United Nations A/CN.9/642

General Assembly

Distr.: General
2 November 2007

Original: English

United Nations Commission on International Trade Law
Forty-first session
New York, 16 June-11 July 2008

Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)

Contents

V.07-87910 (E) 121107 131107

Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.92.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its twentieth session in Vienna from 15 to 25 October 2007. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Benin, Bolivia, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Gabon, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Latvia, Lebanon, Mexico, Namibia, Nigeria, Norway, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Argentina, Brazil, Burkina Faso, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Denmark, Dominican Republic, Finland, Ghana, Indonesia, Kuwait, Netherlands, New Zealand, Nicaragua, Niger, Philippines, Portugal, Romania, Saudi Arabia, Slovakia, Slovenia, Sweden, Tunisia, Turkey, United Republic of Tanzania and Yemen.

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

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

(b) **Intergovernmental organizations**: Council of the European Union, European Commission and the Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) **International non-governmental organizations invited by the Working Group**: Association of American Railroads (AAR), BIMCO, Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, Maritime Organization of West and Central Africa (MOWCA) and the World Maritime University (WMU).

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[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. V. D. Sharma (India)

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

(a) Annotated provisional agenda and corrigendum (A/CN.9/WG.III/WP.92 and A/CN.9/WG.III/WP.92/Corr.1);

(b) The draft convention on the carriage of goods [wholly or partly] [by sea] and corrigendum (A/CN.9/WG.III/WP.81 and A/CN.9/WG.III/WP.81/Corr.1);

(c) A document containing comments and proposals of the Government of Nigeria (A/CN.9/WG.III/WP.93);

(d) A note by the Secretariat containing revised text of articles 42, 44 and 49 of the draft convention (A/CN.9/WG.III/WP.94);

(e) A proposal by the delegations of Denmark and the Netherlands (A/CN.9/WG.III/WP.95);

(f) A proposal on chapter 12 "Transfer of Rights" submitted by the delegation of the Netherlands (A/CN.9/WG.III/WP.96);

(g) A document containing comments from non-governmental organizations (A/CN.9/WG.III/WP.97);

(h) A proposal by the Government of China on jurisdiction (A/CN.9/WG.III/WP.98); and

(i) A proposal by the Government of China on delivery of the goods when a negotiable transport document or a negotiable electronic transport record has been issued and on goods remaining undelivered (A/CN.9/WG.III/WP.99).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea].
5. Other business.
6. Adoption of the report.

I. Deliberations and decisions

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.81). The Working Group was again reminded that the text contained in that note was the result of negotiations within the Working Group since 2002. The Working Group

agreed that while the provisions of the draft convention could be further refined and clarified, to the extent that they reflected consensus already reached by the Working Group, the policy choices should only be revisited if there was a strong consensus to do so. Those deliberations and conclusions are reflected in section II below (see paras. 9 to 280 below). All references to A/CN.9/WG.III/WP.81 in the following paragraphs include reference to the corrections set forth in A/CN.9/WG.III/WP.81/Corr.1.

II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

Chapter 9 – Transport documents and electronic transport records

(*continued from nineteenth session, see A/CN.9/621, paras. 301 to 302*)

Draft article 42. Evidentiary effect of the contract particulars

9. The Working Group proceeded to consider the text of draft article 42 as contained in paragraph 1 of A/CN.9/WG.III/WP.94. It was explained that that draft provision remained the same as it appeared in A/CN.9/WG.III/WP.81 except for corrections made to the cross-references to draft article 37. It was observed that the corrections to the text were not intended to alter its meaning.

10. The Working Group was reminded of the extensive debate that led to the formulation of draft article 42. As currently drafted, the text was the result of a careful compromise between conflicting views as to the treatment of the evidentiary value of transport documents.

11. It was pointed out that subparagraph (b)(i) used the term “third party”, while the term “consignee” was used in subparagraph (b)(ii). It was noted, in that connection, that the term “third party” seemed to suggest the “holder” of the transport document, as defined in draft article 1, paragraph 12. However, since the consignee might also be a holder of a transport document, the concern was expressed that the distinction between the two terms used in subparagraphs (b)(i) and (ii) was unclear and that it might need further clarification. The Working Group agreed that in preparing the final revised draft for consideration by the Working Group, the Secretariat should carefully review the text so as to ensure consistency in the use of those two terms.

12. It was further proposed that, whilst the principle that proof to the contrary by the carrier should not be admissible against a consignee acting in good faith, the notion of good faith could not stand alone but rather should relate to a particular subject matter. In that respect, it was proposed to refer to wording along the lines contained in article 16 (3) of the Hamburg Rules by referring to “a consignee who in good faith has acted in reliance on the information therein”. There was support for that proposal.

13. A concern was expressed regarding the extension in draft article 42 of the conclusive evidentiary effect of the statements in a transport document to include not only non-negotiable transport documents, but also sea waybills.

Conclusions reached by the Working Group regarding draft article 42:

14. After discussion, the Working Group agreed that the text of draft article 42 as contained in A/CN.9/WG.III/WP.94 was acceptable subject to clarifying the context in which the notion of good faith would operate. The Working Group requested the Secretariat to review the use of terms throughout the draft convention, in particular the use of the terms "third parties" and "consignees" to ensure consistency of terminology.

Chapter 10 – Delivery of the goods

Draft article 44. Obligation to accept delivery

15. The Working Group proceeded to consider draft article 44 as contained in A/CN.9/WG.III/WP.94. In that respect it was observed that, for the sake of clarity, the Secretariat proposed to remove paragraph 2 from draft article 11, as contained in A/CN.9/WG.III/WP.81, and to move its content to the end of paragraph 1 of draft article 44, since it appeared that the rule regarding time and location of delivery would be best placed in draft article 44 in the chapter on delivery. Moreover, the Secretariat suggested that, as the obligation of unloading the goods pursuant to paragraph 2 of draft article 14 would be performed by the consignee, the corresponding provision should be moved from paragraph 2 of draft article 27 to a new paragraph 2 of article 44.

Concept of delivery

16. The view was expressed that the last sentence contained in paragraph 1 of draft article 44 dealt with actual delivery rather than the contractual time and place of delivery. For that reason, it was proposed that that sentence should be deleted and the following wording inspired by the current draft article 21 as contained in A/CN.9/WG.III/WP.81, should be added to the end of paragraph 1 after the words "time and location": "at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the journey, delivery could be reasonably expected."

17. In support of a redrafting of paragraph 1, it was also stated that the reference, in that context to the time and location of delivery as being that "of the unloading of the goods from the final means of transport in which they are carried under the contract of carriage" might be read to suggest that the consignee could be obliged to accept delivery at any time or place when or where the goods might be finally unloaded. That, it was said, would be an unreasonable imposition on the consignee.

18. The proposal to redraft paragraph 1 received some support, but the Working Group agreed to defer a final decision on the proposed additions, so as to allow delegations more time to reflect further on their implications.

Choice between bracketed alternatives

19. The Working Group proceeded to consider the two bracketed texts contained in draft article 44 which referred to the obligation to accept delivery of the goods by the consignee that either "exercises any of its rights under" or "has actively involved itself in" the contract of carriage. It was suggested that both texts could be

deleted given that the definition of consignee as contained in draft article 1 already clarified the consignee's entitlement to delivery and that in context of the draft article, the consignee's obligation to take delivery should be made unconditional. While there was some support for that suggestion, the Working Group was predominantly in favour of retaining some form of qualification in the draft article, and proceeded to consider the options available in the draft before it.

20. The view was expressed that both sets of square brackets contained unclear language and that neither of them offered sufficient guidance as to the circumstances under which a consignee should be obliged to accept delivery under the contract of carriage. It was suggested that it would be preferable to delete both bracketed texts and refer instead to a requirement that the consignee demanded delivery or something comparable. However, concerns were expressed that such a requirement might prove overly onerous for the carrier that could not discharge itself of the custody of the goods under the contract of carriage in situations where a consignee took some legally relevant actions without formally demanding delivery, for example, when the consignee requested samples of the goods to determine whether or not to accept them pursuant to the underlying contract of sale.

21. Some support was expressed for the second bracketed text. It was suggested that the term "actively" should be deleted from the second bracketed text for the reason that passive behaviour might sometimes suffice to oblige the consignee to accept delivery of the goods. However, concern was expressed that the second bracketed text was too broad and ambiguous in that it did not indicate which level of "involvement" in the contract of carriage would suffice to obligate the consignee to take delivery of the goods. In the light of those concerns, the Working Group expressed a preference for the first bracketed text.

22. In considering the text in the first set of brackets, the Working Group heard expressions of concern that the reference to a consignee exercising "any" of its rights under the contract of carriage might be too broad. For example, should it be sufficient in order to trigger the provision that a consignee exercised a contractual right to obtain information on the whereabouts of goods during the voyage? It was suggested that such was not the case and that the exercise of a contractual right referred to matters such as exercising a right of control or asking the carrier to take samples of the cargo. To meet that concern, it was suggested that the words "any of" should be deleted from the first bracketed text. It was said that the intention of the article was that a consignee who wished to exercise its rights under the contract of sale, such as the right to reject the goods, should not be allowed to refuse to take delivery of the goods under the contract of carriage.

Conclusions reached by the Working Group regarding draft article 44:

23. After discussion, the Working Group agreed that the text of draft article 44 as contained in A/CN.9/WG.III/WP.94 was acceptable and that:

- The first bracketed text be included with the words "any of" being deleted; and
- The final wording of paragraph 1 of draft article 44 be revisited once delegations had an opportunity to reflect on the proposal to delete the last sentence thereof and redraft the final words of the first sentence.

Draft article 45. Obligation to acknowledge receipt

24. The Working Group was in agreement that the text in draft article 45 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 46. Delivery when no negotiable transport document or negotiable electronic transport record is issued

25. It was recalled that draft article 46 had last been considered at the sixteenth session of the Working Group (see A/CN.9/591, paras. 223 to 230). The Working Group proceeded to consider the text in draft article 46 as contained in A/CN.9/WG.III/WP.81. A question was raised as to whether the reference to "after having received a notice of arrival" in paragraph (c) of draft article 46 could imply that notice should always be given to the consignee. It was said that such an interpretation would be inconsistent with draft article 50 (3), which allowed notice to be given to someone other than the consignee. It was proposed that paragraph (c) be redrafted so as to be consistent with draft article 50 (3).

26. Some support was expressed for the deletion of the words "after having received a notice of arrival" from paragraph (c) of draft article 46. It was noted that those words could place a heavy burden on a carrier, particularly in the context of container shipping where there could be a significant number of consignees. It was also suggested that the words were unnecessary given that paragraph 50 (3) already dealt with the circumstance where a carrier might wish to treat goods as undeliverable. If those words were retained, a suggestion was made to amend the wording to refer instead to a consignee "after having given notice of arrival" to take account of the possibility that a carrier could not be expected to know when a consignee had received a notice of arrival. However, support was expressed for retention of the text without amendment. It was said that draft article 46 dealt with the obligations of the carrier once the goods arrived at the place of destination and that it could therefore be distinguished from draft article 50 (3) which dealt with the situation where goods could be considered as undeliverable.

27. A suggestion was made to clarify that the obligation in paragraph (c) of draft article 46 of the controlling party or the shipper to give instructions in respect of delivery of the goods should be subject to the same terms that applied under article 54, for example, that the instructions be reasonable and not interfere with the normal operations of the carrier.

Conclusions reached by the Working Group regarding draft article 46:

28. After discussion, the Working Group agreed that the text of draft article 46 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 47. Delivery when a non-negotiable transport document that requires surrender is issued

29. The Working Group was reminded that draft article 47 was inserted in A/CN.9/WG.III/WP.81 following a decision of the Working Group at its seventeenth session to insert into the text of the draft convention a provision concerning delivery of the goods when a non-negotiable transport document that required surrender had been issued (see A/CN.9/594, paras. 208 to 215). The Working Group was further reminded that draft article 47 appeared in A/CN.9/WG.III/WP.81 in square brackets,

and that its text was based on that of proposed article 48 bis as set out in A/CN.9/WG.III/WP.68 (see para. 15).

General discussion

30. While it was acknowledged that non-negotiable transport documents that required surrender were not known in all jurisdictions, the Working Group was of the general view that draft article 47 was useful in cases where such documents existed. The Working Group decided that draft article 47 should be retained and the square brackets around the provision deleted.

"[provides] [indicates] [specifies]"

31. The Working Group next considered the three alternatives presented in the chapeau of draft article 47: whether such a non-negotiable transport document should "[provide]", "[indicate]" or "[specify]" that it must be surrendered. It was observed that in some jurisdictions, the simple title "bill of lading" meant that surrender of the document was required upon delivery of the goods, and that if the intention of draft article 47 was to preserve existing law regarding these types of documents, the preferred text would be "indicates according to the law applicable to the document". However, it was further suggested that if the Working Group did not agree with that proposal, the word "indicates" should be chosen, since, although being slightly vague, that term would at least preserve current practice with respect to such documents. There was support for the view that current practice should be preserved, but it was suggested that the word "indicates" would be preferable, since reference to the applicable law might be clear in legal terms, but it would be difficult for the carrier to know at the time of delivery whether or not the document in issue fulfilled the requirements of the applicable law. There was a preference in the Working Group for the retention of the term "indicates", as among the three alternatives, and for the deletion of the other options, in order to retain current practice with respect to non-negotiable transport documents that required surrender.

32. However, it was observed in response that the draft convention classified all transport documents according to whether they were negotiable or non-negotiable, and that reference to documents as "bills of lading", along with whatever legal consequences that label might entail in terms of national law, would resort to a taxonomy that was contrary to that used in the draft convention. It was further suggested that, while it had been decided by the Working Group to accommodate the current practice regarding non-negotiable transport documents that required surrender, there was no uniformity in national law regarding the treatment of such documents. Under the circumstances, an implicit referral to considerations of national law would allow too much scope for interpretation to fit with the categorization of documents in the draft convention. It was suggested that to preserve a uniform classification system in the draft convention, it should be clear that the wording of such a document must itself suffice to determine its character, and that, at a minimum, the term "indicates" should be deleted as lacking clarity and as potentially importing uncertainty into the otherwise clear categorization in the draft convention. In addition, it was observed that the draft convention aimed to establish a clear, predictable system, and that the assumption that the parties had agreed to a non-negotiable transport document that required surrender, which would be unusual in some jurisdictions, should require an indication of a conscious

decision. Thus, the draft convention should require a more rigorous standard than that denoted by the word “indicates”. There was support for the view that, for the purposes of consistency and certainty, the word “indicates” should be avoided in this context.

33. Support was also expressed in the Working Group for the term “provides”, and some support was expressed for the term “specifies”. In addition, there was some discussion regarding whether the different language versions of the three alternatives might suggest a term that was preferable to the three options set out in the text. However, no clear consensus emerged regarding which of the three alternatives should be selected. The least amount of support was expressed for the term “specifies”, and the Working Group decided that that option should be deleted from the draft convention, but that the other alternatives should be retained for future consideration. It was further observed that, in any event, the text of draft article 42 (b)(ii) should be aligned with whichever term was ultimately chosen by the Working Group.

Notice of arrival

34. It was observed that while a notice of arrival was required in subparagraph (c) of draft article 46, no notice of arrival was required by draft article 47. The Working Group agreed that, in the interests of consistency, a notice of arrival should also be required in subparagraph (b) of draft article 47.

Conclusions reached by the Working Group regarding draft article 47:

35. The Working Group was in agreement that:

- The text of draft article 47 should be retained and the square brackets around it deleted;
- The alternatives “[provides]” and “[indicates]” should be retained in the chapeau in square brackets for future consideration, while the third alternative, “[specifies]” should be deleted;
- The requirement for a notice of arrival should be added to subparagraph (b); and
- Care should be taken to align the text of draft article 42 (b)(ii) depending on which term was ultimately chosen by the Working Group.

Draft article 48. Delivery when a non-negotiable electronic transport record that requires surrender is issued

36. The Working Group was reminded that draft article 48 was inserted in A/CN.9/WG.III/WP.81 following a decision of the Working Group at its seventeenth session to insert into the text of the draft convention a provision concerning delivery of the goods when a non-negotiable electronic transport record that required surrender had been issued (see A/CN.9/594, paras. 208 to 215). The Working Group was further reminded that draft article 48 appeared in A/CN.9/WG.III/WP.81 in square brackets, and that its text was based on that of proposed article 48 ter as set out in A/CN.9/WG.III/WP.68 (see para. 16).

37. It was observed that the term "non-negotiable electronic transport record" was somewhat illogical in light of the difficulty of requiring "surrender" of an electronic record, and it was suggested that the term "the electronic equivalent of a non-negotiable transport document" could be used in its stead. While some support was expressed for that suggestion, it was observed that it would be equally illogical to require surrender of the electronic equivalent of a non-negotiable transport document. It was also noted that this provision could have unintended consequences in terms of using the same approach as that taken in draft article 49 for negotiable electronic transport records, thus possibly affording a non-negotiable electronic transport record similar treatment to that given a negotiable electronic transport record.

38. Other concerns were raised regarding the treatment of the consignee and the use of the term "exclusive control" in subparagraph (a) of draft article 48. While the view was expressed that a consignee must have control over the goods, and thus must have control over the transport document or record, concerns were expressed regarding whether the standard of "exclusive control" was appropriate in draft article 48, since it was used in other contexts in respect of negotiable electronic transport records, as, for example, in draft article 1 (12) (b) definition of "holder".

Necessity of retaining draft article 48

39. A question was raised regarding whether, in light of current industry practice, it was necessary to have a provision such as draft article 48 at all. It was suggested that draft article 48 could be deleted, and that, if some reference to the electronic equivalent of such documents was thought necessary by the Working Group, such an addition could be made through drafting adjustments to draft article 47.

Notice of arrival

40. It was also observed that while a notice of arrival was required in subparagraph (c) of draft article 46, no notice of arrival was required by draft article 48. The Working Group agreed that, in the interests of consistency, a notice of arrival should also be required in subparagraph (b) of draft article 48.

Conclusions reached by the Working Group regarding draft article 48:

41. The Working Group was in agreement that:

- Further consideration should be given to the title of the article;
- The text of draft article 48 should be retained in square brackets;
- Subparagraph (a) of draft article 48 should be placed in square brackets for further consideration by the Working Group; and
- The requirement for a notice of arrival should be added to subparagraph (b).

Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued

42. The Working Group was reminded that its most recent consideration of draft article 49 on delivery when a negotiable transport document or negotiable electronic transport record has been issued was at its sixteenth and seventeenth sessions (see

A/CN.9/591, paras. 231 to 239, and A/CN.9/594, paras. 80 to 89). The Working Group was advised that consequential drafting changes to subparagraphs (d) and (g) were suggested, as described in paragraphs 4 to 6 of A/CN.9/WG.III/WP.94, and the Working Group proceeded to consider the slightly revised text of draft article 49 as contained in A/CN.9/WG.III/WP.94.

Subparagraph (a)

43. A suggestion was made that the Working Group may wish to consider whether an addition should be made to subparagraph (a) to indicate the period within which the consignee was obliged to accept delivery. It was observed that this might be a particular problem in cases of delay in delivery of the goods. In response to a question regarding the purpose of subparagraph (a)(i) when the definition of "holder" in draft article 1 (12) already referred to a document that was "duly endorsed", it was explained that subparagraph (a)(i) referred to so-called "order" documents that allowed for the endorsement of the document on to other persons, and that there should be a requirement in such cases for the holder to show that it was the person to whom the document had ultimately been endorsed. Finally, it was suggested that the phrase "as appropriate" in the chapeau of subparagraph (a) might be unnecessary.

Subparagraph (b)

44. It was proposed that the phrase "the carrier shall refuse delivery" in subparagraph (b) should be adjusted to read "the carrier may refuse delivery", since there could be occasions on which the carrier might decide not to deliver even though the requirements of subparagraph (a) had been met, for example, in the case of other contractual relationships that the carrier might have. In response, it was noted that the term "shall" had been inserted to clarify and to reinforce the position of the carrier in refusing delivery of the goods in cases where the requirements of subparagraph (a) had not been met, and that the term "may" would dilute that result. The Working Group did not adopt the proposed change.

Subparagraph (c)

45. The Working Group was reminded that it had agreed at its nineteenth session to include in draft article 40 an additional paragraph providing that the legal effect of the carrier's failure to include in the contract particulars the number of original negotiable transport documents when more than one was issued was that the negotiable transport document would be deemed to have stated that only one original had been issued (see A/CN.9/621, para. 296). In light of that agreement, it was proposed that in order to avoid confusion with that principle, the opening phrase of subparagraph (c) should be adjusted to read, "If the negotiable transport document states that more than one original …" and should then continue on with the remainder of the subparagraph.

46. However, the Working Group was reminded that the practice of issuing multiple originals of the negotiable transport document was considered to be ill-advised, and had been cautioned against. It was suggested that rather than include further reference to that practice in the draft convention, thereby possibly encouraging or condoning the practice, any mention of it should be deleted. There was some support for that approach. An alternative was suggested, such that if the

Working Group was of the view that the provisions concerning the practice should be maintained, then draft article 36 should be adjusted to indicate that the shipper was entitled to ask for multiple originals of the negotiable transport document.

47. In reference to its previous agreement to add an additional paragraph in draft article 40 concerning the legal effect of the carrier's failure to include the number of original bills of lading in the contract particulars, the Working Group was invited to consider the policy underlying such a decision. In particular, it was noted that a failure to include the number of originals in the contract particulars was the fault of the carrier, yet a provision that, in such cases, would deem that only one original had been issued would be to the advantage of the carrier and would be contrary to cargo interests. Further, such a provision would require the reconsideration of certain other provisions of the draft convention, such as the requirement to produce all originals in order to demonstrate the right of control under draft article 53 (2) (b).

48. In light of these concerns, the Working Group considered four possible options regarding the proposed addition to subparagraph (c) and its decision at its nineteenth session regarding the legal effect of the carrier's failure to include the number of original negotiable transport documents in the contract particulars:

(a) To confirm the decision taken at its nineteenth session and to include the proposed text in subparagraph (c);

(b) To retain subparagraph (c) as drafted and to reverse the decision taken at its nineteenth session;

(c) To include the proposed text in subparagraph (c) to exclude its application in those cases where numbers of originals are not stated on the negotiable transport document, but to reverse the decision taken at its nineteenth session; or

(d) To delete all references in the draft convention to the use of multiple originals of the negotiable transport document.

49. There was some support in the Working Group for the first option listed in paragraph 48 above. It was noted that there was no sanction in the draft convention for a failure to include the other contract particulars required pursuant to draft article 37, and that the proposed inclusion in draft article 40 of such a provision in the case of a failure to provide the number of originals of the negotiable transport document would be unique in that regard.

50. However, the Working Group strongly supported the third option set out in paragraph 48 above, to include the text proposed with respect to subparagraph (c), but to reverse the decision taken at its nineteenth session to include a sanction for failing to include the number of multiple originals of the negotiable transport document in the contract particulars.

Conclusions reached by the Working Group regarding draft article 49, subparagraphs (a), (b) and (c):

51. The Working Group was in agreement that:

- The text of subparagraph (a) should remain in the text as drafted;

- The text of subparagraph (b) should remain in the text as drafted;
- The text of subparagraph (c) should be adjusted by changing its opening phrase to, “If the negotiable transport document states that more than one original …”; and
- It reversed the decision it took during its nineteenth session (see A/CN.9/621, para. 296) and decided not to include an additional paragraph in draft article 40 concerning the legal effect of the carrier’s failure to include the number of original bills of lading in the contract particulars.

Subparagraphs (d), (e), (f) and (g)

52. It was observed that the scheme set out in subparagraphs (d), (e), (f) and (g) of draft article 49 was intended to address the current problem of delivery of the goods without presentation of the negotiable transport document or electronic transport record. It was noted that, as discussed in previous sessions, the problem was a structural one arising from the requirements of the underlying sales contract and the length of modern voyages, and that it was frequently encountered in certain trades, such as in the oil industry. It was said that the entire scheme of subparagraphs (d), (e), (f) and (g) was based on the modern ability of the carrier to communicate with the holder regardless of the location of either, and that the onus was thus on the carrier to search for the controlling party or the shipper in order to obtain delivery instructions.

53. There was some support for the view that the establishment of such a system undermined the traditional bill of lading system by institutionalizing the undesirable practice of delivery without presentation of the negotiable transport document or electronic transport record. However, a contrary view was expressed that rather than undermining the bill of lading system, the approach in the provisions in issue was intended to restore to as great an extent as possible the value and the integrity of the traditional bill of lading system.

54. It was generally recognized that the system established by subparagraphs (d), (e), (f) and (g) of draft article 49 intended to protect in such cases both the carrier and the third party acquirer of the negotiable transport document or electronic transport record. There was some support in the Working Group for the text of subparagraphs (d), (e), (f) and (g) of draft article 49 as it appeared in A/CN.9/WG.III/WP.94. However, there were also various proposals to shorten the draft article or amend its subparagraphs, which the Working Group proceeded to consider.

Proposed deletion

55. In support of a proposal to delete subparagraphs (d), (e), (f) and (g) of draft article 49, it was observed that subparagraphs (d), (e) and (f) read together allowed the carrier, in certain circumstances, to deliver the goods to a person other than the holder of a negotiable transport document or electronic transport record. It was suggested that that possibility, while perhaps not ideal, fulfilled a significant practical need in modern shipping. Support was expressed for the system established by those three subparagraphs, but it was noted that an equally pressing concern was the protection of third party holders of a negotiable transport document or electronic transport record who acted in good faith, such as those protected through the

operation of subparagraph (g) of draft article 49. It was suggested that a conflict was created between subparagraphs (d), (e) and (f) on one hand, and subparagraph (g) on the other, not only in terms of the interests protected, but in the actual wording of the provisions as well.

56. As a consequence, it was suggested that subparagraphs (d), (e), (f) and (g) of draft article 49 should be deleted in their entirety, and that the matter of delivery of the goods without presentation of the negotiable transport document or electronic transport record should be left entirely to national law (see A/CN.9/WG.III/WP.99). There was some support in the Working Group for that suggestion.

Deletion of subparagraph (g) and addition to subparagraph (f)

57. Another proposal in respect of subparagraphs (f) and (g) of draft article 49 was made, such that subparagraph (g) would be deleted, and the phrase "or compensation for the failure to deliver the goods" would be added after the phrase "other than the right to claim delivery of the goods" in subparagraph (f) (see A/CN.9/WG.III/WP.87). The rationale given for the addition to subparagraph (f) was that the proposed text would protect carriers from claims for losses or damages for failure to deliver the goods. Further, the deletion of subparagraph (g) was intended to protect carriers from becoming liable in possible cases of so-called "second delivery", such that the third party holder in good faith that became a holder after delivery acquired all of the rights incorporated in the negotiable transport document or electronic transport record, including the right to claim delivery. Some support was expressed for that proposal, although it was observed that the simple elimination of subparagraph (g) might not be sufficient to eliminate the exposure of the carrier, since it could still be held liable as a result of delivering according to the instructions received from the controlling party or the shipper under subparagraphs (d) and (e).

Additions to subparagraph (g) and draft article 50 (2)

58. An additional proposal was made to the Working Group that aimed at protecting carriers from potential exposure to liability in the case of so-called "second deliveries" demanded by good faith acquirers of negotiable transport documents or electronic transport records (see A/CN.9/WG.III/WP.95). It was observed that the current practice of carriers faced with demands for delivery despite the absence of the negotiable transport document or electronic transport record was for carriers to demand from consignees a letter of indemnity often accompanied by a bank guarantee. It was noted that that procedure was a nuisance for the carrier, and an expensive one for the consignee, particularly since the bank guarantee must often be for a large sum. Although it was thought that the system established in draft article 49 for dealing with situations of non-presentation was a positive development, reluctance was expressed to expose the carrier, who was without blame, to potential liability in the face of third party holders.

59. The solution proposed for that problem was twofold:

- To add the following as a second sentence to subparagraph (g) of draft article 49:

> When the contract particulars state the expected time of arrival of the goods, or include a statement on how to obtain information about

whether or not delivery of the goods has taken place, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

- And to add the following new subparagraph (f) to draft article 50 (2):

No security as reasonably required by the carrier is provided for the purpose of protecting the carrier against the risk that it must deliver the goods to a person other than to whom it is instructed to deliver them under article 49, paragraph (d).

60. Support was expressed in the Working Group for that proposal.

Refinement to the proposal concerning subparagraph (g) and draft article 50 (2)

61. While the proposal outlined above in paragraph 59 was thought to be a positive step in terms of solving the problem of non-presentation while protecting the carrier and the third party, it was suggested that it should be refined in two ways. First, since the instructions that the carrier would seek from the controlling party or the shipper in accordance with subparagraphs (d) and (e) would give rise to the potential liability of the carrier under subparagraphs (f) and (g), it was thought that a specific right for the carrier to take a recourse action against the controlling party or the shipper should be included in draft article 49. Secondly, it was felt that once such a right to a recourse action was established on behalf of the carrier, it could be combined in draft article 49 with an obligation on the consignee to establish reasonable security with the carrier. Finally, it was thought that the inclusion of provisions on indemnity and security in draft article 49 would be better-placed than in draft article 50, and that it would obviate the need for a new subparagraph (f) in draft article 50 (2) as set out in paragraph 59 above.

62. The Working Group expressed support for the proposal set out in paragraphs 59 above as refined by the above suggestion.

An additional proposal

63. An additional proposal was made to the Working Group that the problem with which it was grappling might be dealt with by a means similar to that employed in the case of draft article 47 non-negotiable documents requiring surrender. In particular, it was suggested that the operation of subparagraphs (d), (e), (f) and (g) could be limited to those situations where a negotiable transport document or electronic transport record had been issued that stated on the document or electronic record itself that the goods to which it related could be delivered without presentation of the negotiable transport document or electronic transport record. It was thought that such an approach would give sufficient warning to the holder that, in some cases, delivery could be made to another person. A mechanism proposed for the implementation of that suggestion was that a phrase could be inserted prior to subparagraphs (d), (e), (f) and (g) along the following lines: “If a negotiable transport document or electronic transport record that states on its face that the goods may be delivered without presentation of the document or electronic record, the following rules apply:”.

64. Some interest was expressed in exploring the suggestion, although caution was advised in embracing an additional document or electronic record that did not

strictly meet the negotiable and non-negotiable categorization of the draft convention, and that might create a secondary category of lesser-valued negotiable documents and electronic records. However, to facilitate future discussions, the Working Group agreed to include the substance of the proposal in a footnote to the text of the draft convention, in order to allow delegations to consider its implications.

Further drafting suggestions to subparagraph (d)

65. It was observed that, pursuant to subparagraphs (d) and (e), it was not clear whether the carrier may refuse to execute the instructions of the controlling party or the shipper. It was suggested that the carrier's requirement to execute those instructions should be subject to the same requirements as set out in draft article 54:

- That such instructions could reasonably be executed according to their terms; and
- That there would be no interference with the normal operations of the carrier.

66. It was also suggested that the text of the draft convention should be reviewed to ensure consistency in the usage of the terms "controlling party" and "holder". There was support for that suggestion.

Conclusions reached by the Working Group regarding draft article 49, subparagraphs (d), (e), (f) and (g):

67. After discussion, the Working Group agreed:

- The text of subparagraphs (d), (e), (f) and (g) of draft article 49 should be retained;
- The proposal set out in paragraph 59 above and in A/CN.9/WG.III/WP.95 should be implemented into the text of the draft convention, but for its suggestion to add subparagraph (f) to draft article 50 (2);
- The refinement to the above proposal set out in paragraph 61 above should be implemented into the text of the draft convention by the Secretariat; and
- The proposal outlined in paragraphs 63 to 64 above should appear as a footnote to the text in the draft convention.

Draft article 50. Goods remaining undelivered

68. The Working Group was reminded that former draft article 50, set out in A/CN.9/WG.III/WP.56, had been deleted and its substance incorporated into draft article 50 in A/CN.9/WG.III/WP.81, in light of the Working Group's deliberations at the 17th session (A/CN.9/594, paras. 90-93).

Paragraphs 1 and 2

69. It was suggested that the right of the carrier to cause the goods to be sold under subparagraph (c) had the potential to cause significant damage to cargo interests. For that reason, there was some support for a proposal to add a time requirement of sixty days before a carrier could exercise its rights to sell the goods

except in case of perishable goods, or where the goods were otherwise unsuitable for preservation.

70. There was general agreement within the Working Group as to the importance of safeguards to ensure that any measures involving disposal of the goods that the carrier might take pursuant to the draft article were carried out properly. However, it was pointed out that subparagraph 1 (c) already made express reference to the requirements of domestic law. Those requirements could not be fully reproduced in the draft convention, and the Working Group was cautioned against including one particular safeguard, such as a time bar, without including other safeguards contained in some national laws. The Working Group agreed not to introduce a specific time limit into subparagraph 1 (c).

71. The question was asked as to whether the carrier should be free to decide when the circumstances warranted the destruction of the goods or whether such action should only be authorized in specific circumstances to be mentioned in the draft convention. In response, it was noted that draft paragraph 1 already subjected the actions of the carrier to a test of reasonableness and that it would be preferable to leave the possible consequences of unreasonable measures by the carrier entirely to national law rather than attempt to encompass all imaginable circumstances where destruction of the goods might be warranted.

72. A proposal was made to delete the words “unless otherwise agreed and” from paragraph 1 for the reason that it opened the potential for abuse, and small shippers would rarely have an opportunity to enter into a contrary agreement with carriers. It was suggested that it was more important to expressly state the situation in which a carrier might sell or destroy the goods. The contrary view was, as an instrument concerned with commercial relations, rather than consumer protection, the draft convention should respect freedom of contract on the matter. Nevertheless, after having considered those views, the Working Group agreed to delete the words “unless otherwise agreed and” in the draft paragraph.

73. The Working Group accepted a proposal to reverse the order of paragraphs 1 and 2, so as to place the definition on when goods could be deemed to be undeliverable, before the operative provision.

74. It was noted that the term “undelivered” was used in paragraph 1, whereas the term “undeliverable” was used in paragraph 2. It was suggested that the text should be reviewed to determine whether the same term should be used in both paragraphs.

Conclusions reached by the Working Group regarding paragraphs 1 and 2 of draft article 50:

75. The Working Group was in agreement that the text of draft article 50 should be retained subject to the following:

- The order of paragraphs 1 and 2 be reversed;
- The words “unless otherwise agreed and” be deleted from the chapeau of paragraph 1; and
- The Secretariat should examine the use of the term “undelivered” in paragraph 1 as compared to “undeliverable” in paragraph 2, to determine whether one term should be used in both cases.

Paragraphs 3 to 5

76. A proposal was made to include "the notify party" before the consignee in the list of persons to be notified of the arrival of the goods at the place of destination. That proposal did not receive support.

77. There was strong support for a proposal to include a requirement of 14 days in relation to the advance notice to be given under paragraph 3, instead of merely requiring a reasonable advance notice. However, very strong objections were raised against that proposal. It was pointed out that the inclusion of a fixed time period which might be appropriate to longer sea legs but less appropriate in short sea legs, some of which might be covered within a few days only. It was also said that requiring the carrier to retain undelivered goods for 14 days prior to disposing of them might generate considerable cost and even cause a congestion of stored goods in port terminals.

78. In the context of that discussion, it was noted that it was not clear whether draft paragraph 3 envisaged a notice following the arrival of the goods or a notice anticipating their arrival at the place of destination. It was explained that, in the context in which it was placed, the notice in paragraph 3 should logically refer to the notice that the goods had arrived as distinct from an advance notice which was sent prior to the arrival of the goods. It was suggested that the nature of the notice intended to be covered could be further clarified.

79. It was suggested that paragraph 5 should be amended to more clearly delimit the carrier's liability and ensure that the carrier would not be under a continuing liability where destruction or sale of the goods was not open to the carrier. It was suggested that the carrier should be relieved of continuing liability for damage to the goods or other loss or damage which was a consequence of the goods not being received by the consignee, provided the goods were handed over to a suitable terminal authority, public authority or other independent person or authority that took care of the goods. That proposal did not receive support.

80. It was suggested that the words "and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps" be deleted. There was not sufficient support for that proposal, as it was felt that the provision applied where the cargo interest had defaulted on its obligations and therefore an overly onerous burden should not be placed on the carrier in such circumstances.

Conclusions reached by the Working Group regarding paragraphs 3 to 5 of draft article 50:

81. The Working Group was in agreement that the text of paragraphs 3 to 5 of draft article 50 should be retained subject to clarifying that the notice referred to in paragraph 3 was to notice that the goods had arrived at destination.

Paragraph 4

82. It was suggested that a time limit should be specified in paragraph 4 with respect to the period during which the carrier should keep the proceeds.

83. The Working Group was in agreement that the paragraph should be retained and that the matter of the time limit should be determined by national law.

Draft article 51. Retention of goods

84. The Working Group was reminded that it had agreed to include a provision that dealt with the retention of goods in the draft instrument at its seventeenth session (see A/CN.9/594, paras. 114-117).

Conclusions reached by the Working Group regarding draft article 51:

85. The Working Group agreed that the text of draft article 51 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Chapter 11 – Rights of the Controlling Party

86. It was suggested that the heading of the chapter should be replaced with "Right of Control", because the current heading did not fully reflect the essence of the chapter.

87. The Working Group agreed to consider the heading after completing the discussions on the draft articles in this chapter.

Draft article 52. Exercise and extent of right of control

88. The Working Group was reminded that draft article 52 was revised text after the provision was last considered by the Working Group at its seventeenth session (see A/CN.9/594, paras. 10-16).

89. The Working Group agreed that the text of draft article 52 was acceptable.

Draft article 53. Identity of the controlling party and transfer of the right of control

Paragraph 1 (b)

90. The Working Group proceeded to consider the text in draft article 53 as contained in A/CN.9/WG.III/WP.81. A concern was expressed that paragraph 1 (b) of draft article 53 did not specify the party to whom notification should be given. It was noted that the word "its" in paragraph 1 (b) already indicated that the carrier was the party to be given notification.

Paragraph 2 "[provides] [indicates] [specifies]"

91. The Working Group next considered the three alternatives presented in the chapeau of paragraph 2 of draft article 53. There was broad consensus that the approach decided upon by the Working Group with regard to the alternatives in the chapeau of draft article 47 should also be applied in this draft article to maintain consistency in the draft convention.

Paragraph 3

92. It was suggested that, for reasons of consistency, the approach adopted in subparagraph (c) of draft article 49 regarding the issuance of multiple originals of negotiable transport documents should also be reflected in subparagraphs 3 (b) and 3 (c) of draft article 53. It was suggested that the operation of subparagraphs 3 (b)

and 3 (c) of draft article 53, too, should be limited to cases where the negotiable transport document expressly stated that more than one original had been issued. In response to that suggestion, it was observed that the two provisions in question had different purposes. Under draft article 49, subparagraph (c), if more than one original of the negotiable transport document has been issued, the carrier who delivered the goods to the holder of one original transport document would be discharged from liability vis-à-vis the possible holders of the other transport document. In the context of paragraph 3 of draft article 53, however, the transfer of the right of control to a third party might adversely affect the rights of the holder of the remaining transport documents, as the holders who acquired rights in good faith were generally protected under the draft convention. The Working Group was therefore urged to carefully consider the desirability of aligning entirely draft article 49, subparagraph (c), with paragraph 3 of draft article 53.

Paragraph 5

93. A proposal was made to delete the words "in accordance with the Convention" from paragraph 5 of draft article 53, as those words suggested that the right of control would not cease, despite the fact that the goods had actually been delivered, if for whatever reason, the actual delivery was not strictly in conformity with the contract of carriage. The continuation of a right of control despite actual delivery was said to be an anomalous situation, and inconsistent with paragraph 2 of draft article 52, which limited the duration of the right of control for "the entire period of responsibility of the carrier". There was support for that proposal, as well as for an alternative proposal to delete the paragraph 5 in its entirety, since it was said to be redundant in the light of paragraph 2 of draft article 52.

94. In response to those proposals, it was pointed out that in practice there might be situations where the rights of a controlling party needed to be preserved even after delivery had actually taken place. The carrier might deliver the goods against a letter of indemnity, for instance, because the person claiming delivery could not surrender the negotiable transport document. Such a delivery was not provided for in the draft convention, and the legitimate holder of the transport document should not be deprived of the right of control in such a case, since that might affect the remedies available to it. The Working Group was urged to carefully consider those possible situations before agreeing to delete either the words "in accordance with the Convention" or paragraph 5 of draft article 53 in its entirety.

Paragraph 6

95. The Working Group was reminded that paragraph 6 of draft article 53 was slightly revised following the decision of the Working Group when it last considered the provision at its seventeenth session (see A/CN.9/594, paras. 42-45). After discussion on the interplay between paragraph 6 of draft article 53 and draft article 60, as well as the entire chapter 12, it was agreed to postpone discussion on paragraph 6 until draft article 60 and chapter 12 were examined (see paragraphs 122 to 124 below).

Conclusions reached by the Working Group regarding draft article 53:

96. The Working Group was in agreement that:

- The text of paragraph 1 of draft article 53 as contained in A/CN.9/WG.III/WP.81 was acceptable;
- The alternatives "[provides]" and "[indicates]" should be retained in the chapeau in square brackets for future consideration, while the third alternative, "[specifies]", should be deleted;
- The Secretariat should review the text of paragraphs 3 (b) and (c) of draft article 53 with subparagraph (c) of draft article 49 and consider the desirability of aligning those provisions and the extent to which that should be done;
- The text of paragraph 5 of draft article 53 should be put into square brackets until it can be verified that deletion of this paragraph does not harm the substance of the draft instrument. In addition, it should be examined whether deletion of only the last words "in accordance with this Convention" of paragraph 5 would be feasible.

Draft article 54. Carrier's execution of the instructions

Paragraph 2

97. It was suggested that the word "diligently" should be added before "executing any instruction" in paragraph 2 of draft article 54, in order to balance the rights of the parties concerned. It was noted that there was a need to qualify the execution of the instructions in some way, so that the controlling party would not be liable for additional expenses or damage that was attributable to the carrier's lack of diligence in executing the controlling party's instructions. Broad support was expressed for the suggestion.

98. It was proposed that the text in square brackets in paragraph 2 of draft article 54 should be deleted, because the Working Group, at its nineteenth session, had decided to delete all reference to the shipper's liability for delay (see A/CN.9/621, paras. 177 to 184). Consistency with that earlier decision also required the deletion of the text in square brackets in paragraph 2 of draft article 54, since the shipper and the controlling party would often be the same. The proposal of deletion was widely accepted. Some expressions of support for the deletion, however, were qualified by the observation that the deletion of references to liability for delay in paragraph 2 of draft article 54 did not mean that such liability would not arise, since paragraph 2 of draft article 54 dealt with redress of the carrier against the controlling party, and the carrier was itself subject to liability for delay under the draft convention.

99. In the course of that discussion, the view was expressed that paragraph 2 of draft article 54 exposed the controlling party to a potentially substantial liability. It was, therefore, suggested that the Working Group should consider ways to limit the controlling party's exposure, for instance by limiting its liability under paragraph 2 of draft article 54 to foreseeable additional expenses or liability. There was general agreement within the Working Group that the controlling party could indeed be protected against exorbitant reimbursement claims by inserting the word "reasonable" before "additional expenses". However, the Working Group was

divided in respect of a possible limitation of the controlling party's obligation to indemnify the carrier against loss or damage that the carrier might suffer as a result of executing the controlling party's instructions.

100. The Working Group was invited to consider possible means to achieve the proposed limitation. Proposals to that effect included adding words such as "reasonably foreseeable" before the words "loss or damage", or requiring the carrier to give notice or warn the controlling party about the possible magnitude of loss or damage that the carrier might suffer in carrying out the instructions received from the controlling party. However, in the course of the Working Group's discussions, a number of objections were voiced to those proposals. It was said that inserting any such limitation would be contrary to the nature of paragraph 2 of draft article 54, which contemplated a recourse indemnity obligation, rather than an independent liability, for the controlling party. It was also noted in that connection, that to the extent that the controlling party would be asked to indemnify the carrier for compensation that the carrier had to pay to other shippers under the draft convention, those payments by the carrier could not be regarded as being entirely unforeseeable to the controlling party. Furthermore, it was said that any limitation by means of a foreseeability requirement would mean that the carrier would have to bear the loss or damage that exceeded the amount originally foreseen by the controlling party, which was not felt to be an equitable solution. By the same token, the carrier should not have the burden of anticipating all possible types of loss or damage that might arise from the controlling party's instruction and should not be penalized with a duty to absorb loss or damage actually sustained only because the carrier was unable to foresee the loss or damage when considering the instructions received from the controlling party.

101. Having considered the various views that were expressed, the Working Group agreed that it would be preferable to refrain from introducing a requirement of foreseeability as a condition for the controlling party's obligation to indemnify the carrier under paragraph 2 of draft article 54.

Paragraph 4

102. It was proposed that the text in square brackets in paragraph 4 of draft article 54 should be retained and the square brackets removed. This difference in approach, as compared to the decision taken by the Working Group in respect of the same phrase in paragraph 2 was justified on the grounds that paragraph 4 referred to the carrier's own liability for delay, whereas paragraph 2 was conceived to indirectly make the controlling party liable for delay. Broad support was expressed to remove the square brackets and retain the text, as it would provide greater legal certainty by making it clear that articles 17 to 23 also apply to the carrier's liability under paragraph 4 of draft article 54.

Conclusions reached by the Working Group regarding draft article 54:

103. The Working Group was in agreement that:

- The word "reasonable" should be inserted before or after "additional" in paragraph 2;
- The word "diligently" should be inserted before "executing any instructions pursuant …" in paragraph 2;

- The text in square brackets in paragraph 2 should be deleted; and
- The text in square brackets in paragraph 4 should be retained and the square brackets should be deleted.

Draft article 55. Deemed Delivery

104. A concern was expressed regarding the reference to chapter 10 in draft article 55. It was questioned whether requirements to give notice of arrival should apply in cases where delivery was made under the instructions of the controlling party. The Working Group agreed that the text of draft article 55 was acceptable in substance.

Draft article 56. Variations to the contract of carriage

105. It was observed that paragraph 2 of draft article 56 provided that variations to the contract of carriage were required to be stated in negotiable transport documents or incorporated into negotiable electronic transport records, but that their inclusion in non-negotiable transport documents or electronic transport records was at the option of the controlling party. Some concern was raised regarding the clarity of the term "at the option of", and a suggestion was made that it should be deleted so as to treat negotiable and non-negotiable transport documents and electronic transport records in similar fashion. That proposal was not accepted, however, since non-negotiable transport documents and electronic transport records were only one means of proving the contract of carriage, rather than the only means, to treat them the same way as negotiable transport documents and electronic transport records would be to unnecessarily elevate their status, as well as to invite practical difficulties in recovering the non-negotiable documents and records to incorporate the changes. Further, it was pointed out that the carrier always had the option of issuing new non-negotiable transport documents and electronic transport records if it so desired. However, the suggestion to replace the term "at the option of" with "upon the request of" was supported by the Working Group.

106. In response to the question whether non-negotiable transport documents that required surrender should also be included in paragraph 2 of draft article 56, the Working Group agreed that they should be included, and that they should be treated in a similar fashion to that of negotiable transport documents.

Conclusions reached by the Working Group regarding draft article 56:

107. The Working Group agreed that:

- The same treatment should be given to non-negotiable transport documents that required surrender as that given to negotiable transport documents in paragraph 2 of draft article 56, and requested the Secretariat to make the appropriate adjustments to the text; and
- In paragraph 2, the phrase "at the option of the controlling party" should be substituted with "upon the request of the controlling party".

Draft article 57. Providing additional information, instructions or documents to carrier

108. The Working Group was reminded that its most recent consideration of draft article 57 on the provision of additional information, instructions or documents to the carrier was at its seventeenth session (see A/CN.9/594, paras. 60 to 64).

109. It was explained that the purpose of draft article 57 was not to create an additional obligation with respect to cargo interests, but to provide a mechanism whereby the carrier could obtain additional information, instructions and documents that became necessary during the course of the carriage. It was noted that while draft article 29 appeared to be similar, it concerned a different obligation, that is, the obligation of the shipper to provide information, instructions and documents as a pre-condition for the transport of the goods.

110. By way of further explanation, the Working Group heard that the intention of draft article 57 was to create a system whereby the carrier not only received instructions from the controlling party pursuant to draft articles 52 and 53, but that the carrier could also request information, instructions or documents from the controlling party further to draft article 57. Should such a need for instructions, information or documents arise during the carriage, the provision was intended to place some onus on the controlling party to recognize that its obligation to the carrier in this regard was an important one.

111. While it was thought by some that the consequences of a failure to fulfil the obligation in draft article 57 would be left to national law, it was suggested that the practical approach under the draft convention if any loss or damage was caused as a result of a failure of the controlling party to provide such information, instructions or documents, the carrier could resort to draft article 17 (3) (h) to relieve itself of liability for the loss or damage.

112. It was observed that draft article 29 contained similar obligations to those contained in draft article 57, but that article 29 concerned the obligations of the shipper rather than the controlling party. It was suggested that, in order to clarify the difference in the intended application of draft article 57 as compared with draft article 29, the obligation that the controlling party "shall provide such information, instructions or documents" should be reduced, such as by rephrasing the provision instead to allow the carrier to request the information, instructions or documents from the controlling party. That proposal was not taken up by the Working Group. Further, while it was recognized that the contexts of draft articles 29 and 57 were different, it was suggested that the Secretariat should review the two provisions in order to align the approach taken in draft article 57 with that taken in draft article 29, such as, for example, with respect to the timely provision of information. There was support in the Working Group for that proposal.

Conclusions reached by the Working Group regarding draft article 57:

113. The Working Group was in agreement that:

- The text of draft article 57 should remain in the text as drafted; and
- The Secretariat should be requested to consider aligning the text with that of draft article 29 on the shipper's obligation to provide information, instructions

and documents, bearing in mind the different contexts of draft articles 29 and 57.

Draft article 58. Variation by agreement

114. While there was general agreement in the Working Group with the text of the provision as it appeared in A/CN.9/WG.III/WP.81, it was observed that should the Working Group decide to amend or delete draft article 53 (5), a correction would have to be made to draft article 58. It was further observed that, if draft article 53 (5) were deleted, it might not be sufficient in the context of draft article 58 to merely change the reference from "article 53, paragraph 5" to "article 52, paragraph 2". The Secretariat was requested to take note of those drafting concerns.

Chapter 12 – Transfer of Rights

115. The Working Group was reminded that its most recent consideration of chapter 12 on transfer of rights was at its seventeenth session (see A/CN.9/594, paras. 77 to 78), when it had agreed that its consideration of chapter 12 on transfer of rights should be deferred for future discussion, following consultations. The Working Group had not considered the text since that time, and it was recalled that a decision on the disposition of chapter 12 was necessary.

116. To that end, the Working Group heard a proposal intended to facilitate discussion regarding the disposition of chapter 12 as presented in A/CN.9/WG.III/WP.96. It was suggested that it would be a mistake for the Working Group to eliminate the entire chapter from the draft convention as a result of some of its provisions being perceived as too difficult, too contentious or not yet mature enough for inclusion in the draft convention. Instead, it was thought that some of the provisions in the chapter should be retained in the draft convention as useful and necessary. It was proposed that draft article 59 be retained as having been non-contentious in previous readings, but being of great technical importance for the purposes of electronic commerce in order to achieve functional equivalence with paper documents. In terms of draft article 60, it was suggested that paragraphs 1 and 3 were important to retain in the draft convention, since they had been relatively non-contentious in previous readings, and given their importance in terms of clarifying the legal position of intermediate holders such as banks. However, it was thought that paragraph 2 of draft article 60 could be deleted since it concerned the sensitive matter of transfer of liabilities, which was an issue not yet considered ripe for inclusion in the draft convention. Finally, it was proposed that draft article 61 should not be retained in the draft convention, as being a problematic provision combining applicable law with substantive legal provisions.

117. There was strong support in the Working Group for the retention of portions of chapter 12 in the draft convention. While there was general agreement with the proposal set out in A/CN.9/WG.III/WP.96 regarding which provisions should be retained, a number of delegations felt that it was also important to retain draft article 60 (2) in the draft convention for further consideration.

Conclusions reached by the Working Group regarding the disposition of chapter 12:

118. The Working Group was in agreement that:

- Draft article 59 should be retained in the text for further discussion;
- All three paragraphs of draft article 60 should be retained in the text for further discussion; and
- Draft article 61 should be deleted from the draft convention.

Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued

119. While a question was raised regarding the appropriateness in paragraph 2 of the use of the terms "made out to order or to the order of a named person" in respect of negotiable electronic transport records, the Working Group approved the text of draft article 59.

Draft article 60. Liability of the holder

Paragraph 1

120. In considering the text of paragraph 1 of article 60, it was suggested that, while not inaccurate, the phrase "and that does not exercise any right under the contract of carriage" might be perceived in a negative fashion, and should be deleted. In response, the view was expressed that the provision would become too vague if that phrase were deleted. Another view was that the provision could have the unintended consequence of broadly pre-empting the application of national law with respect to the liability of holders if the phrase were deleted. An additional proposal was suggested that in order to satisfy the concerns aimed at through the suggested deletion, the title of the provision could instead be changed to "position of the holder", or a similar, more neutral term.

121. The Working Group generally approved of the text of paragraph 1 as it appeared in A/CN.9/WG.III/WP.81.

Paragraph 1 and relationship with draft article 53 (6)

122. It was observed that, while paragraph 1 of draft article 60 provided that the holder did not assume any liability under the contract of carriage solely by reason of being a holder, draft article 53 (6) provided that a person that transferred the right of control without having exercised it was, upon such transfer, discharged from the liabilities imposed on the controlling party. It was thought that the text of paragraph 1 of draft article 60 was more precise than that of draft article 53 (6).

123. It was suggested that paragraph 6 of draft article 53 could be amended by following the more precise approach of paragraph 1 of article 60. That suggestion was not taken up, as the Working Group decided to delete draft article 53 (6) in its entirety.

Conclusions reached by the Working Group regarding draft articles 60 (1) and 53 (6):

124. The Working Group was in agreement that:

- The text of draft article 60 (1) should remain in the text as drafted;
- The Secretariat should consider the advisability of changing the title of the provision to "position of the holder", or a similar term; and
- Draft article 53 (6) should be deleted.

Paragraph 2

125. It was clarified that, although A/CN.9/WG.III/WP.96 suggested the deletion of paragraph 2 of draft article 60 with a view to expediting the negotiation of the draft convention, the view of the delegation presenting that document was that paragraph 2 nonetheless had a useful substantive role to play and should be retained. It was also indicated that the issues treated in paragraph 2 provided for greater harmonization in the draft convention. Since the draft had achieved harmonization regarding transfer of rights, it was thought to be appropriate that harmonization regarding the transfer of liabilities such as that set out in paragraph 2 should also be sought. For those reasons, there was support in the Working Group for the retention of paragraph 2.

126. However, there was also support in the Working Group for the deletion of paragraph 2 as being too controversial for its content to be agreed upon in a timely fashion for completion of the draft convention. In particular, it was noted that the concept in the draft provision that the liabilities were incorporated into the transport document or electronic transport record did not exist in all legal systems, and that seeking acceptable harmonization on this point could be very difficult. The view was expressed that incorporating paragraph 2 into the draft convention could cause some countries to hesitate in ratifying the draft convention, and that this would be an unfortunate price to pay for a relatively unimportant provision. There was some support for that strongly held view.

127. In response, it was suggested that paragraph 1 of draft article 60 already indicated that the holder was subject to a certain amount of liability, and that paragraph 2 actually operated to limit that potential liability to the obligations contained in the transport document or electronic transport record. In a similar vein, it was observed that simple deletion of paragraph 2 would not necessarily remove all liability on the holder pursuant to the draft convention, and that if the Working Group decided to delete the provision, the draft convention should be very carefully reviewed to ensure that there were no lingering rules placing liability on the holder.

128. Despite differing views regarding how best to deal with paragraph 2, both those in the Working Group in favour of its retention and those in favour of its deletion were unanimous in concluding that, whatever the fate of the provision, the first alternative text in square brackets was preferable. As such, the first variant should be retained and the brackets around it deleted, and the second alternative text in square brackets should be deleted in its entirety. Further, a drafting question was raised whether the phrase in the first alternative, "liabilities imposed on it", would be better recast as, "liabilities provided for", in order to reflect that the document or record would not operate to impose liabilities on the holder.

Conclusions reached by the Working Group regarding draft articles 60 (2):

129. The Working Group was in agreement that:

- The text of draft article 60 (2) should remain in the text but square brackets should be placed around it to indicate the divided views of the Working Group; and
- The first alternative text in square brackets should be retained and the brackets around it deleted, and the second alternative text should be deleted.

Paragraph 3

130. While there was general approval in the Working Group for the text of draft paragraph 3 as it appeared in A/CN.9/WG.III/WP.81, a question was raised regarding whether the opening phrase of the paragraph, "For the purposes of paragraphs 1 and 2 of this article [and article 44]", was necessary. There was some support for the view that the phrase did not appear to be necessary, but that the draft convention should be examined in order to ensure that there were no additional provisions in the text to which this paragraph should not apply, thus paving the way for the deletion of the opening phrase.

Conclusions reached by the Working Group regarding draft articles 60 (3):

131. The Working Group was in agreement that:

- The text of paragraph 3 should remain in the text without square brackets but including the text retained therein; and
- The draft convention should be examined to see whether the opening phrase, "For the purposes of paragraphs 1 and 2 of this article [and article 44]", could be safely deleted.

Draft article 61. When no negotiable transport document or negotiable electronic transport record is issued

132. While there was general agreement in the Working Group that draft article 61 should be deleted from the draft convention, it was observed that, while subparagraphs (a), (b) and (c) were applicable law provisions that were problematic, subparagraph (d) was a substantive legal provision. The question was raised whether subparagraph (d) could be retained in the draft convention, since it dealt with substantive aspects of the transfer of rights and liabilities. In response, it was indicated that, while subparagraph (d) did not concern private international law, it was nonetheless quite contentious, particularly subparagraph (iii) thereof concerning the transferor and the transferee's joint and several liability for liabilities attached to the right transferred. Consequently, it was thought that subparagraph (d) should also be deleted from the draft convention, and possibly considered for future work.

Chapter 13 – Limits of Liability

Draft article 62. Limits of liability

133. The Working Group proceeded to consider the text of draft article 62 as contained in document A/CN.9/WG.III/WP.81.

General comments

134. The Working Group was reminded that it had thus far had general exchanges of view on the limits of liability. The exploratory nature of those earlier discussions was reflected by the fact that paragraph 1 of the draft article did not yet indicate a proposed figure for the carrier's limits of liability.

135. By way of general comment, the Working Group was reminded of its earlier understanding at which it had arrived at its eighteenth session (Vienna, 6-17 November 2006), that any decision on the limit of liability was to be treated as an element of the overall balance in the liability regime provided in the draft convention (A/CN.9/616, para. 171). There was support for the suggestion that the consideration of the limit of the carrier's liability under draft article 62, paragraph 1, should not be dissociated from certain other provisions in the draft convention, including: the special amendment procedure for the level of the limitation on the carrier's liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damage (draft articles 26 and the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

Arguments in favour of liability limits closer to those in the Hamburg Rules

136. There was wide and strong support for the view that the draft convention should increase the limits for the carrier's liability, as compared to the limits provided for under the Hague-Visby Rules, and that the new limits should not be lower than those set forth in the Hamburg Rules (i.e. 835 Special Drawing Rights ("SDR") per package or 2.5 SDR per kilogram of gross weight of the goods lost or damaged). There were also expressions of support for the view that, nearly thirty years after their adoption, the liability limits in the Hamburg Rules themselves no longer reflected the realities of commerce and international transport, so that the draft convention should envisage a substantial increase over and above the amounts set forth in the Hamburg Rules, ideally by raising the per package limitation to 1,200 SDR, or at least to the level provided for in the 1980 United Nations Convention on International Multimodal Transport of Goods (i.e. 920 units of account per package of other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged).

137. As a further argument in favour of an increase in the liability limits, it was pointed out that the limits of liability in the context of a multimodal transport were considerably higher than the maritime limits established in the Hague and Hague-Visby Rules. It was explained that carriers engaging in multimodal transport were usually exposed to different limits of liability (ranging from 8.33 SDR

per kilogram for road transport to even 17 SDR per kilogram for air transport). As the draft convention had door-to-door coverage, the liability limits established in draft article 62, paragraph 1, should not be significantly lower than the liability limits applicable to other modes of transport. Failure to set the limits for the carrier's liability at an acceptable level, as compared to other modes of transportation, might prevent some countries from joining the draft convention, unless they were given the possibility to apply higher limits for domestic or non-localized incidents of loss or damage, a result which was recognized as being contrary to the objective of achieving a high degree of uniformity.

138. It was noted that broad containerization had meant that cheaper goods could be transported in containers more economically than in the past. Thus, the claim that the limits of liability provided for under the Hague-Visby Rules would suffice to cover most cargo claims, the average value of which would be lower than the Hague-Visby limits, could be misleading in attempting to decide upon an equitable limit for the liability of the carrier. Instead, it was pointed out that the value of high-value cargo had increased over time, and that inflation had also clearly affected the value of goods and depreciated the limitation amounts since the adoption of existing maritime transport conventions, which had been negotiated decades ago. The possibility to increase the carrier's liability by declaring the actual value of cargo was said not to constitute a viable option, since ad valorem freight rates were in some cases prohibitively expensive and in any event too high for most shippers in developing countries.

139. It was further observed that in today's world a significant volume of high-value goods was carried by sea, which for many countries was the only feasible route for foreign trade. A large portion of those goods (such as paper rolls, automobiles, heavy machinery and components of industrial plants) was not packed for transportation purposes, so that the liability limits for gross weight of carried goods under the Hague-Visby Rules were far from ensuring adequate compensation. Anecdotal evidence obtained from cargo insurers suggested that they would in most cases absorb the cost of insurance claims without seeking recourse from the carrier's insurers because the amounts recoverable would be insignificant when compared to the payments made to the cargo owners. Besides an increase in the per package limitation, the Working Group was invited to consider a substantial increase in the limits per gross weight of cargo, so as to align them to the higher limits currently applicable to road transport under the Convention on the Contract for the International Carriage of Goods by Road, 1956 ("CMR") (i.e. 8.33 SDR per kilogram of gross weight).

140. It was also argued that an increase of liability limits would not likely have a dramatic effect on carriers' liability insurance given the small relative weight of insurance in freight costs. It was pointed out that studies that had been conducted at the time the Hamburg Rules entered into force had suggested that the increase in the liability limits introduced with the Hamburg Rules would influence liner freight rates only by 0.5 per cent of the total freight rate, at the most. In some countries, the liability limits for domestic carriage by sea had in the meantime been raised to 17 SDR per kilogram of gross weight, without any adverse effect being felt by the transport industry.

141. It was also said that an increase in the carrier's liability would shift to their insurers part of the risks for which cargo owners currently purchased cargo

insurance. It was argued that this by itself might prevent an increase in transportation costs to be eventually borne by consumers, since mutual associations offering protection and indemnity insurance ("P&I clubs") were known for working efficiently and might offer extended coverage to their associates at lower rates than commercial insurance companies offered to cargo owners.

142. The Working Group was further reminded that the principle of monetary limitation of carrier's liability had been introduced in the early 20th century as a compromise to ban the practice of carriers unilaterally excluding their liability for cargo loss or damage, at a time when such liability was not subject to a monetary ceiling under most domestic laws. Apart from the transport industry, very few other economic activities enjoyed the benefit of statutory limits of liability. Besides, sea carriers already enjoyed a double limitation of liability. Indeed, the value of the goods already set the limit for the overall liability of the carrier, including for consequential loss or damage caused by loss of or damage to the goods. For higher-value goods, the carrier's liability was further limited by the monetary ceiling set forth in the applicable laws or international conventions. The combination of those rules already placed carriers in a privileged position, as compared to other business enterprises, and that circumstance should be taken into account when considering adequate monetary liability limits, which should not be allowed to stagnate at a level detrimental to cargo owners.

143. In addition to the historical and commercial issues discussed by the Working Group in its consideration of the factors involved in choosing an appropriate level for the limitation of the carrier's liability, the Working Group was encouraged to take into account certain additional factors. In particular, it was said that regard should be had to the need to ensure broad acceptability of the draft convention, such as through careful consideration of the level of the limitation on the carrier's liability in relation to earlier maritime transport conventions. There was support for the view that it was preferable to strike a middle ground in choosing an appropriate limitation level, which might require an increase from levels in historical maritime conventions. Thus far, 33 countries had ratified the Hamburg Rules and a number of other countries had aligned the limits of liability provided in their domestic laws with the limits provided for in the Hamburg Rules. It was said that it would be extremely difficult to persuade domestic legislators and policy makers in those countries to accept, in an instrument to be finalized in the year 2008, liability limits that were lower than those introduced by the Hamburg Rules in 1978. Concern was expressed that anything other than a substantial increase in the level of the limitation from previous maritime conventions might be perceived as a move backwards rather than forwards.

Arguments in favour of liability limits closer to those in the Hague-Visby

144. In response to calls for a substantive increase in the liability limits, there was also strong support for the view that the draft convention should aim at setting the limits for the carrier's liability in the vicinity of the limits set forth in the Hague-Visby Rules (i.e. 666.67 SDR per package or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher), possibly with a moderate increase.

145. The Working Group was reminded of the general principle for which a limitation on the carrier's liability was included in the draft convention and in other

transport conventions. It was said the primary purpose of such provisions on limitation of liability was to regulate the relationship between two commercial parties in order to entitle each of them to obtain a benefit. It was recalled that, without the benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and that where such goods were in containers, the carrier would have no knowledge regarding their contents, thus potentially exposing the carrier to very high and unexpected risks. Rather than pay expensive insurance costs, and in order to share the burden of that potentially very high risk, the carrier would have to apportion it to every shipper through an increase in freight rates. By allowing for a limitation of the carrier's liability, this allocation of risk allowed the costs of both shippers and carriers to be reduced, with the trade-off that full compensation for high-level losses would not be possible. It was further observed that the aim of an appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but that it would not so limit too many claims. It was also noted that the optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet to provide for a proper allocation of risk between the commercial parties.

146. The view was expressed that the limits of liability provided in the Hague or Hague-Visby Rules have proven to be satisfactory. It was observed that the limitation on the carrier's liability that appeared in paragraph 1 allowed for a limitation level on a per package or a per kilogram basis, whichever was higher. It was recalled that the Hague Rules contained only a per package limitation, while the Hague-Visby and Hamburg Rules contained both per package and per kilo limitation provisions, but that each of those conventions predated the advent of modern container transport. The importance of this was said to be that prior to widespread containerization, most goods were shipped in a crate or a large wooden box that counted as one package, while with the widespread use of containers, the per package limitation level was instead based on the number of packages inside the container. This development in practice increased the amounts recoverable from the carrier, as compared with the per kilogram limitation level or pre-container per package limitation would have allowed. It was further observed that, through the method in which the goods were packed for shipment, the shipper could essentially unilaterally choose whether any claim for loss or damage would be on the basis of a per package or a per kilogram calculation.

147. The essential purpose of limitation of liability, it was stated, was to ensure predictability and certainty. It was observed that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated on the basis of either the limitation per package or the limitation per kilogram, since the value of most cargo carried by sea was lower than the Hague-Visby limits. By way of explanation, it was stated that packages in the practice of modern containerized transport had generally become smaller and that it was generally recognized that, in containerized transport, the notion of "package" applied to the individual packages inside the container and not to the container itself. From a similar perspective, it was stated that, since the adoption of the Visby protocol, the freight rates in maritime trade had decreased and that such decrease had made shipments of very low value cargo feasible.

148. It was also observed that it would be incorrect to expect that the liability limits should ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. It was recalled that paragraph 1 provided for an exception when the "nature and value" of the goods lost or damaged had been declared by the shipper before shipment and included in the contract particulars, or when a higher amount had been agreed upon by the parties to the contract of carriage. Shippers who delivered high value cargo for shipment were expected to be aware of the applicable liability limits and had the option to declare the actual value of the goods against payment of a commensurate higher freight, or to purchase additional insurance to supplement the amounts not covered by the carrier.

149. In addition, it was reiterated that the liability limits in the Hague-Visby Rules were often much higher in practice than might appear at first sight, and that given the volume of container traffic and the "per package" liability limit set out therein, they were often much higher than those in the unimodal transport regimes, where the liability limits for recovery were based only on weight. By way of example, it was said that given the typically higher value of cargo carried by air, the liability limits set forth in the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (Montreal Convention) (i.e. 17 SDR per kilogram of gross weight) only covered some 60 per cent of the claims for loss or damage to air cargo. The portion of cargo claims covered by the liability limits set forth in the CMR (i.e. 8.33 SDR per kilogram of gross weight) was said to be probably even less than 60 per cent.

150. In further support of the view that the limits of liability provided in the Hague or Hague-Visby Rules were satisfactory, it was said that the limitation levels of other transport conventions, such as the CMR or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 ("CIM-COTIF") conventions, were not directly comparable to those in the maritime transport conventions, since several of the unimodal transport conventions included only per kilogram limitation levels. Thus, it was said, while the per kilogram limitation level was much higher than the Hague-Visby level, in fact, the level of recovery was much greater under those conventions that allowed for a per package calculation of the limitation level. It was also said that certain other conventions, such as the Montreal Convention, set a high limitation level in comparison with other transport conventions, but that they also contained provisions rendering their limitation on liability incapable of being exceeded, even in the case of intentional acts or theft, and that the freight payable for the mode of transport covered by those other transport conventions was much higher than under the maritime transport conventions. Further, it was observed that it could be misleading to compare the regimes from unimodal transport conventions, since each convention contained provisions that were particularly geared to the conditions of that type of transport. In this regard, it was noted that it would be helpful to obtain actual figures with respect to recovery in cases of loss or damage to the goods, and to what extent the per package and per kilogram limits had been involved in those recoveries, but that such information had been sought from various sources and was difficult to obtain.

151. In further support of the adequacy of the liability limits of the Hague-Visby Rules, it was suggested that, in the bulk trade, the average value of cargo had not increased dramatically since the time of earlier maritime conventions, and that, in the liner trade, the average value of the cargo inside containers had not increased dramatically either. A note of caution was voiced that setting the limitation level for the carrier's liability at the level set forth in the Hamburg Rules, which currently governed only a relatively small fraction of the world's shipping, would represent a significant increase for the largest share of the cargo in world trade, which was currently governed by the lower limits of the Hague-Visby Rules, or even lower limits, as was the case in some of the world's largest economies. The need to absorb and spread the higher costs generated by an increase in the liability limits would be that lower-value cargo would be expected to pay a higher freight, even though it would not benefit from the increased liability limits, which would mean that shippers of lower-value cargo, such as commodities, would effectively subsidize the shippers of highest value cargo.

Scope of paragraph 1

152. Concern was expressed with respect to the application of the limit on liability in paragraph 1 to "the carrier's liability for breaches of its obligations under this Convention." It was observed that this phrase had replaced the phrase "the carrier's liability for loss of or damage to or in connection with the goods" throughout the text of the draft convention when it had been consolidated as A/CN.9/WG.III/WP.56. The phrase "loss of or damage to or in connection with the goods", which had been used in the Hague-Visby Rules, had been considered vague, and as giving rise to uncertainty, and it was thought that the use of the phrase "breaches of its obligations under this Convention" was a drafting improvement that lent the draft convention greater clarity.

153. However, it was pointed out that while there may have been no intention in replacing the phrase to change the scope of the provision, it appeared that the limit on liability in paragraph 1 of the draft convention was broader than that of the Hague-Visby Rules, in that it applied to all breaches of the carrier's obligations under the draft convention rather than simply relating to the loss or damage to or in connection with the goods. The Working Group was cautioned against over-estimating the difference in scope suggested by the two terms, and it was noted that the main additional obligation that was covered by both phrases was liability for misdelivery, which was also included in the Hague-Visby Rules, although not expressly. In addition, it was noted that the main additional obligation now included in the draft convention that had not been included in the Hague-Visby Rules was the liability of the carrier for misinformation. In regard to the different phrases, the question was raised whether the Working Group intended to limit the carrier's liability with respect to all of the apparently broader category, or whether the limit on liability in paragraph 1 was intended to be confined to loss or damage related to the goods. The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals to reflect the policy choice made by the Working Group.

Further consideration of draft article 62

154. The Working Group noted that, among the views expressed during the debate, there was a preponderance of opinion for using the liability limits set forth in the Hamburg Rules, with a more or less substantial increase, as a parameter for finding adequate liability limits for the draft convention. However, the Working Group also noted that there was a strongly supported preference for liability limits in the vicinity of the liability limits provided for in the Hague-Visby Rules. The Working Group therefore agreed that no decision on the limits of liability could be made at the present stage.

155. The Working Group further noted the interconnection between its consideration of the limit of liability and other aspects of the draft convention, including the special amendment procedure for the level of the limitation on the carrier's liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damages (draft articles 26 and the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

156. The Working Group therefore agreed to revert to the issue of limits of liability after it had had an opportunity to examine chapter 20 (Final clauses).

Further consideration of the limits of liability

157. Following its earlier exploration of views, the Working Group proceeded to consider further paragraph 1 of draft article 62 on limits of liability, as well as related provisions, with a view to making progress in terms of arriving at figures that could be provisionally inserted into that article for the carrier's limitation of liability.

Associated issues

158. In keeping with its earlier discussion, the Working Group was reminded that there was support for the view expressed at that time that a discussion of the proposed limits of liability for insertion into paragraph 1 of article 62 should not be dissociated from a group of provisions, including: paragraph 2 of draft article 62, as well as to the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192), and draft articles 97 and 99 (see paragraph 135 above). The view was also expressed that other issues with respect to the overall balance of liabilities in the draft convention could be said to be associated with a discussion of the level of the carrier's limitation on liability, such as the period of responsibility of the carrier (draft article 11); the basis of liability of the draft convention (draft article 17); delay in delivery of the goods (draft article 21); the period for notice of loss, damage, or delay (draft article 23); the limitation of the carrier's liability for delay in delivery (draft article 63); and the special rules for volume contracts (draft article 89).

Domestic considerations

159. The Working Group was reminded that a number of States could face strong domestic opposition to changes in the existing limitation level for the carrier's liability in those States. For some, it was thought that although the limitation on liability in the Hague-Visby Rules was currently in force domestically, a small increase of that level would likely be acceptable, while with respect to others, there was some expectation that an increase of the limitation levels to those contained in the Hamburg Rules might be acceptable, but that no amount higher than that would be accepted. In that respect, there was some concern expressed regarding the overall increase that a specific domestic regime might undergo with such an increase in the limitation amounts, and it was observed that a large amount of world trade was currently conducted using limitation levels on the lower end of the scale. On the other end of the spectrum, it was recalled that it could be problematic for many States to accept any limitation level lower than that set out in the Hamburg Rules, and that previous increases in the limitation amounts set out in other international conventions had not caused major problems for States implementing them. Further, it was noted that there was some expectation that the limitation levels agreed in the draft convention might be slightly higher than those in the Hamburg Rules, given the passage of time since the adoption of the Hamburg Rules.

160. However, the Working Group also recognized that the attainment of a level of harmony between States currently party to the Hague Rules or the Hague-Visby Rules and those that were Contracting States to the Hamburg Rules would be desirable, and would contribute greatly to the overall harmonization of the current regimes covering the international carriage of goods by sea. Concern was expressed that a failure to reach agreement in this regard could lead to renewed efforts toward the development of regional and domestic rules regarding the carriage of goods by sea, thus causing further fragmentation of the international scheme. There was support in the Working Group for the pursuit of productive discussions that would lead to a harmonized result.

Specific figures

161. In light of the considerations set out in paragraphs 157 to 160 above, and in light of the previous discussion in the Working Group on this subject during its current session (see, also, paragraphs 133 to 156 above), a number of specific proposals for the limitation of the carrier's liability were made. Those proposals, which received varying amounts of support, could be described as:

(a) A proposal to adopt slightly higher limitation amounts than those set out in the Hague-Visby Rules, i.e. slightly higher than 666.67 SDR per package and 2 SDR per kilogram of weight of the goods lost or damaged;

(b) A proposal to adopt the limitation amounts in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(c) A proposal to adopt slightly higher limitation amounts than those in the Hamburg Rules, with no specific amount named;

(d) A proposal to adopt the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation;

(e) A proposal to adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 SDR per package and 8.33 SDR per kilogram; and

(f) A proposal to adopt still higher limitation amounts than those in the Hamburg Rules, i.e. 1,200 SDR per package and 8.33 per kilogram.

162. In addition to the proposal of specific figures for inclusion in paragraph 1 of draft article 62, there was support for treating the provisions listed in paragraph 135 in a manner such as to achieve an overall balance in the draft convention. In particular, if limitation levels on the higher end of the spectrum were chosen, there was support for the view that it would be appropriate to delete certain of those provisions, since the higher limitation amounts would provide sufficient protection for cargo interests.

Compromise proposal

163. In light of the thorough discussion of the issue that had taken place in the Working Group, and the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a compromise proposal was made. The elements of the proposal, which were to be treated as parts of an entire package, were as follows:

(a) The level of the carrier's limitation of liability to be inserted into paragraph 1 of draft article 62 should be the amounts set out in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(b) The level of the carrier's limitation of liability for delay in delivery inserted into draft article 63 should be the same as that of the Hamburg Rules, i.e. 2.5 times the freight payable on the goods delayed;

(c) Paragraph 2 of article 62 with respect to non-localized damage to the goods was said to be in conflict with the limited network principle in draft article 26 and should be deleted;

(d) Draft article 99 should be deleted since the operation of the so-called "tacit amendment procedure" would require a State to denounce the Convention in cases where an amendment was agreed to which the State did not wish to be bound and since its operation could require as long as nine years to accomplish; and

(e) The Working Group should reverse its decision from its nineteenth session to include in the draft convention a provision on national law in proposed new draft article 26 bis (see A/CN.9/621, paras. 189 to 192).

164. There was a positive overall reception in the Working Group for the compromise package set out in the paragraph above, in recognition of the fact that a strong preference had been expressed in the Working Group for using the limits in the Hamburg Rules as a maximum or a minimum basis for further negotiations. A few concerns were raised with respect to some of its constituent elements as follows:

(a) Given the decision of the Working Group at its nineteenth session to subject the carrier's liability for delay in the delivery of goods to freedom of contract of the parties (see A/CN.9/621, paras. 177 to 184), it was thought that raising the limitation of the carrier's liability for delay to 2.5 times the freight from the current "one times the freight" currently in draft article 63 was not a meaningful

bargaining chip in the overall compromise, since the carrier would have either excluded its liability for delay altogether, or would have, by implication, agreed to that amount in any event;

(b) A view was expressed that paragraph 2 of draft article 62 should be retained on the basis that, if the limitations on liability in the draft convention were high enough to allow for adequate compensation for damaged cargo, there would be no need to resort to the use of the higher liability limits set out in unimodal transport regimes pursuant to that provision. However, that same argument was also suggested as a reason for which to delete the provision, and it was observed that the prevailing preference during the nineteenth session of the Working Group had been in favour of its deletion (see A/CN.9/621, para. 200); and

(c) There was some support for the retention for the time being of the draft article 99 tacit amendment procedure, since it was thought to allow for a faster amendment process than a protocol to the convention. In this respect, a proposal was made that if draft article 99 were deleted, a so-called "sunset" clause should be included in the text in its stead, so as to provide that the draft convention would no longer be in force after a certain time.

165. While not considered as part of the overall compromise package, the Working Group was reminded that, as observed earlier in the session (see paragraphs 152 and 153 above), it should take into consideration concerns regarding the possible change in the scope of paragraph 1 of draft article 62, brought about by the current phrase in the text "the carrier's liability for breaches of its obligations under this Convention."

Provisional conclusions regarding the limitation on the carrier's liability:

166. It was provisionally decided that, pending further consideration of the compromise proposal on limitation of the carrier's liability:

- The limitation amounts of the Hamburg Rules would be inserted into the relevant square brackets in paragraph 1 of draft article 62, i.e. 835 SDR per package and 2.5 SDR per kilogram;
- A figure of "2.5 times" would be inserted into the remaining square brackets of draft article 63, and "one times" would be deleted;
- Square brackets would be placed around draft article 99 and paragraph 2 of draft article 62 pending further consideration of their deletion as part of the compromise package, and a footnote describing that approach would be inserted into the text of the draft convention duly noting that draft article 99 could cause constitutional problems in some states regardless of whether the Hamburg Rules limits or the Hague-Visby Rules limits were adopted;
- A footnote would be inserted to draft article 26 indicating that the Working Group was considering reversing the decision that it had taken during its nineteenth session to include an article provision regarding national law tentatively to be called article 26 bis; and
- The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals with respect to the phrase "the carrier's liability for breaches of its obligations under this Convention."

Chapter 14 – Time for suit

167. The Working Group was reminded that all provisions in chapter 14 had been revised to reflect the deliberations by the Working Group at its eighteenth session (see A/CN.9/616, paras. 119-160).

Draft article 65. Limitation of actions

168. The Working Group agreed that the text of draft article 65 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 66. Extension of limitation period

169. The view was expressed that the substance of draft article 66 was inconsistent with the principle of a limitation period, at least as that principle was understood in some legal systems. It was pointed out that some legal systems distinguished between ordinary limitation periods ("*prescription*" or "*prescripción*") and peremptory limitation periods ("*déchéance*" or "*caducidad*"). Among other differences, the first type of limitation period was generally capable of being suspended or interrupted for various causes, whereas the second type of limitation period ran continuously without suspension or interruption. It was observed that, in some language versions, the draft article used terms suggesting an ordinary limitation period ("*prescription*", in the French version, and "*prescripción*" in the Spanish), but the provision itself stated that the period was not subject to suspension or interruption. That, it was said, might give rise to confusion and incorrect interpretation under domestic law. It was therefore proposed that the first sentence of the draft article should be amended by deleting the entire first clause and the word "but" at the beginning of the second clause.

170. In response, it was noted that the Working Group was aware of the lack of uniformity among legal systems as to the nature and effect of a limitation period, in particular of the different types of limitation period that had been mentioned. The Working Group was also mindful of the diversity of domestic laws on the question of suspension or interruption of limitation periods, but was generally of the view that the draft convention should offer a uniform rule on the matter, rather than leave it to domestic law. The general agreement within the Working Group was that the draft convention should expressly exclude any form of suspension or interruption of the limitation period, except where such suspension or interruption had been agreed by the parties under the draft article (see A/CN.9/616, para. 132). At the same time, the Working Group had agreed that the limitation period would be automatically extended, under the circumstances referred to in draft article 68, because the limitation period might otherwise expire before a claimant had identified the bareboat charterer that was the responsible "carrier" (see A/CN.9/616, para. 156).

171. The limitation period provided for in the draft convention was an autonomous rule that, according to draft article 2, should be understood in the light of the draft convention's international character, and not in accordance to categories particular to any given legal system. Nonetheless, the Working Group agreed that, to avoid misunderstandings, the term "limitation period" should be replaced through the text of the draft convention with a reference to "the period provided in article 65".

172. Apart from that amendment, the Working Group agreed that the text of draft article 66 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 67. Action for indemnity

173. It was observed that the rule contained in subparagraph (b) of draft article 67 had caused some practical problems in jurisdictions that followed a similar system to that set out in the provision. It was noted that a person who was served with process might not necessarily be liable for the claim, but would nevertheless be forced to initiate an indemnity action within 90 days. It was therefore suggested to either delete the second possibility set out in subparagraph (b), retaining only the reference to the date of settlement of the claim, or to refer instead to the date of notification of the final judgement.

174. In response, it was recalled that the Working Group had already discarded a rule that referred to the date of the final judgement (see A/CN.9/616, para. 152). In any event, a reference to the final judgement would have been impractical, as judicial proceedings might take several years until reaching final judgement, and the person against whom an indemnity action might be brought had a legitimate interest in not being exposed to unexpected liabilities for an inordinate amount of time. It was recognized that at the time a party was served with process it might not be apparent whether the suit would succeed, and, as such, the amount of the judgement would remain unclear. However, at least the party would know that a claim existed and would have a duty to act so that the party that might be ultimately liable under the indemnity claim would be put on notice at an early stage.

175. In that connection, there was no support in the Working Group for elaborating the rule in subparagraph (b) so as to provide that the period for the indemnity claim should run from the date of the final judgement, provided that the indemnity claimant had notified the other party, within three months from the time when the recovery claimant had become aware of the damage and the default of the indemnity debtor. It was felt that such elaboration would render the provision overly complicated and that it would be preferable to keep the provision in line with article 24, paragraph 5 of the Hamburg Rules, on which the draft article was based.

176. Having noted that the draft article should cover all indemnity actions under the draft convention, but not indemnity actions outside the draft convention, the Working Group agreed to request the Secretariat to review the need for, and appropriate placement of, the phrase “under this Convention”, in the chapeau of the draft article.

177. Subject to that request, the Working Group agreed that the text of draft article 67 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 68. Actions against the person identified as the carrier

178. It was suggested that subparagraph (b) could be shortened by deleting the reference to the bareboat charterer, since the identification of the carrier was the way by which the bareboat charterer would rebut the presumption of being the carrier under that provision. The Working Group agreed to request the Secretariat to review the interplay between the two provisions and to suggest any amendments that might be appropriate for the Working Group’s consideration.

179. Apart from that observation, the Working Group agreed that the text of draft article 68 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Chapter 15 – Jurisdiction

180. The Working Group proceeded to consider draft chapter 15 on jurisdiction, which it had last considered during its eighteenth session (see A/CN.9/616, paras. 245 to 266).

Draft article 69. Actions against the carrier

181. The Working Group agreed that the text of draft article 69 as contained in A/CN.9/WG.III/WP.81 was acceptable as currently drafted.

Draft article 70. Choice of court agreements

182. There was not sufficient support for a proposal to add the word "exclusive" to the title of the draft article.

Subparagraph 2 (c)

183. It was suggested that the draft paragraph 2 (c) requirement of timely and adequate notification of a third party to a volume contract in order for a choice of court agreement to be binding on that party was insufficient, and it was proposed that the consent of such third parties should be required in order for an exclusive choice of court agreement in the volume contract to be binding on them. It was also noted that the special rules for volume contracts set out in draft article 89 (1) and (5) provided that a third party could only be bound by the terms of the volume contract that derogated from the draft convention when that party gave its express consent to be so bound. A proposal was made to revise subparagraph 2 (c) of draft article 70 to provide greater protection to third parties to volume contracts by adding the following phrase to the end of the subparagraph before the word "and": "and that person gives its express consent to be bound by the exclusive choice of court agreement". That proposal received some support.

184. However, opposition was expressed to that proposal. It was said that the paragraph had already been debated at length and that subparagraph 2 (c) represented one part of the larger bundle of issues agreed by the Working Group with respect to volume contracts and to jurisdiction. It was observed that for third parties to be bound at all by a volume contract pursuant to draft article 89, they had to give their consent, thus providing for additional protection for such parties. Moreover, it was said that binding a third party to a provision in a contract to which it was not a party was not unique in international trade, for example, in the insurance industry. It was further suggested that it was essential to bind third parties, provided they were adequately protected, in order to provide commercial predictability in knowing where litigation would take place.

Subparagraph 2 (d)

185. The Working Group proceeded to consider paragraph 2 of draft article 70, which set out the requirements pursuant to which a third party to a volume contract

could be bound by an exclusive choice of court agreement in the volume contract. The fourth requirement set out in subparagraph 2 (d) was that the law must recognize that such a person could be bound by the exclusive choice of court agreement. The Working Group had before it four bracketed options contained in subparagraph 2 (d) concerning how best to articulate which applicable law should be consulted in making that determination.

186. To address the concern expressed in footnote 209 of A/CN.9/WG.III/WP.81 that the "court seized" might not necessarily be a competent court, another possible option was added to the four set out in draft subparagraph 2 (d) along the following lines: "the law of the place of the court designated by article 69, paragraph (b)". A preference was expressed by some for this additional option, as the reference therein was to a competent court and it was felt that the revised text would aid certainty and predictability.

187. Some support was expressed for the second option, including the words in square brackets as follows: "The law of the agreed place of delivery of the goods". However, there were objections to that option on the grounds that cargo interests might not always wish to refer to the law of the place of delivery, for instance, in cases where they preferred to sue the carrier at another location, such as one where the carrier had assets. For the same reasons, there were also objections to the third option in subparagraph 2 (d).

188. Some support was also expressed for the fourth option which referred to "the applicable law pursuant to the rules of private international law of the law of the forum", provided that the words following "applicable law" were omitted. It was proposed that the words following "applicable law" were unnecessary. Further, it was observed that the term "applicable law" was used elsewhere in the draft convention without those additional words, and it was suggested that for the sake of consistency in the draft convention, these words should be omitted from the fourth option.

189. Support was expressed in the Working Group for the first option, which referred to "the law of the court seized".

190. An additional proposal was made to delete paragraph (d) altogether as complicated and unnecessary, since the court in issue would have regard to the applicable law in any event. Further, it was observed that such deletion would not give States the flexibility to have other requirements in order for exclusive choice of court agreements to bind third parties. The proposal for deletion was not supported.

191. The Working Group was reminded that the entire text of paragraphs 3 and 4 of article 70 had been placed in square brackets pending a decision to be made by the Working Group on whether the application of Chapter 15 to Contracting States should be made subject to a general reservation, or whether the chapter should apply on an "opt-in" or an "opt-out" basis as set out in the three variants in draft article 77. Discussion of paragraphs 3 and 4 was thus deferred until that decision had been made (see paragraph 205 below).

Conclusions reached by the Working Group regarding draft article 70:

192. The Working Group agreed that the text of draft article 70 should be retained as contained in A/CN.9/WG.III/WP.81 and:

- To retain the text of subparagraph 2 (c) as drafted;
- Notwithstanding that a number of delegations also supported the deletion of paragraph (d), decided to retain paragraph (d);
- To retain the first bracketed text in paragraph 2 (d) as the preferred option; and
- To defer any discussion of paragraphs 3 and 4 until draft article 77 had been discussed.

Draft article 71. Actions against the maritime performing party

193. The Working Group agreed that the text of draft article 71 as contained in A/CN.9/WG.III/WP.81 was acceptable, subject to the deletion of the terms "initially" and "finally" in paragraph (b) to reflect similar drafting changes made in respect of draft article 19 (1).

Draft article 72. No additional bases of jurisdiction

194. The Working Group agreed that the text of draft article 72 as contained in A/CN.9/WG.III/WP.81 was acceptable although the fate of the bracketed text at the end of the draft article could only be determined following discussions on draft article 77 (see paragraph 205 below).

Draft article 73. Arrest and provisional or protective measures

195. The Working Group agreed that the text of draft article 73 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 74. Consolidation and removal of actions

196. The Working Group agreed that the text of draft article 74 as contained in A/CN.9/WG.III/WP.81 was acceptable, although the fate of the bracketed text in paragraphs 1 and 2 could only be determined following discussions on draft article 77 (see paragraph 205 below).

Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

197. Support was expressed for the text of draft article 75 as currently drafted. It was noted that the words in paragraph 2 of draft article 75, "in a Contracting State" should be deleted as being otiose given that the definition of "competent court" in draft article 1 (30) already included those words.

Conclusions reached by the Working Group regarding draft article 75:

198. The Working Group agreed that the text of draft article 75 as contained in A/CN.9/WG.III/WP.81 was acceptable subject to the deletion of the words "in a Contracting State".

Draft article 76. Recognition and enforcement

199. Support was expressed for the text of draft article 76 as currently drafted. A concern was expressed that the requirement that a Contracting State "shall" recognize and enforce a decision made by a court having jurisdiction under the

Convention could be too inflexible and should be changed to a less mandatory term such as "may". In response, it was said that the provisions on recognition and enforcement were not harmonized in the draft convention, in particular with respect to the grounds for refusal of recognition and enforcement by a state under paragraph 2. It was observed that the intention of the draft article was mainly to provide a treaty obligation for those countries that required such an obligation, and on that basis, it was agreed that the word "shall" should be retained. However, it was recognized that the draft article also offered States the possibility to refuse to recognize and enforce judgements subject to their national laws.

200. It was suggested that the opening words in paragraph 2 (c) of draft article 76 which refer to "If a court of that Contracting State", could be too narrow and might suggest that only two states were concerned in the application of that paragraph when in some situations it might be necessary to give recognition in respect of decisions of a court in a third Contracting State. For that reason, it was suggested that paragraph 2 (c) be redrafted along the following lines: "if a court of that or other Contracting State had exclusive jurisdiction". It was also observed that the text of paragraph 2 (c) would depend upon the outcome of the discussion on draft article 77.

Conclusions reached by the Working Group regarding draft article 76:

201. The Working Group agreed that the text of draft article 76 as contained in A/CN.9/WG.III/WP.81 was acceptable subject to a revision of paragraph 2 (c) in accordance with the proposal made in paragraph 200 above, and with the Working Group's decision regarding draft article 77.

Draft article 77. Application of chapter 15

202. It was explained that the Variants A, B and C, respectively, of draft article 77 corresponded to the options for the Working Group regarding the three alternatives to the application of chapter 15 to Contracting States that the Working Group had decided at its eighteenth session should be considered: a reservation approach, an "opt-in" approach and a "partial opt-in" approach (see A/CN.9/616, paras. 246 to 252).

203. There was very strong support in the Working Group for the "opt-in" approach of Variant B. Due to institutional reasons regarding competencies within a regional economic grouping, it was explained that if Variant A, the reservation approach, were chosen, the grouping would have to ratify the draft convention on behalf of its member States. It was thought that that approach could be very lengthy and could be subject to potential blockages in approval. However, it was agreed that Variant B, or the "opt-in" approach, would allow the member States of that grouping to ratify the draft convention independently, thus allowing for greater speed and efficiency in the ratification process, and avoiding the possibility that the chapter on jurisdiction could become an obstacle to broad ratification. Further, upon additional reflection since its eighteenth session, the Working Group was of the view that, while offering some advantages in terms of increased harmonization, the "partial opt-in" approach of Variant C was considered too complex an approach to retain in the text.

204. Having decided upon the retention of Variant B of draft article 77 and the deletion of Variants A and C, the Working Group next considered the alternative text

in square brackets in Variant B. It was suggested that Contracting States should be allowed to opt in to the chapter on jurisdiction at any time, thus it was proposed that the text contained in both sets of square brackets be retained and the brackets deleted, and that the word "or" be inserted between the two alternatives. There was widespread approval for that proposal.

Conclusions reached by the Working Group regarding draft article 77:

205. The Working Group agreed that:

- Variant B of the text of draft article 76 as contained in A/CN.9/WG.III/WP.81 should be retained, and Variants A and C deleted;
- That the two sets of alternative text in Variant B should be retained and an "or" inserted between them, and the brackets that surrounded the text should be deleted; and
- That due to the adoption of Variant B of draft article 77:
    - Paragraphs 3 and 4 of draft article 70 should be deleted;
    - Subparagraph 2 (c) of draft article 76 should be deleted;
    - The phrase "or pursuant to rules applicable due to the operation of article 77, paragraph 2" should be deleted and the word "or" retained in draft articles 72 and 74 (1) and (2).

Chapter 16 – Arbitration

206. The Working Group proceeded to consider draft chapter 16 on arbitration, which it had last considered during its eighteenth session (see A/CN.9/616, paras. 267 to 279).

Draft article 78. Arbitration agreements

207. The view was expressed that draft article 78 (1) and (2), as currently drafted, could create uncertainty in the use of arbitration in the liner trade and could lead to forum shopping. It was suggested that it would be preferable to give full effect to an arbitration agreement, even though arbitrations were not common in the liner trade, and that the inclusion of subparagraph 2 (b) would create uncertainty and lead to forum shopping in that trade. There was some sympathy for that view expressed in the Working Group, but it was acknowledged that there had been thorough discussion of these aspects in past sessions, and that the text of paragraphs 1 and 2 had been agreed upon by the Working Group as part of a compromise approach (see A/CN.9/616, paras. 267 to 273; see A/CN.9/591, paras. 85 to 103).

208. The Working Group was reminded of the goal to create in the arbitration chapter provisions that paralleled those of the jurisdiction chapter so as to avoid any circumvention of the jurisdiction provisions by way of the use of an arbitration clause, and thereby protect cargo interests. In regard to subparagraph 4 (b), currently in square brackets in the text, it was proposed that it should receive the same treatment as that granted the same text in draft article 70 (2) (b), that is, that

the text should be retained and the square brackets around it deleted. There was agreement in the Working Group for that proposal.

209. It was suggested that subparagraph 4 (b) should only apply to negotiable transport documents and electronic transport records, since they were subject to reliance. It was proposed that drafting adjustments should be made so as to ensure that non-negotiable transport records and electronic transport documents were not included in subparagraph 4 (b). That suggestion was not taken up by the Working Group.

210. The view was expressed that the reference to "applicable law" in subparagraph 4 (d) was too vague and that, in the interest of ensuring uniform application of the draft convention, it would be better to specify which law was meant. One possibility, it was said, might be to reinsert the words "for the arbitration agreement" which had appeared in earlier versions of the text. In response it was explained that, after many consultations with experts in the fields of maritime law and commercial arbitration, the Secretariat had arrived at the conclusion that it would be preferable to include only a general reference to "applicable law" in subparagraph 4 (d), without further qualification. There was no uniformity in the way domestic laws answered the question as to which law should be looked at in order to establish the binding effect of arbitration clauses on parties other than the original parties to a contract. In some jurisdictions, that issue was regarded as a matter of procedural law, whereas in other jurisdictions that question was treated as a substantive contract law question. Different answers might therefore be given, depending on the forum before which the question might be adjudicated in the course, for instance, of an application to set aside an arbitral award or to recognize and enforce a foreign award. It was explained that, in light of those considerations, harmonization of the law in the draft convention on a point that had repercussions well beyond the confines of maritime law, would have been far too difficult, and that the decision was made to retain the more flexible concept of "applicable law".

Conclusions reached by the Working Group regarding draft article 78:

211. The Working Group agreed that the text of draft article 78 as contained in A/CN.9/WG.III/WP.81 was acceptable, subject to the deletion of the square brackets surrounding subparagraph 4 (b) and the retention of the text therein.

Draft article 79. Arbitration agreement in non-liner transportation

212. A drafting suggestion was made that where reference in draft article 79 (1) was made to "article 7", consideration should also be given to making reference to "article 6, paragraph 2".

213. Some potential difficulties were noted in the text of subparagraphs 2 (a) and (b) as they currently appeared in A/CN.9/WG.III/WP.81. While there were difficulties understanding the whole of paragraph 2, subparagraph 2 (a) raised questions regarding how a claimant would know that the terms of the arbitration clause were the same as those in the charterparty once arbitration had started. In addition, concerns were cited regarding subparagraph 2 (b) regarding the specificity of the prerequisites in order to bind a third party to the arbitration agreement, since those prerequisites might not meet with practical concerns and current practice.

While it was suggested that the whole of paragraph 2 be placed in square brackets pending further consultations with experts, it was agreed that the provision should be identified for further consideration by some other means, such as perhaps by means of a footnote in the text.

Conclusions reached by the Working Group regarding draft article 79:

214. The Working Group agreed that:

- The text of draft article 79 (1) should be retained as contained in A/CN.9/WG.III/WP.81, with consideration of possible additional references to article 6 (2); and
- Further consultations should be had regarding the operation of draft article 79 (2).

Draft article 80. Agreements for arbitration after the dispute has arisen

215. The Working Group agreed that the text of draft article 80 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 81. Application of chapter 16

216. The Working Group was reminded that it had decided previously to take an approach to the application of chapter 16 to Contracting States parallel to the approach that it had taken with respect to the application of chapter 15 (see A/CN.9/616, paras. 268 and 272 to 273). It was recalled that the purpose of adopting a parallel approach to that of the jurisdiction chapter was to ensure that, with respect to the liner trade, the right of the cargo claimant to choose the place of jurisdiction for a claim pursuant to jurisdiction provisions was not circumvented by way of enforcement of an arbitration clause. The Working Group agreed that Variant B of draft article 81 should be retained, and Variant A deleted, and that, in keeping with its earlier decision regarding draft article 77, both sets of alternative text in Variant B of draft article 81 should be retained and the word “or” inserted between the two phrases.

217. A further proposal was made that the ability to opt in to chapter 16 should be tied to opting in to the chapter on jurisdiction as well, but it was confirmed that, while perhaps desirable, that approach would not be possible due to the differing competencies for the two subject matters as between a major regional economic grouping and its Member States.

Conclusions reached by the Working Group regarding draft article 81:

218. The Working Group agreed that:

- Variant B of the text of draft article 81 as contained in A/CN.9/WG.III/WP.81 should be retained, and Variant A deleted; and
- The two sets of alternative text in Variant B should be retained and an “or” inserted between them, and the brackets that surrounded the text should be deleted.

Chapter 17 – General Average

Draft article 82. Provisions on general average

219. A suggestion was made that draft article 16 (2) should be considered in conjunction with the Working Group's consideration of draft article 82. However, it was pointed out that the Working Group had decided at its nineteenth session to retain paragraph 2 of draft article 16 as a separate provision, possibly draft article 16 bis, and to delete the square brackets surrounding it (see A/CN.9/621, paras. 60 to 62). The Working Group confirmed its earlier decision in that regard.

220. The Working Group agreed that the text of draft article 82 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

Chapter 18 – Other conventions

Draft article 83. Denunciation of other conventions

221. The Working Group proceeded to consider the text of draft article 83 as contained in document A/CN.9/WG.III/WP.81. The Working Group was reminded that the text of paragraph 1 had been corrected through the deletion of the phrase "or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978," (see A/CN.9/WG.III/WP.81/Corr.1, para. 3).

222. A concern was expressed with respect to a possible lack of harmonization that could be caused by the rule in draft article 83 requiring that a Contracting State denounce any previous convention concerning the international carriage of goods by sea when that State ratified the new convention. By way of explanation, there was no problem perceived if two potential Contracting States had each been party to a different convention for the international carriage of goods by sea, and only one of them ratified the new convention, as that would not alter the existing disharmony between them. However, in the case where two potential Contracting States had each been party to the same international regime for the carriage of goods by sea, and only one of them ratified the new convention, the concern was that a lack of harmonization would actually be created by that ratification and the requisite denunciation of the previous convention, and could lead to parties to a dispute racing to one jurisdiction or the other to obtain more favourable treatment under the applicable convention. There was some sympathy in the Working Group for that concern and some interest was expressed in considering a written proposal suggesting a solution to the problem described, but it was acknowledged that it was a very complex issue and should therefore be carefully considered. For example, the question was raised regarding what the recommended outcome would be if a third State through which trans-shipment was required were added to the hypothetical situation, and only two of the three States concerned were Contracting States of the draft convention.

223. In response, it was pointed out that it would be unusual for a convention to allow a State that had ratified one convention to continue to be a party to another convention on the same subject matter. Further, it was thought that the problem described was less a problem of a State denouncing the previous regime to which it

had been a party, and more of an issue of reciprocity, and that if reciprocity regarding other potential Contracting States was a concern, it would be better considered pursuant to the provisions in the draft convention on the scope of application. For example, if reciprocity was sought, draft article 5 could be adjusted such that both the place of receipt and the place of delivery had to be in Contracting States, and not merely one of those locations, and the solution should not be sought pursuant to draft article 83. There was some support for that view, and caution was expressed regarding any possible narrowing of the broad scope of application of the draft convention that had been previously agreed by the Working Group.

224. Further, it was pointed out that a solution along the lines of article 31 of the Hamburg Rules might be of assistance in regard to the concern expressed. It was suggested that an approach could be adopted similar to the approach in article 31 (1) whereby a Contracting State was allowed to defer denunciation of previous conventions to which it was a party until the Hamburg Rules entered into force. It was thought that any problem concerning which rules would apply in the case of a State that had ratified the draft convention and denounced previous conventions to which it had been a party could be regulated by way of an approach similar to that of paragraphs 1 and 4 of article 31 of the Hamburg Rules. Another possible solution for the concerns raised regarding potential disharmony created by the ratification of the draft convention by a Contracting State and its denunciation of previous conventions was that a high number of States could be required pursuant to draft article 97 for entry into force of the draft convention.

225. By way of further consideration of the issue, the concern was expressed that a legal vacuum could be created when a State ratified the draft convention and denounced any previous convention to which it was a party in accordance with draft article 83, but when the draft convention had not yet entered into force. It was noted that paragraph 3 did not seem to provide a clear rule in that regard. However, it was observed that this was a policy matter, on which the Working Group had to make a decision. While the draft convention took the approach to the issue that it should be open to States to decide on how best to achieve a smooth transition in terms of the conventions to which it was party, the Hamburg Rules set out another approach by providing express rules for States in that regard.

226. A view was expressed that the text as drafted solved the problem of any perceived legal vacuum in the same manner as previous practice with respect to a number of other conventions: it left the decision open to a State to decide how best to avoid a legal vacuum in its transition from one international legal regime to another, but that the rule requiring denunciation of previous conventions on ratification of a new convention was rightfully preserved in the text. However, there was support in the Working Group for the view that the more explicit procedure laid down in article 31 of the Hamburg Rules should be considered, and that it should be incorporated into the text of this draft convention, since it would provide a clear rule with which States already had some experience. One issue in paragraph 4 of article 31 of the Hamburg Rules which was not considered entirely satisfactory was that it allowed Contracting States to defer the denunciation of previous conventions for up to five years from the entry into force of the new convention. It was suggested that allowing the deferral of a denunciation of a previous convention for such a length of time should not be allowed under the draft convention.

Conclusions reached by the Working Group regarding draft article 83:

227. The Working Group agreed that:

- The Secretariat should review the text of draft article 83, with a view to taking a similar approach to that in paragraph 1 of article 31 of the Hamburg Rules.

Draft article 84. International conventions governing the carriage of goods by air

228. A concern was raised that conflicts might arise between the draft convention and other unimodal transport conventions not addressed in draft article 84, because that provision only ensured that the draft convention would not conflict with international conventions governing the carriage of goods by air. It was suggested that, to the extent that conventions such as the CMR or CIM-COTIF also contained a certain multimodal dimension, those conventions should also be included in draft article 84 in order to avoid any conflicts. A suggestion was made that, to remedy that perceived problem, draft article 84 could be redrafted along the following lines:

> "Nothing in this Convention prevents a contracting State from applying the provisions of any other international convention regarding the carriage of goods to the contract of carriage to the extent that such international convention according to its provision applies to the carriage of goods by different modes of transport."

229. Whereas some support was expressed for that proposal, there was also firm opposition to it. Moreover, the Working Group was reminded that at its eighteenth and nineteenth sessions (see A/CN.9/616, paras. 225 and 234-235, and A/CN.9/621, paras. 204 to 206), it had decided to include a provision such as draft article 84 only with respect to international conventions regarding the carriage of goods by air, and that it had approved draft article 84 as it appeared in the text. It was noted that the Working Group had considered the concerns noted above in paragraph 228 at its previous sessions, and that it had decided to include a text like that found in draft article 84 only with respect to international conventions regarding the carriage of goods by air. It was recalled that the reason for limiting the provision to those conventions was due to the fact that they were unique in their expansive inclusion of multimodal transport in their scope of application to such an extent that a conflict between those conventions and the draft convention was inevitable. It was also noted that draft article 84 could be expected to have only a minor application, as multimodal transport contracts seldom combined transport by sea with transport by air. Support was expressed for that previous decision in the Working Group.

230. Notwithstanding the broad support to retain draft article 84 as drafted, it was noted that a very specific area of possible conflict could also arise with respect to the CMR and CIM-COTIF. In particular, concern was raised regarding ferry traffic, and the specific situation in which goods being transported by road or rail would remain loaded on the vehicle or railroad cars during the ferry voyage. It was said that provision should be made in the draft convention in order to ensure that it did not conflict with the CMR and CIM-COTIF in those very specific situations so as to ease the concerns of States Parties to those instruments regarding possible conflicts, but that there should not be a broader exception for unimodal transport as such. While some doubt was expressed regarding whether there was a conflict with respect to such ferry transport, the Working Group expressed some willingness to consider resolutions that were set out in written proposals regarding those perceived

conflicts with unimodal transport conventions. It was also pointed out that some concerns with respect to the treatment of ferry transport under the draft convention had also been mentioned in previous sessions (see A/CN.9/526, paras. 222 to 224, and A/CN.9/621, paras. 137 to 138, and 144 to 145), but that no specific solution had been proposed at that time. It was further suggested that, if such a proposal were taken up by the Working Group, it might be better to treat it in the context of draft article 26, or by way of the scope of application provisions in chapter 2, rather than in draft article 84.

Conclusions reached by the Working Group regarding draft article 84:

231. The Working Group agreed that:

- The text of draft article 84 as contained in A/CN.9/WG.III/WP.81 should be maintained; and
- The Working Group would consider written proposals intended to avoid specific conflicts with unimodal transport conventions, and that did not markedly change draft article 84.

Further consideration of draft article 84 conflict of convention issues

232. With reference to the Working Group's willingness to consider proposals for a text to resolve possible issues regarding a conflict between the draft convention and existing unimodal conventions that were raised earlier in the session (see paragraphs 228 to 231 above), two written proposals were submitted to the Working Group as follows:

> **"Article 5, para. 1 bis**
>
> "Notwithstanding article 5, para. 1, if the goods are carried by rail or road under an international convention and where the goods for a part of the voyage are carried by sea, this Convention does not apply, provided that during the sea carriage the goods remain loaded on the railroad car or vehicle."
>
> **"International conventions governing the carriage of goods**
>
> "Nothing in this Convention prevents a Contracting State from applying the provisions of any of the following conventions in force at the time this Convention enters into force:
>
> "(a) Any convention regarding the carriage of goods by air to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport;
>
> "(b) Any convention regarding the carriage of goods by land to the extent such convention according to its provisions applies to the carriage of land transport vehicles by a ship; or
>
> "(c) Any convention regarding the carriage of goods by inland waterways to the extent such international convention according to its provisions applies to a carriage without trans-shipment both on inland waterways and on sea."

233. By way of explanation, it was noted that the first proposal had taken the approach of slightly narrowing the scope of application of the draft convention

through adding a paragraph 1 bis, and that it had focused on the CMR and CIM-COTIF issue of ferry transport of railroad cars and vehicles on which the goods remained loaded through the transport. In contrast, the second proposal had focused on a conflict of conventions approach that enlarged upon the existing provision with respect to air transport in draft article 84, and that also referred to possible sources of conflict with the CMR and CIM-COTIF, and with the Convention on the Contract for the Carriage of Goods by Inland Waterway ("CMNI"). It was explained that, in both cases, the proposals were intended to eliminate only a very narrow and unavoidable conflict of convention between the relevant unimodal transport conventions and the draft convention.

234. The Working Group expressed its support for finding a resolution to the very narrow issue of possible conflict of laws outlined in the proposals presented. A slight preference was expressed for the approach to the problem taken by the second proposal in paragraph 232 above, although paragraph (a) was thought to require some adjustment, and paragraph (b) was thought to be drafted slightly too widely. The Working Group requested the Secretariat to consider the two approaches, and to prepare draft text along the lines of the proposals aimed at meeting the concerns expressed. By way of further clarification, in response to a question, it was noted that the first proposal in paragraph 232 above contemplated that the draft convention would govern the relationship between the road carrier and the ferry operator.

235. A view was expressed that a third alternative could be pursued to avoid even narrow conflicts of convention, such as that taken in the United Nations Convention on Contracts for the International Sale of Goods ("Vienna Sales Convention"), in which article 3 (2) excludes contracts in which the "preponderant part" consists of the supply of labour or other services. It was suggested that a similar methodology could be used in the draft convention to exclude transport for which the preponderant part was non-maritime. That suggestion was not taken up by the Working Group.

Conclusions reached by the Working Group regarding proposals on draft article 84 conflict of convention issues:

236. The Working Group agreed that a resolution to the very narrow issue of possible conflict of laws outlined in the proposals in paragraph 232 above should be sought, and requested the Secretariat to prepare a draft based on the proposals as set out.

Draft article 85. Global limitation of liability

237. It was observed that draft article 85 might be too narrowly drafted and needed clarification. In particular, it was proposed that the phrase "or inland navigation vessels" should be inserted after "applicable to the limitation of liability of owners of seagoing ships" and that the last part "or the limitation of liability for maritime claims" should be deleted. The first part of the proposal found broad support, however, it was noted that appropriate wording should be found to cover all vessels, whether seagoing or inland. With regard to the second part of the proposal, the question was raised whether the deletion of the final phrase was necessary, and it was suggested that the final phrase should be retained. The Working Group was reminded that the phrase "for maritime claims" had been added in order to reflect

the terminology of the Convention on Limitation and Liability for Maritime Claims, 1976 and its 1996 Protocol. It was suggested that it should not be deleted hastily.

Conclusions reached by the Working Group regarding draft article 85:

238. The Working Group agreed that:

- Appropriate wording should be found to cover all vessels in the provision; and
- The Secretariat should review the matter and, if necessary, suggest amendment to the text to reflect the subject matter of the conventions in question, including whether it was necessary to retain the final phrase "or the limitation of liability for maritime claims" in the text.

Draft article 86. Other provisions on carriage of passengers and luggage

General comments

239. The Working Group proceeded to consider the text of draft article 86 as contained in document A/CN.9/WG.III/WP.81. The Working Group was reminded of its understanding that the draft convention should not apply to luggage of passengers. It was suggested, however, that draft article 86 was formulated too narrowly. In its present form, the draft article could imply that a carrier could become liable under this draft convention, as long as it was not at the same time liable under any convention or national law applicable to the carriage of passengers and their luggage. In order to reflect that concern, it was suggested that the phrase "for which the carrier is liable" should be replaced with the word "covered".

240. Another proposal was to explicitly exclude passengers' luggage from the definition of "goods" in paragraph 25 of draft article 1, so as to clarify the draft convention's scope of application. However, it was pointed out that excluding passengers' luggage from the definitions in the draft convention would mean a complete exclusion of passengers' luggage from the draft convention. That result would be substantially different from excluding only the carrier's liability in respect of passengers' luggage otherwise covered by domestic law or another international convention. Under the latter approach, there could be instances where the draft convention would still apply to passengers' luggage.

241. There was strong agreement in the Working Group to indicate in the draft convention that it did not apply to the passengers' luggage. Such an exclusion should not only apply to the liability of the carrier, since the treatment of transport documents and right of control clearly indicated that the draft convention focused on commercial shipments of goods and not on passengers' luggage. Whether the best way to effect such an exclusion should be by means of amendments of the definition of goods under draft article 1, paragraph 25, or by means of an expansion of draft article 86 was a matter that the Working Group could consider at a later stage on the basis of recommendations to be made by the Secretariat after review of the implications of the available options.

242. It was further noted that the title of draft article 86 would also need to be amended to fully reflect the understanding of the Working Group with respect to the provision, since the current wording could imply that the draft convention applied to personal loss or injury of passengers.

Conclusions reached by the Working Group regarding draft article 86:

243. The Working Group agreed that the Secretariat should review the possible ways of resolving the matter of passengers' luggage and suggest amendments to the text of draft article 86 either by excluding them from the definition or making amendments to the text of draft article 86 as well as the title of the article.

Draft article 87. Other provisions on damage caused by nuclear incident

244. The Working Group proceeded to consider the text of draft article 87 as contained in document A/CN.9/WG.III/WP.81. It was observed that draft article 87 raised the same concerns as draft article 86 because the chapeau contained a similar phrase, "if the operator of a nuclear installation is liable". There was broad support to address this concern with the same approach to be taken as with respect to draft article 86. It was noted that the draft convention should make it clear that liability for damage caused by a nuclear incident is outside its scope of application.

Conclusions reached by the Working Group regarding draft article 87:

245. The Working Group agreed that the Secretariat should make the necessary amendments to the text of draft article 87 following the same approach taken in draft article 86.

Chapter 20 – Final Clauses

Draft article 91. Depositary

246. The Working Group agreed that the text of draft article 91 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

Draft article 92. Signature, ratification, acceptance, approval or accession

247. The Working Group proceeded to consider the text of draft article 92 as contained in document A/CN.9/WG.III/WP.81.

248. The Working Group was informed that after it completed its review of the draft convention at its twenty-first session, scheduled to take place in Vienna from 14 to 25 January 2008, the Working Group would be expected to formally approve the draft, which would be circulated to Governments for written comments within the first quarter of 2008, and submitted for consideration by the Commission at its 41st annual session (New York, 16 June to 11 July 2008). It was pointed out that no recommendation would be made for convening a special diplomatic conference for the final act of adoption of the convention. Instead, it was envisaged that the draft approved by UNCITRAL would be submitted to the General Assembly, which would be requested to adopt the final text of the convention at its 63rd annual session, acting as a conference of plenipotentiaries, likely during the last quarter of 2008. Thereafter, some time should be allowed for the depositary to establish the original text of the convention, which would not likely be capable of being opened for signature before the first quarter of 2009.

249. There was general agreement that it was premature to insert specific dates in the square brackets at the present stage of the negotiations. In response to a

question, it was pointed out that paragraph 1 of draft article 92 currently made possible either to have the convention opened for signature during a certain period at the United Nations Headquarters in New York only, or to open the convention for signature at a given date at a different location prior to the ordinary signature period at the United Nations Headquarters. The latter alternative had been left open, for the time being, in the event that a State might wish to host a diplomatic conference or a signing event.

250. In response to another question, it was pointed out that a signing ceremony would not have the character of a diplomatic conference, since the convention at that time would already have been formally adopted by the General Assembly. Nevertheless, anyone signing the convention at a signing ceremony would be requested to produce the adequate full powers in accordance with the depositary's practice.

Conclusions reached by the Working Group regarding draft article 92:

251. The Working Group agreed that the text of draft article 92 as contained in A/CN.9/WG.III/WP.81 was acceptable and would be supplemented as needed.

Draft article 93. Reservations

252. It was noted that the text of draft article 93 as contained in document A/CN.9/WG.III/WP.81 had been revised to accommodate the possible inclusion of reservations in chapters 15 and 16. However, as the Working Group had decided to adopt an opt-in approach by way of declarations (see paras. 202 to 205 and 216 to 218 above), it was proposed to delete from draft article 93 the phrase "except those expressly authorized."

253. One view was expressed that further discussion of draft article 83, which might include a proposal on a reservation model, could actually require maintaining the text of draft article 93 as contained in A/CN.9/WG.III/WP.81, as the draft convention would need to be open for reservations. It was clarified that the approach envisaged to resolve the problem of possible disharmony regarding article 83 involved declarations, which the draft convention allowed under draft article 94 and which were different in character from reservations.

Conclusions reached by the Working Group regarding draft article 93:

254. The Working Group agreed that the text of draft article 93 should be amended to read, "No reservation may be made to this Convention."

Draft article 94. Procedure and effect of declaration

255. The Working Group proceeded to consider the text of draft article 94 as contained in document A/CN.9/WG.III/WP.81. It was first suggested that the reference to "modify" or "modification" in paragraph 4 of draft article 94 should be deleted because the only declarations contemplated by the draft convention (i.e. the opt-in declarations to chapter 15 on jurisdiction, and chapter 16 on arbitration) were not, by their nature, susceptible of being modified. In response it was noted, however, that if the Working Group decided in the future to insert a provision allowing declarations for the application of domestic laws under the circumstances envisaged in draft article 26 (see A/CN.9/621, paras. 189-192), there might be

circumstances where States would need to modify their declarations. To address that concern, the Working Group agreed to put the reference to "modification" in square brackets until draft article 26 bis was decided upon.

256. A concern was raised that the text of paragraph 4 of draft article 94 was too general and might be interpreted to the effect that States were allowed to make any kind of declaration. It was suggested that the language of paragraph 4 should be aligned with the text of draft article 93 as contained in document A/CN.9/WG.III/WP.81. Some States also expressed their concerns as they were not familiar with declarations as instruments in international law.

257. In response, it was pointed out that in the area of private international law and uniform commercial law, it had become the practice to distinguish between declarations pertaining to the scope of application, which were admitted in uniform law instruments without being subject to a system of acceptances and objections by Contracting States, on the one hand, and reservations, on the other hand, which triggered a formal system of acceptances and objections under international treaty practice, for instance, as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties, of 1969.

258. As the draft convention dealt with law that would apply not to the mutual relations between States, but to private business transactions, it was suggested that declarations would serve the purpose of the draft convention better than reservations in the way that term was understood under international treaty practice. Recent provisions in UNCITRAL instruments supported those conclusions, such as articles 25 and 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) and articles 19 and 20 of the United Nations Convention on the use of Electronic Communications in International Contracts (New York, 2005), in the same way as final clauses in private international law instruments prepared by other international organizations, such as articles 54 to 58 of the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001) and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.

259. However, in the practice of UNCITRAL and other international organizations, such as Unidroit and the Hague Conference, States were not free to submit declarations, which as a matter of principle were only possible where explicitly permitted. If a declaration was used without explicit permission, it would be treated as a reservation. Accordingly, it was suggested that there was no stringent need to make a general reference in draft article 94 that no declarations other than those expressly allowed were admitted, but such a qualifying provision could be inserted, if the Working Group wished.

260. The question was raised whether paragraph 3 of draft article 94 implied that declarations could be made at any time whereas paragraph 1 seemed to only allow declarations at the time of signature. It was clarified that paragraph 3 only provided a general procedure for declarations and that provisions in the draft convention permitting its use would state the specific time for declarations to be made. In particular, it was recalled that the draft convention in chapters 15 and 16 permitted declarations to be made with regard to jurisdiction and arbitration at any time.

Conclusions reached by the Working Group regarding draft article 94:

261. The Working Group agreed that the text of draft article 94 as contained in A/CN.9/WG.III/WP.81 was acceptable in substance. However, the Secretariat was requested to examine paragraph 4 of draft article 94 to ensure that the text was aligned with the practice and interpretation of international private law.

Draft article 95. Effect in domestic territorial units

262. The Working Group agreed that the text of draft article 95 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

Draft article 96. Participation by regional economic integration organizations

263. The Working Group agreed that the text of draft article 96 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained, subject to the addition of a footnote, to assist the Working Group in its further consideration of the draft article, indicating in which UNCITRAL or other international instruments a similar provision had already been used.

Draft article 97. Entry into force

General comments

264. The Working Group proceeded to consider the text of draft article 97 as contained in document A/CN.9/WG.III/WP.81. It was observed that the draft provision contained two sets of alternatives in square brackets: the time period from the last date of deposit of the ratification to the entry into force of the convention, and the number of ratifications, acceptances, approvals or accessions required for the convention to enter into force.

Number of ratifications required

265. In the interests of avoiding further disunification of the international regimes governing the carriage of goods by sea, it was suggested that a high number of ratifications, such as thirty, should be required in draft article 97. In support of that suggestion, it was stated that a high number of ratifications would be more likely to reduce any disconnection created by the ratification by some but not all the States Parties to any of the existing regimes, as set out in paragraph 222 above. Furthermore, reference was made to the desire that the convention be as global as possible, and it was suggested that a higher number of required ratifications would make that outcome more likely. There was some support for that proposal. However, it was observed that thirty ratifications could take a long time to achieve, and that a large number of required ratifications was unlikely to create any sort of momentum toward ratification for a State.

266. It was observed that the number of ratifications required for entry into force was thought to be affected by the final outcome with respect to the compromise package on limitation levels of the carrier's liability (see paragraphs 135 and 158 above), and that, as such, no final number could yet be decided upon by the Working Group. In any event, it was said that thirty ratifications was too high a requirement, and that a lower number closer to 3 or 5 would be preferable, both for reasons of allowing the convention to enter into force quite quickly, and of affording

States that were anxious to ratify the convention and modernize their law the opportunity to do so as quickly as possible. Speed in terms of entry into force was also considered by some to be a factor in averting the development of regional or domestic instruments. However, concerns were also expressed regarding the adoption of a very low number of required ratifications, since it would not be advantageous to have yet another less than successful regime in the area of the international carriage of goods by sea. In that connection, a view was again expressed in favour of the adoption of a so-called "sunset" clause that provided that the draft convention would no longer be in force after a certain time. However, there were strong objections to the adoption of such a clause as being extremely unusual in a convention, and contrary to the spirit of such international instruments. In any event, it was noted that any State could make the decision to denounce the convention at any time, thus making a "sunset" clause unnecessary should the convention enter into force with only a small number of ratifications.

267. In response to concerns regarding the length of time that it would take to achieve thirty ratifications to the convention, it was noted that the Montreal Convention required thirty ratifications, and that it had entered into force very quickly, despite that fact. However, it was cautioned that instruments covering different transport modes could not necessarily be compared, as the industries were quite different in each case.

268. Some support was expressed in the Working Group for twenty ratifications to be required prior to entry into force. A further nuance was suggested in that a calculation could be added to the provision so that a minimum amount of world trade was required by the ratifying countries prior to entry into force, or a minimum percentage of the world shipping fleet. However, that calculation was thought to be rather difficult to make with precision.

269. It was observed that perhaps three or five ratifications would be too low a number for any sort of uniformity to be achieved but that a number of other maritime conventions tended to adopt an average of ten required ratifications for entry into force, which seemed to be an optimal number. The proposal of a requirement of ten ratifications received some support.

Time for entry into force

270. The Working Group did not have a strong view with respect to the time period that should be required prior to entry into force following the deposit of the last required ratification.

Conclusions reached by the Working Group regarding draft article 97:

271. The Working Group agreed that, in paragraphs 1 and 2:

- The word "[fifth]" should be substituted for the word "[third]" and the word "[twentieth]" should be kept as an alternative in the text;
- The alternatives "[one year]" and "[six months]" should both be retained; and
- The text of draft article 97 as contained in A/CN.9/WG.III/WP.81 was otherwise acceptable.

Draft article 98. Revision and amendment

General comments

272. The Working Group proceeded to consider the text of draft article 98 as contained in document A/CN.9/WG.III/WP.81. The statement in footnote 255 that amendment procedures were not common in UNCITRAL texts was noted, and the suggestion was made that resort could simply be had to normal treaty practice to amend the text pursuant to the Vienna Convention on the Law of Treaties, if necessary.

273. However, it was observed that the lack of an amendment provision in a convention could be considered unusual, since despite the Vienna Convention on the Law of Treaties, it was standard practice for conventions to have provisions for amendment. It was thought that failure to include one in this case could mistakenly induce the conclusion that no amendment was possible. Support was expressed for keeping the draft provision.

Conclusions reached by the Working Group regarding draft article 98:

274. The Working Group agreed that the text of draft article 98 as contained in A/CN.9/WG.III/WP.81 was acceptable.

Draft article 99. Amendment of limitation amounts

General comments

275. In spite of its earlier decision to place square brackets around draft article 99 as part of the provisional consensus on the limitation on liability of the carrier in the draft convention (see paragraphs 135 and 158 above), the Working Group heard some technical remarks on the text of draft article 99 as contained in document A/CN.9/WG.III/WP.81. In particular, it was suggested that the phrase "Contracting States" in paragraph 2 be replaced with "States Parties" because of the definition in the Vienna Convention on the Law of Treaties, and so that the text refers to States that are bound by the text and not just those that have ratified it. Secondly, it was suggested that, in order to shorten the time required for the operation of the procedure, the phrase "may be considered" should be deleted in paragraph 6, and replaced with the phrase "may take effect".

276. It was also observed that an alternative proposal for an amendment procedure had been submitted at a previous session (A/CN.9/WG.III/WP.77), but that further comment in that regard would be reserved, pending an outcome of the decision on the fate of draft article 99.

Conclusions reached by the Working Group regarding draft article 99:

277. The Working Group agreed that the text of draft article 99 should be put in square brackets (see paragraph 166 above).

Draft article 100. Denunciation of this Convention

General comments

278. The Working Group agreed that the text of draft article 100 was acceptable as contained in document A/CN.9/WG.III/WP.81.

Further comment on draft article 89 volume contracts

279. Regret was expressed by a delegation that there was insufficient time on the agenda to consider further draft article 89 on volume contracts, and the definition of volume contracts in draft article 1 (2). Concern on that point was reiterated that the volume contract provisions in the draft convention allowed for too broad a derogation from the mandatory provisions of the draft convention. An express reservation to the provisions on volume contracts was made by that delegation, as was a wish for further consideration of the matter, which that delegation did not recognize as being the subject of a consensus.

280. The Working Group took note of that statement. It was observed that the issue of volume contracts had been considered during the third reading of the draft convention at its last session (see A/CN.9/621, paras. 161 to 172), and that the topic was not on the agenda for the current session of the Working Group.

III. Other business

Planning of future work

281. The Working Group took note that its twenty-first session was scheduled for 14 to 25 January 2008 in Vienna, and that a final review of the draft convention would take place at that session, with a view to presenting to the Commission at its 41st session in 2008 a text that had been the subject of approval by the Working Group.