was unknown in European law. It was suggested that this approach amounted to creating a new category of document that was somewhere between a negotiable and a non-negotiable document, and that this was an unnecessary complication for the draft instrument. Further concerns were expressed with respect to the lack of clarity of this draft article.

46. Some support was expressed for the retention of subparagraph 8.3.3 (b) (ii) and the removal of the square brackets surrounding it in the draft instrument, since it was suggested that the draft article reflected current trade practice, where an estimated 50 per cent of letters of credit were being paid on cargo receipts. It was urged that the law should keep pace with these changes.

47. It was suggested that a conclusive evidence rule with respect to non-negotiable documents already existed with respect to sea waybills in article 5 of the CMI Uniform Rules for Sea Waybills, and that since the concept was not novel, subparagraph 8.3.3 (b) (ii) should be retained. However, it was also noted that the requirements for this draft provision that a person acting in good faith must have paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars was an unusual concept in civil law countries.

48. It was suggested that in spite of the problems that were noted with respect to the possible creation of a new category of document, the advantages of including a provision such as subparagraph 8.3.3 (b) (ii) could outweigh its disadvantages. The prevailing view in the Working Group was to retain subparagraph 8.3.3 (b) (ii) in square brackets in the draft instrument, and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made.

(iv) Subparagraph 8.3.4

49. The Working Group heard that subparagraph 8.3.4 was a clarification of subparagraph 8.3.3, that stated that if there was a qualifying clause in the transport document that complied with the requirements of subparagraph 8.3.1, then the transport document, whether it was negotiable or non-negotiable, was not prima facie or conclusive evidence pursuant to subparagraph 8.3.3.

50. It was suggested that subparagraph 8.3.4 was too much in favour of the carrier, in allowing the carrier to rely upon the qualifying clause regardless of the condition in which it delivered the goods. It was noted that while it was appropriate to allow the carrier to rely upon the qualifying clause with respect to the situation where there was delivery of an unopened container, in the situation where the carrier delivered a damaged or opened container, and could not establish the chain of custody, the carrier should not be entitled to benefit from the qualifying clause. It

was suggested that subparagraph 8.3.4 should be redrafted in accordance with paragraphs 153 and 154 of the commentary on the draft instrument (A/CN.9/WG.III/WP.21).

51. Another view was that the validity of the qualifying clause should not depend upon the delivery of an undamaged container by the carrier, and that the issue of the liability of the carrier should not be confused with the issue of the description of the goods and the weight and contents of the container. It was emphasized that there was no connection between the qualifying clause and the condition of the container upon delivery, and that the carrier was not automatically relieved of responsibility by the existence of a qualifying clause in the transport document.

52. While some support was expressed for redrafting subparagraph 8.3.4, the prevailing view was that it should be retained in substance for continuation of the discussion at a future session.

(d) Paragraph 8.4

(i) Subparagraph 8.4.1

53. The Working Group heard that subparagraph 8.4.1 regarding the date operated only if the date was inserted into the contract particulars without any statement of its significance. It was explained that this provision was inserted into the draft instrument in order to deal with problems that have arisen with respect to incorrectly dated bills of lading.

54. It was noted by way of general comment that the terms “transport document or electronic record” are repeated throughout the provisions of chapter 8 of the draft instrument, and that the repetition of this phrase emphasized the distinction between transport documents and electronic records, rather than focusing on the content of the document, as intended in the mandate of the Working Group. It was suggested that care should be taken to avoid this problem when reviewing the provisions in chapter 8 in light of existing instruments on electronic commerce.

55. The Working Group found the substance of subparagraph 8.4.1 to be generally acceptable, taking into account the issue raised with respect to electronic records.

(ii) Subparagraph 8.4.2

56. The Working Group heard that whilst paragraph 8.2 provided that the contract particulars should contain the name and address of the carrier, identity of carrier clauses have caused problems in some jurisdictions. It was explained that subparagraph 8.4.2 was intended to remedy this situation by providing that where the contract particulars fail to identify the carrier, but name a vessel, then the registered owner of the vessel is presumed to be the carrier, unless the owner proves that the ship was under a bareboat charter at the time of the carriage. It was noted that inclusion of such an article amounted to a policy decision that was controversial in some quarters. It was further noted that if the Working Group agreed to include a provision such as subparagraph 8.4.2, a further decision would have to be made with respect to the last sentence of the draft article, which was in additional square brackets, and which sets out the additional presumption that where the registered owner rebuts the presumption that it is the carrier, the bareboat charterer is presumed to be the carrier.

57. Opposition was expressed to the approach taken in this draft article, based upon the view that the registered owner of the vessel should not play a role in the draft instrument, but instead should have responsibility in conventions on liability where third parties were involved. It was also suggested that a party who was unrelated to the contract should not, in some situations, become liable as a result of it, and that a bareboat charterer should not be implicated as a result of a contract of carriage.

58. The view was expressed that a provision such as subparagraph 8.4.2 was both important and justified, particularly since, in practice, the issue of identifying the carrier is key when establishing liability. Support for the draft article was expressed based on its clarity, and the fact that it simply raised a presumption, rather than dictated a rigid rule. It was noted that there could be additional problems with the draft article, such as where there was a consortium of carriers, but that overall, the principle embodied in the draft article filled a gap, and deserved the support and further examination of the Working Group. It was also noted that the inclusion of non-contracting parties was not a novel idea, since many jurisdictions already create a liability for registered owners on the basis of maritime liens for cargo claims. Another suggestion was made to create an irrebuttable presumption by retaining the first sentence and by deleting the final two sentences.

59. Further, concerns were expressed that a provision such as subparagraph 5.4.2 could create further uncertainty because its relationship with various case laws as to the identity of the carrier in some jurisdictions is not clear. Reference was made to case law that put emphasis on the heading of the transport document when it did not include the carrier's name on its face or which imposed liability on more than one carrier for one bill of lading, or on an apparent carrier when the document failed to identify clearly the carrier. A further reservation was expressed with respect to the second sentence of subparagraph 8.4.2, pursuant to which it was unclear whether this was the only way through which the registered owner could rebut the presumption set out therein. It was suggested that the registered owner should be free to introduce any evidence that defeats the presumption that it was the carrier. A note of caution was also voiced with respect to the possibility that since there is no requirement that the carrier provide its proper name and address, the carrier may have an incentive to intentionally fail to include that information, thus leaving the registered owner of the vessel in the position of the carrier, and potentially subject to liability. Other concerns were expressed regarding which document should be used to establish the identity of the carrier. It was also noted that the working assumption with respect to the draft instrument was that it was to cover door-to-door carriage, and that the presumption contained in the draft article could be quite inappropriate in the case where, for example, the carrier that failed to identify itself was a non-vessel operating carrier.

60. It was also suggested that parties to a contract should be more vigilant regarding the identity of their counterparties. It was noted that the principle embodied by the draft article was important to retain on behalf of cargo owners. The prevailing view in the Working Group was that subparagraph 8.4.2 identified a serious problem that must be treated in the draft instrument, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working

Group decided to keep subparagraph 8.4.2 in square brackets in the draft instrument, and to discuss it in greater detail at a future date.

(iii) Subparagraph 8.4.3

61. The Working Group found the substance of subparagraph 8.4.3 to be generally acceptable.

2. Draft article 10 (Delivery to the consignee)

62. The text of draft article 10 as considered by the Working Group was as follows:

> "10.1 When the goods have arrived at their destination, the consignee that exercises any of its rights under the contract of carriage shall accept delivery of the goods at the time and location mentioned in article 4.1.3. If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party will act in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.
>
> "10.2 On request of the carrier or the performing party that delivers the goods, the consignee shall confirm delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.
>
> "10.3.1 If no negotiable transport document or no negotiable electronic record has been issued:
>
> (i) The controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee;
>
> (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee's production of proper identification.
>
> "10.3.2 If a negotiable transport document or a negotiable electronic record has been issued, the following provisions apply:
>
> (a)
>
> (i) Without prejudice to the provisions of article 10.1 the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;
>
> (ii) Without prejudice to the provisions of article 10.1 the holder of a negotiable electronic record is entitled to claim delivery of the goods

from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 2.4 that it is the holder of the electronic record. Upon such delivery, the electronic record ceases to have any effect or validity;

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise accordingly the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 7.7 is deemed to be the shipper for purposes of this paragraph;

(c) Notwithstanding the provision of paragraph (d) of this article, a carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in article 2.4, that it is the holder;

(d) If the delivery of the goods by the carrier at the place of destination takes place without the negotiable transport document being surrendered to the carrier or without the demonstration referred to in paragraph (a) (ii) above, a holder who becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage will only acquire rights under the contract of carriage if the passing of the negotiable transport document or negotiable electronic record was effected in pursuance of contractual or other arrangements made before such delivery of the goods, unless such holder at the time it became holder did not have or could not reasonably have had knowledge of such delivery;

(e) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled, without prejudice to any other remedies that a carrier may have against such controlling party or shipper, to exercise its rights under article 10.4.

"10.4.1 (a) If the goods have arrived at the place of destination and

(i) The goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage; or

(ii) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee,

then the carrier is entitled to exercise the rights and remedies mentioned in paragraph (b);

(b) Under the circumstances specified in paragraph (a), the carrier is entitled, at the risk and account of the person entitled to the goods, to exercise some or all of the following rights and remedies:

(i) To store the goods at any suitable place;

(ii) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or

(iii) To cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time;

(c) If the goods are sold under paragraph (b) (iii), the carrier may deduct from the proceeds of the sale the amount necessary to:

(i) Pay or reimburse any costs incurred in respect of the goods; and

(ii) Pay or reimburse the carrier any other amounts that are referred to in article 9.5 (a) and that are due to the carrier.

Subject to these deductions, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods.

"10.4.2 The carrier is only allowed to exercise the right referred to in article 10.4.1 after it has given notice to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper that the goods have arrived at the place of destination.

"10.4.3 When exercising its rights referred to in article 10.4.1, the carrier or performing party acts as an agent of the person entitled to the goods, but without any liability for loss or damage to these goods, unless the loss or damage results from [a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]".

(a) General Remarks

63. The Working Group heard that draft article 10 consisted mainly of innovative material intended to set out what constituted delivery, and to deal with two problems that were pressing and frequent in daily practice. The first problem that was encountered frequently was that goods were not claimed by the consignee, and the second was that the consignee could demand delivery, but the negotiable transport document was not available to be surrendered to the carrier. It was noted that paragraph 10.1 stated that when the goods had arrived at their destination, the consignee had to accept delivery if the consignee had exercised any of its rights under the contract of carriage. It was stated that paragraph 10.2 was uncontroversial. Subparagraph 10.3.1 dealt with the situation where, if no negotiable document was available, the carrier had to deliver the goods to the consignee upon production of proper identification. It was explained that subparagraph 10.3.2 was potentially the

most controversial aspect of this provision, since it dealt with the case of the negotiable transport document. Subparagraph 10.3.2 (a) (i) set out the traditional practice where the holder of a negotiable instrument was entitled to claim delivery of the goods, at which point the carrier had to deliver the goods to the holder upon surrender of the negotiable instrument. It was noted that subparagraphs 10.3.2 (c) and (d) were intended to deal with the non-production of the transport document or bill of lading at the destination. The Working Group heard that these draft provisions were an attempt to remedy a long-standing problem to which there was no simple solution, and that the draft provisions attempted to strike a fair balance between the rights of all of the parties involved.

64. It was suggested that paragraph 10.1 could be approved in principle, since it contained provisions that were comparable to other texts, such as those that impose a liability regime on a warehouse manager or a bailee for taking charge of the goods. A widely held view was that, while the various provisions in draft article 10 might need to be restructured and reordered in future versions of the draft instrument, the substance of the draft article was generally acceptable.

(b) Paragraph 10.1

65. Support was expressed for the principle that there be a provision in the draft instrument pursuant to which the consignee was obliged to take delivery at the time and place of delivery agreed in the contract of carriage, or in accordance with trade practice, customs or usages. The draft provision was praised for attempting to strike a balance between the interests of the shipper and of the carrier, and for providing a flexible solution to some of the problems associated with delivery. It was suggested that paragraph 10.1 could look to additional sanctions on the consignee in situations where the consignee was in breach of its obligation to accept delivery, such as the termination of the contract.

66. However, a note of caution was raised with respect to the balance struck between cargo interests and the carrier. It was suggested that paragraph 10.1 granted too broad a set of rights to the carrier, in that the carrier bore no responsibility for loss or damage to the goods unless it was caused by the carrier's intentional or reckless act or omission. In response, it was stated that paragraph 10.1 was intended to set out the basis for the carrier's liability for loss or damage to the cargo in the situation where the carrier was forced to act as a floating warehouse. Thus, it imposed a warehouseman's level of care. By contrast, paragraph 10.4 was drafted using permissive language, and was intended to provide the carrier with the entitlement to exercise certain rights, but those rights were circumscribed by certain conditions included in the article to protect the consignee.

67. A preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional. Further, concern was raised with respect to the interaction between paragraphs 10.1 and 10.4, and it was recommended that the relationship between the draft provisions be clarified. A suggestion was made that paragraphs 10.1 and 10.4 could be merged. In order to reduce the confusion caused by the interplay of paragraphs 10.1 and 10.4, it was also suggested that the second sentence of paragraph 10.1 be deleted, and that paragraph 10.4 be left to stand on its own.

68. While general support was voiced for the principle embodied in paragraph 10.1, concerns were raised with respect to the concept of "agent". In some national legal regimes, the rights, obligations and responsibilities of agents have been clearly set out, and it was suggested that the potential confusion generated in this regard could be avoided by deletion of the concept of agent in this draft provision. However, the view was also expressed that the characterization of the carrier or performing party as agent of the consignee was important in order for the carrier to exercise power over the goods, and to avoid liability, provided that no damage was caused and with an established limit on inexcusable fault.

69. It was also suggested that paragraph 10.1 should be considered in light of the law of the sale of goods, which did not contain an unconditional obligation to take delivery of the goods. The view was expressed, however, that the rule in this draft article was in accordance with the right of rejection pursuant to article 86 of the United Nations Convention on Contracts for the International Sale of Goods. It was cautioned that not all States were parties to that convention, and that the provisions of the convention were non-mandatory. It was suggested that this latter point was important since the obligation to accept delivery under paragraph 10.1 was a mandatory provision.

70. Concern was expressed that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of paragraph 10.1. It was suggested that this could be clarified with the addition of the phrase "or of the performing party" after the phrase "personal act or omission of the carrier".

71. A risk of confusion was mentioned with respect to the relationship between draft article 10 and draft article 11 on right of control. It was suggested that this could be remedied by providing that the controlling party could replace the consignee only until the consignee exercised its rights under the contract, after which the right of control ceased to exist.

72. After discussion, the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made, and also to the need for consistency between the various language versions.

(c) Paragraph 10.2

73. The Working Group found the substance of paragraph 10.2 to be generally acceptable.

(d) Paragraph 10.3

(i) Subparagraph 10.3.1

74. The Working Group was reminded that subparagraph 10.3.1 was intended to govern the situation where no negotiable transport document or electronic record had been issued. It was suggested that provisions were drafted in an even-handed fashion, where subparagraph 10.3.1 (i) stated that the controlling party had to put the carrier in a position to be able to make delivery by providing it with the consignee's name, and subparagraph 10.3.1 (ii) provided the corollary that the carrier had to deliver the goods according to the agreement in the contract of carriage upon the production of proper identification by the consignee.

75. It was suggested that this draft provision was confusing, since it could be read to imply that the carrier did not know the identity of the consignee until the end of the carriage. However, except where the controlling party would change the consignee during the course of the carriage, it was more likely that the carrier would know the identity of the consignee from the outset. It was explained that subparagraph 10.3.1 was intended to set out the general obligation of the controlling party to put the carrier in a position where delivery could be effected. The suggestion was made that the Working Group should consider redrafting subparagraph 8.2.1 to include the name and address of the consignee in the contract particulars that must be put into the transport document.

76. A question was raised regarding what consequences would flow from the situation where the carrier did not follow the rule set out in subparagraph 10.3.1 (ii). It was suggested that this matter should be left to national law, and that subparagraph 10.3.1 (ii) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier.

77. The Working Group found the principles embodied in subparagraph 10.3.1 to be generally acceptable. The Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

(ii) Subparagraph 10.3.2

78. The Working Group was reminded that subparagraph 10.3.2 considered delivery in the case of issued negotiable transport documents, and that subparagraph 10.3.2 (a) (i) corresponded to the current practice, wherein the holder of the negotiable document had the right to claim delivery of the goods upon their arrival at the place of destination, and upon surrender of the negotiable document, the carrier had the obligation to deliver the goods. It was emphasized that subparagraph 10.3.2 (a) (ii), which referred to negotiable electronic records, mirrored subparagraph 10.3.2 (a) (i) regarding negotiable documentary records, but that the holder of a negotiable electronic record had to demonstrate in accordance with paragraph 2.4 that it was the holder. It was noted that paragraph 2.4 was fundamental to the operation of the electronic system set out in the draft instrument. It was reiterated to the Working Group that in the event the holder of the negotiable instrument did not claim delivery, subparagraph 10.3.2 (b) provided a mechanism for the carrier to put the controlling party, and failing it, the shipper, in a position to give the carrier instructions with respect to the delivery of the goods. The Working Group was reminded that subparagraph 10.3.2 (c) discharged the carrier from the obligation to deliver the goods under the contract of carriage only, and not from its other obligations. It was noted that subparagraph 10.3.2 (d) reduced the holder's rights in certain circumstances, but that the risk remained with the carrier if the transfer of the negotiable instrument took place before the delivery. It was pointed out that subparagraph 10.3.2 was intended to preserve some of the risk on the part of the carrier, and to provide an even-handed solution to the problems associated with the failure of the holder of a negotiable transport document to claim delivery.

79. General support was expressed for principle embodied in subparagraph 10.3.2 as a whole. Approval was expressed for the draft provision's goal of solving an important and practical problem with respect to the delivery of cargo that has

greatly troubled the shipping world for many years, both on the carrier and cargo sides of the issue. The Working Group welcomed a convention-based solution to the problem. It was noted that insurance cover for the carrier was excluded by international group clubs when the carrier delivered cargo without surrender of the transport document, but it was acknowledged that it was often difficult for the consignee to obtain the negotiable transport document prior to delivery of the goods. Support was expressed for providing protection to a carrier in such circumstances when the carrier had acted properly and prudently. It was generally agreed that this draft provision provided a good basis from which to further refine the text.

80. However, a note of caution was raised that the Working Group would have to carefully examine the balance of the different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution.

81. The Working Group found the substance of subparagraphs 10.3.2 (a) (i) and (ii) to be generally acceptable.

82. The suggestion was made with respect to subparagraph 10.3.2 (b), that the carrier should have the obligation of accepting the negotiable transport document, and that if the holder of the document did not claim delivery of the goods, then the carrier should have the obligation of notifying the controlling party. Support was expressed for the suggestion that the principle expressed in subparagraph 10.3.2 (b) should also apply in cases where no negotiable instrument had been issued. Further, it was suggested that this subparagraph of the draft article should set out the consequences for the carrier when it failed to notify the controlling party, or the shipper, or the deemed shipper pursuant to paragraph 7.7. However, it was noted that if the carrier was not able to locate the consignee for delivery, then subparagraph 10.3.2 (e) became operational, and the carrier became entitled to exercise its rights under paragraph 10.4.

83. It was suggested that it was unclear how subparagraphs 10.3.2 (c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. It was requested that the drafting in this regard be clarified.

84. Concerns were expressed with respect to subparagraph 10.3.2 (d). It was suggested that this subparagraph should be revised to provide greater protection for the third party who became a holder of the negotiable transport document after delivery was made. However, it was explained that the draft article was based on two pillars: the contract of carriage between the carrier and the shipper pursuant to which the carrier agreed to deliver goods to a certain person, and the general principle that the carrier had to refer to its contractual counterpart for instructions, and that the shipper had to enable the carrier to perform its part of the contract. In response to a question regarding why subparagraph 10.3.2 was limited to negotiable transport documents, unlike conventions such as the CMR that considered this issue with respect to non-negotiable documents, it was noted that the real problem arose where there was a negotiable transport document, since in principle, the arrival of the goods at their destination exhausted the bill of lading.

85. Further concerns were expressed with respect to the effect that this provision might have on the principle found in some national legal regimes that the burden of

proof in cases of a good faith holder did not lie with the party claiming good faith, but rather with the party attempting to prove otherwise. It was stated in response to this concern that subparagraph 10.3.2 was not intended to govern the burden of proof, which would be dependent upon the circumstances, and that the draft article was intended only to grant certain protections to an innocent third party holder when there was no knowledge of delivery. Additional concerns suggested that the rule in this subparagraph could weaken the bill of lading as a document of title, and the suggestion was made that a way to solve this problem might be to develop a system for electronic bills of lading that were more easily and more quickly transferred.

86. It was explained that the regime that subparagraph 10.3.2 was attempting to establish was an effort to reform the whole system of negotiable transport documents, since, it was suggested, it was an area that was in urgent need of repair. It was further suggested that the whole system was being undermined by the current trade practice whereby bills of lading were often not available upon delivery, and industry had filled the gap with its own documentary solutions, such as with letters of indemnity. It was suggested that these practices had weakened the bill of lading, and that this provision was attempting to restore the integrity and strength of the bill of lading system. It was also stated that the problem of bills of lading being unavailable upon delivery was not a result of the speed with which a bill of lading travelled, but rather it was a function of the fact that voyages are often much shorter than time period required for the holding of bills of lading by financial institutions.

87. The Working Group heard that the "contractual or other arrangements" referred to in subparagraph 10.3.2 (d) referred not to letters of indemnity, but principally to contracts of sale, and particularly to those situations in which there was a series of buyers and sellers and the bill of lading could not travel quickly enough through the entire series in order to be there at the time of delivery. The goal of this draft article was to protect the buyer in the series who received the bill of lading after the goods had been delivered, so that the buyer could acquire certain contractual rights under the bill of lading, even though delivery could not be obtained. It was noted that this provision was inspired by a similar provision in the 1992 Carriage of Goods by Sea Act in the United Kingdom. The second situation that subparagraph 10.3.2 (d) was intended to cover was the situation where there is a bona fide acquirer of a bill of lading.

88. Other concerns expressed with respect to subparagraph 10.3.2 (d) were that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. Further, concern was expressed with respect to the lack of certainty of the phrase "could not reasonably have had knowledge of such delivery".

89. The view was expressed that subparagraph 10.3.2 (e) should be aligned with subparagraph 10.3.2 (b), by adding to it, after the opening phrase, "If the controlling party or shipper does not give the carrier adequate instructions as to the delivery of the goods", the phrase, "or in cases when the controlling party or the shipper cannot be found". Support was expressed for this suggestion, and it was agreed that it would appear in square brackets in the next version of the draft instrument prepared by the Secretariat.

90. The prevailing view in the Working Group was that subparagraph 10.3.2 represented an important and welcome advancement in establishing the balance of interests among parties in the situation where the holder of a negotiable transport document failed to claim delivery of the goods. It was decided that the Working Group would resume a detailed discussion of this draft article in the future, and the Secretariat was requested to prepare a redraft of the provision, taking into account the concerns expressed.

(e) Paragraph 10.4

91. The Working Group heard that subparagraph 10.4.1 stated the general principle setting out the entitlement of the carrier to exercise certain rights and remedies in situations of failure of delivery involving negotiable and non-negotiable transport documents, and concerning consignees who had or had not exercised any rights pursuant to the contract of carriage. It was noted that subparagraph 10.4.1 (b) entitled the carrier to store, unpack or sell the goods at the risk and account of the person entitled to them, and subparagraph 10.4.1 (c) entitled the carrier to deduct the costs incurred with respect to the goods, or payable to the carrier under subparagraph 9.5 (a). It was explained that subparagraph 10.4.2 provided a safeguard to the consignee in requiring the carrier to give notice to the consignee, controlling party or shipper prior to exercising its rights, and that subparagraph 10.4.3 made the carrier liable for loss of or damage to the goods sustained intentionally or recklessly by the carrier.

92. While there was general support for subparagraph 10.4.1, concern was expressed with respect to the phrase “no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage”. It was suggested that this phrase was confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand.

93. General approval was also expressed for the policy reflected in subparagraph 10.4.2, with the proviso that it was unclear why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights.

94. Concern with respect to the use of the term “agent” in subparagraph 10.4.3 was again echoed, and it was noted that the third line of this draft article should read “loss of or damage to these goods”. An additional note of caution was again raised with respect to the wording of the draft article that could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. Support was expressed for the suggestion that this latter point could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”. Support was also expressed for the suggestion that the word “personal” should be deleted from this draft provision in order to broaden its scope.

95. In response to a question regarding the placement of the square brackets in subparagraph 10.4.3, it was explained that the square brackets were in the correct position, since the contents of the brackets were intended to define the carrier’s liability, but the Working Group had to decide at what level to determine that

liability before the brackets could be removed. Some support was received for the suggestion that the square brackets should be removed from this draft provision.

96. It was noted that subparagraphs 10.4.3 and 10.4.1 had similarities in their content, and it was suggested that their language should be adjusted to reflect those similarities. There was some support for this suggestion.

97. It was suggested that when the carrier exercised its rights under sub-paragraph 10.4.1, it could result in costs in addition to those arising from loss or damage, such as, for example, expenses arising from warehousing or sale. In addition, it was noted that the value of the goods might not in some cases cover the costs incurred. The suggestion was made that subparagraph 10.4.3 should include the idea that when exercising its rights in subparagraph 10.4.1, "the carrier or performing party may cause costs and risks, and that these shall be borne by the person entitled to the goods".

98. The suggestion was made that the reference in subparagraph 10.4.1 (c) (ii) to the deduction by the carrier from the proceeds of the sale, the amount necessary to reimburse the carrier pursuant to subparagraph 9.5 (a) should be placed in square brackets in light of the fact that subparagraph 9.5 (a) had not yet been agreed upon by the Working Group. It was noted that in the conclusions reached with respect to subparagraph 9.5 (a), the Working Group had not decided to place that provision in square brackets (A/CN.9/525, para.123), and that it would be inappropriate to do so in subparagraph 10.4.1 (c) (ii).

99. The Working Group expressed its general approval with paragraph 10.4, and requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

3. Draft article 11 (Right of control)

100. The text of draft article 11 as considered by the Working Group was as follows:

> "11.1 The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1.1. Such right to give the carrier instructions comprises rights to:
>
> (i) Give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
>
> (ii) Demand delivery of the goods before their arrival at the place of destination;
>
> (iii) Replace the consignee by any other person including the controlling party;
>
> (iv) Agree with the carrier to a variation of the contract of carriage.
>
> "11.2 (a) When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:
>
> (i) The shipper is the controlling party unless the shipper and consignee agree that another person is to be the controlling party and the

shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party;

(ii) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor or the transferee shall notify the carrier of such transfer;

(iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification;

(b) When a negotiable transport document is issued, the following rules apply:

(i) The holder or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party;

(ii) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 12.1, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control;

(iii) In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals shall be produced;

(iv) Any instructions as referred to in article 11.1 (ii), (iii) and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated on the negotiable transport document;

(c) When a negotiable electronic record is issued:

(i) The holder is the sole controlling party and is entitled to transfer the right of control to another person by passing the negotiable electronic record in accordance with the rules of procedure referred to in article 2.4, upon which transfer the transferor loses its right of control;

(ii) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the rules of procedure referred to in article 2.4, that it is the holder;

(iii) Any instructions as referred to in article 11.1, (ii), (iii) and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated in the electronic record;

(d) Notwithstanding the provisions of article 12.4, a person, not being the shipper or the person referred to in article 7.7, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this instrument.

"11.3 (a) Subject to the provisions of paragraphs (b) and (c) of this article, if any instruction mentioned in article 11.1 (i), (ii), or (iii):

(i) Can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;

(ii) Will not interfere with the normal operations of the carrier or a performing party; and

(iii) Would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage,

then the carrier shall execute the instruction. If it is reasonably expected that one or more of the conditions mentioned in subparagraphs (i), (ii), and (iii) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction;

(b) In any event, the controlling party shall indemnify the carrier, performing parties, and any persons interested in other goods carried on the same voyage against any additional expense, loss, or damage that may occur as a result of executing any instruction under this article;

(c) If a carrier

(i) Reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and

(ii) Is nevertheless willing to execute the instruction,

then the carrier is entitled to obtain security from the controlling party for the amount of the reasonably expected additional expense, loss, or damage.

"11.4 Goods that are delivered pursuant to an instruction in accordance with article 11.1 (ii) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.

"11.5 If during the period that the carrier holds the goods in its custody, the carrier reasonably requires information, instructions, or documents in addition to those referred to in article 7.3 (a), it shall seek such information, instructions, or documents from the controlling party. If the carrier, after reasonable effort, is unable to identify and find the controlling party, or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the obligation to do so shall be on the shipper or the person referred to in article 7.7.

"11.6 The provisions of articles 11.1 (ii) and (iii) and 11.3 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 11.2 (a) (ii). If a transport document or an electronic record is issued, any agreement referred to in this paragraph must be stated in the contract particulars."

(a) General remarks

101. While it was generally felt that a provision regarding the right of control would constitute a welcome addition to traditional maritime transport instruments, the views and concerns expressed in respect of draft article 11 at the ninth session of the Working Group were reiterated (see A/CN.9/510, paras. 55-56). It was pointed

out that, when revising draft article 11, particular attention should be given to avoiding inconsistencies among the various language versions.

(b) Paragraph 11.1

102. As a matter of drafting, a concern was expressed that subparagraph (i) was unclear as to the exact meaning of the words "give or modify instructions … that do not constitute a variation of the contract". It was pointed out that those words might be read as contradicting themselves. While it was acknowledged that clearer drafting might be needed, it was stated in response that a clear distinction should be made in substance between what was referred to as a minor or "normal" modification of instructions given in respect of the goods, for example, regarding the temperature at which those goods should be stored, and a more substantive variation of the contract of carriage.

103. With respect to subparagraph (iv), it was suggested that the provision should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was stated that, while subparagraph (iv) was not directly related to the exercise of the right of control, it served a particularly useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. It was stated that, although a variation of the contract of carriage would normally be negotiated between the parties to that contract, the contractual shipper might not always be the best person for the carrier to contact where an urgent decision had to be made in respect of the goods. In such a case where urgent dialogue should take place between the carrier and the person most interested in the goods, with the possible consequence that certain terms of the contract of carriage would need to be modified, it was suggested that the controlling party would be the best person for the carrier to contact.

104. After discussion, the Working Group found the substance of paragraph 11.1 to be generally acceptable. The Secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(c) Paragraph 11.2

(i) Subparagraph 11.2 (a)

105. With respect to subparagraph 11.2 (a) (i), a question was raised as to the reasons why the consent of the consignee was required to designate a controlling party other than the shipper. It was observed that the consignee was not a party to the contract of carriage. It was also observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) conferred to him the power to unilaterally transfer his right of control to another person. In response, a view was expressed that the designation of the controlling party took place at a very early stage in the carriage process or even before the conclusion of the contract of carriage. At that stage, designating the controlling party might be an important point for the purposes of the underlying sale transaction that took place between the

shipper and the consignee. For that reason, it was considered appropriate under that view to involve the consignee in the designation of the controlling party.

106. With respect to the duration of the right of control, it was observed that, under paragraph 11.2, the controlling party remained in control of the goods until their final delivery (see A/CN.9/WG.III/WP.21, para. 188). A question was raised as to the reasons why the draft instrument departed from the CMI Uniform Rules for Sea Waybills in that, under the draft instrument, there was no automatic transfer of the right of control from the shipper to the consignee as soon as the goods had arrived at their place of delivery. It was suggested in that context that the draft instrument might create a difficult situation for the carrier if the right of control could be transferred or otherwise exercised after the goods had arrived at their place of delivery. It was thus proposed that the draft instrument should be made fully consistent with the CMI Uniform Rules for Sea Waybills. The Working Group took note of that proposal. It was explained in response that, if there were such automatic transfer, the most common shipper's instruction to the carrier, namely not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected, could be frustrated. For that reason, the duration of the right of control under the draft instrument had been extended until the goods had been actually delivered. More generally, it was pointed out that subparagraph 11.2 (a) dealt with the situation where no negotiable document had been issued, a situation where flexibility in the transfer of the right of control was essential.

107. With respect to subparagraph 11.2 (a) (ii), concern was expressed that, under existing law in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier. It was suggested that only notification from the transferor should be acceptable as a means of informing the carrier of such a transfer. In that connection, a more general question was raised regarding the relationship between paragraph 11.2 and paragraph 12.3. It was suggested that the issue of the transfer of the right of control should be made subject to applicable domestic law. While the Working Group took note of that suggestion, it was generally felt that no reference to domestic law should be made in draft article 11. It was agreed that various options might need to be discussed further as to which parties should notify the carrier of a transfer of the right of control.

108. After discussion, the Working Group found the substance of subparagraph 11.2 (a) to be generally acceptable. The Secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(ii) Subparagraph 11.2 (b)

109. A concern was raised that the reference to the "holder" of the bill of lading might be unduly restrictive and the person to whom the bill of lading was endorsed should also be listed under subparagraph 11.2 (b). In response, it was explained that the definition of "holder" under paragraph 1.12 sufficiently took care of that issue.

110. With respect to subparagraph 11.2 (b) (iii), the view was expressed that the draft provision did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier. It

was suggested that the draft instrument should provide that, in such a case, the carrier should be free to refuse to follow the instructions given by the controlling party. It was also suggested that a similar indication should be given under subparagraph 11.2 (c) (ii). The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised. It was further suggested that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. The Working Group generally agreed with that suggestion.

111. After discussion, subject to the above-mentioned views and suggestions, the Working Group found the substance of subparagraph 11.2 (b) to be generally acceptable. The Secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(iii) Subparagraph 11.2 (c)

112. The Working Group deferred consideration of subparagraph 11.2 (c) until it had come to a more precise understanding of the manner in which the issues of electronic commerce would be addressed in the draft instrument.

(iv) Subparagraph 11.2 (d)

113. The Working Group found the substance of subparagraph 11.2 (d) to be generally acceptable.

(d) Paragraph 11.3

(i) Subparagraph 11.3 (a)

114. A question was raised regarding the relationship between subparagraph 11.3 (a) (iii) and subparagraph 11.1 (ii). It was stated that, under subparagraph 11.1 (ii), the exercise of the right of control would inevitably involve "additional expenses". However, such expenses resulting from delivery of the goods before their arrival at the place of destination might range from acceptable minor expenses to less acceptable expenses from the perspective of the carrier, for example, if the instructions received from the controlling party resulted in a change in the port of destination of the vessel. To avoid a contradiction between those two provisions, it was suggested that either the carrier should be under no obligation to execute the instruction received under subparagraph 11.1 (ii) or that subparagraph 11.3 (a) (iii) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses.

115. A contrary view was expressed that the issue of "additional expenses" should not be dealt with under subparagraph 11.3 (a). It was pointed out that the matter was sufficiently covered by subparagraph 11.3 (c). Broad support was expressed for the deletion of subparagraph 11.3 (a) (iii).

116. A more general question was raised regarding the nature of the obligation incurred by the carrier under paragraph 11.3. As to whether the carrier should be under an obligation to perform (*"obligation de résultat"*) or under a less stringent

obligation to undertake its best efforts to execute the instructions received from the controlling party (*"obligation de moyens"*), the view was expressed that the former, more stringent obligation, should be preferred. However, it was stated by the proponents of that view that the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft instrument should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract.

117. After discussion, the Working Group generally agreed that subparagraph 11.3 (a) should be recast to reflect the above views and suggestions. It was agreed that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session.

(ii) Subparagraph 11.3 (b)

118. A question was raised regarding the meaning of the words "the controlling party shall indemnify the carrier". As already pointed out at the ninth session of the Working Group (see A/CN.9/510, para. 56), it was recalled that the notion of indemnity inappropriately suggested that the controlling party might be exposed to liability. It was suggested that the notion of "indemnity" should be replaced by that of "remuneration", which was more in line with the rightful exercise of its right of control by the controlling party. Subject to that suggestion, the Working Group found the substance of subparagraph 11.3 (b) to be generally acceptable.

(iii) Subparagraph 11.3 (c)

119. The Working Group found the substance of subparagraph 11.3 (c) to be generally acceptable.

(e) Paragraph 11.4

120. The Working Group found the substance of paragraph 11.4 to be generally acceptable.

(f) Paragraph 11.5

121. The view was expressed that, since subparagraph 7.3 (a) dealt with the obligation of the shipper to provide information to the carrier, that obligation should be reflected in paragraph 11.5. It was suggested that the end of the first sentence of paragraph 11.5 should be amended to provide the carrier with the choice to seek instructions from "the shipper or the controlling party" and not exclusively from "the controlling party". It was generally felt, however, that the obligation for the shipper to provide information in cases where the controlling party could not be identified was already contained in the second sentence of paragraph 11.5. It was thus unnecessary to refer to the shipper in the first sentence. Furthermore, providing

the carrier with a choice to seek instructions from either the shipper or the controlling party would run counter to the policy that, during the carriage, the counterpart of the carrier should be the controlling party. Consistent with that policy, the shipper would only intervene as a substitute for the controlling party if that party could not be located or was unable to provide the requested information.

122. Another view was that, in addition to the carrier, performing parties such as warehouses or stevedores who held the goods in their custody might need to seek instructions from the shipper or the controlling party. It was thus suggested that the first sentence of paragraph 11.5 should be amended to refer to "the carrier or the performing party". That suggestion was generally supported.

123. As a matter of drafting, it was suggested that it might be misleading to combine in the same provision a first sentence dealing with an obligation of the carrier and a second sentence dealing with an obligation of the shipper. It was generally felt that the formulation of the paragraph should be made clearer. Subject to the above suggestions, the Working Group found the substance of paragraph 11.5 to be generally acceptable.

(g) Paragraph 11.6

124. Broad support was expressed for the principle expressed in paragraph 11.6 under which the provisions regarding the right of control should be non-mandatory. A question was raised regarding the interplay of paragraphs 11.6 and 11.1 if paragraph 11.1 was to be interpreted as defining the right of control by way of an open-ended list. It was stated in response that the word "comprises" in paragraph 11.1 had been used as opposed to the word "includes" precisely to make it clear that the list in that paragraph was exhaustive.

125. Doubts were expressed regarding the extent to which party autonomy should be allowed to deviate from article 11. It was stated that it might be inappropriate to allow carriers, for example, to exclude totally the right of the controlling party to change the initial instructions regarding delivery of the goods, even where the carrier knew that the initial instructions had become unreasonable or should otherwise be changed.

126. Regarding the third sentence of the paragraph, the view was expressed that the words "any agreement … must be listed in the contract particulars" might overly restrict the effect of paragraph 11.6 by allowing only agreements fully expressed in a bill of lading. Other types of agreement could be used for the purposes of paragraph 11.6, for example, through incorporation by reference to a contractual document outside the bill of lading. Such incorporation by reference would also be particularly important where electronic documentation was used. It was suggested that a revised draft of paragraph 11.6 should avoid suggesting any restriction to the freedom of the parties to derogate from article 11. That suggestion was broadly supported. Subject to that suggestion, the Working Group found the substance of paragraph 11.6 to be generally acceptable.

4. Draft article 12 (Transfer of rights)

127. The text of draft article 12 as considered by the Working Group was as follows:

"12.1.1 If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person,

(i) If an order document, duly endorsed either to such other person or in blank, or,

(ii) If a bearer document or a blank endorsed document, without endorsement, or,

(iii) If a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement.

"12.1.2 If a negotiable electronic record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by passing the electronic record in accordance with the rules of procedure referred to in article 2.4.

"12.2.1 Without prejudice to the provisions of article 11.5, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.

"12.2.2 Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.

"12.2.3 Any holder that is not the shipper and that:

(i) Under article 2.2 agrees with the carrier to replace a negotiable transport document by a negotiable electronic record or to replace a negotiable electronic record by a negotiable transport document, or

(ii) Under article 12.1 transfers its rights,

does not exercise any right under the contract of carriage for the purpose of the articles 12.2.1 and 12.2.2.

"12.3 The transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record is issued shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights. Such transfer of rights may be effected by means of electronic communication. A transfer of the right of control cannot be completed without a notification of such transfer to the carrier by the transferor or the transferee.

"12.4 If the transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record has been issued includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities."

(a) General remarks

128. The Working Group heard that article 12 of the draft instrument constituted a novel approach, at least with regard to maritime conventions. It was noted that there were two principal reasons for the inclusion of a chapter on transfer of rights: first, to ensure that the provisions of the draft instrument were coherent throughout in terms of the issue of liability of the parties, and second, in order to set out the necessary rules to accommodate the electronic communication component of the draft instrument. It was explained that subparagraph 12.1.1 and paragraph 12.2 related to a negotiable transport document, whilst paragraphs 12.3 and 12.4 concerned non-negotiable transport documents and instances where no transport document at all was issued. It was stated that subparagraph 12.1.1 should be read in conjunction with the definition of "holder" in paragraph 1.12, and that subparagraph 12.1.2 concerned negotiable electronic records. It was explained that subparagraph 12.2.1 contained a declaration of the non-liability of a holder who did not exercise any right under the contract of carriage, whilst subparagraph 12.2.2 made it clear that a holder who exercised a right under the contract of carriage also assumed any liabilities pursuant to that contract, to the extent that they were ascertainable pursuant to that contract. Subparagraph 12.2.3 and paragraph 12.3 were said to be self-explanatory and administrative in nature. It was further stated that paragraph 12.4 should be read with subparagraph 11.2 (d), since that provision constituted a qualification of paragraph 12.4.

129. The suggestion was made that article 12 be deleted from the draft instrument in its entirety, or that the entire chapter be placed in square brackets. In response to these suggestions, it was recalled that article 12 was inserted into the draft instrument as a response to problems that had been encountered in the preparation of the UNCITRAL Model Law on Electronic Commerce, which were specific to bills of lading, and the notion of "functional equivalency" between electronic records and paper documents. It was concluded at that time that the law of bills of lading was insufficiently codified in an international instrument to be able to accommodate an electronic record functionally equivalent to a paper-based bill of lading. It was recalled that the prevailing view at that time was that the development of rules regarding paper transport documents would facilitate the development and use of electronic records. The Working Group was cautioned that if it decided that the task of codifying rules on bills of lading was too difficult, then it would fail to accomplish its objective regarding electronic records. It was pointed out that the preliminary exchange of views in the Working Group made it clear that the entire chapter warranted further discussion.

(b) Paragraph 12.1

(i) Subparagraph 12.1.1

130. In considering the text of subparagraph 12.1.1, there was general support for the principle embodied in the provision that a holder of a negotiable transport document was entitled to transfer the rights incorporated in the document by transferring the document itself. It was stated, however, that there might be exceptions to this principle as, for example, in the case of paragraph 13.3, which provided that the shippers or consignees who were not holders could still sue for loss or damages. It was suggested that this matter could be dealt with through the addition of a phrase into subparagraph 12.1.1 such as, "except for the provisions in

article 13.3, the transfer of a negotiable transport document means the transfer of all rights incorporated in it".

131. A concern was raised with respect to the interaction of subparagraph 12.1.1 and article 71 of the United Nations Convention on Contracts for the International Sale of Goods, which provided that a seller could in certain circumstances suspend the delivery of the goods to the buyer, even after they had already been shipped. It was explained that article 71 of the Sale of Goods Convention represented an exception to the principal rule, which is that embodied in the draft instrument, that only the party with right of control can stop the carriage of the goods. It was suggested that reading article 71 of the Sale of Goods Convention as an exception to the main rule removed the apparent inconsistency between that convention and the draft instrument.

132. In the course of discussions in the Working Group, there was some support for the concern raised with respect to the types of negotiable transport documents included within the terms of subparagraph 12.1.1. It was noted that some national law regimes included bills of lading to a named person as negotiable documents, yet these nominative documents were not included in the list of negotiable transport documents in subparagraph 12.1.1, nor were they included by virtue of the definition of "negotiable transport document" in paragraph 1.14. It was suggested that a bill of lading to a named person should be included in subparagraph 12.1.1, either through direct inclusion, or by including it in paragraph 1.14. Through the course of discussions, it was noted that in most national legal regimes, a nominative bill of lading was non-negotiable, and that it was transferred by assignment rather than by endorsement. By way of explanation, it was noted that subparagraph 12.1.1 was drafted in order to circumvent the difficulties of dealing with the nominative aspect of electronic documents. It was further noted that the drafting decision was made to limit these problems and promote harmonization by using terms such as "to order" and "to bearer" to describe negotiable documents, and it was suggested that reintroducing the nominative document as a negotiable document could negatively affect the ability of the electronic system to differentiate documents.

133. There was strong support in the Working Group to maintain the text of subparagraph 12.1.1 as drafted in order to promote the harmonization and to accommodate negotiable electronic records. The concern regarding nominative negotiable documents under certain national laws was noted.

(ii) Subparagraph 12.1.2

134. The Working Group took note that subparagraph 12.1.2 would be discussed at a later date in conjunction with the other provisions in the draft instrument regarding electronic records.

(c) Paragraph 12.2

(i) Subparagraph 12.2.1

135. It was suggested that subparagraph 12.1.2 could be clarified by providing examples of the types of liabilities that could be assumed by a holder who was not the shipper and who had not exercised any right under the contract of carriage. By way of explanation, it was pointed out that this provision was intended to provide comfort to intermediate holders such as banks that, as long as they did not exercise

any right under the contract of carriage, they would not assume any liability under that contract. The question was raised whether this was an appropriate rule for the draft instrument, since the draft article might be misread as suggesting that any time a holder became active or exercised a right, the holder would automatically assume responsibilities or liabilities under the contract of carriage. In response, it was suggested that subparagraphs 12.2.1 and 12.2.2 should be read together, since the latter provision clarified what liabilities a holder would assume in the situation where the holder exercised any right under the contract of carriage.

136. There was some support for the view that the concept in subparagraph 12.2.1 was superfluous. After discussion, the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

(ii) Subparagraph 12.2.2

137. The concerns raised with respect to subparagraph 12.2.1 were echoed with respect to subparagraph 12.2.2, and a request was made that the text in the draft article stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract. It was suggested that it would be difficult to itemize which obligations in the contract of carriage could be assumed by the holder, and that, in any event, the text of the provision was sufficiently clear in stating that the liabilities were those that "are incorporated in or ascertainable from the negotiable transport document". Further reservations were noted with respect to the breadth of the subparagraph, and the possibility was suggested that carriers could expand the liability of holders significantly pursuant to this provision by including standard clauses in the contract of carriage that extended the liabilities of the shipper.

138. By way of explanation, it was pointed out that subparagraph 12.2.2 was intended not to detail which obligations would be imposed on the holder, but rather to state that if there were obligations on a holder, then the later holder would assume those liabilities once that holder exercised any rights under the contract. It was further stated that the existence of any such liabilities was to be decided by the parties who negotiated the contract, and that any liabilities were limited to those that were incorporated in or ascertainable from the contract. It was suggested that any further specification of potential liabilities for the holder would be impossible in an international instrument, and should be left to national law to ascertain those potential liabilities from the contract. In response to this suggestion, it was urged that the issue should be dealt with in the draft instrument rather than be left to the applicable law.

139. Additional concern was raised with respect to the possibility that specific liabilities that might be considered unfair could be incorporated into the contract and thus be assumed by the holder. An example was given of the possibility that a demurrage claim could be incorporated into the contract of carriage, and the receiver of cargo as the holder could become responsible for its payment.

140. The Working Group requested the Secretariat to prepare a revised draft of subparagraph 12.2.2 with due consideration being given to the views expressed.

(iii) Subparagraph 12.2.3

141. The Working Group found the substance of subparagraph 12.2.3 to be generally acceptable.

(d) Paragraph 12.3

142. Concern was raised with respect to a conflict that could arise between paragraph 12.3 and national law in countries where notice of transfer of rights must be given by the transferor, and may not be given by the transferor or the transferee as stated in the last sentence of the provision. It was suggested that this potential conflict could be avoided through the inclusion of the following phrase after the words "or the transferee" at the end of the final sentence of the provision: "in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights". In the alternative, it was suggested that the potential conflict could be avoided through the deletion of the phrase "by the transferor or the transferee" in the final sentence of paragraph 12.3.

143. Whilst support was expressed for the principle behind the opening sentence of paragraph 12.3, concern was expressed with respect to the requirement in the provision that the transfer of rights under a contract of carriage pursuant to which no negotiable transport document was issued "shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights". In particular, it was noted that this provision raised very complex conflict of law issues for certain European countries, given its conflict with the approach taken to the issue of assignment in the Rome Convention on the Law Applicable to Contractual Obligations. It was suggested that a simpler approach might be found, but some uncertainty was expressed regarding whether it would be possible to solve the issue using a single applicable law approach. The suggestion was also made that, with a view to avoiding conflict with any regional convention, paragraph 12.3 could simply refer to "applicable law" in its first sentence, rather than stating how to apply the law.

144. A view was expressed that the Secretariat could promote the harmonization of international approaches to the issue of transfer of rights by examining how the Convention on the Assignment of Receivables in International Trade dealt with the transfer of rights. The Working Group was reminded, however, that the draft instrument was intended to focus on the carriage of goods, and not on the transfer of rights.

145. The Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.3, with due consideration being given to the suggestions made in the course of the discussion.

(e) Paragraph 12.4

146. It was suggested that the text of paragraph 12.4 was unnecessarily complicated and difficult to understand. Criticism was heard that this provision derogated from the law of assignment, and that it did not appear consistent with the approach taken in paragraph 12.3, wherein the transfer of rights was to take place according to applicable law. Further, the specific substantive law set out in paragraph 12.4 appeared to strongly favour the carrier, and might be seen as undermining the balance of rights in the draft instrument as a whole. It was suggested that the

matters dealt with in this provision might better be left to the agreement of the parties, than to be decided by any specific rule on joint and several liability.

147. In response to the specific criticisms of paragraph 12.4, support was expressed for the view that paragraph 12.4 was a welcome attempt to state the general principle that a debtor cannot escape liability by transferring its rights to another party. It was also suggested that a provision that ensured that a debtor remained liable until the carrier agreed to the transfer of rights was a positive approach, although it was questioned why a carrier would need joint and several liability on the part of the holder if the carrier had agreed to the transfer. Further, in response to the statement that draft paragraphs 12.3 and 12.4 could apply when no document at all was issued, it was explained that the transfer of rights could take place pursuant to an exchange of electronic data.

148. In light of the discussion with respect to draft article 12 and to paragraph 12.4 in particular, the Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.4, with due consideration being given to the views expressed.

5. Draft article 13 (Rights of suit)

149. The text of draft article 13 as considered by the Working Group was as follows:

> "13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:
>
> (i) The shipper;
>
> (ii) The consignee;
>
> (iii) Any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage;
>
> (iv) Any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer. In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.
>
> "13.2 In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. If such holder did not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffered such loss or damage.
>
> "13.3 In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of

the contract of carriage, prove that the holder did not suffer such loss or damage."

(a) Paragraph 13.1

150. By way of introduction, it was recalled that paragraph 13.1 was intended to apply to any contract of carriage, whether or not a document or electronic record had been issued and, if it had been issued, irrespective of its nature. That provision set out a general rule as to which parties had a right of suit under the draft instrument. As a possible deficiency of the current draft, it was mentioned that two parties listed in paragraph 13.1 might suffer loss, for example, where goods were damaged and delayed, an insurer paid the insured portion of the loss, and the consignee had to bear the uninsured portion, such as loss due to delay. It was thus suggested that a revised draft of paragraph 13.1 should make it clear that both parties were entitled to claim to recover their respective portions of the loss. As a matter of drafting, it was also suggested that the readability of the provision might be improved if the words "Without prejudice to articles 13.2 and 13.3" were deleted.

151. Some support was expressed about the principle expressed in paragraph 13.1, under which a contracting shipper or a consignee could only assert those contractual rights that belonged to it and if it had a sufficient interest to claim. This meant that in the case of loss of or damage to the goods the claimant should have suffered the loss or damage itself. If another person, e.g. the owner of the goods or an insurer, was the interested party, such other person should either acquire the right of suit from the contracting shipper or from the consignee, or, if possible, assert a claim against the carrier outside the contract of carriage.

152. Fundamental concerns and questions were raised with respect to paragraph 13.1. It was pointed out that, under most legal systems, the provision could be regarded as superfluous since it established a right of suit where such a right would normally be recognized by existing law to any person who had sufficient interest to claim. At the same time, the provision might be regarded as unduly restrictive in respect of the persons whose right of suit was recognized. It was emphasized that recognizing a right of suit to a limited number of persons by way of closed list was a dangerous technique in that it might inadvertently exclude certain persons whose legitimate right of suit should be recognized. Among such persons possibly omitted unduly from the list contained in paragraph 13.1, it was suggested that the controlling party, in cases where the carrier had refused to follow its instructions, and the person identified in paragraph 7.7 might need to be considered. In the course of that discussion, a note of caution was struck regarding the appropriateness of limiting in any way the exercise of rights of suit, a policy that might run counter to fundamental rights, possibly human rights, that should be recognized to any person who had sufficient interest to claim.

153. The view was expressed that the provision could also be regarded as unduly restrictive regarding the nature of the action that could be exercised. In that respect, a question was raised as to the reasons why paragraph 13.1 dealt only with actions for damages and not with actions for performance.

154. The provision was further criticized on the grounds that it dealt in general terms with claims asserted against the carrier or any performing party. The view was expressed that dealing with claims against the carrier was too restrictive and

resulted in an insufficiently balanced provision. Under that view, a provision on the rights of suit should also envisage claims asserted against the shipper or the consignee, for example, claims for payment of freight. As regards claims asserted against the performing party, the view was expressed that the scope of the provision was too broad. It was suggested that, with a view to avoiding conflict with existing mandatory regimes applicable to land carriers, the scope of the provision should be restricted to claims asserted against sea carriers.

155. The overall structure of the provision was criticized as reflective of an approach based on the recognition of an action, as opposed to the recognition of a right, which would be the preferred approach under many legal systems. It was observed that the recognition of an action to a limited number of persons offered the advantage of predictability. However, widespread preference was expressed for a general provision recognizing the right of any person to claim compensation where that person suffered loss or damage as a consequence of the breach of the contract of carriage.

156. Some support was expressed for the retention of the last sentence of paragraph 13.1, which was said to provide a useful rule applicable both to suits based on breach of contract and to suit based on tort. It was generally felt that that sentence appropriately expressed the general principle that when transferring rights, the transferee could not acquire more rights than the transferor had. The view was expressed, however, that the matter of assignment or subrogation should be left to applicable law. A contrary view was that the matter should not be dealt with through private international law but that the draft instrument should provide a uniform rule governing the situation where claims were made by third parties. In that situation, it was suggested that, where the carrier was sued by a third party on the basis of an extra-contractual claim, the protection afforded by the draft instrument, in particular the limits of liability, should be available to the carrier. The Working Group took note of that suggestion.

157. While strong support was expressed for the deletion of paragraph 13.1, the Working Group decided to defer any decision regarding paragraph 13.1 until it had completed its review of the draft articles and further discussed the scope of application of the draft instrument. The Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage.

158. In the context of the discussion of paragraph 13.1, the view was expressed that the draft instrument should contain provisions regarding the issues of applicable law and dispute settlement through arbitration. While the view was expressed that no such provisions were needed and that those issues should be entirely left to the discretion of the parties, the widely prevailing view was that such provisions should be introduced in the draft instrument. Strong support was expressed in favour of modelling such provisions on articles 21 and 22 of the Hamburg Rules, although those provisions were criticized by some delegations. Other possible models, including articles 31 and 33 of the CMR, Regulation 44-2001 of the European Union, and the Montreal Convention, were suggested. It was pointed out that a decision would need to be made as to whether the jurisdiction should be exclusive, as in the European Regulation, or not, as in the CMR Convention. A decision would also need to be made as to whether a jurisdiction clause would be binding only on

parties to the contract of carriage or also on third parties. A further suggestion was made that the draft instrument should also encourage parties to conciliate before resorting to more adversarial dispute settlement mechanisms.

159. After discussion, the Working Group requested the Secretariat to prepare draft provisions on issues of jurisdiction and arbitration, with possible variants reflecting the various views and suggestions expressed in the course of the above discussion.

(b) Paragraph 13.2

160. It was stated that, under existing law in certain countries, the holder of a bill of lading would only be given a right of suit if the holder could produce a bill of lading and prove that loss or damage had occurred. From that perspective, the combination of paragraphs 13.2 and 13.3 would lead to the questionable result that the holder of a bill of lading would be entitled to exercise a right of suit without having to prove that it suffered loss or damage. It was generally felt, however, that the first sentence of paragraph 13.2 was in line with existing law in most countries and served a useful purpose, in particular by establishing that the holder did not have an exclusive right of suit. From that perspective, it was however suggested that the same principle should apply in the case of paragraph 13.1, where no negotiable instrument had been issued.

161. Doubts were expressed regarding the meaning of the words "on behalf" in the second sentence of paragraph 13.2. While it was felt that the second sentence was needed in order to avoid the possibility that a carrier might have to pay twice, it was generally agreed that further clarification should be introduced in the provision regarding the subrogation relationship to be established between the holder of a bill of lading and the party that suffered loss or damage.

(c) Paragraph 13.3

162. It was recalled that the person exercising a right of suit under the contract of carriage should not be dependent on the cooperation of the holder of a negotiable document if that person, and not the holder, had suffered the damage. Doubts were expressed regarding the operation of the provision under which the claimant should prove that the holder did not suffer the damage. The Working Group agreed that the issue might need to be further discussed at a later stage.

6. Draft article 14 (Time for suit)

163. The text of draft article 14 as considered by the Working Group was as follows:

> "14.1 The carrier is discharged from all liability in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper is discharged from all liability under chapter 7 of this instrument if judicial or arbitral proceedings have not been instituted within a period of one year.
>
> "14.2 The period mentioned in article 14.1 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 4.1.3 or 4.1.4 or, in cases where no goods have been delivered, on the

last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

"14.3 The person against whom a claim is made at any time during the running of the period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

"14.4 An action for indemnity by a person held liable under this instrument may be instituted even after the expiration of the period mentioned in article 14.1 if the indemnity action is instituted within the later of:

(a) The time allowed by the law of the State where proceedings are instituted; or

(b) 90 days commencing from the day when the person instituting the action for indemnity has either:

(i) Settled the claim; or

(ii) Been served with process in the action against itself.

"[14.5 If the registered owner of a vessel defeats the presumption that it is the carrier under article 8.4.2, an action against the bareboat charterer may be instituted even after the expiration of the period mentioned in article 14.1 if the action is instituted within the later of:

(a) The time allowed by the law of the State where proceedings are instituted; or

(b) 90 days commencing from the day when the registered owner both;

(i) Proves that the ship was under a bareboat charter at the time of the carriage; and

(ii) Adequately identifies the bareboat charterer.]"

(a) General remarks

164. It was recalled that draft article 14 on time for suit was discussed in general terms by the Working Group at its ninth session (A/CN.9/510, para. 60). It was noted that, in keeping with the time for suit in the Hague and Hague-Visby Rules, paragraph 14.1 provided a period of one year as the basic time limit for suits against the carrier and the shipper, while the question of adopting a different time period, such as the two-year period specified in the Hamburg Rules, remained open as a policy question for the consideration of the Working Group. It was noted that paragraph 14.2 was intended to clarify the basis on which the time for suit commenced to run in order to overcome problems that had arisen in practice with respect to previous conventions. Paragraph 14.3 was described as an important provision, which followed the Hague-Visby and Hamburg Rules, and which was intended to clarify that a valid extension to the time for suit could be given. It was explained that paragraph 14.4 was also based on the Hague-Visby and Hamburg Rules, and that paragraph 14.5 was placed in square brackets in order to reflect its reliance on the rule in subparagraph 8.4.2, also in square brackets, in accommodating a claimant's potential inability to identify the carrier in a timely fashion.

(b) Paragraph 14.1

165. There was general support for the principle of limiting the time for suit, as set out in paragraph 14.1. It was questioned why the paragraph discharged the carrier from all liability in respect of the goods once the time for suit had expired, yet it was silent on the discharge of liability of performing parties. Support was expressed for the inclusion of performing parties in this provision.

166. It was recognized that the inclusion of a time-for-suit provision for the shipper in the second sentence of paragraph 14.1 was a new approach. Some general doubt was expressed with respect to this innovation, but support was also expressed for that provision which was said to provide for a balanced approach in limiting the time for suit against both carriers and shippers. A question was raised why the time for suit for shippers referred only to shipper liability pursuant to article 7 of the draft instrument, and why it did not also refer to shipper liability pursuant to other articles, such as article 9. It was suggested that all persons subject to liability under the contract of carriage should be included in this provision, and that they should be subject to the same period of limitation. A further suggestion was made that paragraph 14.1 not make specific reference to carriers or shippers, but that it simply state that any suit pursuant to the draft instrument would be barred after a period of time to be agreed by the Working Group. Another question raised with respect to the second sentence of the paragraph was why it mentioned only shippers and not other persons who were subject to the same responsibilities and liabilities as shippers under article 7. A further question was raised with respect to a possible error in paragraph 7.7, which made reference to Chapter 13 rather than to Chapter 14 in its reference to provisions concerning shipper's rights and immunities.

167. An important question of terminology was raised with respect to paragraph 14.1. It was noted that the commentary to this provision (A/CN.9/WG.III/WP.21, paragraph 208) stated that the expiration of the time for suit resulted in the extinguishment of the rights of the potential claimant, and as such, suggested that paragraph 14.1 concerned a prescription period rather than a limitation period. It was noted that this distinction was very important, particularly in civil law systems, where the law establishing a time period for the extinction of a right would typically not allow a suspension of the time period. As to whether the *lex fori* or the *lex contractus* would govern the issue of the limitation period, it was pointed out that certain existing international instruments such as the Rome Convention on the Law Applicable to Contractual Obligations would lead to the application of the *lex contractus* as matters of time for suit for claims arising from the contract of carriage would be governed by the proper law of the contract. However, in some jurisdictions, the matter would be regarded as one of civil procedure to be governed by the *lex fori*. It was suggested that any ambiguity with respect to prescription periods versus limitation periods should be carefully avoided, in order to ensure predictability of the time for suit provisions.

168. During the course of the discussion, significant support was expressed for retaining the time period of one year, as set out in the paragraph and in accordance with the Hague and Hague-Visby Rules. It was further suggested that a one-year period would avoid the situation where an extra year was not seen to have significant advantages for the parties, but rather had major disadvantages in terms of increased uncertainty, both terms of the practical aspects of the case such as preservation of evidence, but also with respect to unresolved potential liability for

claims. On the other hand, there was also support for the suggestion that one year was not long enough to find the correct party to sue, given the complexity of modern cases and the number of parties involved, and that a two-year period such as that appearing in the Hamburg Rules would be more appropriate. Another suggestion was to extend the one-year period in cases of wilful misconduct to a three-year period. It was noted that the length of the limitation period should be fair and balanced, and should offset other changes that might be effected by the draft instrument as a whole in the allocation of risk amongst the parties. Caution was raised that rules on time for suit had caused difficulties of interpretation in other transport conventions, and the Working Group was urged to agree upon a simple and effective rule.

169. The suggestion was made to insert the one-year time period in square brackets, or alternatively, to simply insert empty square brackets and not state any specific period of time. The Working Group requested the Secretariat to place "one" in square brackets, and to prepare a revised draft of paragraph 14.1, with due consideration being given to the views expressed.

(c) Paragraph 14.2

170. Whilst there was strong support for the principle that it was necessary to have a very clear and easily ascertainable date for the commencement of the time for suit, doubt was expressed with respect to the choice in paragraph 14.2 of the date of delivery of the goods pursuant to the contract of carriage as set out in subparagraphs 4.1.3 or 4.1.4 as that date. It was suggested that the date of delivery in the contract of carriage might be much earlier than the date of actual delivery and might therefore be detrimental to the consignee. It was further suggested that a better date for the commencement of the time period would be the actual date of delivery. The Working Group was reminded that delivery was not defined in the draft instrument since it was thought to be impossible to provide an appropriate definition of delivery that would satisfy most jurisdictions, thus it was left to national law. It was noted that the choice of the date of delivery in the contract of carriage was intended to avoid the uncertainty surrounding whether delivery meant actual delivery, or whether it meant the date that the carrier offered the goods for delivery, or some other time involved in delivery. It was also noted that actual delivery could be unilaterally delayed by the consignee, and that it could also be highly dependent on local customs authorities and regulations, thus causing great uncertainty concerning the date of delivery and the commencement of the running of the time for suit. It was suggested that in order to avoid uncertainty, it was necessary to choose as the date of commencement of the time period a date that was easily fixed by all parties.

171. Concern was also raised with respect to the choice of the last day on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It was stated that if the parties had not agreed, then subparagraph 6.4.1 on delay stated that delivery should be within the time it would be reasonable to expect of a diligent carrier, and that this was not an easily fixed date either.

172. Another issue raised with respect to paragraph 14.2 was the possibility that a plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time

for suit. It was suggested that a possible solution to this problem could be to include counterclaims in the terms provided for additional time under subparagraph 14.4 (b) (ii) of the draft instrument (see para. 177 below).

173. The suggestion was also made that there be a different commencement day regarding the claim against the shipper than for a claim against the carrier.

174. The Working Group requested the Secretariat to retain the text of paragraph 14.2, with consideration being given to possible alternatives to reflect the views expressed.

(d) Paragraph 14.3

175. The Working Group found the substance of paragraph 14.3 to be generally acceptable.

(e) Paragraph 14.4

176. Concerns were raised with respect to subparagraph 14.4 (b) (ii), which set out that an action for indemnity by a person held liable under the draft instrument could be instituted after the expiration of the paragraph 14.1 time for suit in certain circumstances. It was noted that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgement in the case had been rendered, and it was suggested that the 90-day period in subparagraph 14.4 (b) (ii) be adjusted to commence from the date the legal judgement is effective. Support was expressed for this position, and alternative language was offered that the 90-day period should run from the day the judgement against the recourse claimant became final and unreviewable.

177. It was suggested that the concern raised with respect to the possibility of counterclaims being barred by the late commencement of claims pursuant to paragraph 14.1 (see above, para. 172) could be met by allowing counterclaims to be made after the expiration of the time for suit, provided that they are instituted within 90 days of the service of process in the main action, pursuant to subparagraph 14.4 (b) (ii) as currently drafted. A further suggestion was made that counterclaims could be dealt with in a separate draft article, but that they should nonetheless be treated in similar fashion to subparagraph 14.4 (b) (ii).

178. The Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4, with due consideration being given to the views expressed.

(f) Paragraph 14.5

179. It was recalled that paragraph 14.5 appeared in square brackets due to its link to subparagraph 8.4.2, which was also bracketed, and that if the decision was made to delete subparagraph 8.4.2, then the entire text of paragraph 14.5 would also be deleted as unnecessary. It was reiterated that this provision was intended to accommodate the claimant who could be at risk of running out of time to file suit through no fault of its own if the registered owner waited too long before producing the bareboat charterer pursuant to subparagraph 8.4.2.

180. Mindful of the fact that the fate of this provision depended upon that of subparagraph 8.4.2, the Working Group expressed support for the principle embodied in paragraph 14.5, and for the 90-day time period. However, a doubt was

raised whether this provision would be of any assistance to cargo claimants that experienced difficulties in identifying the carrier, since if the registered owner of the vessel successfully rebutted the presumption, the claimant would need to introduce a new claim against the bareboat charterer.

181. It was suggested that subparagraphs (i) and (ii) of subparagraph 14.5 (b) be combined into one, since subparagraph (ii) could be considered a sufficiently rigorous condition to subsume subparagraph (i). Whilst it was recognized that the sheer size of a typical bareboat charter, in addition to the likelihood that it would contain confidential information, would make it impractical to produce in a proceeding, it was thought that proof of the facts by the registered owner of the vessel could be expressed in one single condition.

182. The Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain subparagraph 8.4.2 in square brackets, and that it therefore requested the Secretariat to retain paragraph 14.5 in square brackets, bearing in mind that the fate of the latter article was linked to that of the former.

7. Draft article 15 (General average)

183. The text of draft article 15 as considered by the Working Group was as follows:

> "15.1 Nothing in this instrument prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.
>
> "15.2 With the exception of the provision on time for suit, the provisions of this instrument relating to the liability of the carrier for loss of or damage to the goods 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."

(a) General remarks

184. The Working Group was reminded that it had discussed draft article 15 on general average in broad terms in relation to paragraph 5.5 during its ninth session (see A/CN.9/510, paras. 137-143). It was recalled that draft article 15 was closely based upon article 24 of the Hamburg Rules, and that article 15 of the draft instrument was intended to permit the incorporation into the contract of carriage the operation of the York-Antwerp Rules (1994) on general average. It was pointed out that the drafting in chapter 15 was intended to reflect the principle that the general average award adjustment must first be made, and the general average award established, and that pursuant to paragraph 15.2, liability matters would thereafter be determined on the same basis as liability for a claim brought by the cargo owner for loss of or damage to the goods. It was submitted it was reasonable to determine the two claims using the same liability rules, given that they amounted to two sides of the same set of facts. It was further stated that the principles of general average have a long history in maritime law, and that they form part of the national laws of most maritime countries.

185. There was broad support for the continued operation of the rules on general average as a set of rules independent from the operation of those in the draft instrument. Whilst there was some discussion as to whether it was necessary to specifically include provisions such as those in article 15 in order to accomplish this goal, there was general support for the existing chapter as drafted. It was stated, however, that article 24 of the Hamburg Rules had been included due to the specific liability rules in that convention, and that the Hague and Hague-Visby Rules had no specific provision on general average, although they did contain in article V a statement that "Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision on general average". It was recalled that this statement in the Hague and Hague-Visby rules allowed for the operation of the York-Antwerp Rules on general average, but it was pointed out that the issue was unclear and generated jurisprudence. It was suggested that since the liability provisions in the draft instrument more closely resembled the Hague and Hague-Visby Rules, it would be appropriate to delete article 15 on general average as unnecessary, without fear that it would impede the operation of the general average rules. It was stated in response, however, that the insertion of an article such as draft article 15 was of great assistance in clarifying the relationship between the draft instrument and the general average rules, such that it could significantly reduce the potential jurisprudence on this point.

(b) Paragraph 15.1

186. There was broad support for the continued incorporation of the York-Antwerp Rules on general average into the contract of carriage, and, with the Working Group found the substance of paragraph 15.1 to be generally acceptable.

(c) Paragraph 15.2

187. Whilst it was generally conceded that paragraph 15.1 served to clarify and ensure the incorporation of the rules on general average, the question was raised whether paragraph 15.2 was necessary in the draft instrument. It was suggested that the rules on liability pursuant to the contract of carriage would apply regardless of the inclusion of paragraph 15.2, and that the statement to this effect in paragraph 15.2 only served to confuse the issue.

188. There was also support expressed for the retention of paragraph 15.2, but there were suggestions for modification to the drafting. It was stated that the opening phrase of paragraph 15.2 with respect to time for suit was intended to indicate that the time for suit provisions did not apply to general average awards, but it was suggested that clearer language could be found to express that meaning. In this connection, it was also suggested that the Working Group might wish to establish a separate provision on time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. Some support was expressed for this approach.

189. In addition, it was questioned whether paragraph 15.2 should also include liability for loss due to delay and demurrage in those liabilities under the draft instrument which should be applied to the determination of refusals for contribution to general average.

190. The Working Group requested the Secretariat to prepare a revised draft of paragraph 15.2, with due consideration being given to the views expressed.

8. Draft article 16 (Other conventions)

191. The text of draft article 16 as considered by the Working Group was as follows:

> "16.1 This instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [seagoing] ships.
>
> "16.2 No liability arises under the provisions of this instrument for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage by sea.
>
> "16.3 No liability arises under the provisions of this instrument 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."

(a) General remarks

192. The Working Group heard that article 16 on other conventions was based upon article 25 of the Hamburg Rules, although the order of the subparagraphs had been adjusted somewhat in the draft instrument. Further, it was noted that the draft instrument did not contain an article in keeping with article 25.2 of the Hamburg Rules with respect to other conventions on jurisdiction and arbitration, since the draft instrument did not yet contain chapters on these matters. It was suggested that the Working Group might wish to include a similar provision in the draft instrument if it decided to include provisions therein regarding jurisdiction and arbitration. The additional comment was made that if such a provision were included in the draft instrument, the Working Group might wish to consider specifying the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968) and any subsequent regulation, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

193. It was also explained that article 25.5 of the Hamburg Rules had been omitted in the draft instrument in light of the scope of application issue. It was noted that the Working Group might wish to revisit the possibility of adding a provision similar to article 25.2 of the Hamburg Rules once it had made a decision regarding the scope of application of the draft instrument.

194. General support was expressed for draft article 16 as a useful and appropriate addition to the draft instrument.

195. It was noted that article 16 was intended to specify the relationship between the draft instrument and other international conventions, but that the list of other international conventions that could be affected by the draft instrument was much longer than that set out in article 16, and could include, for example, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996). It was suggested that rather than risk omitting a convention in a specific list of instruments, a general clause be used instead that this instrument would not affect other international conventions concerning the limitation of liability. Some support was expressed for this approach, however, caution was urged that too general a statement, such as, for example, to state that all other conventions with limitation on liability should prevail, might not accurately reflect the intention of the Working Group. It was also suggested that the Working Group should carefully examine the list of other conventions, keeping in mind the fact that the draft instrument, unlike the Hamburg Rules upon which draft article 16 is based, dealt not only with the carrier's liability, but also with the shipper's liability, on a mandatory basis.

(b) Paragraph 16.1

196. The suggestion was made that it would be helpful to some States attempting to avoid conflicts with other transport conventions if paragraph 16.1 were amended to add language stating that the draft instrument would prevail over other transport conventions except in relation to States that are not members of the instrument. It was stated that this addition would be particularly helpful if the Working Group decided upon a door-to-door scope of application of the draft instrument, but that it would be equally welcome if the Working Group were to decide upon a port-to-port scope of application.

197. It was noted that the word "seagoing" in paragraph 16.1 appeared in square brackets, and it was suggested that this word be deleted, since in light of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (2000), use of the term might cause confusion regarding which convention was applicable.

(c) Paragraph 16.2

198. Support was expressed for paragraph 16.2, however, it was suggested that the phrase "by sea" be deleted from the final line of paragraph 16.2, since a number of conventions govern the carriage of passengers and luggage by means other than sea, such as by road, railroad and air, and it would be helpful to clarify that the draft instrument was not intended to affect these conventions.

199. The Working Group found the substance of paragraph 16.2 to be generally acceptable, and in keeping with the drafting approach in paragraph 16.1, the Working Group decided to place square brackets around the phrase "by sea".

(d) Paragraph 16.3

200. It was explained that the list of conventions in paragraph 16.3 was not yet complete, since the instruments listed had been supplemented by further protocols

and amendments, one of which was the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1998). It was noted that care would have to be taken to examine the list and to prepare an accurate and updated version thereof.

201. The suggestion was made that other conventions touching on liability could be added to those listed in paragraph 16.3, such as those with respect to pollution and accidents. However, some hesitation was voiced at extending the list of conventions in this fashion, and caution was urged to include on the list only those conventions with which the draft instrument could have a conflict. It was suggested that the list of conventions that appeared in paragraph 16.3 and in article 25.3 of the Hamburg Convention might be as a result of the requirements of the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (1971).

202. The Working Group requested the Secretariat to update the list of conventions and instruments in paragraph 16.3, and to prepare a revised draft of paragraph 16.3, with due consideration being given to the views expressed.

9. Draft article 17 (Limits of contractual freedom)

203. The text of draft article 17 as considered by the Working Group was as follows:

> "17.1 (a) Unless otherwise specified in this instrument, any contractual stipulation that derogates from the provisions of this instrument is null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under the provisions of this instrument.
>
> (b) [Notwithstanding paragraph (a), the carrier or a performing party may increase its responsibilities and its obligations under this instrument.]
>
> (c) Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.
>
> "17.2 Notwithstanding the provisions of chapters 5 and 6 of this instrument, both the carrier and any performing party may by the terms of the contract of carriage exclude or limit their liability for loss of or damage to the goods if
>
> (a) The goods are live animals, or
>
> (b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic record is or is to be issued for the carriage of the goods."

(a) Title

204. As a matter of drafting, it was suggested that the title of the draft article should be revised to reflect more accurately the contents of the provision, which did not deal with "limits of contractual freedom" in general, but dealt with clauses limiting

or increasing the level of liability incurred by the various parties involved in the contract of carriage.

(b) Paragraph 17.1

(i) Subparagraph 17.1 (a)

205. The discussion focused on the words "or increase" in square brackets in paragraph 17.1. With a view to ensuring a balanced and even treatment of the shipper and the carrier under the draft instrument, the view was expressed that the traditional solution allowing the carrier to increase its liability should be extended to the shipper. In response, a widely shared view was expressed that, while the possibility for the carrier to increase its liability should be recognized, as it was under the Hague Rules, the shipper should be protected against clauses that might increase its liability, particularly in contracts agreed on standard terms. It was generally felt that, in examining the balance of rights and obligations between the shipper and the carrier, it should be borne in mind that, with the notable exception of certain very large shippers, a shipper would typically have less bargaining power and should thus be protected. Another view was expressed that paragraph 17.1 should not at all address the shipper, the controlling party, or the consignee. In response to a question regarding the possibility for the carrier to increase its liability under CMR, it was explained that such an increase was not necessary, in view of the higher limit of liability under CMR.

206. With respect to the liability incurred by the controlling party, the view was expressed that further discussion would be needed regarding clauses limiting or extending such liability. It was suggested that the liability of agents or employees of the contractual parties might also need to be envisaged.

207. A proposal was made that special treatment should be given under draft article 17 to competitively negotiated contracts between shippers and carriers. It was stated that parties to such contracts (which were described as "sophisticated parties") should have freedom to negotiate terms of their own choosing. Should these parties be allowed to negotiate clauses to increase or decrease their liability among themselves, such clauses should not affect third parties.

208. In response to that proposal on the exclusion of certain "competitively negotiated contracts between sophisticated parties", several major concerns were expressed. One concern was based on what was described as the "near impossibility" of a clear definition. While the Hague and Hague-Visby Rules made it relatively easy to distinguish between matters included in and excluded from the conventions because the distinguishing element was the traditional bill of lading, such distinguishing element was lost in the draft instrument, which was intended to apply to "contracts for the carriage of goods [by sea]". Consequently, clear definitions should be provided in the draft instrument in order to circumscribe the exact scope of any exclusion. It was pointed out that a "volume" contract, also referred to as an "ocean transportation contract" or "OTC", had few distinctive characteristics when compared to a carriage contract. Expressions such as "contract of affreightment", "volume contract", "tonnage contract" and "quantity contract", were also used and, depending on the legal system, appeared to be treated as synonymous. The characteristics of such contracts were: that the carrier undertook to perform a "generic" obligation (i.e. a generally defined duty which later needs to

be further specified) to carry a specified quantity of goods; that no ships were as yet nominated in the contract; that the cargo consisted of a large quantity which was to be carried in several ships over a certain period of time; that the freight was calculated on the basis of an agreed unit or as a lump sum; and that the risk of delay was borne by the carrier. The volume contract consequently had many of the characteristics of a voyage charter-party. However, the individual shipments pursuant to such a contract would be mandatorily governed by the Hague or Hague-Visby Rules. This was said to contradict the allegations by the supporters of the exclusion of such contracts from the scope of the draft instrument, that under current practice, no small shipper was ever forced into a so-called "service contract" (which would then be an adhesion contract), and that this practice would not change under the draft instrument if service contracts were excluded from its scope of application. The fundamental difference was that in the present situation, such contracts could not be imposed on small shippers because of the compulsory application of the Hague Rules to the individual shipments. Were the scope of the draft instrument to be reduced in the proposed manner, that protection would be lost and the parties would be faced with the situation that prevailed in the 19th century.

209. A second concern was that the exclusion of individual shipments performed pursuant to a volume contract from the scope of the draft instrument would constitute a legal revolution, and would undermine the ambit of the draft instrument to such an extent as to make it virtually non-existent in certain trades. The proposed exclusion was described as a first step towards the effective abolition of the Hague Rules regime, which was put in place to protect cargo interests. In that context, it was recalled that, for example, it had been said that 80 to 85 per cent of United States container trade was presently performed under volume contracts.

210. A third concern was expressed with regard to the application of national legislation. It was stated that the exclusion of service contracts from the scope of the draft instrument might create a competitive advantage for ocean carriers as opposed to non-vessel operating carriers (NVOC) where national legislation, for example, would allow an "individual ocean common carrier" to enter into a "service contract" or "ocean transportation contract", but would not allow an NVOC (a freight forwarder acting as principal) to do so. Thus, the draft instrument would significantly change the legal situation with regard to competition in certain large domestic markets. It was stated that this should not be the purpose of an international convention, and that this secondary effect of the proposed exclusion would be highly detrimental to freight-forwarding interests.

211. A fourth concern was expressed with respect to the creation of a possibility of opting out of the draft instrument. It was stated that the proposal envisaged the draft instrument to apply by default, i.e. if the sophisticated parties did not decide otherwise. This amounted to creating an opting-out possibility. It was stated that any opting-out or opting-in provision would constitute a fundamental change in the philosophy on which most international conventions on maritime carriage of goods were based.

212. In response to those concerns, it was indicated that a proposal for a draft provision excluding "competitively negotiated contracts between sophisticated parties" would be made available to the Secretariat before the next session of the Working Group. The above-mentioned concerns would be borne in mind when drafting that proposal. It was pointed out that the proposal, while innovative, was

not as revolutionary as might be feared, since it was based on analogy between service contracts and charter-parties, and it would simply amplify the current exclusion of charter-parties from the scope of the Hague and Hague-Visby Rules. Interest in the proposal for the exclusion of competitively negotiated contracts was expressed.

213. After discussion, the Working Group decided to maintain the text of subparagraph 17.1 (a) in the draft instrument, including the words "or increase" in square brackets, for continuation of the discussion at a future session, possibly on the basis of one or more new proposals.

(ii) Subparagraph 17.1 (b)

214. The Working Group found the substance of subparagraph 17.1 (b) to be generally acceptable. It was decided that the square brackets around that provision should be removed.

(iii) Subparagraph 17. 1 (c)

215. The Working Group found the substance of subparagraph 17.1 (c) to be generally acceptable.

(c) Paragraph 17.2

(i) Subparagraph 17.2 (a)

216. It was recalled that, at the ninth session of the Working Group, subparagraph 17.2 (a), which allowed the carrier and the performing party to exclude or limit liability for loss or damage to goods where the goods were live animals, was widely supported. It was also recalled that the provision was a traditional exception, with both the Hague and Hague-Visby Rules excluding live animals from the definition of goods. It was noted that trade in live animals represented only a very small trade. However, a concern was raised against allowing the carrier to exclude or limit the liability for loss or damage to live animals. It was suggested that a better approach would be to simply exclude carriage of live animals altogether from the draft instrument rather than allowing exclusion of liability (see A/CN.9/510, para. 64). Support was expressed for adopting the text of subparagraph 17.2 (a) unchanged. Strong support was also expressed for the view that, while the traditional exception with respect to live animals should be maintained, the draft instrument should not simply recognize any clause that would "exclude or limit" the liability of the carrier and any performing party where live animals were transported. The carrier or the performing party should not be allowed to exempt itself from any liability, for example, in case of serious or intentional fault or misconduct in the treatment of live animals, or where the carrier or performing party failed to follow the instructions given by the shipper. Yet another view was that the draft instrument should specify the circumstances under which the liability of the carrier or the performing party could be excluded in the case of transport of live animals. It was suggested that a reference to the "inherent vice of the goods" might be helpful in that respect, for example, to establish that a carrier carrying live cattle in poor health condition might be allowed to exclude its liability. It was generally felt, however, that the inherent vice of the goods, which was

already covered under subparagraph 17.2 (b), was difficult to characterize with respect to live animals.

217. After discussion, the Working Group decided that the substance of subparagraph 17.2 (a) should be maintained in the draft instrument for continuation of the discussion at a future session. The Secretariat was requested to prepare alternative wording to limit the ability of the carrier and the performing party carrying live animals to exonerate themselves from liability in case of serious fault of misconduct.

(ii) Subparagraph 17.2 (b)

218. The Working Group found the substance of subparagraph 17.2 (b) to be generally acceptable.

B. Scope of application of the draft instrument

1. General discussion

219. The Working Group agreed to proceed in its examination of the scope of application of the draft instrument by first hearing presentations from those delegations that had made written proposals to the Working Group. It was agreed that the second step would be to discuss the positions of other delegations with respect to the proposals on the table, taking into account that the existing proposals were not necessarily intended to be mutually exclusive, but that the decision of the Working Group on how to proceed in its work on scope of application could combine elements from the various proposals, or generate new proposals. It was further agreed that once the Working Group had heard general statements on the scope of application of the draft instrument, it would revert its attention to the specific provisions of article 3 of the draft instrument on scope of application, and article 4 on period of responsibility.

220. By way of presentation of the proposal by Italy (A/CN.9/WG.III/WP.25), it was stated that, whilst the best system applicable to a door-to-door contract of carriage performed partly by sea and partly by other modes of transport would clearly be a uniform system, a network system had been adopted in all multimodal transport instruments because it was impossible to derogate by contract from the mandatory rules applicable to the different modes of transport, whether they were uniform rules or national rules. It was pointed out that provisions of the draft instrument applied to the non-contractual liability of the servants or agents of the contracting carrier, as did the 1980 Convention on International Multimodal Transport of Goods, but that the network system in the draft instrument had been extended to the carrier's liability and time for suit in an attempt to avoid a conflict between conventions in lieu of a specific provision on conflict of conventions. It was also suggested that adopting a limited network system would not be an adequate means for avoiding a potential conflict with other conventions because the allocation of the burden of proof in paragraph 5.1 of the draft instrument differed from that adopted in other transport conventions, and because matters other than liability, limits on liability and time for suit were regulated in other transport conventions. Further, it was suggested that if a contract of carriage entered into between a door-to-door carrier and a performing carrier came under the scope of

application of another international convention, that convention and the draft instrument would apply simultaneously. It was further noted that the contracting carrier who undertook to perform a carriage by a mode other than by sea could be unaware of the fact that the contract being entered into was subject to the draft instrument, rather than to the international convention or national law applicable to the transport that contracting carrier had undertaken to perform. It was suggested that this would create the situation where a recourse action of the door-to-door carrier against the performing carrier would be subject to the international convention or national law applicable to the contract entered into by those two parties, while a direct action of the shipper or consignee against the performing carrier would be subject to the draft instrument. It was further suggested that the liability of the performing carrier would thus be governed by different rules depending on whether the action was brought against the performing carrier by the door-to-door carrier or by the shipper/consignee. It was stated that the Italian proposal intended to overcome the anomalies of this situation, by having the draft instrument apply to the performing carrier only when the performing carrier was a carrier by sea. To this end, three basic principles were submitted by the Italian delegation for consideration by the Working Group. First, any person who had a right of suit under the contract of carriage against the carrier would also have a right of suit against any performing carrier or performing party. Second, if the performing carrier against whom suit was brought was a carrier by sea, the provisions of the draft instrument would apply to the contract to which that performing carrier was a party. Finally, if the performing carrier against whom suit was brought was not a carrier by sea, the convention or national law applicable to the contract to which such performing carrier was a party, as well as the terms and conditions of that contract, would apply.

221. By way of additional explanation of the proposal by Canada (A/CN.9/WG.III/WP.23; see also A/CN.9/525, para. 25), the Working Group heard that whilst the Canadian delegation preferred the first option set out in paragraph 8 of its proposal with respect to a port-to-port scope of application, that delegation was of the view that the Working Group was unlikely to reach consensus on a port-to-port scope of application in the draft instrument. It was stated that option 2 in paragraph 9 of the Canadian proposal, under which the draft instrument should be modified to include national law in subparagraph 4.2.1 in order to deal with land-based carriage, was not the preferred option, since inserting a reference to national law into the draft instrument would not enhance the uniformity of the law in this area. It was submitted to the Working Group that the preferred option should be option 3 in paragraphs 10 and 11 of the proposal by Canada, since, if the draft instrument was to be a door-to-door regime, it should be recognized that some States were not yet ready to adopt such a regime. However, the option 3 approach would enhance the uniformity of the instrument, since a contracting State's adoption of a door-to-door regime would be as simple as removing the reservation placed earlier on that chapter of the draft instrument.

222. The Working Group next heard a presentation by the Swedish delegation of its proposal (A/CN.9/WG.III/WP.26). It was submitted that, while the structure of the draft instrument remained open for discussion, the intention of the proposal was to ensure that, if the draft instrument were to be a door-to-door regime, it would address certain issues. It was stated that one of these issues was the potential conflict with other mandatory transport conventions, and another was the potential

conflict between the draft instrument and mandatory national laws dealing with inland carriage. It was further suggested that the draft instrument should deal in the manner suggested in the Swedish proposal with other possible issues that could place it in conflict with other transport conventions, such as the issue of calculation of compensation and the issue of non-localized damages (see below, paras. 258 and 264 to 267, respectively).

223. UNCTAD presented to the Working Group its findings in the responses it received to its questionnaire on Multimodal Transport Regulation (A/CN.9/WG.III/WP.30; the complete text was published by UNCTAD as "Multimodal transport: the feasibility of an international instrument" (UNCTAD/SDTE/TLB/2003/1)). It was stated that the questionnaire was sent to 191 States and industry organizations, both governmental and non-governmental, and that 109 responses had been received, 60 from the Governments of developed and developing countries, and 49 from industry representatives and others. In response to the question of how the status quo was perceived, it was submitted that over 80 per cent of respondents found the present legal framework unsatisfactory and that 70 per cent considered that it was not cost-effective. It was suggested that there was interest in a multimodal instrument, but that some respondents wondered whether it was practical. With respect to the suitability of different approaches, it was suggested that around two thirds of the respondents appeared to prefer a new international instrument to govern multimodal transport or a revision of the 1980 Convention on International Multimodal Transport of Goods. It was further stated that some respondents expressed support for a new instrument based on the UNCTAD/ICC Rules, while a minority of respondents, mainly from maritime transport interests, favoured the extension of an international sea carriage regime to all contracts for multimodal transport involving a sea leg, and still others felt that the new instrument should reflect a completely new approach. It was suggested that with the exception of the maritime transport industry, there appeared to be limited support for the regime adopted in the draft instrument. With respect to the issue of the content and features of a multimodal system, it was suggested that approximately equal numbers of respondents expressed support for a fault-based liability system and for a strict liability system. It was further stated that around 75 per cent of respondents felt that any international instrument should adopt the same approach as existing statutory or multimodal liability regimes by providing for continuing responsibility of the contracting carrier through the entire transport. It was noted that whilst governments and providers of services saw the need for changes to the legal framework, views were divided on how best to proceed, and some respondents supported the development of a binding international instrument, while others supported the development of a non-mandatory regime. The view was expressed that there was interest amongst respondents in a new instrument and that there was a willingness to debate controversial issues. It was suggested that these issues could be debated in an informal forum to assess how best to proceed with future work.

224. The Working Group next heard a summary of the position of the Netherlands on the issue of scope as contained in a position paper on the multimodality of the draft instrument (to be published in A/CN.9/WG.III/WP.28/Add.1). It was suggested that the position of the Netherlands in the discussion with respect to the scope of application of the draft instrument should be considered in the context of its view in the long term. It was recalled that, in the current discussion in the Working Group,

the solution envisaged for multimodal carriage focused on either a network liability system or a uniform liability system. It was stated that, while the network system had well-known disadvantages, a uniform system, such as that contained in the 1980 Multimodal Convention deviated too much from the practices of commercial parties in order for it to be broadly accepted. It was suggested that worldwide application of a liability regime on a uniform basis applicable to all modes of transport was not attainable. It was submitted that what might be envisaged realistically in the long term was a multimodal convention for intercontinental maritime transport ("maritime plus"); a multimodal convention for intercontinental air carriage ("air carriage plus"); and regional multimodal conventions that included all modes of transport. It was explained that the term "intercontinental maritime transport" was used simply as a means to differentiate it geographically from "regional maritime transport", and it was not meant as a term of art to suggest a scope of application for the draft instrument different from international maritime transport. It was suggested that the current draft instrument fit into this long-term perspective in light of its maritime plus approach. It was noted that in order to achieve regional multimodal conventions, the current trend was to extend the scope of unimodal conventions to carriage by other modes of carriage that preceded or were subsequent to its own mode of carriage, using, for example, the model of the 1999 Convention for the Unification of Certain Rules for the International Carriage by Air (the Montreal Convention) for air carriage and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix B to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the CIM-COTIF) for European rail carriage. It was suggested that if such an extension to other preceding and subsequent modes of carriage was made generally for each mode and for each unimodal convention on a cross-border basis, such an approach could fit neatly into commercial practice. In this manner, it was suggested that the various modes of transport would grow toward each other and the result eventually could be a merged multimodal convention on a regional basis. It was noted that this approach would require an appropriate conflict of conventions provision that would have to be identical for each unimodal convention so extended. It was suggested that a further advantage of such a general "unimodal plus" approach would be that it could act as a breakthrough for the current stalemate between the network system and uniform system approaches. It was also emphasized that the proposal of the Netherlands was intended to serve as background information for the discussion on scope of application, and it was not intended to preclude any of the current proposals put forward by Canada, Sweden and Italy.

225. The Working Group was reminded by the CMI that the draft instrument adopted a contractual approach, which was intended to adjust maritime transport to modern reality by adopting a door-to-door regime. It was stated that the idea of a draft instrument was originally intended to harmonize maritime cargo regimes, but that it became apparent that it would be necessary to go beyond the port-to-port approach and take into account the facts of modern carriage of goods. It was suggested that the limited network scheme in subparagraph 4.2.1 was a workable system, but that there was further room for flexibility to explore other approaches toward a workable and simple system in defining the scope of application of the draft instrument. It was stated that, when subparagraph 4.2.1 was formulated, the decision was made not to defer to national law in order to achieve the greatest

possible uniformity of law, and that the important and difficult issue of performing parties was also discussed at length. It was also stated that the Working Group would have to consider how best to create a fair allocation of risk amongst parties in the overall context of a door-to-door regime.

226. It was stated in a submission by the United States delegation that it did not yet have a final position on the issue of the scope of coverage of the draft instrument. It was suggested that this uncertainty stemmed from its view that certain key issues under discussion by the Working Group were interrelated, in effect, those of the scope of application and treatment of performing parties, choice of forum and jurisdiction, liability limits and freedom of contract, and that any position on a single issue would depend on a particular outcome being reached on other issues. Support was expressed for the view that a fully uniform system was most likely impossible to achieve, but it was submitted that the goal of the Working Group should be to attain as much uniformity as was politically attainable. With respect to the contracting parties, the United States suggested that subparagraph 4.2.1 could be adopted, so that the instrument's liability limits would apply on a uniform basis, subject only to the limited network exception when CMR or some other mandatory international convention was applicable. It was also stated that the treatment of performing parties was an important aspect of the issue of scope of application, and that a distinction could be drawn between maritime performing parties and inland performing parties. Support was expressed for the mandatory application of the draft instrument to maritime performing parties. With respect to inland performing parties, different concerns arose. The instrument could neither create nor prohibit suits against them. They would instead be subject to whatever legal regime would otherwise apply in the absence of the instrument, and could take advantage of any applicable Himalaya clause to the extent permitted by national law. The United States stated that, under its suggestion, there would be no need to add "national law" to subparagraph 4.2.1's exclusion for mandatory international conventions in order to protect the interests of either inland performing parties or cargo owners. Inland performing parties would be outside the scope of the instrument. As an example, the United States noted that where there was no mandatory international convention applicable to the inland carrier's activities (such as the United States or Canada), a cargo owner could sue the contracting carrier under the instrument's terms or sue the inland performing party under the otherwise applicable law, for example, under United States tort law or Canadian legislation.

227. Certain differences between the United States suggestion and the Italian proposal were stressed. First, under the Italian proposal, the contracting carrier's liability to the shipper would be on a fully uniform basis (using the liability limits established by the instrument), rather than under subparagraph 4.2.1's limited network system. Second, under the Italian proposal, the instrument would create a cause of action by the cargo owner against the performing party on the terms of the contract between the performing party and the carrier. Thus, under the Italian proposal, the cargo interests would in effect step into the shoes of the contracting carrier vis-à-vis the performing party. In contrast, under the United States suggestion, the cargo interests could sue the performing party under whatever law would otherwise be applicable to the suit in the absence of the instrument, for example, under domestic tort law.

228. The Working Group heard the International Federation of Freight Forwarders Associations (FIATA) (see also pp. 3-5, A/CN.9/WG.III/WP.28) reiterate its position that the draft instrument was originally conceived as a maritime law draft, as was evident throughout its provisions, and that its scope should thus be confined to port-to-port coverage. It was also suggested that confining the scope of application to port-to-port was an opportunity to reunite maritime carriage of goods law, and that the instrument already sought to address issues that had not before been addressed in a maritime convention, as well as pressing daily issues, such as delivery of goods without the production of a bill of lading, on-deck carriage in the container trade, and the use of electronic documents. It was also suggested that by expanding the scope of application to true port-to-port carriage from that of tackle-to-tackle, a number of the traditional liability gaps in the network system could be closed, and stevedores and terminal operators could be drawn into the regime. It was submitted that the door-to-door approach advocated in the Working Group was truly multimodal transport, and the Group should take care to use precise language in describing the various options it was considering. It was also stated that experience should be drawn from the UNCTAD/ICC Rules and from the Multimodal Convention, as well as from a previous effort by CMI, the Draft Convention on the International Combined Transport of Goods, or the TCM Convention. It was suggested that the "maritime plus" expression was merely a euphemism for the expansion of maritime law onto land, and that at least a true multimodal approach should be called for. Further, it was suggested that such a multimodal approach should take into account "generic" or "unspecified" transport, where the consignor might give an instruction to the carrier without indicating the mode of transport to be used. It was also urged that there should be a clear definition of what was meant by "strict" liability and "fault-based" liability, and that the Working Group should exercise caution in including rules of private international law in the draft instrument, since it was suggested that they tend to cause serious problems. It was also stated that the scope of application and the position of the performing parties were closely linked.

229. The Working Group also heard from the Association of American Railroads (AAR) (see also pp. 32-34, A/CN.9/WG.III/WP.28) that North American freight railroads had well-established systems in Canada and the United States that governed the liability of rail carriers for goods transported in connection with a movement by sea, and that fundamental to those systems was the right of every ocean carrier to choose the level of protection it desired for its cargo. It was stated that in this regard, the rail carrier had privity of contract only with the ocean carrier when transporting containers having a prior or subsequent movement by sea, but that the draft instrument would repress the ability of rail carriers to exercise this contractual right and would significantly and adversely affect the current system affecting United States and Canadian rail carriers' liability. It was suggested that the draft instrument was a maritime-oriented instrument that neither addressed in-depth nor resolved the significant issues affecting rail transport, and that it should not apply to the rail inland portion of a transport movement if a door-to-door concept was adopted. It was stated that vigorous debate over the full spectrum of issues that affect and impact upon the possible extension of the draft instrument on a door-to-door basis to rail land transport was welcomed and it was suggested that such a debate would result in an instrument that would not have application to rail carriage.

It was also submitted that an exclusion for rail carriage should apply whether such rail carriage was subject to international conventions or national domestic law.

230. The Working Group also heard from the Intergovernmental Organisation for International Carriage by Rail (OTIF), which reiterated the support it expressed at the tenth session of the Working Group (see para. 28, A/CN.9/525) for the establishment of global rules to govern multimodal transport, provided that unimodal regimes such as COTIF and CMR were taken into consideration. It was suggested that adopting a network system rather than a uniform system would preserve the integrity of the existing unimodal conventions, and would thus reduce possible conflicts with them, and enhance the likelihood of widespread support for the draft instrument. It was suggested that only in cases when there was non-localized damage should a uniform regime for multimodal transport apply rather than a network system, and it was submitted that the primary purpose of conventions for international carriage should not only be to promote uniformity, but also to ensure an acceptable and fair balance of rights and liabilities amongst the parties to the contract of carriage. It was stated that OTIF had doubts whether the draft instrument, as currently drafted, could serve as a useful basis for a door-to-door instrument, and that there was increasing scepticism that a multimodal regime on the basis of a maritime-based draft could gain general acceptance. The Working Group was urged to consider existing commercially-accepted solutions for multimodal transport, such as the UNCTAD/ICC Rules, as an alternative basis for a door-to-door convention.

231. The International Chamber of Shipping (ICS) reiterated its position on the scope of application of the draft instrument to the Working Group (see pp. 9-11, A/CN.9/WG.III/WP.28), noting that the shipping industry was in favour of a door-to-door regime that provided added value and went beyond the port-to-port system. It was also noted that ICS was in favour of an international maritime plus convention based upon the draft instrument, and that it supported a limited network system as contained in subparagraph 4.2.1.

232. It was recalled that the International Group of Protection & Indemnity Clubs (P&I Clubs) had made its views known to the Working Group (see pp. 36-41, A/CN.9/WG.III/WP.28) in the previous session. It was reiterated that the P&I Clubs supported a door-to-door scope of application, and it was suggested that although difficulties could arise with both the limited network system and a uniform system; it should be noted that industry had to a large extent adopted a network system for multimodal transportation, such as those found in the UNCTAD/ICC Rules and in the COMBICON bill of lading. The Working Group was urged to consider and respond to the needs of industry, and support was expressed for a limited network approach along the lines provided for in subparagraph 4.2.1.

233. Having heard the above statements, the Working Group entered into a general exchange of views on the scope of application of the draft instrument. Broad support was expressed for a door-to-door scope of application as best suited to meet current industry needs and demands. It was suggested that in its pursuit of appropriate provisions for door-to-door coverage, the Working Group should attempt to reach the optimal balance with respect to four competing principles: the promotion of uniformity to as great an extent as possible; the avoidance of conflicts of convention to as great an extent as possible; the accommodation to as great an extent as possible of those States that would prefer to leave the regime covering

their inland carriers untouched; and the provision of rules in the draft instrument that should be particularly geared to the needs of practitioners so as to avoid ambiguity. It was suggested, however, that it was necessary to define more precisely what a door-to-door carrier meant, in particular, how a distinction could be drawn between a door-to-door carriage and a multimodal carriage. In addition, several delegations expressed the view that the issue of non-localized damage in a door-to-door context had to be solved in a satisfactory way regarding all parties concerned.

234. Support was expressed for the limited network principle embodied in subparagraph 4.2.1, since it would entail that the liability rules in the recourse action and the main action would be the same. It was also noted that industry had developed its own network system in the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents and in the COMBICON combined transport bill of lading adopted by the Baltic and International Maritime Council (BIMCO 1971, updated in 1995). Support was also expressed for a true multimodal system. Some caution was encouraged in this regard, however, since other multimodal regimes could be negotiated in the future, and States were unlikely to ratify and implement multiple multimodal regimes. It was also suggested that paragraph 1.5 together with subparagraph 4.2.1 was really a multimodal approach, but doubts were expressed regarding that characterization. A concern was also raised that the limited network system would disadvantage developing countries, because the draft instrument was mainly a maritime instrument and, since most developing countries were not party to mandatory inland transport conventions, this maritime draft instrument would govern the entire period of the multimodal transport in such countries.

235. Some support was expressed for the approach taken in option 2 of the Canadian proposal, in adding a reference to national law in subparagraph 4.2.1. It was stated that such an approach would be particularly appropriate for those States that were not parties to the European unimodal transport conventions, and that would prefer to have their national laws applicable in the treatment of performing carriers. It was stated in response that including national law in subparagraph 4.2.1 would dilute the uniformity of the limited network principle to such an extent that it would no longer be acceptable. In addition, the suggestion was made that option 2 might not be clear enough on the issue which national law would apply to inland carriers, since the law governing the contract for inland carriage would depend on the rules of applicable law, as well as the choice of law in the contract itself, and a provision regarding applicable law might be necessary. It was also stated that, if mandatory national law was added to subparagraph 4.2.1, aspects of its inclusion should be qualified, such that, for example, it could not create lower liability levels than the draft instrument. There was some support for another suggestion that the insertion of national law could be limited to national law based on international conventions, in order to limit the loss of uniformity that would result.

236. Support was also expressed for the Italian proposal, particularly for the third principle thereof which was felt to accommodate the concerns of those States that wished to preserve the applicability of their national law by holding that any action by an inland carrier should be governed by the applicable inland transport convention or applicable inland law. It was suggested that this aspect promoted uniformity by replacing subparagraph 4.2.1 and making the contracting carrier no longer potentially subject to an applicable inland convention, and by making clear that the inland performing carrier would at all times be subject to the inland

convention or applicable national law through the contract concluded by that inland performing carrier. However, concern was expressed that the performing carrier could conclude a contract that would be detrimental for the shipper.

237. Some support was expressed for option 3 of the Canadian proposal, since it was suggested that, leaving aside questions of reservation until later, structuring the draft instrument in two separate chapters would deal with the two different regimes, it could promote long-term uniformity, and it would facilitate the discussion in the Working Group by proceeding on a structured basis. In addition, the precedent of the Convention on Contracts for the International Sale of Goods was cited in support of the structure suggested, since one part therein dealt with the formation of contracts, and another dealt with substantive sales contracts along with a reservation for opting out. Caution was expressed with respect to the approach suggested in option 3 of the Canadian proposal, however, since it was felt that accommodating reservations to the instrument at this point in the discussion was premature, and should be left to the closing stages of a diplomatic conference, when other means of bridging differences had been exhausted. Further, it was suggested that this structure could encourage States to opt for the port-to-port approach rather than the door-to-door option, and that it would thus dilute uniformity. An additional concern was raised that option 3 might serve to divide the process, and encourage negotiations on maritime provisions at first, and on multimodal provisions in the future. In addition, it was stated that option 3 would complicate discussions by requiring reference throughout the discussions on two different periods of responsibility. However, it was pointed out in response that there was no need to correlate the periods of responsibility in the two chapters, since the period would simply apply to the contract of carriage, depending on which of the multimodal or the maritime contract had been chosen. There was some support for the view that option 3 might be revisited at a later stage in the discussions.

238. It was also stated that subparagraph 4.2.1 did not solve the issue of a possible conflict with existing transport conventions, and that it should be deleted in favour of a general reservation for pre-existing transport conventions that could be inserted into chapter 16 of the draft instrument as a type of conflict of conventions clause.

239. After discussion, however, wide support was expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port. Support was expressed for a uniform system in the door-to-door instrument, and it was suggested that an effort should be made to achieve such a uniform system. However, there was broad acceptance that a uniform system was likely unattainable, and support was also expressed in favour of a limited network system along the lines of that set out in subparagraph 4.2.1, but for a corrected version thereof. Various means of correcting the limited network system were discussed, including those suggested in the Italian, the Canadian and the Swedish proposals, but no firm decision was made by the Working Group in this regard.

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

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

dealt with under the draft instrument; (d) the limits of liability under the draft instrument; and (e) the treatment of non-localized damages under the draft instrument.

(a) Type of carriage covered by the draft instrument

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

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

243. A question was raised as to how the internationality of the carriage covered by the draft instrument should be reflected in the individual unimodal legs of the carriage. The suggestion was made that the draft instrument should only apply to

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

244. After discussion, the Working Group agreed on a provisional basis that the draft instrument should cover any type of multimodal carriage involving a sea leg. No further distinction would be needed, based on the relative importance of the various modes of transport used for the purposes of the carriage. It was also agreed that draft article 3 might need to be redrafted to better reflect that the internationality of the carriage should be assessed on the basis of the contract of carriage. The Secretariat was requested to prepare revised provisions, with possible variants, for continuation of the discussion at a future session. In view of the decision made by the Working Group regarding the type of carriage to be covered by the draft instrument, the attention of States members of the United Nations Economic Commission for Europe (UN/ECE) was drawn to the need to ensure coordination of their delegations in the Working Group and in the UN/ECE to avoid duplication of efforts.

(b) Relationship of the draft instrument with other transport conventions and with domestic legislation

245. The Working Group next considered the issue of the relationship of the draft instrument with other conventions and with domestic legislation. Discussion ensued in an effort to clarify views regarding the relationship between the draft instrument and multimodal and unimodal instruments, and with applicable national law.

246. The Working Group was reminded that subparagraph 4.2.1 was intended to accommodate the continued application of the normally applicable inland conventions for the carriage of goods. The view was expressed that with respect to pure unimodal conventions, with no multimodal aspects, no conflict with the draft instrument would arise, and that, as a consequence, subparagraph 4.2.1 was unnecessary. A widely supported view was expressed that the limited network principle in subparagraph 4.2.1 of the draft instrument was effective in ensuring that there was no overlap with unimodal conventions or any future regional multimodal convention. Another view was expressed, however, that subparagraph 4.2.1 did not solve the issue of conflict of conventions, since it gave preference only to specific provisions of applicable unimodal conventions. The Working Group was reminded that certain States would find it impossible to be signatory to more than one multimodal convention, and that if the draft instrument was a multimodal

instrument, ratification of it could preclude some States from ratifying broader multimodal conventions. A further concern was raised that if the draft instrument was multimodal, parties to other instruments that have multimodal aspects, such as the Montreal Convention and COTIF, might have to denounce those conventions in favour of the draft instrument.

247. It was also suggested that paragraph 3.1 should be clarified with respect to the situation where, for example, goods on a truck were not unloaded onto the vessel during a multimodal carriage of goods, such that the draft instrument and CMR would compete in terms of applicable law. A further suggestion was made that the network system in subparagraph 4.2.1 should be abandoned in favour of a uniform approach, and that, in its stead, a conflict of conventions provision could be inserted into article 16 of the draft instrument. It was also suggested that such a provision should be added to article 16, in any event, if it was decided that subparagraph 4.2.1 should be deleted.

248. Concern was raised with respect to how the draft instrument would deal with future regional transport conventions. The view was expressed that the terms of such future conventions might also prevail over those of the draft instrument pursuant to subparagraph 4.2.1, and thus that such future conventions represented at least as great a threat to uniformity as the inclusion of mandatory national law. The suggestion was made that since the limited network principle was intended as a practical approach to gain as much support for the draft instrument as possible, the problem of future conventions could be solved by limiting the operation of subparagraph 4.2.1 to existing international conventions.

249. It was reiterated that there was an important relationship between national law and the draft instrument, since the current version of the draft instrument would automatically supersede national law pursuant to subparagraph 4.2.1, yet the provisions of international conventions would stand. The suggestion was again made that the draft instrument should include mandatory national law in the exception to its scope of application set out in subparagraph 4.2.1, and reference was again made to option 2 of the Canadian proposal (see above, paras. 221 and 235). In response, the view was expressed that subparagraph 4.2.1 should not be so amended in order to apply mandatory national law, since it could mean, in some cases, that the limit on liability in the national law would be lower than that set out in the draft instrument, and this would mean not only that performing parties would be protected in terms of the lower liability limits, but that contracting carriers could claim the same liability limit. It was explained that the change suggested with respect to the treatment of performing parties under the draft instrument was intended to take into account the concern with respect to national law, but at the same time to allow cargo interests to proceed directly against performing parties under whatever law would apply in the absence of the draft instrument. The point was made that option 2 of the Canadian proposal was not intended to allow the application of national law to the contracting carrier, but that the possibility of this unintended consequence would have to be assessed. Interest was voiced in pursuing further discussions based on both the Italian proposal (see above paras. 220 and 236) and the United States suggestion (see above paras. 226 and 227), one of which the Working Group might potentially adopt in the future to deal with concerns respecting the preservation of mandatory national law.

250. After discussion, the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The Secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 of the draft instrument, and to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1. The exchange of views regarding the relationship between the draft instrument and national law was inconclusive, and the decision was made to consider this issue further in light of anticipated future proposals. Given the level of support with respect to the issue of national law, however, the Working Group requested the Secretariat to insert a reference to national law in square brackets into the text of subparagraph 4.2.1 for further reflection in the future.

(c) Treatment of performing parties

251. The Working Group was reminded that the issue of the treatment of performing parties pursuant to the draft instrument had been discussed in general terms by the delegations of the United States and of Italy in the presentation of their proposals regarding scope of application (see above, paras. 220, 226 and 227).

252. One concern raised with respect to the treatment in general of performing parties was the geographic reach of the draft instrument. The example was given of goods being shipped from Tokyo to Rotterdam via Singapore, and whether the stevedore handling the goods in Singapore was subject to the draft instrument if either Japan or the Netherlands had ratified it but Singapore had not. It was said that a direct cause of action against a performing party in a non-contracting State should not be maintained in the draft instrument.

253. Interest was shown in the proposal by the United States that the draft instrument should provide different treatment for maritime performing parties and for inland performing parties, but the view was expressed that firm positions on the proposal could not be expressed until it was formally presented at a later date. It was stated that, under that proposal, maritime performing parties would be treated pursuant to paragraph 6.3, and thus they would be subject to action under the terms of the draft instrument, receiving all of the benefits of the carrier's defences and limitations. Subparagraphs 6.3.1 and 6.3.3 would have to be modified with respect to inland performing parties, however, so that the draft instrument would not create any additional cause of action against them, nor create any additional Himalaya protection for them, outside of the existing applicable law. The view was expressed that separate treatment of maritime and inland performing parties would be of particular importance if mandatory national law was not included in subparagraph 4.2.1. One concern was raised, however, that the institution of the performing party was created to protect both the shipper and the performing party from potential exposure to unlimited liability pursuant to an action in tort, and that the proposal could create problems in this regard in the multimodal environment, since the performing party could be sued by a claimant on the basis of a different contract. Another concern was raised with respect to whether the operation of this proposal could conflict with the 1991 Convention on the Liability of Operators of Transport Terminals in International Trade.

254. A request was made for clarification with respect to the difference between the performing party and the performing carrier in the Italian proposal. In responding to

this question, it was said that the Italian proposal narrowly defined performing party to exclude from it those persons who handled and warehoused the goods, and who were not subject to any inland convention, leaving only those who actually moved or carried the goods as performing parties under the draft instrument. The proposal was said to include a right of suit against performing parties in this narrowed sense, such that the contract that the performing party itself concluded would apply. Some concern was expressed with respect to this narrowed definition of performing party, particularly with the Himalaya protection which, it was thought, should be available to all performing parties. Another concern raised with respect to the narrowed definition of performing party was that it was thought that performing parties should not be defined on the basis of their function, since to do so could give rise to uncertainty over who was covered in the draft instrument, and who should be sued. It was said that another aspect of the Italian proposal was a distinction drawn between maritime performing parties and inland performing parties, such that the draft instrument would apply to maritime performing parties, and the inland performing parties would be subject to the contract that they themselves concluded. It was thought that inland performing parties should have the Himalaya protection granted by the contract concluded by them. The view was expressed that allowing the inland performing party to make use of the protection in its own contract could unduly complicate matters, and might not provide sufficient clarity. Another concern raised with respect to this proposal was that the reference to international conventions and to the national law applicable between the performing carrier and the inland performing party could be understood to include non-mandatory national law, and the terms of that contract could be binding on the shipper who would like to sue the inland performing party directly. It was said that this would unfairly allow the contracting carrier and the performing carrier to conclude a contract to the detriment of the shipper.

255. Some tentative support was expressed for a combination of the Italian and the United States proposals with respect to the treatment of performing parties. For example, there was general support for the separate treatment of maritime and inland performing parties, but it was thought to be better for the purposes of uniformity if the draft instrument would make specific reference to the rights of suit of inland performing parties. No conclusion was reached with regard to such a combination of proposals.

256. After discussion, it was agreed that the treatment of performing parties under the draft instrument was an important matter that would shape the entire instrument, and could help in the solution of other problems, such as the inclusion of mandatory national law in subparagraph 4.2.1. The anticipation of a more refined written proposal on this issue prevented a clear final or interim decision from being made at this stage. It was thought that the time was not yet ripe for revisions to be made to the draft instrument with respect to its treatment of performing parties.

(d) Limits of liability

257. A widely shared view was that no attempt should be made to reach an agreement on any specific amount for the limits of liability under subparagraph 6.7.1 at the current stage of the discussion. A suggestion was made that, irrespective of the amount that was finally retained, a rapid amendment procedure should be established by the draft instrument. It was suggested that the

1996 Protocol to the IMO Convention on Limitation of Liability for Maritime Claims might provide a model in that respect. That suggestion was widely supported.

258. The view was expressed that the limits of liability in the context of a multimodal instrument should be considerably higher than the maritime limits established in the Hague and Hague-Visby Rules. It was explained that, should the carrier engage in multimodal transport, a situation where different limits of liability might be applicable (ranging from 2 SDR per kilogram for maritime transport to 8.33 SDR per kilogram for road transport and even 17 SDR per kilogram for air transport), the carrier would in any event get insurance coverage for the higher limit applicable during the carriage, provided that a network system was applicable. It was stated in response that the purpose of a limitation of liability was not to ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. The purpose of limitation of liability, it was stated, was to ensure predictability and certainty. It was observed that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of losses and damages were fully compensated on the basis of the limitation per package. By way of explanation, it was stated that packages in the practice of modern containerized transport had generally become smaller and that it was generally recognized that, in containerized transport, the notion of "package" applied to the individual packages inside the container and not to the container itself. It was also explained that the limitation per kilogram set out in the Hague-Visby Rules still corresponded to the average value of containerized cargo, despite considerable regional variations. From a similar perspective, it was stated that, since the adoption of the Hague-Visby protocol, the freight rates in maritime trade had decreased and that such decrease should be taken into account when determining the limits of liability.

259. With respect to the last sentence of subparagraph 6.7.1, it was recalled that the sentence had been bracketed pending a decision as to whether any mandatory provision should be one-sided or two-sided mandatory, that is whether or not it should be permissible for either party to increase its respective liabilities (see A/CN.9/WG.III/WP.21, para. 106). The earlier discussion by the Working Group (see above, para. 214) was noted and it was provisionally agreed that the square brackets should be removed from that provision.

260. With respect to the loss of the right to limit liability under paragraph 6.8, the view was expressed that the reference to the "personal act or omission" of the person claiming a right to limit should be replaced by a reference to the "act or omission" of that person. It was recalled that a similar suggestion had been made at the previous session of the Working Group, for reasons of consistency with the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. It was pointed out in response that the issue of consistency with the Athens Convention would arise mostly in the case where both cargo and passengers were carried on the same vessel, a case that was described as relatively rare. One delegation offered to prepare a study on the issue of consistency between the draft instrument and the Athens Convention for consideration by the Working Group at a future session.

261. It was widely felt that the reference to the "personal act or omission" of the person claiming a right to limit should be considered in the context of the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. In

favour of introducing such a provision, it was stated that paragraph 6.8 dealt with the extreme situation where loss or damage to the goods had been caused by the intentional act or omission of the carrier who, in this case, should not be permitted to avoid liability by demonstrating that the acts that caused the loss or damage were those of a servant or agent and not the personal acts or omissions of the carrier. In response, it was recalled that, at the previous session of the Working Group, it had been suggested that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules (A/CN.9/525, para. 88). It was stated that an almost unbreakable limit of liability would result in a situation where it would be easier for the carrier to obtain insurance coverage. However, it was also recalled that, while there existed precedents of international instruments where such unbreakable limits of liability had been implemented, such instruments relied on a relatively high-amount limitation (ibid.). With a view to alleviating the concern that had been expressed regarding the possibility for the carrier to avoid liability, it was pointed out that the notion of "personal act or omission" under paragraph 6.8 should be understood to apply not only to the contracting carrier but also to each performing party. After discussion, the Working Group decided that the word "personal" should be placed between square brackets for continuation of the discussion at a later stage.

262. A suggestion was made that the draft instrument should make it clear that the carrier should never be liable for more than the value of the goods. It was stated in response that a provision to that effect had been placed in subparagraph 6.2.3. It was generally felt that the purpose of that provision might need to be expressed more clearly in a future draft.

263. Another suggestion was made that the provisions dealing with limits of liability in the draft instrument might need to be adjusted in view of the decisions made by the Working Group with respect to the possibility for the carrier to qualify the description of the goods given by the shipper in the transport document. Should such a qualification be made by the shipper regarding the weight of the goods or the number of packages, the draft instrument should be clear as to which weight and number of packages should be used for the purposes of applying the limits of liability. It was suggested that, in such a context, the qualifications might need to be ignored, much in the same way as a "said to weigh" clause would be ignored under current practice. The Working Group took note of that suggestion.

(e) Treatment of non-localized damages

264. In light of the deliberations of the Working Group regarding the limits of liability, the view was expressed that the limits set out in the Hague-Visby Rules were too low to be acceptable as a default rule in case of non-localized damages. Support was expressed for a proposal that the following provision should be inserted after subparagraph 6.7.1: "Notwithstanding the provisions of subparagraph 6.7.1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply." It was explained that, where a non-localized damage occurred, the damages to the goods usually were detected at the place of receipt, which meant that only small amounts of goods were damaged (see A/CN.9/WG.III/WP.26). In addition to the

proposal that higher limits of liability should apply in case of non-localized damages, it was suggested that the draft instrument should be amended to reflect the policy that, should the carrier wish to avoid the higher limit of liability, it should bear the burden of proving the part of the carriage during which the damage had occurred. It was stated that such a policy regarding the burden of proof was justified by the fact that the carrier was in a better position than the shipper to investigate the events that had occurred during the voyage.

265. In response to a question regarding the reasons why the draft instrument should apply as a default rule in case of non-localized damages, the view was reiterated that the main consideration regarding that matter should be to ensure predictability and certainty regarding the liability regime applicable to non-localized damages.

266. As a matter of drafting, it was suggested that the draft instrument might need to reflect more clearly the legal regimes governing localized damages under subparagraph 4.2.1 and non-localized damages under subparagraph 6.7.1. The Secretariat was invited to consider the need for improved consistency between those two provisions when preparing a revised draft of the instrument.

267. After discussion, the Working Group decided that the proposal in paragraph 264 above should be reflected between square brackets as one possible variant in a revised version of the draft instrument to be considered at a future session.

Notes

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 210-215.

[2] Ibid., para. 210.

[3] Ibid., para. 211.

[4] Ibid., para. 215.

[5] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 264.

[6] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.

[7] Ibid., paras. 414-415.

[8] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 416-427.

[9] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 319-345.

[10] Ibid., para. 345.

[11] Ibid.

[12] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 210-224.

[13] Ibid., para. 224.