REPORT

OF THE

UNITED NATIONS COMMISSION

ON

INTERNATIONAL TRADE LAW

on the work of its ninth session

---

12 April - 7 May 1976

GENERAL ASSEMBLY

OFFICIAL RECORDS: THIRTY - FIRST SESSION

SUPPLEMENT No. 17 (A/31/17)

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(217 p.)

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NOTE

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

CONTENTS

INTRODUCTION

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

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

CHAPTER I

ORGANIZATION OF THE SESSION

A. Opening

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

B. Membership and attendance

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

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

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

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

(a) United Nations organs

United Nations Conference on Trade and Development.

(b) Specialized agencies

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

(c) Intergovernmental organizations

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

(d) International non-governmental organizations

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

C. Election of officers

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

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

D. Agenda

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

1. Opening of the session

2/ The elections took place at the 173rd and 174th meetings, on 12 April 1976. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, Volume 1: 1968-1970 (United Nations publication, Sales No.: E.71.V.1)), part two, I, para. 14).

2. Election of officers

3. Adoption of the agenda, tentative schedule of meetings

4. International sale of goods

5. International payments

6. International legislation on shipping

7. International commercial arbitration

8. Ratification of or adherence to conventions concerning international trade law

9. Training and assistance in the field of international trade law

10. Future work

11. Other business

12. Date and place of the tenth session

13. Adoption of the report of the Commission

E. Establishment of Committees of the Whole

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

Committee I

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

Committee II

Item 7. International commercial arbitration: UNCITRAL Arbitration Rules.

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

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

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

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

its 1st meeting, also on 12 April 1976, Committee II unanimously elected Mr. R. Loewe (Austria) as Chairman and at its 6th meeting unanimously elected Mr. I. Szasz (Hungary) as Rapporteur.

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

F. Adoption of the report

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

CHAPTER II

INTERNATIONAL SALE OF GOODS

A. Uniform rules governing the international sale of goods

Report of the Working Group

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

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

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

5/ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38, subpara. 3 (a) of the resolution contained therein (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, II, para. 38); ibid., Twenty-sixth Session, Supplement No. 17 (A/8417), para. 92, subpara. 1 (c) of the resolution contained therein (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 92). The 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and the annexed Uniform Law (ULIS) appears in the Register of Texts of Conventions and Other Instruments Concerning International Trade Law, vol. I (United Nations publication, Sales No.: E.71.V.3), chap. I, sect. 1.

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

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

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

Consideration of the report by the Commission 6/

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

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

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

Introduction

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

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

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

Working Group should give priority to the consideration of ULIS and take up the formation of contracts only upon the completion of that task. 8/

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

Report of the Working Group

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

Consideration of the report by the Commission 10/

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

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

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

8/ Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 72 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, III, para. 72).

9/ Ibid., Twenty-ninth Session, Supplement No. 17 (A/9617) paras. 91 to 93 (Yearbook of the United Nations Commission on International Trade Law, Volume V: 1974 (United Nations publication, Sales No.: E.75.V.2), part one, II, A, paras. 91 to 93).

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

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

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

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

Decision of the Commission

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

The United Nations Commission on International Trade Law

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

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

3. Decides:

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

(b) To defer until its tenth session the question whether the rules on formation and validity of contracts should be set forth in the same convention containing the rules on the international sale of goods or in a separate

convention, and whether, if there are separate conventions, they should be considered at the same conference of plenipotentiaries;

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

CHAPTER III

INTERNATIONAL PAYMENTS

Negotiable instruments

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

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

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

Consideration of the report by the Commission 12/

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

Decision of the Commission

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

11/ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 35 (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, II, A, para. 35). The draft uniform law and commentary are set forth in A/CN.9/WG.IV/WP.2.

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

The United Nations Commission on International Trade Law

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

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

3. Requests the Secretary-General to carry out, in accordance with the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the inquiries regarding the use of cheques for settling international payments, in consultation with the Commission's Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

CHAPTER IV

INTERNATIONAL LEGISLATION ON SHIPPING

A. Introduction

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

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

36. To carry out this programme of work, the Commission established a Working Group on International Legislation on Shipping consisting of 21 members of the Commission. The Working Group held eight sessions and submitted to the eighth session of the

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13/ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), paras. 10-23 (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, II, A, paras. 10-23). For the Commission's prior action on the subject of international legislation on shipping, see ibid., Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 114-133 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71V.1), part two, II, A, paras. 114-133); ibid., Twenty-fifth Session, Supplement No. 17 (A/8017), paras. 157-166 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970, part two, III, A, paras. 157-166); ibid., Twenty-seventh Session, Supplement No. 17 (A/8717), paras. 44-51 (Yearbook of the United Nations Commission on International Trade Law, Volume III: 1972 (United Nations publication, Sales No.: E.73.V.6), part one, II, A, paras. 44-51); ibid., Twenty-eighth Session, Supplement No. 17 (A/9017), paras. 46-61 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part one, II, A, paras. 46-61); ibid., Twenty-ninth Session, Supplement No. 17 (A/9617), paras. 38-53 (Yearbook of the United Nations Commission on International Trade Law, Volume V: 1974 (United Nations publication, Sales No.: E.75.V.2) part one, II, A, paras. 38-53; and ibid., Thirtieth Session, Supplement No. 17 (A/10017), paras. 64-77.

Commission the text of a draft Convention on the Carriage of Goods by Sea. 14/ At its seventh session, the Commission requested the Secretary-General to transmit the final text of the draft Convention, upon its adoption by the Working Group on International Legislation on Shipping, to Governments and interested international organizations for their comments and to prepare an analysis of such comments for consideration by the Commission at its present session.

37. The Commission had before it the following documents:

(i) A/CN.9/109: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea. This document also reproduces the text of the draft Convention (pp. 4 to 19).

(ii) A/CN.9/110: analysis of the comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea.

(iii) A/CN.9/115: draft provisions concerning implementation, reservations and other final clauses for the draft Convention on the Carriage of Goods by Sea. These draft provisions had been prepared by the Secretariat in response to a request made to it by the Working Group on International Legislation on Shipping at the Group's eighth session. The Working Group had not considered these draft provisions.

(iv) A/CN.9/115/Add.1: the 1975 table 1 and table 2 of Lloyd's Register of Shipping.

(v) A/CN.9/105: report of the Working Group on International Legislation on Shipping on the work of its eighth session.

(vi) Documents of the United Nations Conference on Trade and Development:

- TD/B/C.4/ISL/19: bills of lading - comments on a draft convention on the carriage of goods by sea prepared by the UNCITRAL Working Group on International Legislation on Shipping - report by the UNCTAD secretariat;

- TD/B/C.4/ISL/19/Suppl.1 and Suppl.2: bills of lading - draft convention on the carriage of goods by sea; background comments prepared by the UNCTAD secretariat;

- TD/B/C.4/ISL/21: report of the UNCTAD Working Group on International Shipping Legislation on the first part of its fifth session.

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

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

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

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

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

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

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

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

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

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

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

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

(g) The following foot-note "6/" was added to paragraph 1 of article 21, following the word "State": "A considerable number of delegations favoured the addition of the word 'Contracting' before the word 'State'";

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

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

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

15/ Summary records of these meetings are contained in A/CN.9/SR.178 and 179.

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

Decision of the Commission

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

The United Nations Commission on International Trade Law,

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

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

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

2. Requests the Secretary-General:

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

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

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

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

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

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

DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

PART I. GENERAL PROVISIONS

Article 1. Definitions

In this Convention:

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

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

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

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

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

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

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

Article 2. Scope of application

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

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

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

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

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

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

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

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

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

Article 3. Interpretation of the Convention

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

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

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

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

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

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

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

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

Article 5. Basis of liability

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

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

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

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

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

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

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

Article 6. Limits of liability

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

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed /.../ 1/ the freight /payable for the goods delayed/ /payable under the contract of carriage/.

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

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

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

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

3. Unit of account means ... 2/

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

Alternative article 6. Limits of liability 3/

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

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

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

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

2. Unit of account means ... 4/

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

Article 7. Application to non-contractual claims

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

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

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

Article 8. Loss of right to limit liability

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

(a) The carrier himself, or

(b) An employee of the carrier other than the master and members of the crew, while exercising, within the scope of his employment, supervisory authority in respect of that part of the carriage during which such act or omission occurred, or

(c) An employee of the carrier, including the master or any member of the crew, while handling or caring for the goods within the scope of his employment.

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

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

Article 9. Deck cargo

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

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

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

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

Article 10. Liability of the carrier and actual carrier

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

2. The actual carrier shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 shall apply if an action is brought against a servant or agent of the actual carrier.

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

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

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

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

Article 11. Through carriage

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

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

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

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

Article 13. Special rules on dangerous goods

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

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

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

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

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

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue of bill of lading

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

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

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

Article 15. Contents of bill of lading

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

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

(b) The apparent condition of the goods;

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

(d) The name of the shipper;

(e) The consignee if named by the shipper;

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

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

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

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

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

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

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

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

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

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 6 of article 1.

Article 16. Bills of lading: reservations and evidentiary effect

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

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

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

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

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

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

Article 17. Guarantees by the shipper 5/

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

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

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a th rd party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in the latter case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

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

Article 18. Documents other than bills of lading

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

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

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

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

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

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

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

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

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

Article 20. Limitation of actions

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

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

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

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

5. An action for indemnity by a person held liable may be brought even after the expiration of the period of limitation provided for in the

preceding paragraphs if brought within the time allowed by the law of the State where proceedings are initiated. However, the time allowed shall not be less than 90 days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 21. Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 22. Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

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

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

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

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

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

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

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

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

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

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

PART VI. SUPPLEMENTARY PROVISIONS

Article 23. Contractual stipulations

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

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

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

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

Article 24. General average

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

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

Article 25. Other conventions

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

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

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

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

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

CHAPTER V

INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

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

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

47. At its eighth session, the Commission had before it a report of the Secretary-General which set forth a preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97), observations submitted by the Government of Norway and by interested national and international organizations and institutions (A/CN.9/97/Add.1, 3 and 4), and a document setting forth suggested modifications to the preliminary draft rules resulting from discussions by the Fifth International Arbitration Congress, held at New Delhi, from 7 to 10 January 1975 (A/CN.9/97/Add.2).

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

49. At the present session, the Commission had before it a report of the Secretary-General containing a revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules)

16/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 85 (Yearbook of the United Nations Commission on International Trade Law, Volume IV, 1973 (United Nations publication, Sales No.: E.74.V.3) part one, II, para. 85).

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

18/ Ibid., para. 83.

(A/CN.9/112). 19/ It also had before it a report of the Secretary-General containing a commentary on the UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), a working paper prepared by the Secretariat containing alternative draft provisions for the draft UNCITRAL Arbitration Rules (A/CN.9/113), and a note by the Secretariat on the feasibility of a schedule of fees for arbitrators (A/CN.9/114).

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

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

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

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

53. After deliberation, the Commission approved the text of the UNCITRAL Arbitration Rules and of a model arbitration clause proposed by Committee II, subject to the following changes:

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

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

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

54. The Commission considered the suggestion that a commentary on the UNCITRAL

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

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

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

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

Decision of the Commission

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

The United Nations Commission on International Trade Law,

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

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

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

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

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

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

C. Text of UNCITRAL Arbitration Rules

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

UNCITRAL ARBITRATION RULES

Section I. Introductory rules

Scope of application

Article 1

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

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

Notice, calculation of periods of time

Article 2

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

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

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* MODEL ARBITRATION CLAUSE

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

Note - Parties may wish to consider adding:

(a) The appointing authority shall be ... (name of institution or person);

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town or country);

(d) The language(s) to be used in the arbitral proceedings shall be ...

Notice of arbitration

Article 3

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

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

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and addresses of the parties;

(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;

(d) A reference to the contract out of or in relation to which the dispute arises;

(e) The general nature of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;

(b) The notification of the appointment of an arbitrator referred to in article 7;

(c) The statement of claim referred to in article 18.

Representation and assistance

Article 4

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

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 5

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

Appointment of arbitrators (articles 6 to 8)

Article 6

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

(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and

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

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

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

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

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

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

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

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

Article 7

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

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

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

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

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

Article 8

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

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

Challenge of arbitrators (articles 9 to 12)

Article 9

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

Article 10

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

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

Article 11

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

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

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

Article 12

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

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

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

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

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

Replacement of an arbitrator

Article 13

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

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

Repetition of hearings in the event of the replacement of an arbitrator

Article 14

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

Section III. Arbitral proceedings

General provisions

Article 15

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

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

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

Place of arbitration

Article 16

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

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

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

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

Language

Article 17

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

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

Statement of claim

Article 18

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

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

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

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

Statement of defence

Article 19

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

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

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

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

Amendments to the claim or defence

Article 20

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

Pleas as to the jurisdiction of the arbitral tribunal

Article 21

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

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

a; an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

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

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

Further written statements

Article 22

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

Periods of time

Article 23

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

Evidence and hearings (articles 24 and 25)

Article 24

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

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

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

Article 25

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

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

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

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

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

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

Interim measures of protection

Article 26

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

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

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

Experts

Article 27

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

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

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

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

Default

Article 28

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

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

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

Closure of hearings

Article 29

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

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of Rules

Article 30

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

Section IV. The award

Decisions

Article 31

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

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

Form and effect of the award

Article 32

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

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

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

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

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

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

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

Applicable law, amiable compositeur

Article 33

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

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

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

Settlement or other grounds for termination

Article 34

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

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

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

Interpretation of the award

Article 35

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

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

Correction of the award

Article 36

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

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

Additional award

Article 37

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

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

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

Costs (articles 38 to 40)

Article 38

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

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

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

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

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

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

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

Article 39

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

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

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

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

Article 40

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

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

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

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

Deposit of costs

Article 41

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

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

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

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

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

CHAPTER VI

RATIFICATION OF OR ADHERENCE TO CONVENTIONS CONCERNING INTERNATIONAL TRADE LAW 21/

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

CHAPTER VII

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW 22/

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

A. Fellowships for training in international trade law

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

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

61. The Commission took note with satisfaction of the fact that the United Nations Institute for Training and Research (UNITAR) had included the subject of international trade law in the curriculum of its regional training and refresher

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

22/ Idem.

23/ Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 113; Yearbook of the United Nations Commission on International Trade Law, Volume V, 1974, part one, II, A, para. 113.

course for members of the Economic Commission for Western Asia, held at Doha, Qatar, from 19 to 31 January 1976, and expressed the hope that it would be possible to work out similar arrangements with UNITAR in the future.

C. Second UNCITRAL symposium

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

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

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

CHAPTER VIII

FUTURE WORK 25/

A. Future work programme of the Commission

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

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

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

25/ See foot-note 21 above.

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

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

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

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

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

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

CHAPTER IX

OTHER BUSINESS 26/

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

71. The Commission took note of this resolution. In particular, attention was directed to paragraph 8, in which the General Assembly "calls upon the United Nations Commission on International Trade Law to take account of the relevant provisions of the resolutions of the sixth and seventh special sessions of the General Assembly that lay down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of those resolutions". The Commission had before it a note by the Secretary-General on the "Relevant provisions of the resolutions of the sixth and seventh special sessions of the General Assembly" (A/CN.9/122).

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

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

C. Multinational enterprises

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

D. Attendance by observers

74. The Commission noted that at the present session, as at previous sessions, and at sessions of its Working Groups, several Governments that were not members of the Commission had expressed the wish to attend sessions of the Commission and its Working Groups as observers. The Commission was of the unanimous view that it would be desirable if these Governments were permitted to attend sessions in that

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26/ See foot-note 21 above.

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

capacity. The Commission therefore agreed that it should recommend to the General Assembly that it include in its resolution on the report of the Commission on the work of its ninth session an operative paragraph whereby the Commission would be expressly authorized to permit States not members of the Commission to attend sessions of the Commission as observers, where the States concerned so requested. The Commission, at its 177th meeting, on 28 April 1976, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

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

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

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

E. Date for termination of membership of the Commission

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

Decision of the Commission

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

The United Nations Commission on International Trade Law,

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

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

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

Recommends that the General Assembly should:

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

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

ANNEX I

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

I. INTRODUCTION

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

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

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

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

Title of the draft Convention

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

* * *

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

PART I. GENERAL PROVISIONS

Article 1. Definitions

Article 1, paragraphs 1 and 2

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

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

* * *

2. The Committee considered the following proposals:

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

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

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

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

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

3. In support of the proposal noted at paragraph 1 (a) above, it was observed that the proposed new paragraphs 1 and 2 were simpler in form than the existing paragraphs 1 and 2. The proposed new paragraphs would also create a greater

degree of uniformity between the definitions of these terms in the draft Convention and the definitions contained in article 1, paragraph 1 (a) and (b), of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974. a/

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

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

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

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

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a/ This Convention will hereinafter be referred to as the Athens Convention of 1974.

"PART I. GENERAL PROVISIONS

"Article 1. Definitions

"In this Convention:

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

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

Article 1, paragraph 3

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

* * *

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

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

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

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

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

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

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

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

Article 1, paragraph 4

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

* * *

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

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

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

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

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

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

15. In support of the proposal noted in paragraph 13 (b) above, it was observed that, since the liability of the carrier for passenger luggage was already regulated by the Athens Convention of 1974 it was desirable to exclude passenger luggage from the scope of the definition of "goods". It was noted in reply that the Athens Convention of 1974 only regulated carrier liability when a contract

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

had been made for the carriage of a passenger and his luggage. If, therefore, passenger luggage was excluded from the definition, a contract concluded solely for the carriage of passenger luggage would fall outside the scope of both the Athens Convention of 1974 and the draft Convention. After deliberation, the Committee decided to exclude liability for passenger luggage from the scope of the convention, not by modifying the definition of "goods", but by the addition of a new paragraph 3 to article 25.

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

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

18. The Committee adopted the following text:

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

Article 1, paragraph 5

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

* * *

19. The Committee considered the following proposals:

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

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

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

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

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

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

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

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

23. In support of the proposal noted in paragraph 19 (d) above, it was observed that the term "specified goods" appearing in the English text might be interpreted to mean goods specifically listed in a bill of lading or other transport document. If that interpretation were adopted, a carrier could avoid the application of the

Convention to a carriage of goods by not issuing a transport document listing the goods. After deliberation, the Committee decided to delete the word "specified".

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

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

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

Article 1, paragraph 6

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

* * *

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

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

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

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

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

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

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

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

29. In support of the addition of the new paragraph 3 set forth in paragraph 26 (b) above, it was observed that the definition contained therein clarified the identity of the shipper, which was sometimes uncertain. It was noted, however, that the definition might create difficulties in certain cases. Thus, when the contract of carriage was concluded by the consignee, the consignee would, under the proposed definition, be the shipper. Again, a buyer under an F.O.B. contract who concluded the contract of carriage would under the proposed definition be the shipper. After deliberation, the Committee decided not to adopt this proposal.

Article 2. Scope of application

Article 2, paragraph 1

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

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

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

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

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

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

* * *

1. The Committee considered the following proposals:

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

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

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

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

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

scope of application to the Convention, and that paragraph 1 (d) of article 2 served to widen the scope of application. After deliberation, the Committee decided to retain paragraph 1 (d) of article 2.

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

Article 2, paragraph 2

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

* * *

5. The Committee considered the following proposals:

(a) That this paragraph should be deleted.

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

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

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

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

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

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

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

Article 2, paragraph 3

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

* * *

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

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

Article 2, paragraph 4

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

* * *

12. The Committee considered the following proposals.

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

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

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

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

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

13. In support of the proposal noted in paragraph 12 (a) above, it was observed that while, under the introductory words of paragraph 1 of article 2 the draft Convention was applicable to all contracts of carriage of goods by sea, under

paragraph 4 of article 2 it was not applicable to charter-parties. It was therefore necessary to clarify the scope of application of the draft Convention by defining the term charter-party. Such a definition was also made necessary by the fact that in certain jurisdictions the term charter-party did not have a settled meaning. It was also observed that the exclusion of the application of the Brussels Convention of 1924 to charter-parties under article 5 of that Convention had created difficulties by reason of the absence in that Convention of a definition of a charter-party. It was further observed that, in the absence of a definition of "charter-party", carriers might seek to avoid the application of the draft Convention by issuing transport documents in the form of charter-parties.

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

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

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

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

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

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

"4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a

charter-party, the provisions of the Convention shall apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer."

Proposed additions to article 2

20. The Committee considered the following proposals:

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

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

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

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

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

22. In support of the proposal set forth in paragraph 20 (b) above, it was observed that the proposal was intended to cover the so-called "frame" contracts which provided for the delivery of a very large quantity of goods in successive shipments over an agreed period of time. Under the current definition of "contract of carriage" in article 1, paragraph 5, the view might be taken that such "frame" contracts fell within that definition and were subject to the draft Convention. However, it was desirable to exclude such contracts, which were concluded by parties in an equal bargaining position, from the scope of application of the draft Convention, while maintaining the applicability of the draft Convention to each shipment made pursuant to the "frame" contract, provided such shipment was not

under a charter-party. It was observed, on the other hand, that the provisions on the scope of application of the draft Convention already secured the result sought to be obtained through the proposed text. After deliberation, the Committee decided to adopt the following text:

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

Article 3. Interpretation of the Convention

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

* * *

1. The Committee considered the following proposals:

(a) That this article should be deleted.

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

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

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a/ A/CONF.63/15.

"PART II. LIABILITY OF THE CARRIER

"Article 4. Period of responsibility

Article 4, paragraphs 1 and 2

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

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

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

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

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

* * *

1. The Committee considered the following proposals:

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

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

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

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

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

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the deletion of the language specified in paragraph 1 (a) above would clarify the points of time at which the responsibility of the carrier began and ended. If that language were retained, it might be necessary to decide in certain cases what were the exact geographic limits of ports of loading and ports of discharge in order to determine whether carrier responsibility had begun or whether it had ended. The deletion of that language also eliminated a potential contradiction

between paragraph 1 and paragraph 2 of article 2 as to the period of responsibility. Under paragraph 1, that period appeared to begin at the port of loading and to end at the port of discharge, while under paragraph 2 it appeared to begin from the time the carrier took over the goods and to end when he delivered the goods. On the other hand, it was observed that the deletion of that language might lead to an undesirable extension of the scope of application of the draft Convention when a carrier had taken over the goods inland, or had delivered them inland. For in such cases the introductory words of paragraph 2 might, in the absence of the words proposed to be deleted in paragraph 1, be interpreted as meaning that carrier responsibility for the inland stages of the transport was regulated by the draft Convention, and thus create conflicts between the draft Convention and the provisions of national law or other transport conventions applicable to inland transport. After deliberation, the Committee decided not to adopt this proposal.

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

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

5. The Committee adopted the following text:

"PART II. LIABILITY OF THE CARRIER

"Article 4. Period of responsibility

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

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

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

"(b) In cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with

the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

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

Article 4, paragraph 3

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

* * *

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

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

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

"Article 5. General rules

Article 5, paragraph 1

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

* * *

1. The Committee considered the following proposals:

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

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

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

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

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

3. In support of the proposals noted in paragraphs 1 (b) and 1 (c) above, it was observed that they were designed to extend the scope of the defence available to the carrier under paragraph 1 of article 5. It was observed that under the present language defining the scope of the defence, the carrier might not be exonerated even where he proved that the circumstances causing the loss or damage

were such that the carrier had no time or opportunity to take any measures whatever to prevent loss or damage. On the other hand, it was observed that the existing language provided a defence to the carrier in such circumstances since, if no measures could be taken by the carrier, then no measures could reasonably be required of the carrier. After deliberation, the Committee decided not to accept these proposals.

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

"Article 5. Basis of liability

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

Article 5, paragraph 2

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

* * *

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

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

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

Article 5, paragraph 3

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

* * *

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

Article 5, paragraph 4

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

* * *

8. The Committee considered the following proposals:

(a) That this paragraph should be deleted;

(b) That this paragraph should be replaced by the following paragraph:

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

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

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

balance between all the liability provisions of article 5, and that this compromise should therefore be retained. In this connexion, the Committee noted that the UNCTAD Working Group on International Shipping Legislation had not suggested the deletion of paragraph 4.

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

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

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

Article 5, paragraph 5

"5. With respect to live animals, the carrier shall be relived of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents."

* * *

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

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

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

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

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

Article 5, paragraph 6

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

* * *

17. The Committee considered the following proposals:

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

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

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

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

18. In support of the proposal set forth in paragraph 17 (a) above, it was observed that the present wording of this paragraph seemed to free the carrier from his obligation to make a contribution in general average or salvage when the type of loss or damage to the cargo interests for which the carrier was normally obligated to make a contribution in general average or salvage resulted from "measures to save life" or "reasonable measures to save property at sea". This proposal was intended to make it clear that in such a case the carrier remained bound to make the appropriate general average or salvage contribution. However, the view was expressed that, since the draft Convention in article 24 contained an express provision on general average, a proposal intended to protect rights which might exist against the carrier in respect of general average or salvage contributions should be considered in connexion with that article. The Committee, however, decided to adopt the proposed substitution of the word "or" for the word "and" appearing between "life" and "from" in paragraph 6, since it was not the intention to exclude liability only in the case of an attempt to save both life and property.

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

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

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

22. The Committee adopted the following text:

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

Article 5, paragraph 7

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

* * *

23. The Committee considered the following proposals:

(a) That this paragraph should be deleted;

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

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

"7. Where damage results from the conjunction of fault or negligence on the part of the carrier, his servants or agents and an occurrence which he could not avoid, with consequences he could not prevent, the carrier shall be liable only for that portion of the damage attributable to such fault or negligence, if he establishes which portion of the damage is not attributable thereto."

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

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

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

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

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

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

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

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

Proposed addition to article 5

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

> /"4. Notwithstanding the provisions of paragraph 1, the carrier shall not be liable for loss, damage or expense arising or resulting from any act, neglect or default of the master, other members of the crew and the pilot in the navigation of the ship."/ b/

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

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b/ This proposal was submitted by the representatives of the Federal Republic of Germany, Japan, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics.

prevent default in navigation even though the defence was excluded and he was not liable to the shipper for loss caused by such default. It was further observed that the hazards to navigation arising in the course of ocean voyages had not significantly decreased in recent times, and that the retention of the exception was therefore justified.

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

32. After deliberation, the Committee decided not to adopt this proposal.

33. The representative of the USSR stated that he did not accept this decision of the Committee, and reserved his position on the issue of "error in navigation".

"Article 6. Limits of liability

"Alternative A

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

"Alternative B

"1. (a) the liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost or damaged.

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed /double/ the freight.

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

"Alternative C

"1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

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

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

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

"Alternative D

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

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

variation X: /double/ the freight;

variation Y: an amount equivalent to (x-y) a/ francs per package or other shipping unit or (x-y) francs per kilo of gross weight of the goods delayed, whichever is the higher.

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

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

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

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

"Alternative E

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

"(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed /double/ the freight.

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

"2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable."

The following paragraphs apply to all alternatives:

"A franc means a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.

"a/ It is assumed that the (x-y) will represent lower limitations on liability than those established under subparagraph 1 (a)."

"The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the preceding paragraph of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention."

* * *

1. The Commission considered the following issues in relation to this article:

(a) Whether the monetary limit of carrier liability should be formulated in terms of the single criterion of the weight of the goods, or in terms of the dual criteria of weight and "package or other shipping unit".

(b) Whether the monetary limit of carrier liability for loss, damage or expense resulting from delay in delivery should be formulated in terms of the same criterion used for formulating the limit for loss, damage or expense resulting from conduct of the carrier other than delay in delivery, or in terms of a different criterion.

(c) Whether the "gold franc" should be retained as the unit of account for specifying the monetary limit under the article.

(d) Whether this article should include a provision under which the limit of liability specified in the article could be modified by a declaration by the shipper of the value of the goods.

(e) Whether the article should contain a special provision regulating the monetary limit of liability when a container, pallet or similar article of transport was used to consolidate goods.

Single criterion or dual criteria

2. In regard to the issue noted in paragraph 1 (a) above, the view was expressed that formulation of the monetary limit in terms of the single criterion of weight was preferable. That criterion was easy to apply in practice. Further, it had been adopted in other transport conventions i.e. the CIM, 1/ CMR 2/ and Warsaw Conventions, 3/ and its application under those Conventions had not created difficulty. The main objection to the adoption of this criterion was that the application of a monetary limit based on it to cargo of low weight but high value resulted in the claimant receiving insufficient compensation. However, this difficulty could be resolved by:

1/ International Convention concerning the Carriage of Goods by Rail. Berne, 25 October 1962. This Convention will hereinafter be referred to as the CIM Convention.

2/ Convention on the Contract for the International Carriage of Goods by Road. Geneva, 19 May 1956. This Convention will hereafter be referred to as the CMR Convention.

3/ Convention for the Unification of Certain Rules relating to International Carriage by Air. Warsaw, 12 October 1929. This Convention will hereinafter be referred to as the Warsaw Convention of 1929.

(a) Insuring the goods to cover their actual value; or

(b) Establishing a minimum monetary amount payable by the carrier, even though the amount payable by the carrier under the normal rule of limitation would fall below such minimum amount. The following proposal was made for establishing such a minimum amount:

> "The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to /3/ units of account /(30) francs/ per kilo of gross weight of the goods lost, damaged or delayed, but the limit shall in no case be less than /1,000/ units of account /10,000 francs/." 4/

(c) By adding a provision to the Convention under which, by declaring the value of the goods in a bill of lading or other transport document, the shipper could exclude the monetary limit.

The proposal was also supported on the ground that one of the criteria used for calculating the freight was the weight of the goods, a higher freight being payable for goods of greater weight. Since a low freight was payable for goods of low weight it was not unreasonable that in the case of such goods the monetary limits of the carrier's liability should also be low. The view was also expressed that the term "package or unit" used in article 4 (5) of the Brussels Convention of 1924 had been given different interpretations in different jurisdictions, and that the continued use of this or a similar term would impede the harmonization of the law.

3. On the other hand, it was observed that the adoption of the dual criteria of weight and "package or other shipping unit" was more equitable from the point of view of the claimant. It resulted in the claimant obtaining adequate compensation in the case of cargo of low weight but having high value. Further, with the dual criteria, the claimant had the option of using that criterion which resulted in his receiving higher compensation. The solution of dual criteria had been adopted in article 2 (a) of the Brussels Protocol of 1968 5/ as an acceptable compromise, and should be retained.

4. After deliberation, the Committee expressed its preference for a provision formulating the monetary limits of limitation in terms of the dual criteria of weight and package or other shipping unit. However, in view of the fact that there was considerable support in the Committee for the single criterion of the weight of the goods, the Committee was of the view that the draft Convention to be submitted to a Conference of Plenipotentiaries should also set forth an alternative provision, under which the limit of liability was formulated in terms of the weight of the goods.

4/ The figures were inserted in this proposal for illustrative purposes only.

5/ Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968. This Convention will hereinafter be referred to as the Brussels Protocol of 1968.

Criterion in the case of delay

5. In regard to the issue noted in paragraph 1 (b) above, it was observed that there were several considerations supporting the adoption of a different criterion for formulating the monetary limits of carrier liability in the case of delay in delivery, and, in particular, for formulating those limits as a function of the freight payable for the carriage of the goods delayed. It was noted that, in general, loss caused by delay in delivery, as opposed to loss caused by other conduct of the carrier, was not covered by marine cargo insurance. In case of such loss, the shipper or consignee would have to obtain recourse from the carrier, and not from an insurer. It was therefore not unreasonable to adopt a different criterion for the formulation of the limit in the case of delay, and to formulate the limit in terms of a function of the freight. The view was also expressed that one factor taken into account in calculating the amount of the freight was the estimated duration of the carriage. If this duration was prolonged, resulting in delay in delivery, it was reasonable to link the compensation payable by the carrier to the amount of the freight. Attention was also drawn to the fact that article 5, paragraph 3, of the draft Convention permitted a person entitled to the goods to treat them as lost after a delay in delivery of 60 days; compensation after such a delay would therefore be calculated on the basis of a total loss of the goods. It was therefore suggested that, if the delay in delivery was less than 60 days, compensation on a different basis was appropriate. It was further observed that in certain jurisdictions the carrier was currently not liable for delay, and that its imposition cast a new and heavy burden on the carrier. It was therefore fair that his liability should be more limited than for loss or damage caused otherwise than by delay, and a limitation by reference to the freight was reasonable.

6. On the other hand, it was observed that the consequences for the consignee of delay in delivery, and loss of or damage to the goods caused otherwise than by delay in delivery, were identical, that is, he suffered economic loss. The economic loss caused by delay in delivery could be as serious as that caused otherwise than by delay. It was also observed that if loss caused by delay in delivery was not covered by marine insurance and could only be recovered by recourse against the carrier, this was a reason for specifying a limit of liability which would provide a shipper with full compensation; freight, however, would not provide adequate compensation. The view was also expressed that the proposals to limit the compensation payable by the carrier to the freight were linked to the view that freight was a fair measure of the costs incurred by the carrier in transporting the goods, and reflected a policy that the carrier should not be liable beyond the extent of such costs. However, the costs to the shipper resulting from delay in delivery were unrelated to the freight, and from the point of view of the shipper there was no justification for limiting his compensation to the freight.

7. After deliberation, the Committee decided to formulate the monetary limit of liability in case of loss, damage or expense resulting from delay in delivery on the basis of a criterion different from that used for the formulation of the limit in the case of loss of or damage to the goods resulting from the conduct of the carrier other than delay in delivery. The Committee also decided to formulate the monetary limit for delay as a function of the freight.

Unit of account

8. At the commencement of its deliberations on the issue set forth in paragraph 1 (c) above, the Committee considered a statement from the observer from the International Monetary Fund on the nature of the special drawing right of the International Monetary Fund, and on the possibility of its use as a unit of account for the purposes of article 6 of the draft Convention.

9. The Committee considered the following proposals:

(a) That the "gold franc" should be retained in the draft Convention as a unit of account for the purposes of article 6, but that the question as to what was to be the unit of account should be finally determined at the Diplomatic Conference which would consider the draft Convention.

(b) That the "gold franc" should be replaced by the special drawing right of the International Monetary Fund as the unit of account for the purposes of article 6.

(c) That the solution in article VII of the Montreal Protocol No. 4 to amend the Warsaw Convention, 6/ under which States members of the International Monetary Fund accepted the special drawing right as the unit of account, while States not members of the International Monetary Fund accepted a unit of account based on gold, should be adopted for the purposes of article 6.

10. There was wide agreement that gold was not an acceptable basis for a unit of account because of current fluctuations in the price of gold, and because the rates of conversion of gold values into national currencies were often not established. The Committee noted, however, that the replacement of the "gold franc" by the special drawing right of the International Monetary Fund would create difficulties for those States not members of the Fund. In regard to the proposal to adopt the solution contained in article VII of the Montreal Protocol No. 4 to amend the Warsaw Convention, the view was expressed that this solution was not satisfactory as it did not achieve uniformity as to the unit of account.

11. After consideration of the alternative proposals, the Committee decided to delete the "gold franc" as the unit of account for the purposes of article 6, and to leave the determination of the unit of account to the diplomatic conference which would consider the draft Convention.

Declaration of value of goods

12. In regard to the issue noted in paragraph 1 (d) above, it was observed that the absence of a provision in article 6 under which the monetary limit of liability specified in the article could be modified by a declaration by the shipper of the value of the goods would make the article void in certain jurisdictions as being contrary to public policy. It was stated that article 4 (5) of the Brussels Convention of 1924 contained a provision under which a shipper could exclude the monetary limit of liability by a declaration of value, and that a similar provision should be added to article 6.

6/ Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol. Done at The Hague on 28 September 1955.

13. It was observed, on the other hand, that the proposal noted above was capable of two interpretations:

(a) That by making a declaration of value, the shipper would be empowered to unilaterally exclude the monetary limit of liability specified in the article; or

(b) That the monetary limit of liability would be modified only if the carrier agreed to such a modification subsequent to the declaration of value.

In support of the interpretation set forth in paragraph 13 (a) above, it was observed that the object of the proposal would be rendered nugatory if the carrier were free to refuse to accept a higher monetary limit of liability subsequent to the declaration of value. On the other hand, it was observed that in the case of a declaration of value under Article 4 (5) of the Brussels Convention of 1924, there would in effect be an agreement between shipper and carrier to modify the monetary limits of liability subsequent to a declaration of value. For the carrier would in most cases stipulate a higher freight rate as a condition for carrying goods whose value was declared. If that higher rate was accepted by the shipper, there would in effect be an agreement by which the monetary limit of liability was waived by the carrier in return for the payment of a higher freight rate by the shipper.

14. The view was also expressed that the addition of a specific provision in article 6 enabling the parties by agreement to modify the monetary limit of liability upon a declaration of value by the shipper was unnecessary and undesirable. Under article 23, paragraph 2, a carrier was free to increase his obligations, and an exclusion of the monetary limit of liability would form an increase of the carrier's obligations. The insertion of a specific provision in article 6 enabling the parties to exclude the monetary limits upon a declaration of value by the shipper might lead to an inference that that was the only permissible method of excluding the monetary limit. whereas other circumstances in which the limit might be validly excluded in terms of article 23, paragraph 2, could be envisaged. On the other hand, it was noted that the interpretation of article 23, paragraph 2, as enabling the exclusion of the monetary limit of liability was not immediately apparent on a reading of that paragraph. It would therefore be useful to insert a specific provision in article 6 enabling the parties to exclude the monetary limit of liability.

15. After deliberation, the Committee decided:

(a) To adopt a provision enabling the shipper and carrier by agreement to exclude the monetary limit of liability specified in article 6; and

(b) To insert this provision in article 6.

Special provisions for unitized cargo

16. In regard to the issue noted in paragraph 1 (e) above, it was observed that it was undesirable to include in the article special provisions on unitized cargo, such as paragraph 2 of alternative C, paragraph 2 of alternative D and paragraph 2 of alternative E, as such provisions impeded the modernization of container carriage. There was wide agreement, however, that if the double criteria of weight and "package or other shipping unit" were adopted for formulating the monetary

limits of liability, it was necessary to make special provision as to the monetary limit of liability in cases of unitized cargo, i.e. where the goods were consolidated in a container, pallet or similar article of transport.

17. The view was also expressed that the language of the provision regulating the monetary limit of liability in cases of unitized cargo in paragraph 2 (a) of alternatives C and D needed clarification in that it was unclear whether an enumeration by the shipper of packages or units contained in an article of transport would determine the monetary limit of liability even though the carrier had not agreed to that enumeration. It was observed, however, that an enumeration, if made by the shipper, would be made pursuant to article 15, paragraph 1 (a), of the draft Convention, and that if the carrier did not agree to the enumeration, he could thereupon enter a reservation under article 16.

18. After deliberation, the Committee decided to include in the article a provision identical with paragraph 2 (a) of alternatives C and D of article 6.

19. The Committee adopted the following text:

"Article 6. Limits of liability

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

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed /.../ 1/ the freight /payable for the goods delayed/ /payable under the contract of carriage/.

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

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

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

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

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

"3. Unit of account means ... 2/"

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

"B. Alternative article 6: limits of liability 3/

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

"2. Unit of account means ... 4/

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

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

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

"4/ The unit of account is to be determined at the conference of plenipotentiaries which will consider the draft convention."

"Article 7. Actions in tort

Article 7, paragraph 1

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

* * *

1. The Committee considered a proposal that the words "or otherwise" should be added at the end of this paragraph.

2. In support of this proposal, the view was expressed that under certain legal systems an action against a carrier could be founded not merely in contract or tort, but on other bases of liability, e.g. quasi-contract. It was therefore desirable to extend the scope of this paragraph to cover actions founded on such other bases of liability. In this connexion it was also observed that the present title of article 7, referring solely to "Actions in tort", was inappropriate.

3. After deliberation, the Committee decided:

(a) That the words "founded in contract or in tort" appearing at the end of the paragraph in the English version should be replaced by the words "founded in contract, in tort or otherwise", and that the words "sur la responsabilité contractuelle ou sur la responsabilité extra-contractuelle" in the French version should be replaced by the words "sur la responsabilité contractuelle, délictuelle ou autrement"; and

(b) That the existing title of the article should be replaced by the title "Application to non-contractual claims".

4. The Committee adopted the following text:

"Article 7. Application to non-contractual claims

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

Article 7, paragraph 2

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

* * *

5. The Committee considered a proposal that the words "a servant or agent of the carrier" should be replaced by the words "the servants, the agents or other persons acting pursuant to the instructions of the carrier".

6. In support of this proposal, it was observed that the words "the servants, the agents or other persons acting pursuant to the instructions of the carrier" proposed to be substituted in this paragraph appeared in paragraph 3 of article 4 of the draft Convention. The said paragraph extended the carrier's period of responsibility as defined in paragraphs 1 and 2 of article 4 by including within that period the time during which the goods carried were in the charge not only of the carrier, but of his servants, agents or other persons acting pursuant to his instructions. It was observed that all such persons should be entitled to avail themselves of the defences and limits of liability which the carrier was entitled to invoke under the Convention and that the proposed substitution would achieve this result.

7. After deliberation, the Committee decided not to adopt this proposal on the grounds that:

(a) There was no reason for requiring an exact correspondence between the category of persons through whom the carrier could be in charge of the goods during his period of responsibility, and the category of persons who should be entitled to the same defences and limits of liability as the carrier;

(b) The proposed substitution would result in an undue extension of the category of persons entitled to the same defences and limits of liability as the carrier, to e.g. independent contractors.

8. The Committee decided to retain the existing text of this paragraph.

Article 7, paragraph 3

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

* * *

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

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

Article 8. Loss of right to limit liability

"The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

* * *

1. The Committee considered the following proposals:

(a) That the article should be modified to provide that, in addition to the cases where the carrier lost the right to limit his liability under the first sentence of the article, he should also lose the right to limit his liability when damage had been caused by the act or omission of a servant or agent of the carrier acting within the scope of his employment done with the intent or recklessness specified in the article;

(b) That the phrase "or recklessly and with knowledge that such damage would probably result" should be deleted;

(c) That the words "loss, damage or delay" should be substituted for the word "damage" wherever the latter word appeared in the article.

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the proposed modification to the article would produce a fairer result for the shipper. Carriers were in most cases not individuals but corporations, and corporations always acted through servants and agents. The result, therefore, of restricting the cases in which a carrier lost his right to limit his liability to cases where acts or omissions of the carrier himself caused damage was that the carrier's limitation of liability would only very rarely be excluded. While under the second sentence of the article the servants or agents of the carrier lost their right to limit liability where they acted with the intention or recklessness specified in the article, it would be very difficult for a shipper to identify which servant or agent of the carrier had caused the damage; obtaining compensation not subject to monetary limitation through an action against a servant or agent of the carrier would therefore be difficult. Further, it was more advantageous for a shipper to sue the carrier rather than his servants or agents, since there was greater certainty that the carrier would have funds to satisfy a judgement rendered against him. The view was also expressed that the proposed modification would harmonize the provisions of the article with the provisions on the carriers loss of the right to limit his liability of article 29 of the CMR Convention and article 25 of the Warsaw Convention of 1929 as modified by the Hague Protocol of 1955. i/

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i/ Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929. Done at The Hague, 28 September 1955.

3. On the other hand, it was observed that there were several considerations which supported the retention of the limited effect of the existing provisions of the article on the loss of the right to limit liability. The monetary limit of carrier liability was one of the most important factors taken into account in calculating the rates of carriers' liability insurance. The greater the degree of certainty that the monetary limit established could not be exceeded, the easier it became to calculate insurance rates, and to provide lower rates which in turn resulted in lower transport costs. If the proposed modification were accepted, there would be a wide extention of the cases in which the carrier might lose his right to limit his liability, e.g. to cases of theft committed by the carrier's servants or agents. It was also noted that, if the proposed modification were accepted, the carrier would be compelled to take out liability insurance cover against the new risks transferred to him which had previously been borne by the shipper and covered by the cargo insurance of the shipper. Since liability insurance was more expensive than cargo insurance, the change in the incidence of insurance cover would result in an increase in transport costs. It was also noted that the proposed modification might lead to an undesirable increase in litigation, since shippers would often attempt to obtain unlimited compensation from the carrier by seeking to prove acts or omissions of the carrier's servants or agents committed with the intention or recklessness specified in the article. It was further noted that, while the proposed modification might harmonize the provisions of the article with corresponding provisions in some transport conventions, the present provisions of article 8 corresponded to article 13 of the Athens Convention of 1974, while article 24 (2) of the Guatemala Protocol j/ to the Warsaw Convention of 1929 had even more stringent provisions than article 8 in that it established limits of liability which could not be exceeded whatever the circumstances which gave rise to the liability.

4. In response to the view that the loss of the carrier's right to limit his liability would occur very rarely because of the difficulty of proving that corporate carriers had personally performed acts or made omissions, it was proposed that the existing text of the article might be modified by inserting the following language between the first and second sentences of the article:

> "For the purposes of this article, 'carrier' shall include any director, manager or other person employed in the management of the carrier's enterprise, who has been given decision-making authority by the carrier, provided that such person has acted within the scope of his authority."

5. In support of the proposal noted in paragraph 1 (b) above, it was observed that the term "recklessness" proposed to be deleted could under certain legal systems be interpreted as having the same meaning as "negligence". Since the liability of the carrier under article 5 was based on negligence, the result in practice might be that the carrier lost the right to limit his liability in every case where he was liable. The words "and with knowledge that such damage would probably result" should be deleted because retention of that phrase would also lead in practice to the loss by the carrier of the right to limit his liability in many cases as it would be very difficult for him to prove that the probablity of damage

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j/ Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971.

was beyond his knowledge. On the other hand, it was observed that the term "recklessness" had a meaning clearly different from "negligence" and should therefore be retained. The Committee also considered suggestions that the entire phrase proposed to be deleted should be replaced by the terms "gross negligence" or "wilful misconduct".

6. In regard to the proposal noted in paragraph 1 (c) above, there was general agreement that the words "loss, damage or delay" should be substituted for the word "damage" wherever the latter word appeared in the article.

7. After deliberation, the Committee approved the following text, intended as a compromise between the view advocating unbreakable limits of liability under the Convention and the view favouring full liability of carriers without any limit for intentional or reckless actions of their servants and agents:

"Article 8. Loss of right to limit liability

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

"(a) The carrier himself, or

"(b) An employee of the carrier other than the master and members of the crew, while exercising, within the scope of his employment, supervisory authority in respect of that part of the carriage during which such act or omission occurred, or.

"(c) An employee of the carrier, including the master or any member of the crew, while handling or caring for the goods within the scope of his employment."

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

8. The representatives of the Federal Republic of Germany, Japan and Poland expressed their opposition to the text of article 8 set forth above and reserved their position. The representative of the Federal Republic of Germany noted that the article should specify clearly the servants or agents of the carrier that were referred to in the various provisions of article 8 and stated that the current language of the article could lead to litigation.

"Article 9. Deck cargo

Article 9, paragraph 1

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

* * *

1. The Committee considered the following proposals:

(a) That the phrase "with the usage of the particular trade" should be deleted;

(b) That the phrase "or with statutory rules or regulations" should be supplemented by a reference to the legal system to which the rules or regulations belonged;

(c) That the paragraph should be modified to require that, in all cases where goods were carried on deck in accordance with this paragraph, the carrier should insert a statement in the bill of lading or other document evidencing the contract of carriage that the goods were being carried on deck.

2. The proposal noted in paragraph 1 (a) above was supported on the ground that the meaning of "usage" was unclear. It would therefore be difficult to establish whether a carrier was or was not entitled to carry goods on deck under a usage. The retention of the phrase was not necessary for the purposes of covering usages relating to the storing of containers, as most bills of lading or other transport documents issued in connexion with container carriage expressly regulated the right to carry containers on deck. The proposal was opposed on the ground that the meaning of "usage" was not unclear in maritime transport, and that there were in fact well settled usages for on-deck carriage in particular trades, such as the timber trade. The right to stow containers on deck was also often regulated solely by usage, and retention of the phrase was of special importance for container carriage. After deliberation, the Committee decided to retain the phrase in question.

3. The proposal noted in paragraph 1 (b) above was supported on the ground that, under the present wording of this paragraph, the legal system by reference to which the statutory rules or regulations were to be ascertained was not specified, and it was therefore impossible in practice to determine whether a carrier was entitled to carry on deck under statutory rules or regulations. It was suggested that the paragraph should specify that the applicable statutory rules or regulations were those of the port of loading, or of the law of the flag of the vessel. In response to this proposal, it was observed that the specification in the paragraph of the applicable statutory rules or regulations did not resolve certain problems. Since the statutory rules and regulations of different ports were not uniform, and since some statutory rules and regulations mandatorily required carriage under deck of certain types of cargo, a carrier who carried goods on deck in accordance with the specified statutory rules or regulations might still be in breach of the law at certain ports.

4. It was suggested that a possible solution to the difficulties noted above would be the deletion of this phrase. It was noted, on the other hand, that if the circumstances under which the right to carry on deck existed were to be restrictively defined by the use of the word "only", then a reference to statutory rules or regulations as a source of entitlement to carry on deck was necessary.

5. After deliberation, the Committee decided not to adopt the proposed modification.

6. The proposal noted in paragraph 1 (c) above was supported on the ground that it would give notice of on-deck carriage to shippers, consignees and third party holders of bills of lading. Such information was relevant, since on-deck carriage might affect the condition of the goods. On the other hand, the view was expressed that a statement that carriage was on deck could not be inserted if the carriage was not under a document evidencing a contract of carriage. After deliberation, the Committee decided not to adopt this proposal. k/

7. The Committee adopted the following text:

"Article 9. Deck cargo

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

Article 9, paragraph 2

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

* * *

8. The Committee considered the following proposals:

(a) That the paragraph should be modified to require that, in all cases where the goods were carried on deck in accordance with paragraph 1, the carrier should insert a statement in the bill of lading or other document evidencing the contract of carriage that the goods were being carried on deck;

(b) That the second sentence of the paragraph should be modified to require that where goods were carried on deck, but no statement to that effect had been inserted in the bill of lading or other document evidencing the contract of

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k/ The proposal was supported by the USSR, which reserved its position on the decision taken by the Committee.

carriage, the burden of proving that he was entitled to carry on deck in accordance with any of the other two sources of entitlement for on-deck carriage referred to in paragraph 1, (i.e. usages of the trade, or statutory rules or regulations) should be on the carrier.

9. The proposal noted in paragraph 8 (a) above was considered in connexion with the proposal noted in paragraph 1 (c) above relating to article 9, paragraph 1, and was supported and opposed on the same grounds as the latter proposal. The views expressed in connexion with the latter proposal are noted in paragraph 6 above.

10. The proposal noted in paragraph 8 (b) above was supported on the ground that when the carrier had not given notice to shippers, consignees and third party holders of a bill of lading of the fact of on-deck carriage by the insertion of a statement to that effect in the bill of lading or other document evidencing the contract of carriage, it was reasonable to place on the carrier the burden of proving that he had a right to carry on deck, even when such right did not arise from an agreement with the shipper.

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

Article 9, paragraph 3

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, in accordance with the provisions of articles 6 and 8. The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith."

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12. The Committee considered the following proposals:

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

"With respect to authorized on-deck carriage under paragraph 1 of this article, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in such carriage. When the carrier proves that in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents.";

(b) That the paragraph should be redrafted:

(i) To clarify the effect of the word "solely"; and

(ii) To clarify that the provisions of articles 6 and 8 regulating the limitation of the carrier's liability were applicable when he had carried goods on deck contrary to the provisions of paragraph 1 of article 9.

13. The proposal noted in paragraph 12 (a) above was supported on the ground that there were special risks inherent in on-deck carriage, such as damage from heavy seas, and that it was reasonable to exclude the carrier's liability when loss or damage resulted from such special risks. The Committee noted that the proposed new paragraph was modelled on article 5, paragraph 5, which provided a defence to the carrier when damage resulted from the special risks inherent in the carriage of live animals. On the other hand, it was observed that the special risks inherent in on-deck carriage were much less serious than those inherent in the carriage of live animals, and that the carrier already had a defence under article 5, paragraph 1, in regard to damage caused by the special risks inherent in on-deck carriage specially mentioned in the course of the deliberations, since they fell within the category of "vis major". After deliberation, the Committee decided not to adopt this proposal.

14. After deliberation, the Committee accepted the proposal noted in paragraph 12 (b) above and retained the present wording of paragraph 3 of article 9, subject to the proposed drafting changes.

15. The Committee adopted the following text:

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

Article 9, paragraph 4

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

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16. The Committee considered a proposal that this paragraph should be deleted for the reason that loss of the carrier's right to limit his liability was too severe a consequence of a carriage of goods on deck by a carrier contrary to express agreement to carry under deck. The Committee decided to retain the existing text of this paragraph on the ground that loss of the right to limit liability was a justifiable consequence of a breach of such express agreement.

"Article 10. Liability of contracting carrier and actual carrier

Article 10, paragraph 1

"1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The contracting carrier, shall in relation to the carriage performed by the actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment."

* * *

1. The Committee considered this paragraph in connexion with

(a) Proposals intended to clarify the relation of this paragraph to article 11, and

(b) Proposals for the definition of "actual carrier" in article 1, paragraph 2.

2. It was observed that the distinction between the circumstances in which this paragraph applied, and the circumstances in which article 11, paragraph 1, applied, needed clarification. It was noted that article 11, paragraph 1, only applied when, at the time of contracting with the shipper, the contracting carrier specified that he would perform only part of the carriage, and that the remainder of the carriage would be performed by another carrier. Therefore paragraph 1 of article 10 should only apply when, at the time of contracting, the carrier did not specify this, and undertook to perform the entire carriage, but nevertheless entrusted performance of a part of the carriage to another carrier.

3. The view was expressed that the scope of the contracting carrier's responsibility under this paragraph for the acts or omissions of the actual carrier and his servants or agents would depend on the definition of "actual carrier". It was also observed in this connexion that where the contracting carrier had entrusted the performance of the carriage to another carrier, and the latter had in turn entrusted it to yet another carrier, this third carrier would not be an actual carrier for the purpose of paragraph 1.

4. The Committee considered proposals for the definition of "actual carrier" and adopted a definition of "actual carrier". This definition, and an account of the deliberations leading to the adoption of this definition, are set forth in this report in the account of the deliberations of the Committee on article 1 of the draft Convention (see paras. 4-5).

5. Consequent upon the adoption of a new definition of "actual carrier", the Committee decided to retain the existing text of this paragraph subject to such drafting changes as would be necessitated by the new definitions of "carrier" and "actual carrier" in article 1 of the draft Convention.

6. The Committee adopted the following text:

"Article 10. Liability of the carrier and actual carrier

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

Article 10, paragraph 2

"2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of the second sentence of article 8 shall apply if an action is brought against a servant or agent of the actual carrier."

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7. The Committee considered a proposal that the words "performed by" in this paragraph should be replaced by the words "entrusted to". The proposal was supported on the ground that it created a desirable extension of the category of actual carriers on whom responsibility according to the provisions of this Convention was imposed by paragraph 2. Thus, where successive carriers had been entrusted with the performance of the carriage, it might in certain circumstances be of advantage to the claimant to sue a non-performing actual carrier entrusted with performance, rather than a performing actual carrier. The proposed modification would also enable a claimant to sue an actual carrier entrusted with the performance of the carriage by the contracting carrier, when the actual carrier had failed to perform the carriage at all. The proposal was opposed on the ground that certain provisions of the Convention could not appropriately be made applicable to a non-performing carrier, since they were only relevant in the event of a performance of the carriage.

8. After deliberation, the Committee decided not to adopt the proposed amendment.

9. The Committee adopted the following text:

"2. The actual carrier shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 shall apply if an action is brought against a servant or agent of the actual carrier."

Article 10, paragraph 3

"3. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing."

* * *

10. The Committee considered a proposal to add the following sentence at the end of the paragraph:

"The carrier shall nevertheless remain bound by the obligations or waivers resulting from such a special agreement."

11. In support of this proposal, it was observed that the additional sentence would clarify that in cases where a contracting carrier had assumed special obligations not imposed by the Convention or had waived rights conferred by it, and then had entrusted performance of the contract of carriage to an actual carrier, the contracting carrier nevertheless remained bound by the special obligations or waivers. On the other hand, it was stated that this result was already clear under the existing language of the paragraph, and that the proposed addition was therefore unnecessary. It was also stated that the existing language was identical with article 4, paragraph 3, of the Athens Convention of 1974, and should therefore be retained in the interests of uniformity.

12. After deliberation, the Committee decided to adopt the proposed amendment.

13. The Committee adopted the following text:

"3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier shall nevertheless remain bound by the obligations or waivers resulting from such special agreement." 1/

Article 10, paragraph 4

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

* * *

14. The Committee considered a proposal that the paragraph should be amended to provide that, where it was not possible to ascertain whether loss, damage or delay had occurred during carriage by the contracting carrier or by the actual carrier, the contracting carrier and the actual carrier should be jointly and severally liable.

15. The proposal was supported on the ground that it was often difficult to ascertain whether loss or damage had occurred during carriage by the contracting carrier or the actual carrier. In such circumstances, it would be of advantage to the claimant to have the option of obtaining compensation from either the contracting carrier or the actual carrier. The proposal was opposed on the ground that it would unfairly extend the liability of actual carriers. The actual carrier had specifically contracted to perform only a part of the carriage, and he should

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1/ The representative of the United Kingdom stated that, in his view, article 10, paragraph 3 of the draft Convention as amended had the same effect as article 4, paragraph 3 of the Athens Convention of 1974.

not be made liable for loss or damage that had occurred during the part of the carriage not performed by him.

16. After deliberation, the Committee decided not to adopt the proposal. m/

17. The Committee adopted the following text:

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

Article 10, paragraphs 5 and 6

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

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

* * *

18. After deliberation, the Committee adopted the following texts:

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

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

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m/ The proposal which was made by Czechoslovakia, was supported by a number of delegations.

"Article 11. Through carriage

Article 11, paragraphs 1 and 2

"1. Where a contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the carriage shall be performed by a person other than the contracting carrier, the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article 10.

"2. However, the contracting carrier may exonerate himself from liability for loss, damage or delay in delivery caused by events occuring while the goods are in the charge of the actual carrier, provided that the burden of proving that any such loss, damage or delay in delivery was so caused, shall rest upon the contracting carrier."

* * *

1. The Committee considered the following proposals:

(a) That paragraphs 1 and 2 be deleted and be replaced by the following paragraph:

"Where a contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a person other than the contracting carrier, the contract may also provide that, notwithstanding the provisions of paragraph 1 of article 10, the contracting carrier shall not be liable for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier during such part of the carriage. The burden of proving that any loss, damage or delay in delivery has been caused by such events, shall rest upon the contracting carrier."

(b) That paragraphs 1 and 2 be deleted and be replaced by the following paragraph:

"Where a contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a named person other than the contracting carrier, the contract may also provide that, notwithstanding the provisions of paragraph 1 of article 10, the contracting carrier shall not be liable for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier during such part of the carriage, provided that, by virtue of assignment by the carrier of his rights against the actual carrier or otherwise, it is possible for the shipper or consignee to institute legal action directly against the actual carrier. The burden of proving that any loss, damage or delay in delivery has been caused by such events, shall rest upon the contracting carrier."

(c) That paragraphs 1 and 2 be deleted.

2. In support of the proposal noted in paragraph 1 (a) above, it was stated that the object of this proposal was both to distinguish clearly the type of contract of carriage regulated by this article from the type of contract of carriage regulated by article 10, and to protect the shipper or consignee adequately in relation to the kind of contract regulated by this article. The type of contract regulated by this article was a contract where a contracting carrier specifically agreed with a shipper to perform only part of the carriage, and to accept liability only for that part of the carriage he had agreed to perform. The remaining part of the carriage was to be performed by an actual carrier, who alone was to be responsible for the part of the carriage performed by him. However, the contracting carrier issued a single bill of lading covering the entire carriage. The advantage to the shipper of an arrangement of this kind was twofold. Firstly, the contracting carrier arranged for the on carriage with the actual carrier, thus relieving the shipper of the need for making arrangements for on carriage. Secondly, documentary credits often required the presentation under them of a single bill of lading covering the entire carriage. The shipper or consignee was protected by the requirement that notice be given, at the time of contracting, that the contracting carrier would only be responsible for a specified part of the carriage. Further, in order to escape liability for loss or damage occurring while the goods were in the charge of the actual carrier, the contracting carrier had to discharge the burden of proving that the loss or damage occurred while the goods were in charge of the actual carrier.

3. In the course of discussions, the view was expressed that the proposed text did not sufficiently protect the rights of the shipper against the contracting carrier or the actual carrier. Since the shipper was not in a contractual relationship with the actual carrier, he would be left without a remedy in cases where the contracting carrier excluded his liability by proving that the loss or damage occurred while the goods were in the charge of the actual carrier. Furthermore, some actual carriers were enterprises without substantial assets, and the shipper would not be able to recover damages from them; it was therefore desirable to limit the right of the contracting carrier to exclude his liability more narrowly than was the case under this proposal. It was also noted that a through bill of lading would be deprived of its chief value if a contracting carrier were permitted to issue a through bill of lading but to exonerate himself from all liability for loss or damage suffered when the goods were in the hands of an actual carrier. It was proposed that a rule could appropriately be modelled on the provisions of article 30 of the Warsaw Convention of 1929, under which the shipper could recover compensation from the first carrier, the consignee from the last carrier, and under which either shipper or consignee could in any event recover compensation from the carrier who had charge of the goods when loss, damage or delay occurred.

4. The proposal set forth in paragraph 1 (b) above was submitted to the Committee in response to the criticisms noted above of the proposal set forth in paragraph 1 (a) above. Under the second proposal, the contracting carrier could exclude his liability only if it were possible for the shipper or consignee to institute legal action directly against the actual carrier. The shipper or consignee would therefore in every case of loss or damage be able to institute action either against the contracting carrier or the actual carrier. The second proposal was opposed on the ground that there could be uncertainty as to when it was "possible" for a shipper or consignee to institute legal action directly against an actual carrier. Thus, it was always possible for a shipper to institute

an action against an actual carrier, but the action might fail for want of jurisdiction. This uncertainty in the meaning of "possible" could in turn result in uncertainty in the allocation of liability between the contracting carrier and the actual carrier. The view was also expressed that the attempt to obtain for the shipper rights against the actual carrier through the proviso of this proposal was unnecessary, since the shipper clearly had such rights already by virtue of paragraph 2 of article 10. It was further objected that the word "named" in the second line of the proposal might create difficulty in the application of the paragraph. For at the time of contracting, the contracting carrier might not know the identity of the actual carrier, e.g. he might only know that the on carriage would be performed by a conference vessel.

5. In support of the proposal noted in paragraph 1 (c) above; it was observed that article 11 was superfluous, because the particular type of contract of carriage it was intended to regulate did not need special regulation. The obligations of the contracting carrier under this type of contract were to carry the goods for a part of the carriage, and to act as an agent in arranging the remaining part of the carriage. The contracting carrier could therefore properly issue a bill of lading or other transport document only in respect of the carriage which he had undertaken to perform. The actual carrier would in turn issue a separate bill of lading or other transport document for the carriage performed by him. Opposition to this proposal to delete the article was based on the view, noted in paragraph 2 above, that there was a commercial need for a single through bill of lading covering the entire carriage. It was also observed that if no provision such as that contained in article 11 was made, empowering contracting carriers to exclude their liability for loss or damage occurring during the on carriage, carriers would refuse to issue through bills of lading, thereby causing inconvenience to shippers.

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

"Article 11. Through carriage

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

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

"PART III. LIABILITY OF THE SHIPPER

"Article 12. General rule

"The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier or by the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents."

* * *

1. The Committee considered the following proposals:

(a) That the following paragraph should be added as a new paragraph 2 to the article.

"2. If the goods have not been claimed by the consignee within a reasonable period after notice was given to him of their arrival, the shipper shall upon request by the carrier give the carrier the instruction on the disposal of the goods. If no such instruction has been given by the shipper within a reasonable time, the goods may be sold or otherwise disposed of by the carrier and the shipper shall remain responsible for any loss, damage or expenses, which could not be recovered from the proceeds of the goods."

(b) That the words "his servants or agents" should be added to the article after the word "shipper", and that the words "or delay" should be added after the word "damage".

2. The proposal noted in paragraph 1 (a) above was supported on the ground that failure to claim the goods by the consignee at destination was a frequent source of difficulty for the carrier. Although national laws existed regulating the carrier's rights in these circumstances, it would be preferable to harmonize the national laws by express provision in the Convention. The proposal was opposed on the ground that the differences in the various national laws, or difficulties in the application of national laws, were not serious enough to justify the insertion of express provisions in the Convention. After deliberation the Committee decided not to adopt this proposal.

3. In regard to the proposal noted in paragraph 1 (b) above, the Committee decided not to add the words "or delay" as proposed, since in practice it was rare for the carrier to sustain loss due to the shipper's delay. The Committee, however, decided to add the words "his servants or agents" as constituting a useful modification of the article, since the article would in consequence also cover the liability of the servants and agents of the shipper.

4. The Committee adopted the following text:

"PART III. LIABILITY OF THE SHIPPER

"Article 12. General rule

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

"Article 13. Special rules on dangerous goods

Article 13, paragraph 1

"1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous."

* * *

1. The Committee considered the following proposals:

(a) That the words "or the actual carrier" be added after the word "carrier" in each of the two instances the word "carrier" appeared in the paragraph;

(b) That the words "if necessary" should be deleted;

(c) That the words "whenever possible" should be deleted.

2. The proposal noted in paragraph 1 (a) above was supported on the ground that in certain cases the shipper may hand over dangerous goods directly to an actual carrier. In such cases, it was necessary to require the shipper to inform the actual carrier of the nature of the goods, and to indicate to the actual carrier, if necessary, the character of the danger and the precautions to be taken. However, the paragraph in its present form did not require the shipper to give any such information or indication to the actual carrier. There was general agreement that the proposal was useful, and after deliberation it was adopted by the Committee.

3. The proposal to delete the words "if necessary" was supported on the ground that in the case of dangerous goods it was always necessary for the shipper to inform the contracting or actual carrier of the character of the danger and the precautions to be taken. On the other hand, the view was expressed that in some cases the carrier might already know the character of the danger and the precautions to be taken, and that it was then unnecessary for the shipper to indicate this, e.g. in the cases of common explosives and dangerous goods which the carrier had previously transported, and in regard to which he had previously received such indications from the shipper.

4. The Committee noted that the UNCTAD Working Group on International Shipping Legislation had proposed that the paragraph should be redrafted retaining the words "if necessary", but making them qualify only the phrase "the precautions to be taken".

5. After deliberation, the Committee decided to retain the words, but to redraft the paragraph in the manner proposed by the UNCTAD Working Group.

6. The proposal to delete the words "whenever possible" was supported on the grounds that it was almost always possible to mark goods as dangerous. If it was impossible to mark the goods as dangerous, judicial or arbitral tribunals would recognize such impossibility, and would not hold the shipper to be at fault for

failure to mark or label. The retention of these words would create uncertainty as to the shipper's duty to mark or label. The proposal was opposed on the grounds that it was impossible to mark or label certain goods, such as bulk cargo, and that the words "whenever possible" took account of these cases. After deliberation, the Committee decided to delete the words "whenever possible".

7. The Committee also decided to replace the word "hands" appearing in the first sentence of the paragraph with the words "hands over", and to delete this first sentence of paragraph 1 of article 13, and place that sentence in paragraph 2.

8. The Committee adopted the following text:

"Article 13. Special rules on dangerous goods

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

Article 13, paragraph 2

"2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment."

* * *

9. The Committee considered the following proposals:

(a) That the words "or the actual carrier" should be added after the word "carrier" in the two instances where the latter word appeared in the paragraph.

(b) That the words "or precautions to be taken" should be added after the word "character" in the second sentence of the paragraph, and that the word "dangerous" should be added before the word "nature" in the two instances where the latter word appeared in the paragraph.

(c) That the phrase "knowledge of their nature and character" appearing in the first and second sentences of the paragraph should be replaced by the phrase "the information provided for in paragraph 1 of this article".

(d) That the words "directly or indirectly" appearing in the second sentence of this article be deleted.

10. The proposal noted in paragraph 9 (a) above was supported on the ground that:

(a) It was desirable to give, not only the contracting carrier but also the actual carrier, the power under paragraph 2 of the draft convention to unload, destroy or render innocuous dangerous goods under the conditions specified in the first sentence of that paragraph; and

(b) It was desirable to make the shipper liable to the extent defined in the second sentence of paragraph 2 of the draft convention also in the case where dangerous goods were shipped without the actual carrier having knowledge of their nature and character.

11. In regard to the desirability of giving the actual carrier the power described in the first sentence of paragraph 2 of article 13, there was general agreement that:

(a) The actual carrier should be given such a power where goods had been handed over directly to the actual carrier by the shipper, and the shipper had not given the actual carrier the information required under paragraph 1;

(b) The actual carrier should not be given such a power if the shipper had handed over the goods to the contracting carrier, and had given the information required under paragraph 1 to the contracting carrier, but the contracting carrier had not in turn conveyed the information to the actual carrier when the goods were handed over to the latter.

12. In regard to the possible imposition on the shipper, in favour of the actual carrier, of the liability described in the second sentence of paragraph 2 of article 13 in cases where the goods were shipped without an actual carrier having knowledge of their nature and character, there was general agreement that such a liability should only be imposed in the same instances in which the actual carrier was empowered to unload, destroy or render innocuous the goods, i.e. when the goods were handed over by the shipper directly to the actual carrier, and the shipper had not given the actual carrier the information as required by paragraph 1.

13. The Committee was further agreed that, even in cases where the shipper had not given the information required by paragraph 1 of article 13, it was reasonable both to exclude the power of contracting carriers and actual carriers to unload, destroy or render innocuous dangerous goods, and to exclude the liability of the shipper who had shipped dangerous goods, in each of the following circumstances:

(a) If, at the time the goods were handed over by the shipper to the contracting carrier or actual carrier, such carrier independently had knowledge of the dangerous character of the goods; and

(b) If, where goods were not handed over by the shipper to a contracting carrier or actual carrier but were otherwise taken in charge by a contracting carrier or actual carrier, such carrier, at the time he took charge of the goods, had knowledge of the dangerous character of the goods.

The Committee decided that paragraph 2 should be redrafted to accord with these decisions.

14. The proposals noted in paragraphs 9 (b) and 9 (c) were supported on the ground that the proposed modifications would harmonize the language of paragraph 2 with the corresponding language of paragraph 1. It was observed that, while paragraph 1 obliged the shipper to "inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken", the absence of the information which empowered the carrier under the first sentence of paragraph 2 to unload, destroy or render innocuous the goods, and made the shipper

liable under the second sentence of paragraph 2, was defined in paragraph 2 in terms of the goods having been taken in charge by the carrier "without knowledge of their nature and character". There was wide agreement that a harmonization of the language of paragraphs 1 and 2 was desirable.

15. The proposal to delete the words "directly or indirectly" was supported on the grounds that these words were unnecessary, in that their deletion would not alter the meaning of the sentence in which they appeared. After deliberation, the Committee decided to adopt this proposal.

16. The Committee adopted the following text:

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

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

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

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

Article 13, paragraph 3

"3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any."

* * *

17. It was observed that this paragraph might produce an unfair result in the following case: although a shipper gave a carrier to whom he handed over the goods the information required by paragraph 1 of this article, the carrier might nevertheless be negligent in handling the goods, with the result that they became an actual danger to the ship or cargo, and therefore had to be unloaded, destroyed or rendered innocuous. It was unfair to exclude the payment of compensation by the carrier to the shipper in such a case. It was stated, in reply, that such a negligent carrier would have to pay compensation under the liability provisions of article 5.

18. It was also observed that, in giving effect to the modifications to paragraphs 1 and 2 adopted by the Committee, account should be taken in relation to this paragraph of the case where a shipper gave a carrier to whom he handed

over the goods the information required by paragraph 1 of this article, but that carrier failed to convey this information to a second carrier to whom he handed over the goods. If as a result of this failure to convey the information the goods became an actual danger to the ship or cargo while in the charge of the second carrier, and therefore had to be unloaded, destroyed or rendered innocuous by such second carrier it was unclear whether the shipper had a right of action against either carrier. It was observed, on the other hand, that the handing over of the goods by the first carrier to the second carrier, without conveying the information, would constitute negligence on the part of the first carrier, and that the first carrier would therefore be liable under the provisions of article 5.

19. After deliberation, the Committee decided to redraft the paragraph in the light of the modifications adopted in relation to paragraphs 1 and 2, to specify in the paragraph that the exclusion of liability under the paragraph was subject to the operation of the liability provisions of article 5 of the Convention, and to renumber it as paragraph 4.

20. The Committee adopted the following text:

> "4. If, in cases where the provisions of paragraph 2, subparagraph (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5."

"PART IV. TRANSPORT DOCUMENTS

"Article 14. Issue of bill of lading

Article 14, paragraphs 1 and 2

"1. When the goods are received in the charge of the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things the particulars referred to in article 15.

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

* * *

1. After deliberation, the Committee adopted the substance of paragraphs 1 and 2 subject to any drafting changes that may be required to harmonize the paragraphs with the language of other articles adopted by the Committee.

2. On the recommendation of the Working Group, the Committee decided to include as a new paragraph 3 material drawn from the original text of article 15 subparagraph 1(j), i.e. that the signature on the bill of lading "may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means", if not inconsistent with the law of the country where the bill of lading was issued.

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

"PART IV. TRANSPORT DOCUMENTS

"Article 14. Issue of bill of lading

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

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

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

"Article 15. Contents of bill of lading

"Paragraph 1 (introductory language)

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

* * *

1. After deliberation, the Committee decided to retain the present wording of the introductory language for paragraph 1.

2. The Committee noted that neither the Brussels Convention of 1924 nor article 15, paragraph 1, of the draft convention prohibited the preservation, by means of electronic or automatic data processing systems, of the list of particulars required under that paragraph to be included in bills of lading.

3. One representative noted his reservation in respect of the list of particulars that, under the paragraph, had to appear on a bill of lading and stated that the content of bills of lading should be left for determination to commercial practice.

Paragraph 1, subparagraph (a)

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

* * *

4. The Committee considered the desirability of retaining the requirement in subparagraph (a) that the carrier set forth in the bill of lading both the number of packages or pieces and the weight of the goods, as furnished by the shipper.

5. The view was expressed that carriers should only be required to include in bills of lading either the number of packages or pieces or the weight of the goods. Carriers often could not reasonably check the weight of the goods and, in such cases, would be forced to note on the bill of lading their reservation pursuant to article 16, paragraph 1. A reservation concerning the weight of the goods noted on the bill of lading might render that bill of lading "unclean" for documentary credit purposes.

6. It was stated in reply, however, that both the number and the weight of the goods covered by a bill of lading were important items of information for holders of the bill of lading and for financing banks. It was also stated that, under the Uniform Customs and Practice for Documentary Credits (1974 version) of the International Chamber of Commerce, a "general unknown" clause would not make a bill of lading "unclean" for the purposes of financing.

7. It was observed that weight was one of the dual criteria adopted by the Committee for the formulation of the monetary limit of carrier liability in article 6. A mandatory statement of the weight of the goods in the bill of lading would be useful in the event that it became necessary to determine the limit of carrier liability for loss of or damage to the goods.

8. After deliberation, the Committee decided to retain subparagraph (a) of paragraph 1.

Paragraph 1, subparagraph (b)

"(b) The apparent condition of the goods;"

* * *

9. The Committee considered the desirability of adding the phrase "or their packaging" at the end of subparagraph (b), in order to clarify that in the case of packaged goods the carrier was only obligated to note the apparent condition of the packaging.

10. The Committee noted that under the definition of "goods" in article 1, paragraph 4, the term "goods" also covered the packaging of the goods, and decided that for this reason addition of the phrase "or their packaging" to the language of subparagraph (b) was not necessary.

11. The suggestion was made that subparagraph (b) should only call for a notation if the goods or their packaging were not in an apparent good condition in view of the fact that article 16, paragraph 2 provided that the goods were presumed to have been in apparent good condition if the apparent condition of the goods was not noted on the bill of lading.

12. The Committee was of the view that subparagraph (b), requiring that the bill of lading should indicate the apparent condition of the goods should be retained in its present wording. In this connexion, the Committee noted that the Brussels Convention of 1924 set forth the same requirement and that this had not caused any problems in practice.

Paragraph 1, subparagraph (c) to (g)

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

"(d) The name of the shipper;

"(e) The consignee if named by the shipper;

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

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

* * *

13. After deliberation, the Committee decided to retain the present wording of subparagraphs (c), (d), (e), (f) and (g) of paragraph 1.

Paragraph 1, subparagraph (h)

"(h) The number of originals of the bill of lading;"

* * *

14. The Committee decided to retain subparagraph (h), but to clarify that the number of originals of the bill of lading should be mentioned in the bill of lading only if there was more than one original.

15. The Committee adopted the following text:

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

Paragraph 1, subparagraph (i)

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

* * *

16. After deliberation, the Committee decided to retain the present wording of subparagraph (i).

Paragraph 1, subparagraph (j)

"(j) The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;"

* * *

17. The Committee noted that in a number of countries there had not yet been any legislative or judicial pronouncements regarding signature of documents by mechanical or electronic means. It therefore decided to retain the substance of subparagraph (j), but to clarify the meaning of the concluding phrase by redrafting it to read "... if not inconsistent with the law of the country where the bill of lading is issued." The Committee also decided to place the language indicating the permissible methods of signature in a new paragraph 3 of article 14.

18. The Committee adopted the following text:

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

Paragraph 1, subparagraphs (k) and (l)

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

"(l) The statement referred to in paragraph 3 of article 23."

* * *

19. After deliberation, the Committee decided to retain the present wording of subparagraphs (k) and (l) of paragraph 1.

20. One representative reserved his position in respect of subparagraph (l).

Consideration of proposed additions to the list of required particulars in article 15, paragraph 1

(a) Carriage of the goods on deck

21. Consideration was given to the desirability of requiring that the bill of lading contain an appropriate indication whenever the carrier was authorized to carry the goods on deck. It was noted that, for economic and financial reasons, knowledge of the fact that the goods would be carried on deck was of great importance for shippers and consignees.

22. It was observed that at the time the carrier took charge of the goods, particularly if the goods were in containers that could be carried either on deck or below deck, he may not yet know whether the goods would be carried on deck.

23. The Committee was of the view that the bill of lading should bear an appropriate notation whenever the carrier was authorized to carry the goods on deck, and decided to amend paragraph 1 accordingly.

24. The Committee adopted the following new subparagraph (m):

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

(b) Carriage of the goods in containers

25. The Committee considered a suggestion that article 15, paragraph 1, should require that the bill of lading contain an indication if the goods were to be carried in containers.

26. The Committee did not retain this suggestion, on the grounds that under the definition of "goods" in article 1, paragraph 4, it was clear that the term "goods" also encompassed the container or similar article of transport in which the goods were consolidated.

Paragraph 2

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

27. After deliberation, the Committee decided to retain the present wording of paragraph 2.

Paragraph 3

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

28. The Committee considered paragraph 3 in connexion with the following issues:

(a) The question whether paragraph 3 should be deleted;

(b) The desirability of selecting from the particulars required under article 15, paragraph 1, the particulars that were necessary for the transport document to be considered as a bill of lading;

(c) The question of sanctions for the omission of one or more particulars required under article 15, paragraph 1.

29. In support of the deletion of paragraph 3, it was stated that the legal validity of a particular transport document as a bill of lading should be left to the applicable national law. Further, the question whether a given transport document was economically acceptable was one of international commercial practice. After deliberation, the Committee decided to retain the substance of paragraph 3, on the ground that it served the useful purpose of clarifying that a bill of lading was not necessarily invalid as such for the sole reason that it did not contain all the particulars required under article 15, paragraph 1.

30. The Committee considered the desirability of identifying among the particulars required under article 15, paragraph 1, those elements that necessarily had to be included in a document for that document to be considered as a bill of lading. It was recalled that this question had been the subject of lengthy discussions in the UNCITRAL Working Group on International Shipping Legislation and that the Working Group had adopted the present wording of paragraph 3, because no consensus had been reached as to what those elements should be. After deliberation, the Committee decided against specifying in paragraph 3 those mandatory elements.

31. The Committee decided to add to paragraph 3 a provision which would clarify that the omission of one or more required particulars in a bill of lading had no effect on the validity of the bill of lading, provided that the document, as to its particulars, fell within the definition of the term "bill of lading" laid down in article 1, paragraph 6, of the draft convention.

32. The Committee considered a proposal to impose as the sanction for omitting from a bill of lading one or more required particulars the removal of the limitation on the liability of carriers provided in article 6. The Committee did not adopt this proposal, on the grounds that such a sanction would be too harsh in that it did not differentiate among the particulars that might have been omitted and that, in any event, the proposal represented a considerable departure from the system of limiting the liability of carriers established under articles 6 and 8.

33. The Committee adopted the following text:

"3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 6 of article 1."

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

Article 16, paragraph 1

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

* * *

1. The Committee considered:

(a) The desirability of retaining the requirement that the carrier "make special note" on the bill of lading of the grounds for knowing or suspecting that certain particulars on the bill of lading did not accurately describe the goods or of the absence of reasonable means of checking these particulars; and

(b) The question whether "reasonable means of checking" required that the carrier open sealed containers in order to check on the particulars of the goods therein contained.

2. It was proposed that the requirement in paragraph 1 of article 16, that the carrier "make special note" on the bill of lading of the grounds for knowing or suspecting that certain particulars on the bill of lading did not accurately describe the goods or of the absence of reasonable means of checking these particulars, should be replaced by a provision under which the carrier only had to note his reservation on the bill of lading in such cases, without being obliged to describe the grounds on which the reservation was based. Under a similar proposal, the carrier would be able to note his reservation on the bill of lading and then detail the grounds therefore on a separate document. The following reasons were advanced in support of the above proposals to amend paragraph 1:

(a) The requirement to "make special note" of the grounds for reservations on the bill of lading was contrary to the present practice, would be onerous for carriers and would slow down considerably the process of loading;

(b) The servants and agents of carriers who took charge of the goods lacked both the time and the requisite expertise to describe the reasons for reservations in a legally sufficient manner;

(c) The requirement to describe in detail the grounds for reservations on bills of lading would result in frequent litigation.

3. It was stated in reply, however, that the requirement in paragraph 1 that, for a reservation to have legal effect, the bill of lading must specify the grounds for the reservation, should be retained for the following reasons:

(a) The present text of paragraph 1 was designed to protect consignees and other third parties from frequent, unfounded reservations that could be printed on

bills of lading to the effect that the particulars given on the bill could not reasonably be checked;

(b) The requirement could be met in practice by a stamp on the bill of lading setting out in brief the reasons for the reservation;

(c) The requirement served to safeguard the commercial value of bills of lading by ensuring that the goods would be described accurately.

4. After deliberation, the Committee decided to retain the provision in paragraph 1 which required that, for a reservation to be given legal effect, the bill of lading must set forth not only a mention of the reservation but also the grounds for the particular reservation.

5. Consideration was given to a suggestion that paragraph 1 should make it clear that, while a carrier issuing a bill of lading had the right to enter on the bill of lading reservations authorized under that paragraph, a carrier was not obligated to enter such reservations. It was noted that whether paragraph 1 provided that carriers "shall" or "may" make special note of their reservations was of little practical significance in the light of article 16, paragraph 3, which established that, in relation to third parties acting in good faith, carriers were bound by the description of the goods on the bill of lading and could only rely on reservations that were permitted under paragraph 1 of that article and which the carriers had in fact appropriately entered on the bill of lading. The Committee decided to retain in paragraph 1 the requirement that carriers "shall" make special note of reservations, in order to emphasize that carriers should enter all reservations on the bill of lading that were authorized under paragraph 1 of article 16.

6. The Committee considered the desirability of adding a provision to paragraph 1, clarifying that "reasonable means of checking" did not call for the opening of sealed containers. After deliberation, the Committee decided not to add such a provision to paragraph 1, on the grounds that the present text, requiring only reasonable means of checking, was adequate to cover the special case of sealed containers, and that a contrario arguments might result from mentioning specifically in paragraph 1 the case of sealed containers but not other cases, e.g. the frequent case where the weight of the goods could not be checked within a reasonable time.

7. The Committee noted, however, that "reasonable means of checking" did not require that sealed containers be opened so that the particulars of the goods in the containers could be checked.

8. The Committee adopted the following text:

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

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

lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking."

Article 16, paragraph 2

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

* * *

9. After deliberation, the Committee decided to retain the present wording of paragraph 2.

Article 16, paragraph 3

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

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

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

* * *

10. The Committee considered a suggestion that the phrase "including any consignee" appearing in subparagraph (b) was unnecessary and should be deleted. The Committee, however, decided to retain this phrase on the ground that in some national legal systems it was doubtful whether a consignee would be considered as a third party transferee of the bill of lading.

11. Consideration was given to the desirability of adding a provision to subparagraph (b) of paragraph 3, restricting the circumstances under which the carrier would be able to rely on a reservation he had noted on the bill of lading based on reasonable grounds for suspecting the accuracy of a particular contained in the bill of lading. It was proposed that the carrier should not be permitted to rely on such a reservation in cases where, by utilizing the available, reasonable means of checking, he could have ascertained that the particular referred to was in fact inaccurate. It was stated that this provision was designed to ensure that carriers always employed the available, reasonable means for checking the goods and thus to accord protection to third parties who would be relying in good faith on the description of the goods in the bill of lading.

12. After deliberation, the Committee decided not to adopt the above-mentioned proposal on the ground that paragraph 1 already required the carrier to utilize all the reasonable means of checking that were available to him and that third parties would have great difficulty in proving what the carrier "ought to have known", had he made use of the reasonable means of checking the goods.

13. The Committee decided to retain the existing wording of paragraph 3.

Article 16, paragraph 4

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

* * *

14. Consideration was given to the question whether paragraph 4, setting forth the legal consequences if the bill of lading did not indicate that freight would be payable by the consignee upon the delivery of the goods, should be retained.

15. The view was expressed that paragraph 4 should be deleted, since it was usual to provide in contracts for the carriage of goods by sea that the freight or part of the freight was payable only when the transport of the goods was completed. According to another view, paragraph 4 should be retained on the grounds that it accorded necessary protection to consignees and other third parties from the imposition of freight charges payable by them without this having been indicated on the bill of lading.

16. After deliberation, the Committee was agreed that the substance of paragraph 4 of article 16 should be retained.

17. The Committee considered a proposal to extend the scope of paragraph 4 to cover also the legal consequences if the bill of lading did not indicate that demurrage incurred at the port of loading shall be payable by the consignee. It was stated that demurrage should be treated in the same manner as freight charges and that consignees therefore should only be liable for the payment of demurrage if the bill of lading contained an indication to this effect.

18. According to another view, paragraph 4 should not be expanded to cover demurrage, because such modification of the paragraph would lead to delay in the issuance of bills of lading as carriers would not issue them until they ascertained whether demurrage had or had not been incurred at the port of loading.

19. After deliberation, the Committee decided to extend the scope of paragraph 4 so as to cover the legal consequences of a failure to note on the bill of lading that either freight or demurrage was payable by the consignee.

20. The Committee adopted the following text:

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

"Article 17. Guarantees by the shipper

Article 17, paragraph 1

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

* * *

1. The Committee adopted the text of this article, subject to the replacement of the words "inaccuracies of such particulars" appearing in the second sentence by the words "inaccuracies in such particulars", and subject to drafting changes required to harmonize its language with the language adopted in other articles.

2. The Committee adopted the following text:

"Article 17. Guarantees by the shipper

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

Article 17, paragraphs 2, 3 and 4

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

"3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

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

* * *

3. The Committee considered a proposal that paragraphs 2, 3 and 4 be deleted.

4. The deletion of these paragraphs was supported for the following reasons:

(a) The retention of these paragraphs would result in an increase in the number of unclean bills of lading issued by carriers. Under the present law a carrier could, in reliance on a letter of guarantee given by the shipper, omit a reservation from a bill of lading if there was a minor discrepancy between the goods and the particulars relating to the goods supplied by the shipper. If, however, uncertainty was created as to the validity of letters of guarantee, the carrier would always enter a reservation in such cases. The bill of lading would then not be accepted by a bank under a documentary letter of credit.

(b) The issue of a clean bill of lading by the carrier in return for a letter of guarantee given by the shipper was an arrangement always initiated by the shipper for the shipper's benefit. Where the issue of a clean bill of lading in these circumstances constituted a fraud, the party mainly responsible for, and profiting from, the fraud would be the shipper. However, by invalidating the letter of guarantee in the case of fraud the shipper would be placed in a better position than the carrier.

(c) In seeking to regulate arrangements between shippers and carriers concerning the issue of clean bills of lading by carriers, the Convention would exeed its proper scope. Such arrangements were always subject to the applicable national law, which would control possible abuses resulting from such arrangements. It was noted in this connexion that a number of national laws in fact regulated such arrangements.

(d) Paragraphs 2, 3 and 4 of the draft Convention would in some measure confer international recognition on a practice which was capable of abuse, and would conflict with the provisions of national laws which currently checked possible abuses.

5. The retention of these paragraphs was supported on the following grounds:

(a) The provisions of paragraph 2 only invalidated clean bills of lading issued in reliance on letters of guarantee when the carrier, by omitting a reservation, intended to defraud a third party. To the limited extent that they interfered with current law and practice, the provisions were desirable.

(b) Some national laws already had provisions similar to those contained in paragraphs 2, 3 and 4. Such provisions had not resulted in carriers frequently issuing unclean bills of lading. The fear expressed that the provisions in these paragraphs would result in an increase in the number of unclean bills of lading being issued was therefore unfounded.

(c) Other provisions of the draft Convention regulated relations between carrier and shipper. There was therefore no good reason for the view that regulation of arrangements between the shipper and the carrier for the issue of clean bills of lading fell outside the scope of the draft Convention.

(d) Leaving the issue to be regulated by the applicable national law would not resolve the difficulty frequently encountered as to which national law was applicable. Further, the provisions of national laws appeared to differ, and it was therefore desirable to unify them through provisions in the Convention.

6. After deliberation, the Committee decided to retain these paragraphs. n/

7. The Committee adopted the following texts:

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

"3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in the latter case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

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

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n/ Delegations supporting the deletion of these paragraphs formed a sizeable minority within the Committee. The delegations of Japan and a number of other delegations reserved their position in respect of article 17, paras. 2, 3 and 4.

Article 18. Documents other than bills of lading

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

* * *

1. The Committee considered the following proposals:

(a) That the existing text of the article should be replaced by the following:

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

(b) That the existing text of the article should be replaced by the following:

"When a carrier issues a document other than a bill of lading by request of the shipper, such document shall be prima facie evidence of the taking over by the carrier of the goods as therein described."

(c) That the article should be supplemented by provisions regulating the following issues in relation to documents other than bills of lading:

(i) The obligation of the carrier to deliver at the port of destination;

(ii) The retention by the shipper of a right of disposal of the goods before they have reached the port of destination;

(iii) The effect of a reference in the document to other conditions governing the carriage of the goods.

2. The proposal noted in paragraph 1 (a) above was supported on the ground that the conclusion of a contract of carriage frequently occurred prior to the time the carrier took over the goods which were the subject of that contract. The issuance of a document other than a bill of lading evidencing a contract of carriage should therefore not be treated, as it was under the present article, as evidence of the taking over of the goods as described in the document. The proposed text, on the other hand, only made a document prima facie evidence of the taking over of the goods as described in the document by the carrier when the carrier had issued a document to evidence both the contract of carriage, and receipt or acceptance of the goods.

3. The retention of the present text was supported on the ground that in many cases the conclusion of the contract and the taking over of the goods by the carrier occurred at the same time. If the carrier had not taken over the goods when the document evidencing the contract was issued, it was open to the carrier under the present text to prove that in fact he had not taken over the goods as described in the document, since the present text only created a rebuttable presumption. Furthermore, the proposed text treated a document evidencing receipt or acceptance of the goods as prima facie evidence of the taking over of the goods

as therein described. Since receipt or acceptance amounted to taking over, the creation of a presumption as to taking over was unnecessary if the document itself evidenced receipt or acceptance.

4. In regard to the proposal noted in paragraph 1 (b) above, it was noted that the proposed text restricted the operation of the presumption of taking over to the case where the document evidencing the contract of carriage had been issued "by request of the shipper". There was wide agreement that such a restriction was undesirable, as such documents were frequently issued by carriers independently of requests by shippers.

5. The proposal noted at paragraph 1 (c) above was supported on the ground that there was an increased use of documents other than bills of lading evidencing contracts of ocean carriage, and that regulation in the draft convention of some of the principal rights and obligations of carrier and shipper under such documents was desirable. The proposal was opposed on the ground that adequate regulation of such rights and obligations would require detailed provisions, and that such detailed provisions fell outside the proper scope of the convention.

6. After deliberation, the Committee did not adopt any of the proposals noted in paragraph 1, and retained the existing text of the article.

"PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

Article 19, paragraph 1

"1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be prima facie evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any."

* * *

1. The Committee considered the following proposals:

(a) That the word "specifying" should be deleted, and replaced by the word "or".

(b) That the words "or such other person authorized to receive the goods" be added immediately after the word "consignee" in each of the two instances that the word appeared in the paragraph.

(c) That the words "or his servants or agents" should be added after the word "carrier".

(d) That the words ", or in case of such notice being given orally, unless a written confirmation is given to the carrier within 24 hours after the oral notice," be added before the words "such handing over shall be".

(e) That the words "in writing" should be deleted.

2. In support of the proposal noted in paragraph 1 (a) above, it was observed that the inclusion of the word "specifying" resulted in an obligation on the consignee to give, in addition to notice of loss or damage, a detailed description of the general nature of the loss or damage. Since this obligation placed an unnecessary burden on the consignee, it would be preferable to delete "specifying", and make the giving of such a detailed description optional. There was general agreement, however, that the specification of the general nature of the loss or damage was not too heavy a burden for the consignee, and was necessary to give the carrier notice of the nature of a possible claim against him. After deliberation, the Committee did not adopt this proposal.

3. In support of the proposal noted in paragraph 1 (b) above, it was observed that consignees would frequently receive delivery of goods through persons authorized to receive the goods on their behalf. It was therefore desirable to empower such other persons to give notice of loss or damage when goods were received by them. The proposal was opposed on the ground that the proposed addition would result in a requirement that, in order to avoid the operation of the presumption created by the second part of the paragraph, the person authorized to receive the goods must give notice not later than the time he received the goods. Such a requirement would be unfair to the consignee, since in many cases

the consignee alone could detect the loss or damage and specify its general nature. It was also stated that, since under article 4, paragraph 3, "consignee" included the servants, agents, or other persons acting pursuant to the instructions of the consignee, the proposed addition was unnecessary. After deliberation, the Committee decided not to adopt this proposal.

4. In support of the proposal noted in paragraph 1 (c) above, it was observed that it would be of advantage to the consignee if he were empowered to give notice either to the carrier or to his servants or agents. The proposal was opposed on the ground that it would create great practical difficulty for the carrier if notice could be given to any of his servants or agents. It was noted, in this connexion, that the applicable law and practice would specify that notice could validly be given to the carrier through certain categories of servants or agents. After deliberation, the Committee decided not to adopt this proposal.

5. It was stated in support of the proposal noted in paragraph 1 (d) above, that although for the sake of certainty an immediate, written notice of loss or damage was preferable, written notice by the consignee within 24 hours after the goods were handed over to him would be acceptable provided the consignee was required to give immediately an oral notice of the loss or damage. The proposal was opposed on the ground that requiring immediate oral notice would lead to uncertainty and litigation since, frequently, consignees would allege and carriers would deny that immediate oral notice of the loss or damage had been given. It was noted that article 19, paragraph 1, was not a time-bar and only included a rebuttable presumption as to the apparent condition of the goods upon their delivery. After deliberation, the Committee decided not to adopt this proposal.

6. The proposal to delete the words "in writing" was supported on the ground that the consignee could see whether loss or damage had been caused to the goods only after they had been handed over to him. It was therefore difficult for him to give notice in writing of loss or damage, specifying the general nature of the loss or damage, not later than the time the goods were handed over to him, as required by the paragraph. The proposal was opposed on the ground that a notice in writing was clear evidence both of the fact that notice was given, and of the general nature of the loss or damage of which notice was given. On the other hand, both the giving of an oral notice, and the terms of such a notice, could be easily disputed. In the course of the discussions on the above proposal it was suggested that the difficulties noted above arising out of the existing text and the proposed modification might be resolved by retaining the requirement that notice be given in writing, but permitting the consignee to give such notice not later than 24 hours after the goods were handed over to him. The Committee decided to adopt this suggestion, and to modify the text of the paragraph accordingly. o/

7. The Committee adopted the following text:

"PART V. CLAIMS AND ACTIONS

"Article 19. Notice of loss, damage or delay

"1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not

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o/ The representative of Japan reserved his position on article 19, para. 1, and maintained his preference for its formulation noted in para. 1 (d) above.

later than the day after the day when the goods were handed over to the consignee, such handing over shall be prima facie evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition."

Article 19, paragraph 2

"2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day."

* * *

8. The Committee considered a proposal that the period of 10 days specified in the paragraph should be extended to 15 days, on the ground that a 10-day period might be insufficient to give notice where the loss or damage was not apparent. On the other hand, the view was expressed that a 10-day period was sufficient. After deliberation, the Committee decided to modify the paragraph by replacing the 10-day period by a 15-day period.

9. The Committee also decided to harmonize the phrase "completion of delivery" used in this paragraph, and the phrase "handed over" used in paragraphs 1 and 5 of article 19.

10. The Committee adopted the following text:

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

Article 19, paragraph 3

"3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection."

11. After deliberation, the Committee retained the substance of this paragraph, subject to certain drafting changes, and adopted the following text:

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

Article 19, paragraph 4

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

* * *

12. After deliberation, the Committee retained the existing wording of this paragraph.

Article 19, paragraph 5

"5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 days from the time that the goods were handed over to the consignee."

* * *

13. The Committee considered a proposal to add the words "or otherwise delivered in accordance with paragraph 2 of article 4" at the end of this paragraph. In support of this proposal, it was noted that under paragraph 2 of article 4 the carrier ceased to be in charge of the goods not only when he had delivered the goods by handing them over to the carrier (article 4 (2) (a)), but also when he had delivered them in the manner specified in article 4 (2) (b) or 4 (2) (c). It was therefore appropriate that the 21-day period for giving notice should commence when delivery had been made in any of the three ways specified in article 4 (2). The proposal was opposed on the ground that it was only the consignee who, after the goods had been handed over to him, would be in a position to decide if there had been delay. After deliberation, the Committee decided not to adopt that proposal.

14. The Committee accepted a proposal to add the word "consecutive" after the figure "21", and adopted the following text:

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

Article 19, paragraph 6

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

* * *

15. The Committee considered a proposal that the paragraph should be modified to include a provision that a notice given under article 19 to a contracting carrier should have the same effect as if it had been given to an actual carrier who had delivered the goods. After deliberation the Committee adopted that proposal.

16. The Committee adopted the following text:

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

"Article 20. Limitation of actions

Article 20, paragraph 1 (introductory language)

"1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within /one year/ /two years/:"

* * *

1. Consideration of the introductory language of paragraph 1 was focused on the following issues:

(a) The length of the limitation period provided under this article; and

(b) The desirable scope of this article as to the types of actions and claimants covered.

2. After deliberation, the Committee decided that the period of limitation provided for under this article should be two years.

3. Regarding the desirable scope of article 20, it was proposed that its scope should be extended to cover all actions for damages relating to carriage under the convention, including not only actions by shippers or consignees against carriers but also actions by carriers against shippers or consignees. It was noted that the same limitation period should be applicable to all actions arising under the convention and that, e.g. under article 12 or 13, actions by carriers against shippers were foreseen.

4. According to another view, the scope of article 20 should be restricted to actions against carriers for loss of or damage to cargo and the limitation period for other types of actions arising under contracts of carriage covered by the convention should be left to the applicable national law for determination.

5. After considering this question, the Committee decided that article 20, dealing with the limitation period under the draft convention, should apply to all actions for damages relating to carriage under the draft convention, including actions by carriers against shippers or consignees.

6. The Committee was agreed that the introductory language of paragraph 1 should form a separate paragraph establishing the period of limitation under the draft convention and that subparagraphs (a) and (b) of the present paragraph 1 should constitute paragraph 2 dealing with the commencement of the running of the limitation period. It was noted that a similar arrangement had been adopted in article 16 of the Athens Convention of 1974.

7. The Committee adopted the following text as paragraph 1 of this article:

"Article 20

"1. Any action /for damages/ 1/ relating to carriage of goods under this

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1/ The Working Group suggests that these words may be deleted.

Convention is time-barred if legal or arbitral proceedings have not been initiated within a period of two years."

Article 20, paragraph 1, subparagraphs (a) and (b)

"(a) In the case of partial loss of or of damage to the goods, or delay, from the last day on which the carrier has delivered any of the goods covered by the contract;

(b) In all other cases, from the ninetieth day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made."

* * *

8. After deliberation, the Committee decided to retain the substance of subparagraph (a), but to clarify its application in cases where there were successive, partial deliveries of goods under a contract of carriage covered by the draft convention. It was noted that subparagraph (a) was designed to establish the limitation period for all actions arising from circumstances where full or partial delivery of the goods had been affected under the contract of carriage.

9. It was agreed that subparagraph (b) established the limitation period for all actions arising from circumstances where there had not been any delivery of the goods under the contract of carriage. The following proposals were, however, submitted in order to modify the provisions of subparagraph (b):

(i) To clarify that the goods could be taken over from the shipper by the carrier or by an actual carrier;

(ii) To provide that if the carrier fails to take over the goods, the period of limitation commences "the day after the last day when the shipper could have required the carrier to take them over in accordance with the contract of carriage";

(iii) To provide that for all actions covered by subparagraph (b), i.e. whether or not the carrier took over the goods, the period of limitation runs "from the last day on which the goods should have been delivered".

10. There was general agreement that the provision in subparagraph (b), under which in certain cases the commencement of the limitation period depended upon "the time the contract was made", was unsatisfactory since the time at which the contract of carriage was concluded had no necessary bearing on the time at which the contract of carriage was to be performed and claims under the contract were likely to arise.

11. Consideration was given to the case where a carrier failed to deliver the goods for an extended period without, however, incurring any liability for "delay in delivery" under article 5, paragraph 2, because he was taking all reasonable steps to accomplish delivery, e.g., the case of ships stranded in the Suez Canal for several years when the canal was closed. It was noted that under the present wording of subparagraph (b), and under the proposals mentioned at paragraph 9 above to modify subparagraph (b) except the last one, the consignee would, in such a case,

be forced to treat the goods as lost pursuant to article 5, paragraph 3, and claim their total loss, even if the consignee knew that the goods were not lost and that they were not perishable. Otherwise, if the consignee had failed to claim for total loss and if the goods were then delivered to him in a damaged condition after two years, he would be time-barred from asserting a claim. To resolve this problem, it was proposed that subparagraph (b) should provide that, in respect of actions falling within the ambit of that subparagraph, the period of limitation should run "from the last day on which the goods should have been delivered".

12. It was stated in reply that the provisions of article 5, paragraph 3, permitting goods to be treated as lost after 60 days of non-delivery, together with the two-year period of limitation provided for in article 20, were sufficient to protect claimants.

13. After deliberation, the Committee decided that, in substance, subparagraph (b) should state that in respect of actions to which it was applicable the period of limitation ran "from the last day on which the goods should have been delivered".

Proposed addition to paragraph 1

14. The Committee considered the desirability of adding a special provision dealing specifically with the commencement of the period of limitation for actions against shippers or consignees under the convention. It was suggested that the limitation period for actions against shippers or consignees should run from the "scheduled date of delivery".

15. It was stated in reply that such a special provision was unnecessary, since the general rules in subparagraphs (a) and (b) of paragraph 1 provided an adequate starting point for the limitation period applicable to claims against shippers or consignees. It was further stated that the proposed term "scheduled date of delivery" was vague and that not all contracts of carriage specified a "scheduled date of delivery".

16. After deliberation, the Committee decided not to add to this article a special rule on the commencement of the limitation period for actions against shippers or consignees under the convention.

17. The Committee combined the substance of subparagraphs (a) and (b) into a single paragraph and adopted the following text as paragraph 2 of this article:

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

Article 20, paragraph 2

> "2. The day on which the period of limitation begins to run shall not be included in the period."

* * *

18. The Committee considered but did not retain a suggestion to modify the wording of this paragraph to correspond to the wording of article 28 of the Convention on the Limitation Period in the International Sale of Goods. The Committee was agreed that it was not necessary to introduce complex provisions on the calculation of the period of limitation into the draft convention.

19. The Committee retained the text of this paragraph but renumbered it as paragraph 3.

Article 20, paragraph 3

"3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing."

* * *

20. After deliberation, the Committee decided to retain the substance of this paragraph.

21. It was agreed, however, that the paragraph should be redrafted, taking into account the expanded scope of article 20 covering all actions for damages relating to carriage under the convention, and the wording of article 22, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods.

22. The Committee adopted the following text as paragraph 4 of this article.

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

Article 20, paragraph 4

"4. The provisions of paragraphs 1, 2 and 3 of this article shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier."

* * *

23. After deliberation, the Committee decided to delete paragraph 4 as unnecessary, in the light of the expansion of the scope of article 20.

Article 20, paragraph 5

"5. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than ninety days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

* * *

24. After deliberation, the Committee decided to retain the substance of paragraph 5, but to re-examine its wording in the light of the expanded scope of article 20 and of possible conflict between other international agreements and the provisions of this paragraph.

25. The Committee adopted the following text:

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

Proposed addition to article 20

26. Consideration was given to the desirability of adding a paragraph to article 20 that would provide that, subject to the provisions of this article, the lex fori governed the extension of the limitation period in case of fraud or force majeure, the interruption of the running of the limitation period, and the calculation of the limitation period.

27. It was stated that the proposed paragraph was designed to limit the cases where the law of the jurisdiction where the proceedings were instituted could be utilized to extend the two-year period of limitation established under article 20.

28. After deliberation, the Committee decided against the inclusion of the proposed paragraph since the grounds for extending, interrupting or suspending the limitation period differed widely in the various national legal systems. It was also noted that in a number of national legal systems prescription (limitation) of claims was considered as part of the substantive law and not of the procedural law.

"Article 21. Jurisdiction

"1. In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

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

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

"(c) The port of loading; or

"(d) The port of discharge; or

"(e) A place designated in the contract of carriage.

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

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

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

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

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

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

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

* * *

Article as a whole

1. The Committee considered a proposal that the entire article be deleted.

2. The deletion of the article was supported on the following grounds:

(a) Paragraph 1 of the article gave a plaintiff the right to bring an action, at his option, in any one of several jurisdictions. Although this right was given to any plaintiff, whether shipper or carrier, actions seeking to enforce rights conferred by the Convention would in practice be instituted by shippers. An advantage was therefore given to shippers which was not given to carriers, and this resulted in an imbalance in the Convention.

(b) Most systems of national law empowered a plaintiff to institute an action at any of the places specified in paragraph 1 (a), 1 (b), 1 (d) and 1 (e). It was therefore unnecessary to give a plaintiff such a right through specific provision in the Convention.

(c) The several jurisdictions made available to a plaintiff to institute an action might in certain cases create hardship for carriers. For instance, where in a single incident cargo belonging to different shippers was damaged, each cargo owner might institute his action in a different jurisdiction.

(d) The right to bring an action, at his option, in any one of the several jurisdictions specified in the paragraph was given to a plaintiff even in cases where the parties had earlier agreed on a single exclusive jurisdiction. This derogated from the generally accepted principle that agreements entered into by parties should be respected by them.

(e) The article did not unify the rules as to the competent jurisdiction for a plaintiff, since it gave him the right to institute an action in any one of several jurisdictions.

(f) The article was unnecessary for the purpose of protecting shippers since carriers did not in practice impose on shippers clauses conferring exclusive jurisdiction on fora which were only convenient to carriers.

3. The retention of the article was supported on the following grounds:

(a) Bills of lading and other documents evidencing contracts of ocean carriage were often contracts of adhesion which a shipper was compelled to accept because of the superior bargaining position of the carrier. They often contained clauses conferring exclusive jurisdiction in respect of actions arising out of contracts of carriage on a forum which was only convenient to the carrier. Since it was in practice very difficult for the shipper to institute an action at such a forum, these clauses had the effect of protecting the carrier from possible

actions against him. Article 21 was therefore necessary to ensure for the shipper a convenient forum in which he might bring an action.

(b) The provisions of the article constituted an acceptable compromise in protecting both the interests of plaintiffs to whom a convenient forum was made available under paragraphs 1 and 2, and the interests of defendants, who, by reason of paragraph 2, could not be sued in a forum other than the ones specified in paragraphs 1 and 2.

(c) The provisions of paragraph 1 were not unbalanced in that they made available one of several fora to any plaintiff, whether he be carrier or shipper.

4. In the course of the deliberations, a proposal was also made that the article be modified so as to make available to a plaintiff at his option the several jurisdictions specified in paragraph 1 only when there had been no exclusive jurisdiction previously agreed upon between the parties.

5. After deliberation, the Committee decided to retain the article.

Article 21, paragraph 1

6. The Committee considered the following proposals:

(a) That the introductory language to the paragraph should be modified to provide that, when an action is brought in a Contracting State, the particular court within that State in which the action may be brought should be determined by the procedural law of that State.

(b) That the word "contracting" appearing before the word "State" should be deleted.

(c) That the existing wording of subparagraph (b) should be replaced by the following:

"(b) The place where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State".

7. The proposal noted in paragraph 6 (a) above was supported on the ground that, where an action was brought in a Contracting State within whose territory one of the places described in subparagraphs (a) to (e) was situated, the introductory language of paragraph 1 of article 21 did not specify the particular court in which such action might be brought. There was wide agreement that the determination of such court should be left to the procedural law of the Contracting State concerned, and that the introductory language should be modified to reflect this view.

8. (a) The proposal noted in paragraph 6 (b) above was supported on the ground that the retention of the word "contracting" might result in the courts of non-Contracting States refusing to assume jurisdiction in respect of actions in cases where they would assume jurisdiction if the word were deleted. It was noted that bills of lading and other documents evidencing contracts of carriage would frequently provide that the convention was to govern the contract. If an action was brought in a non-Contracting State on a contract containing such a provision,

the courts of a non-Contracting State would apply article 21 as part of the applicable law chosen by the parties to govern the contract, and might deny jurisdiction because an action could under article 21 only be brought in a Contracting State. It was observed that such a denial of jurisdiction might seriously limit the application of the convention in the period immediately following its coming into force, when several States would still not be parties to it.

(b) The proposal was opposed on the grounds that the deletion of the word "contracting" would not result in the courts of non-Contracting States assuming jurisdiction in cases where they would otherwise refuse to assume jurisdiction. The courts of non-Contracting States would decide whether or not to assume jurisdiction on the basis of their own laws of jurisdiction without regard to the content of the new Convention. Nor would such courts regard the adoption of the Convention as the applicable law in the contract of carriage as conclusive in deciding whether or not to assume jurisdiction. In particular, States who were parties to the Brussels Convention of 1924 and not parties to the new Convention would apply the Brussels Convention of 1924 where the latter was applicable.

9. After deliberation, the Committee decided to delete the word "contracting".

10. In support of the proposal noted in paragraph 6 (c) above, it was observed that under the existing wording of subparagraph (b) of paragraph 1 or article 21, a defendant could be sued at a place where he had a branch or agency through which he had concluded a contract of carriage. However, he may not be able adequately to defend the action at a place where he only had a branch or agency. The proposed new wording would eliminate the bringing of actions at such places, and would also harmonize subparagraph (b) of paragraph 1 with article 17, paragraph 1 (d) of the Athens Convention of 1974. The proposal was opposed on the ground that, if a defendant had concluded a contract of carriage with a plaintiff through a branch or agency, it was not unfair to permit the plaintiff to bring an action at the place where the branch or agency was situated. After deliberation, the Committee did not adopt this proposal.

Article 21, paragraph 2

11. The Committee considered the following proposals:

(a) That this paragraph should be deleted, and that the following paragraph should be added as the last paragraph of this article:

> "The provisions of this article shall not prevent the application of international conventions which establish special jurisdictions for claims arising out of the contract for carriage by sea."

(b) That the first sentence of the paragraph should be replaced by the following sentence:

> "Notwithstanding the preceding provisions of this article, an action may be brought before the courts of a Contracting State in any of whose ports the carrying vessel or any vessel of the same ownership may have been legally arrested in accordance with the applicable law of that State."

12. The proposal noted in paragraph 11 (a) above was supported on the following grounds:

(i) The provisions of this paragraph conflicted with article 7 of the Brussels Convention of 1952 relating to the Arrest of Seagoing Ships. p/ In particular, the second sentence of subparagraph (a) of this paragraph providing, subject to certain conditions, for the removal of an action at the petition of the defendant, was inconsistent with the provisions of the Brussels Convention of 1952. This conflict would make it difficult for States parties to the Brussels Convention of 1952 to become parties to the present convention.

(ii) The rules contained in this paragraph were inconsistent with the fundamental principle of law and policy that foreign State-owned vessels were in all circumstances immune from jurisdiction. The paragraph was therefore unacceptable, and would make it very difficult for some States to become parties to the convention. The representative of the USSR made a statement that, if paragraph 2 of article 21 was retained, it would be absolutely necessary to supplement this paragraph by a clear and unambiguous provision on its inapplicability with regard to State-owned vessels which under international law should enjoy immunity from foreign jurisdiction. In the opinion of the representative of the USSR, the absence of such a supplementary provision could create serious obstacles for the adopting of the convention under consideration.

(iii) The removal of an action at the petition of a defendant provided for in the second sentence of the paragraph could not be given effect under the procedural laws of many States. That sentence would therefore be inoperative.

(iv) The deletion of this paragraph would reduce the number of jurisdictions in which a plaintiff might, at his option, bring an action arising out of a contract of carriage. To that extent, the deletion would promote uniformity as to the competent jurisdictions available to a plaintiff and reduce "forum shopping".

13. The proposal was opposed on the following grounds:

(i) The provisions of this paragraph did not conflict with article 7 of the Brussels Convention of 1952 relating to the Arrest of Seagoing Ships. Paragraph 3 of article 7 of that Convention provided for the case where parties had agreed to submit the dispute in respect of which the arrest had been made to the jurisdiction of a particular court other than the one in which the arrest had been made and permitted the claimant in such a case to institute proceedings in the agreed jurisdiction. Since paragraph 3 of article 23 of the draft convention required that the bill of lading or the document evidencing the contract of carriage contain a statement that the carriage was subject to the provisions of the Convention, the parties would by that statement have agreed to submit their disputes to the jurisdictions specified in article 21 of the draft

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p/ International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952.

convention. The jurisdictions specified in article 21 would therefore be agreed jurisdictions within the meaning of paragraph 3 of article 7 of the Brussels Convention of 1952.

(ii) The paragraph only contemplated that a ship may be "legally arrested in accordance with the applicable law" of the State in which the arrest took place. A foreign State-owned vessel would therefore not be arrested by virtue of the provisions of this paragraph in a jurisdiction which recognized the principle of the absolute immunity from arrest of foreign State-owned vessels. Furthermore, it was undesirable to specify in an international convention that foreign State-owned vessels were absolutely immune from arrest, because under the law of some States foreign State-owned vessels engaged in purely commercial activities were not immune from arrest.

(iii) The arrest of a ship was regarded by cargo owners in some States as the only effective method of enforcing a claim against a foreign carrier. This paragraph therefore embodied a useful compromise by protecting the existing right of arrest in such States, while not creating a right of arrest in States which became parties to the Convention.

(iv) Retention of the defendant's right to remove the action to a jurisdiction specified in paragraph 1 of the article was desirable because the arrest might be made in a jurisdiction having no connexion with the contract of carriage out of which the claimant's action arose. It would be unfair to require the defendant to defend the action in such a jurisdiction.

14. After deliberation, the Committee decided to retain paragraph 2 of article 21, and not to add the proposed new paragraph.

15. The representative of the USSR stated that he could not support the decision referred to in paragraph 14 above, for the reasons set forth in paragraph 12 (ii) above.

16. The proposal noted in paragraph 11 (b) above was supported on the ground that it created a desirable extension of the scope of arrest in States which already recognized a right of arrest. It was also observed that this extension was not inconsistent with the provisions of the Brussels Convention of 1952 relating to the Arrest of Seagoing Ships. After deliberation, the Committee decided to adopt this proposal.

Article 21, paragraphs 3 and 4

17. After deliberation, the Committee decided to adopt the text of these paragraphs, subject to the substitution of "paragraphs 1 or 2" for "paragraphs 1 and 2" in each of the paragraphs.

Article 21, paragraph 5

18. After deliberation, the Committee decided to retain this paragraph in its existing wording.

19. Following the deliberations set forth in paragraphs 1 to 18 above, the Committee adopted the following text for article 21:

"Article 21. Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

"Article 22. Arbitration

"1. Subject to the rules of this article, parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration.

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

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

"(i) The port of loading or the port of discharge; or

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

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

"(b) Any other place designated in the arbitration clause or agreement.

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

"4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

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

* * *

Article as a whole

1. The Committee considered a proposal that the entire article should be deleted.

2. The deletion of this article was supported on the following grounds:

(a) The well-established practice in commercial arbitration was to determine the place of arbitration by agreement of the parties to the arbitration agreement. The provisions of this article, however, were inconsistent with that practice since a plaintiff could institute arbitration proceedings at any one of the places specified in paragraph 2 (a) even though that was not the agreed place of arbitration. These provisions were also inconsistent with the principle that agreements entered into by parties should be respected by them.

(b) The article would defeat the efforts made by many international bodies to promote arbitration as a means of dispute settlement. The uncertainty as to the place of arbitration resulting from the many optional places at which a plaintiff could institute arbitration proceedings would discourage resort to arbitration.

3. The retention of the article was supported on the following grounds:

(a) The article was a necessary corollary to the protection given to the plaintiff by article 21 of the Convention. If article 21 were retained but article 22 deleted, clauses conferring exclusive jurisdiction on courts only convenient to the defendant, imposed on the plaintiff by the superior bargaining power of the defendant, would be replaced by clauses similarly imposed stipulating that all disputes were to be settled by arbitration at a place only convenient to the defendant.

(b) The article was only directed to preventing possible abuse of arbitration in a limited area, and would not have adverse consequences on the efforts to promote arbitration in general as a method of dispute settlement.

4. The Committee also considered a proposal that, as an alternative to the deletion of this article, it should be redrafted to provide that the options as to the place of arbitration would only be open to a plaintiff if there was no place of arbitration agreed upon between the parties.

5. After deliberation, the Committee decided to retain this article. q/

Article 22, paragraph 1

6. The Committee considered a proposal that the paragraph be amended by the addition of the words "evidenced in writing" to read as follows:

> "1. Subject to the rules of this article, parties may provide by agreement evidenced in writing that any dispute that may arise under a contract of carriage shall be referred to arbitration."

7. This proposal was supported on the ground that an arbitration agreement had the important consequence of ousting the jurisdiction of courts. It was therefore desirable to require clear evidence of such an agreement. There was wide agreement that the proposal was useful, and the Committee, after deliberation, decided to adopt it.

Article 22, paragraph 1 bis

8. The Committee considered a proposal to add the following new paragraph to the article as paragraph 1 bis:

> "Where a charter-party contains a provision that disputes arising

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q/ A significant minority of delegations expressed their reservation concerning the present formulation of article 22 and favoured deletion of the article.

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

9. It was noted that this proposal was in accord with a suggestion made by the UNCTAD Working Group on International Shipping Legislation that a paragraph to this effect should be added to the draft convention. There was general agreement that the proposed new paragraph was desirable, and the Committee, after deliberation, decided to adopt it with such drafting changes as may be needed.

Article 22, paragraph 2

10. The Committee considered a proposal that this paragraph should be modified by providing that the options given to the plaintiff as to the place for instituting arbitration proceedings should only be available if the parties had not previously agreed on the place of arbitration. The proposal was supported on the ground that this would give effect to the autonomy of will of the parties, which was generally given effect in arbitration proceedings. The proposal was opposed on the ground that it would permit a defendant in a superior bargaining position to impose on a plaintiff a place of arbitration only convenient to the defendant. After deliberation, the Committee decided not to adopt this proposal.

Article 22, paragraph 3

11. After deliberation, the Committee decided to retain this paragraph.

Article 22, paragraph 4

12. The Committee considered a proposal that this paragraph should be deleted on the ground that the Convention should not interfere with an agreement by the parties, prior to the arising of a dispute, as to the procedure for arbitration. The proposal was opposed on the ground that the retention of this paragraph was necessary to give effect to paragraphs 2 and 3 of the article. After deliberation, the Committee decided to retain this paragraph.

Article 22, paragraph 5

13. After deliberation, the Committee decided to retain this paragraph.

14. Following the deliberations set forth in paragraphs 1 to 13 above, the Committee adopted the following text for article 22:

"Article 22. Arbitration

"1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise under a contract of carriage shall be referred to arbitration.

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

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

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

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

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

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

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

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

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

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

"PART VI. DEROGATIONS FROM THE CONVENTION

"Article 23. Contractual stipulations

Article 23, paragraph 1

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

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1. The Committee considered a proposal to delete in this paragraph any reference to "any other document evidencing the contract of carriage". In support of the proposal it was stated that such deletion was justified by the different legal nature of such contracts when compared with a bill of lading.

2. The Committee, after deliberation, decided not to retain this proposal and adopted paragraph 1 in its present wording.

Article 23, paragraph 2

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

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3. The Committee adopted paragraph 2 in its present wording.

Article 23, paragraph 3

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

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4. The Committee considered the following proposals:

(a) That the paragraph should be deleted;

(b) That the paragraph be supplemented by a provision establishing clearly that the convention applied to a bill of lading or other document evidencing the contract of carriage even if the bill of lading or other document did not contain the statement that the carriage was subject to the provisions of the convention;

(c) That the words "which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee" should be deleted.

5. In support of the proposal mentioned in paragraph 4 (a) above, it was argued that the provision in paragraph 3 was superfluous and the requirement of an express statement went against the present trend of simplification of trade documents. The proposal for deletion was opposed on the ground that the requirement of a paramount clause was found in other transport conventions and was useful in certain cases when the convention was applicable by virtue of article 2, for instance where the port of loading was in a contracting State and where a suit for cargo damages was brought in the port of destination of a non-contracting State. In such cases the paramount clause would ensure the application of the convention.

6. The Committee, after deliberation, decided not to retain the proposal for deletion of the paragraph.

7. As regards the proposal mentioned in paragraph 4 (b) above, the Committee was of the view that the suggested addition was superfluous in view of the fact that, under article 2 of the convention, the convention would apply even if there were no express reference in the bill of lading or other document evidencing the contract of carriage that the carriage was subject to the convention. The Committee did not therefore retain this proposal.

8. As regards the proposal mentioned in paragraph 4 (c) above, the Committee was of the view that the words "which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee" should be retained since they contained a useful direction to the courts that were seized of a case under the convention.

9. The Committee, after deliberation, adopted paragraph 3 in its present wording.

Article 23, paragraph 4

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

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10. The Committee considered a proposal that this paragraph be deleted on the ground that its provisions were of little practical utility and were unclear. Since there was no support for this proposal, the Committee decided not to retain it and adopted paragraph 4 in its present wording.

"Article 24. General average

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average."

* * *

1. The Committee considered the following proposals:

(a) That the article should be redrafted to ensure that it did not override rule D of the York-Antwerp Rules;

(b) That the second sentence of the article should be redrafted to the effect that the cargo interest would not be entitled to recover from the carrier a contribution to general average made as a result of an error in navigation;

(c) That article 24 should be deleted;

(d) That the present text of article 24 should be replaced by the following text:

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

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

2. In the course of the discussions, it was noted that rule D of the York-Antwerp Rules as revised in Hamburg in 1974 stated that "Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies or defences which may be open against that party for such fault". It was stated that the over-all effect of article 24 was that if the carrier was liable under the provisions of the Convention he was required to contribute in general average and that the right to counter-claim in respect of general average was governed by the provisions of the convention as if such counter-claim were a claim arising from loss of or damage to the goods. However, there were cases where it was doubtful whether the carrier was liable; if the carrier was not liable under the convention, an action for recovery of the contribution would fail since the action was not one for damages under the convention.

3. There was general agreement that the proposed text, set forth in paragraph 1 (d) above, was acceptable and the Committee agreed with the substance of that proposal. After deliberation, the Committee adopted the following text of article 24:

"Article 24. General average

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

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

"Article 25. Other conventions

Article 25, paragraph 1

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

* * *

1. The Committee did not retain the proposal that this paragraph be deleted and adopted the paragraph in its present wording.

Article 25, paragraph 2

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

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

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

* * *

2. The Committee considered the proposal that the Brussels Convention on Civil Liability in the Field of Maritime Carriage of Nuclear Material of 1971 be added to the conventions referred to in subparagraph 2 (a). The Committee did not retain this proposal on the ground that paragraph 2 was essentially concerned with the nature and type of liability covered by the Paris or Vienna Conventions.

Proposal for a new paragraph 3

3. The Committee considered the following proposal:

"No liability shall arise under the provisions of this Convention for any loss or damage for which the carrier is liable under the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974."

4. There was general agreement that the convention should specify that it did not apply to the carriage of passenger luggage by sea. The suggestion was made that this could appropriately be done by amending the definition of goods in paragraph 4 of article 1 of the draft convention. The Committee did not retain this suggestion on the ground that it was not the nature of the goods, i.e. passenger luggage, that excluded the application of the convention but the fact

that these goods were carried under a contract of carriage by sea of a passenger or of a passenger and his luggage. The Committee, after deliberation, adopted the following new paragraph 3:

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

Draft provisions concerning implementation, reservations and other final clauses

1. The Committee had before it draft provisions concerning implementation, reservations and other final clauses for the convention on the carriage of goods by sea, prepared by the Secretariat (A/CN.9/115). The Committee did not take any decision on these draft provisions on the ground that they could best be considered at the conference of plenipotentiaries that will be convened to adopt the convention on the carriage of goods by sea.

2. The Committee recommended that the Commission request the Secretariat to prepare draft provisions concerning implementation, reservations and other final clauses for the convention on the carriage of goods by sea, on the basis of the draft texts in A/CN.9/115 and the suggestions discussed at paragraphs 3 to 13, below. The Committee understood that the Secretariat would send the text of the convention, together with the draft provisions on final clauses to be prepared by the Secretariat, to Governments and interested international organizations for comments so that Governments would have the opportunity of commenting on the draft provisions on final clauses. The comments of Governments would be placed before the conference of plenipotentiaries.

3. It was noted that the draft final clauses to be prepared by the Secretariat should include a provision to the effect that a Contracting State may also apply, by its national legislation, the rules of the Convention to domestic carriage.

4. Suggestions by representatives in respect of the final clauses concerned the provisions on the implementation and entry into force of the convention and the addition of an article dealing with the special questions arising from intermodal transport.

(a) Implementation

5. The representative of a State with a federal system of government (United States) expressed the view that the "federal state clause" in paragraph 1 of the draft article on implementation r/ was unnecessary. The representative of another federated State (Australia) observed that paragraph 1 would cause difficulties under the constitution of his country.

6. It was noted that the expanded scope of the draft convention might give rise to certain problems of application in States with a federal system of government.

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r/ Paragraph 1 of the draft provision on implementation of the draft convention reads as follows:

> "1. If a Contracting State has two or more territorial units in which /, according to its constitution,/ different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, /acceptance, approval/ or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time."

(b) Entry into force

7. The Secretariat was requested to add to the alternatives presented in A/CN.9/115 on the entry into force of the draft convention an alternative C focusing on the volume of goods shipped by ratifying States. It was stated that an alternative on the entry into force of the draft convention based on the volume of cargo carried was desirable in that it would reflect that the draft convention was concerned not only with the interests of ship-owners, but also with the interests of shippers.

8. It was observed, however, that it would be difficult to obtain statistics as to the volume of cargo connected with a particular State and that a provision on entry into force based solely on the tonnage of goods shipped from a State would give undue emphasis to shipments of bulk cargo of relatively low value. The suggestion was made that a factor to be considered was the value of the goods shipped.

9. The Secretariat was also requested to add to the alternatives presented in document A/CN.9/115 on the entry into force of the draft convention an alternative D focusing only on the number of States ratifying the draft convention. It was observed that the number of required ratifications would have to be set high enough to ensure that the draft convention would only enter into force when ratified by States representing a significant percentage of commercial shipping in the world.

10. The Committee considered a suggestion that alternative A on entry into force in A/CN.9/115, modelled on article 49 (1) of the Convention on the Code of Conduct for Liner Conferences, Geneva 1974, s/ should be deleted since that Convention was only designed to regulate the interests of ship-owners in relations among themselves and the draft convention was intended to take fully into account also the interests of shippers. After deliberation, the Committee decided that both of the alternatives in A/CN.9/115 on entry into force, together with the alternatives mentioned at paragraphs 7 and 9 above, should be presented for final decision to the conference of plenipotentiaries that will be considering the adoption of the convention on the carriage of goods by sea.

11. Reference was made to the difficulties that might arise if the draft convention entered into force while a significant number of States remained bound by the Brussels Convention of 1924 or the Brussels Protocol of 1968. It was suggested that a State ratifying the draft convention should be required to

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s/ Article 49 (1) of the Convention on the Code of Conduct for Liner Conferences, Geneva, 1974, reads as follows:

"(1) The present Convention shall enter into force six months after the date on which not less than 24 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with article 48. For the purpose of the present article the tonnage shall be deemed to be that contained in Lloyd's Register of Shipping, Statistical Tables 1973 table 2 'World fleets - analysis by principal types', in respect of general cargo (including passenger/cargo) ships and container (fully cellular) ships, exclusive of the United States reserve fleet and the American and Canadian Great Lakes fleets."

renounce formally the Brussels Convention of 1924 and the Brussels Protocol of 1968. It was also suggested that simultaneous renunciation of these conventions should not be required.

(c) Suggested addition to the final clauses of article on multimodal transport

12. The Committee took note of certain suggestions to add a new article to the draft provisions concerning implementation, reservations and other final clauses set forth in A/CN.9/115, in order to avoid possible conflict between the draft convention and a future international convention on international intermodal transport. With this object, draft articles were presented by the representatives of Australia, the Federal Republic of Germany and Norway. The new article proposed by the representative of Australia was, in addition, designed to ensure that the draft convention applied to the sea-leg of a contract for multimodal transport in the absence of an international convention on multimodal transport superseding the draft convention.

13. The texts of the new articles proposed by these representatives read as follows:

(a) Australia:

"1. Subject to paragraph 3 hereof, the provisions of this Convention shall apply to all contracts for the carriage of goods performance of which requires that the goods be carried by sea between two different States, but shall so apply only to the extent of such sea-carriage.

"2. This Convention shall apply to such sea-carriage as if that sea-carriage were a contract for carriage of goods by sea between ports in two different States within the meaning of article 2, paragraph 1, of this Convention.

"3. The operation of this article may be superseded, in relation to any particular type of contract for the carriage of goods, by the entry into force of any subsequent Convention, if it is one regulating that type of contract and if it contains a provision for the supersession of this Convention."

(b) Federal Republic of Germany:

"The provisions of this Convention shall not apply to carriage of goods by sea in connexion with a multimodal transport of goods provided that the operator of such transport is liable for the whole transport under an international convention on multimodal transport of goods concluded under the auspices of the United Nations or any of its specialized agencies or under international law giving effect thereto."

(c) Norway:

"Nothing in this Convention shall prevent the application of an international convention relating to contracts for carriage of goods by two or more modes of transport concluded under the auspices of the United Nations or any of its specialized agencies."

ANNEX II

Report of the Committee of the Whole II relating to the UNCITRAL Arbitration Rules

I. INTRODUCTION

1. The Committee of the Whole II was established by the Commission to consider the revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) contained in document A/CN.9/112. Section II of this report summarizes article by article the main points that arose during the deliberations of the Committee in respect of these draft rules. At the beginning of the summary of discussions on each article of the draft rules, the text of that article as it appeared in A/CN.9/112 is reproduced.

2. In the course of its deliberations, the Committee established a number of ad hoc drafting groups for the purpose of redrafting particular articles or paragraphs of articles.

3. The text of the UNCITRAL Arbitration Rules as approved by the Committee is set forth in section III of this report. a/

4. The text of a draft decision adopted by the Committee for submission to the Commission is set forth in section IV of this report. b/

5. The Committee adopted this report at its 19th meeting, on 23 April 1976.

II. CONSIDERATION BY THE COMMITTEE OF THE REVISED DRAFT SET OF ARBITRATION RULES FOR OPTIONAL USE IN AD HOC ARBITRATION RELATING TO INTERNATIONAL TRADE (UNCITRAL ARBITRATION RULES)

Title of the arbitration rules

"Revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules)".

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a/ Sect. III of the report setting forth the text of the UNCITRAL Arbitration Rules as approved by the Committee is not reproduced. The changes made by the Commission to the text of the UNCITRAL Arbitration Rules as approved by the Committee are noted in chap. V, paras. 52 and 53 of the present report, and the text of the UNCITRAL Arbitration Rules as adopted by the Commission is set forth in chap. V, para. 57.

b/ Part IV of the report setting forth the text of the draft decision adopted by the Committee is not reproduced. The decision adopted by the Commission is set forth in chap. V, para. 56 of the present report.

6. The Committee was of the view that the title should be modified in order to reflect more accurately various possible future uses. The Committee therefore decided that the title of the rules should read "UNCITRAL Arbitration Rules".

Articles 1 and 2

"Article 1

"1. These Rules shall apply when the parties to a contract, by an agreement in writing which expressly refers to the UNCITRAL Arbitration Rules, have agreed that disputes arising out of that contract shall be settled in accordance with these Rules.

"2. 'Parties' mean physical or legal persons, including legal persons of public law.

"3. 'Agreement in writing' means an arbitration clause in a contract or a separate arbitration agreement, including an agreement contained in an exchange of letters, signed by the parties, or in an exchange of telegrams or telexes.

"4. 'Disputes arising out of that contract' includes disputes, existing or future, that arise out of, or relate to, a contract concluded between the parties or its breach, termination or invalidity."

"Article 2

"The parties may at any time agree in writing to modify any provision of these Rules, including any time-limits established by or pursuant to these Rules."

7. The discussion on these articles was centred on the following proposals:

(a) That article 1, paragraph 1 and article 2 be combined;

(b) That the requirement of an "agreement in writing" in article 1, paragraph 1 and article 2 be removed and that consequently article 1, paragraph 3 should be deleted;

(c) That article 1, paragraph 2 defining "parties" be deleted; and

(d) That article 1, paragraph 4 defining "disputes arising out of that contract" be deleted.

8. The Committee was agreed that article 1, paragraph 1 and article 2 should be combined in order to make it clear that, when agreeing to settle their disputes under the UNCITRAL Arbitration Rules, the parties could agree to modify any provision in these Rules.

9. Consideration was given to the desirability of eliminating the requirement that agreements to arbitrate under the UNCITRAL Arbitration Rules and agreements by parties to modify these Rules be made in writing. According to one view, this question should be left to the applicable national law. According to another view,

retention of the writing requirement was desirable in the interest of certainty as to the applicability and any agreed upon modification of the UNCITRAL Rules. It was also noted that the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the national arbitration law in most countries, required that agreements to submit disputes to arbitration be in writing.

10. After deliberation, the Committee decided to retain the requirement that agreements to arbitrate under the UNCITRAL Arbitration Rules and agreements to modify these Rules be in writing. However, the Committee deleted article 1, paragraph 3, which defined the phrase "agreement in writing", leaving to the applicable national law the determination of whether the writing requirement was met in a particular case.

11. There was general agreement to delete article 1, paragraph 2, which defined the term "parties" so as to include "legal persons of public law". The Committee was agreed that the question whether a "legal person of public law" could enter into an agreement to submit disputes to arbitration under the UNCITRAL Arbitration Rules was a matter that should be left to the applicable national law.

12. The Committee considered the relationship between the Rules and the provisions of the national law applicable to the arbitration. It was agreed that the inclusion only in selected articles of the Rules of a proviso that the particular article was subject to the national law applicable to the arbitration would give rise to arguments a contrario in respect of other articles which did not set forth such a proviso. The Committee therefore decided to add to article 1 a general reference to the effect that all provisions in these Rules were subject to the national law applicable to the arbitration.

13. The Committee considered a proposal to delete as unnecessary article 1, paragraph 4, which defined the phrase "disputes arising out of that contract". Since the definition of this phrase was only intended to clarify the types of dispute that were covered by the agreement to arbitrate under the UNCITRAL Arbitration Rules, it was decided to modify article 1, paragraph 1, so as to accomplish this directly and to delete article 1, paragraph 4.

Article 3, paragraph 1

> "1. For the purposes of these Rules a notice, notification, communication or proposal by one party to the other party is deemed to have been received on the day on which it is delivered at the habitual residence or place of business of the other party, or if that party has no such residence or place of business, at his last known residence or place of business."

14. The discussion of article 3, paragraph 1, concerned primarily the time and manner of accomplishing "delivery" of a notice or other communication to a party.

15. The Committee considered the suggestion that this paragraph should contain a provision establishing a presumption of delivery after the passage of a certain period of time. This suggestion was not adopted on the grounds that presumptions of delivery should be left to the applicable national law.

16. The proposal that "delivery" be deemed effective when accomplished in accordance with the national law applicable at the place of delivery was considered but not retained, since senders of communications would then have the burden of knowing the applicable national law at each locality where a communication may have to be effected during the course of the arbitral proceedings.

17. The Committee decided to retain the suggestion to clarify the circumstances and method for delivering a communication at the "last known residence or place of business" of a party.

18. One representative noted that article 3, paragraph 1, did not prevent reliance by a party on the provisions of the applicable national law concerning communications.

Article 3, paragraph 2

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

19. There was general agreement on the substance of article 3, paragraph 2.

20. The Committee decided, however, that the day on which a notice or other communication was received should not be counted in the calculation of a period of time prescribed under the UNCITRAL Arbitration Rules. It was observed that this modification was in conformity with the provisions on this point in most national laws and in the 1974 Convention on the Limitation Period in the International Sale of Goods.

21. The Committee considered but did not retain the suggestion that the periods of time referred to in these Rules should be expressed in terms of weeks or months, rather than in terms of days.

Article 4

"1. The party initiating recourse to arbitration (hereinafter called the 'claimant') shall give the other party (hereinafter called the 'respondent') notice that an arbitration clause, or a separate arbitration agreement concluded by them is invoked.

"2. Arbitral proceedings shall be deemed to commence on the date on which such notice (hereinafter called 'notice of arbitration') is delivered at the habitual residence or place of business of the respondent or, if he has no such residence or place of business of the respondent, at his last known residence or place of business.

"3. The notice of arbitration shall include, but need not be limited to the following:

(a) The names and addresses of the parties;

(b) A reference to the arbitration clause or agreement that is invoked;

(c) A reference to the contract out of or in relation to which the dispute arises;

(d) The general nature of the claim and an indication of the amount involved, if any;

(e) The relief or remedy sought;

(f) A proposal as to the number of arbitration (i.e. one or three), if the parties have not previously agreed thereon."

22. The consideration of article 4 was focused on the question whether the provisions of article 4, dealing with the notice of arbitration, and of article 17, dealing with the statement of claim, should be combined. It was stated in support that this would have the effect of speeding up the arbitral proceedings.

23. Although, after deliberation, the Committee decided not to amalgamate articles 4 and 17, it approved the suggestion that claimants be permitted at their option to attach to the notice of arbitration their statement of claim, and thus meet their obligation under article 17 of the Rules.

24. The Committee retained the suggestion that, in the interest of speeding up the arbitral proceedings, a claimant should also be given the option of including in the notice of arbitration the name of the arbitrator he appointed pursuant to article 8, paragraph 1, or proposed pursuant to article 7, paragraph 2.

Article 5

"A party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party. This communication is deemed to have been given where the notice of arbitration, the statement of claim, the statement of defence, or a counter-claim is submitted on behalf of a party by a counsel or agent."

25. There was general agreement that the phrase "counsel or agent" gave rise to problems of translation and would be construed differently in various legal systems. The question was also raised whether the word "represented" appearing in the first sentence of article 5 would be viewed as excluding the possibility that a party be "assisted" by a non-lawyer in the preparation or presentation of his case. The Committee decided that, in substance, the first sentence of article 5 should be based on article VI (8) of the 1966 ECAFE Rules for International Commercial Arbitration, which read as follows: "The parties shall have the right to be represented or assisted at the hearing by persons of their choice."

26. After deliberation, the Committee did not retain the suggestion either to delete the second sentence of article 5 or to require that a person purporting to act on behalf of a party present a power of attorney from that party.

Article 6

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

27. The Committee considered the suggestion that, if the parties failed to agree on the number of arbitrators, article 6 should provide that in such a case the arbitral tribunal would consist of a sole arbitrator, since arbitral proceedings before a sole arbitrator were speedier and less expensive.

28. The Committee, after deliberation, decided to retain article 6 in its present wording on the grounds that arbitral tribunals established ad hoc to hear international commercial disputes were customarily composed of three arbitrators.

29. Three representatives expressed their reservation and noted their preference for the constitution of a tribunal composed of one arbitrator in the case of failure of the parties to agree on the number of arbitrators.

Article 7, paragraph 1

"1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties."

30. The Committee considered the principle set forth in article 7, paragraph 1, that the sole arbitrator should not be of the nationality of one of the parties since it fostered the appearance of impartiality and independence on the part of the sole arbitrator. In this connexion, it was suggested that the requirement of different nationality should only apply to the appointment of a sole arbitrator by an appointing authority.

31. After consideration, the Committee decided to introduce an element of flexibility by replacing article 7, paragraph 1, with a provision to the effect that the appointment of a sole arbitrator shall be made having regard to such considerations as were likely to secure the appointment of a sole arbitrator who would be impartial and independent, taking into account as well the advisability of appointing an arbitrator of a different nationality than that of the parties.

Article 7, paragraphs 2 and 3

"2. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator. The parties shall endeavour to reach agreement on the choice of the sole arbitrator within 30 days after the receipt by the respondent of the claimant's proposal.

"3. If on the expiration of this period of time the parties have not reached agreement on the choice of the sole arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the sole arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall, by telegram or telex, propose to the respondent the names of one or more institutions or persons, one of whom would serve as the appointing authority. The parties shall endeavour to reach agreement on the choice of the appointing authority within 15 days after the receipt by the respondent of the claimant's proposal."

32. The discussion of article 7, paragraphs 2 and 3, was based primarily on a proposal to simplify the procedure for the appointment of a sole arbitrator. There was general agreement that the provisions on the appointment of a sole arbitrator, whether by agreement of the parties or by an appointing authority, should be simplified.

33. The Committee decided that the claimant and the respondent were to be placed on an equal footing in regard to the appointment of the sole arbitrator, so that either party would be empowered to initiate the process of appointment by proposing the name of a person to serve as the sole arbitrator or to request the appropriate appointing authority to make the appointment.

34. The Committee considered whether the method by which one party communicated to the other party proposals as to the choice of a sole arbitrator or of an appointing authority should be regulated in the Rules. The Committee, after considering whether to require that such communication be in writing, decided to refrain from specifying in the Rules the methods of communicating the above proposals.

35. The suggestion was made that, in order to accelerate the process of appointing a sole arbitrator, the parties should be given only 30 days from the date the respondent received the notice of arbitration to agree on the choice of a sole arbitrator. After deliberation, the Committee decided not to retain this suggestion but to provide that the parties be given 30 days after the receipt by a party of the initial proposal as to the choice of a sole arbitrator within which to agree on the identity of the sole arbitrator.

36. There was general agreement that the provisions of article 7, paragraph 3, concerning the cases where the parties failed to agree on the choice of the sole arbitrator within the prescribed period and where they had not previously agreed on an appointing authority, should be simplified. The Committee was agreed that article 7, paragraphs 2 and 3, of the Rules should be restructured along the following lines:

(a) Any party may propose to the other party the name of a person who would serve as the sole arbitrator or the name of an appointing authority which would make such appointment;

(b) Within 30 days from the receipt of the proposal by the other party the parties may agree either on the choice of the sole arbitrator or on the appointing authority;

(c) If the parties fail to reach agreement within the prescribed 30 days, then resort will be had to the designating authority referred to in article 7, paragraph 4 of the Rules.

37. It was also discussed whether not only institutions like chambers of commerce but also individuals may be nominated as an appointing authority. Most of the delegates supported the idea that the Rules should not contain any definition of the appointing authority thus leaving its selection to the free discretion of the parties in each particular case.

Article 7, paragraph 4

"4. If on the expiration of this period of time the parties have not reached agreement on the designation of the appointing authority, the claimant shall apply for such designation to:

(a) The Secretary-General of the Permanent Court of Arbitration at The Hague, or,

(b) /Here add an appropriate organ or body to be established under United Nations auspices./

The authority mentioned under (a) and (b) may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it."

38. The Committee considered the suggestion that a United Nations body should be established that would either appoint the sole arbitrator or would designate an appointing authority to perform this function in cases where the parties failed to agree both on the choice of the sole arbitrator and the choice of an appointing authority. After deliberation, the Committee was agreed that it would suffice if the Rules provided that the Secretary-General of the Permanent Court of Arbitration at The Hague could be requested by a party to designate an appointing authority in such a case. The view was expressed that resort to the Secretary-General of the Permanent Court of Arbitration, would only occur in rare instances and that there was therefore no need for the creation of a special United Nations body for this purpose.

39. The Committee was advised that the Secretary-General of the Permanent Court of Arbitration would not be prepared to assume the task of appointing a sole arbitrator directly. It therefore decided not to retain the suggestion that under article 7, paragraph 4, the designating authority should appoint arbitrators directly.

40. The Committee discussed certain administrative aspects of addressing a request to the Secretary-General of the Permanent Court of Arbitration, such as the costs involved and the language in which the request and supporting documentation was to be submitted. The Committee was of the view that no special provisions were necessary in this respect. The Secretary of the Commission reported that he had received a communication from the Secretary-General of the Permanent Court of Arbitration at The Hague stating that no fees would be charged for this service and that only reimbursement of expenses would be required.

41. The Committee, after deliberation, decided to delete from article 7, paragraph 4, the two sentences at the end of the paragraph, since their provisions were considered obvious and unnecessary. The Committee was also agreed that, as a consequence of its decision in respect of article 7, paragraphs 2 and 3 (cf. paras. 34 and 38) claimants and respondents were to have an equal right to invoke the provisions of article 7, paragraph 4.

Article 7, paragraph 5

"5. The claimant shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract."

42. The Committee noted that article 7, paragraph 5, was applicable in respect of all appointing authorities called upon to appoint sole arbitrators, regardless of whether the appointing authority was agreed on by the parties or designated pursuant to article 7, paragraph 4 of these Rules.

43. There was general agreement that the provision was useful since the documentation thus obtained by the appointing authority facilitated the appointment by that authority of a sole arbitrator who was well qualified to hear the particular dispute.

Article 7, paragraph 6

"6. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:

- The appointing authority shall communicate to both parties an identical list containing at least three names;

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

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

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

The appointing authority may require from either party such information as it deems necessary to fulfil its function."

44. The Committee considered whether the list-procedure for the appointment of an arbitrator by an appointing authority envisaged under article 7, paragraph 6 should be retained.

45. According to one view, the list-procedure was considered useful since it preserved an involvement by the parties in the appointment of the arbitrator by an appointing authority. According to another view, the list-procedure was too complex to be imposed mandatorily on appointing authorities and a system leaving appointing authorities free to select the method of appointment was preferable.

46. After deliberation, the Committee decided that article 7, paragraph 6, should provide that appointing authorities should use the list-procedure, unless the parties otherwise agreed or the appointing authority determined that the list-procedure was not appropriate for the case.

Article 8, paragraph 1

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

47. The Committee was agreed that this paragraph, dealing with the composition of a three-member arbitral tribunal, should be retained in its present form.

Article 8, paragraph 2

"2. The presiding arbitrator shall be of a nationality other than the nationality of the parties."

48. The substance of this paragraph was considered by the Committee when it discussed the similar provision in article 7, paragraph 1, concerning the sole arbitrator. The Committee was agreed that the decision taken in respect of article 7, paragraph 1 should be reflected in the text of article 8, paragraph 2.

Article 8, paragraph 3

"3. If within 15 days after the receipt of the claimant's notification of the appointment of an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, the claimant shall:

(a) If the parties have previously designated an appointing authority, request that authority to appoint the second arbitrator;

(b) If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, apply for such designation to either of the authorities mentioned in article 7, paragraph 4.

The appointing authority may exercise its discretion in appointing the second arbitrator."

49. There was general agreement with the substance of this paragraph. The Committee was agreed, however, that claimants and respondents should be treated equally in article 8, paragraph 3, and that no restrictions should be placed on the methods to be used by a party to communicate to the other party the name of the arbitrator he appointed.

Article 8, paragraph 4

"4. If within 15 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator. The parties shall endeavour to reach agreement on the choice of the presiding arbitrator within 30 days after the receipt by the respondent of the claimant's proposal."

50. The Committee considered the period of time within which the two arbitrators appointed pursuant to article 8, paragraphs 1 to 3, were to agree on the choice of the presiding arbitrator. It was agreed that this choice was extremely important and the Committee considered it therefore justified to extend the time-period from 15 to 30 days in order to permit communication and discussion between the arbitrators.

51. The Committee considered a proposal to modify article 8, paragraph 4, to the effect that if the two arbitrators failed to agree on the choice of the presiding arbitrator within the prescribed period of 30 days, the appointment of the presiding arbitrator would be made by an appointing authority without requiring the parties to try again to agree on the choice of the presiding arbitrator. It was stated that such a requirement would unduly delay the proceedings. After deliberation, the Committee decided not to retain this proposal.

52. One representative noted that under the national law in his country there had to be an "umpire" rather than a presiding arbitrator.

Article 8, paragraph 5

"5. If on the expiration of this period of time the parties have not agreed on the choice of the presiding arbitrator, or if before the expiration of this period of time the parties have concluded that no such agreement can be reached, the presiding arbitrator shall be appointed by the appointing authority previously designated by the parties. If the appointing authority previously designated is unwilling or unable to act as such, or if no such authority has been designated by the parties, the claimant shall, by telegram or telex, propose to the respondent the names of one or more institutions or persons, one of whom would serve as the appointing authority. The parties shall endeavour to reach agreement on the choice of the appointing authority within 15 days after the receipt by the respondent of the claimant's proposal."

53. The substance of this paragraph was considered by the Committee when it discussed the similar provisions in article 7, paragraph 3, concerning the appointment of the sole arbitrator. The Committee was agreed that the decisions taken in respect of article 7, paragraph 3, should be reflected in the text of article 8, paragraph 5.

Article 8, paragraph 6

"6. If on the expiration of this period of time, the parties have not reached agreement on the designation of the appointing authority, the

claimant shall apply to either of the authorities mentioned in article 7, paragraph 4, for the designation of an appointing authority. The authority applied to may require from either party such information as it deems necessary to fulfil its function. It shall communicate to both parties the name of the appointing authority designated by it. The appointing authority may require from either party such information as it deems necessary to fulfil its function."

54. The substance of this paragraph was considered by the Committee when it discussed the similar provisions in article 7, paragraph 4, concerning the appointment of the sole arbitrator. The Committee was agreed that the decisions taken in respect of article 7, paragraph 4 should be reflected in the text of article 8, paragraph 6.

Article 8, paragraph 7

"7. The claimant shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract."

55. The substance of this paragraph was considered by the Committee when it discussed the identical provisions in article 7, paragraph 5. The Committee was agreed that the decision taken in respect of article 7, paragraph 5, applied equally to article 8, paragraph 7.

Article 8, paragraph 8

"8. The appointing authority shall appoint the presiding arbitrator in accordance with the provisions of article 7, paragraph 6."

56. Since this paragraph is merely a cross-reference to article 7, paragraph 6, the decisions taken by the Committee in respect of article 7, paragraph 6 apply equally to article 8, paragraph 8.

Article 9, paragraph 1

"1. Either party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator, irrespective of whether such arbitrator was:

- Originally proposed or appointed by him, or

- Appointed by the other party or an appointing authority, or

- Chosen by both parties or by the other arbitrators,

if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

57. The Committee considered and decided to retain the suggestion that a party should be permitted to challenge the arbitrator appointed by him only for reasons of which he had no knowledge at the time the appointment was made.

58. It was agreed that the text of article 9, paragraph 1 should be simplified.

Article 9, paragraph 2

"2. The circumstances mentioned in paragraph 1 of this article include any financial or personal interest of an arbitrator in the outcome of the arbitration or a family tie or any past or present commercial tie of an arbitrator with a party or with a party's counsel or agent."

59. The Committee considered the question of the decision of this paragraph. It was stated that article 9, paragraph 2 should be deleted since the general rule on grounds for challenge contained in article 9, paragraph 1 was sufficient.

60. After deliberation, the Committee decided to delete article 9, paragraph 2.

Article 9, paragraph 3

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

61. The Committee considered article 9, paragraph 3, and decided to retain the paragraph in its present wording.

Article 10, paragraph 1

"1. The challenge of an arbitrator shall be made within 30 days after his appointment has been communicated to the challenging party or within 30 days after the circumstances mentioned in article 9 became known to that party."

62. The Committee considered the time-limit within which an arbitrator could be challenged. It was agreed that challenges should be made expeditiously and that for this reason the period within which a party could challenge an arbitrator should be shortened to 15 days.

Article 10, paragraph 2

"2. The challenge shall be notified to the other party and to the arbitrator who is challenged. The notification shall be in writing and shall state the reasons for the challenge."

63. The Committee decided to retain this paragraph, subject to the modification that the challenge must be notified to all members of a three-member arbitral tribunal and not only to the arbitrator who was being challenged.

Article 10, paragraph 3

"3. When an arbitrator has been challenged by one party, the other party

may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed or chosen pursuant to the procedures applicable to the appointment or choice of an arbitrator as provided in article 7 or 8."

64. It was agreed to retain the substance of this paragraph.

65. The Committee noted that agreement by the other party to the challenge or to withdrawal by the challenged arbitrator from his office did not necessarily imply an acceptance or acknowledgement that the reasons for the challenge were valid. The Committee was also agreed that article 10, paragraph 3, should be modified in order to make it clear that when a challenged arbitrator vacated his office in one of the two ways covered by article 10, paragraph 3, the appointment process would recommence at the beginning of the procedure under article 7 or 8 for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 11

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

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

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

(c) In all other cases, by the appointing authority to be designated in accordance with the provisions of article 7 or 8.

"2. If, in the cases mentioned under subparagraphs (a), (b) and (c) of paragraph 1, the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge."

66. The Committee considered and decided to retain the substance of paragraphs 1 and 2 of article 11.

67. It was noted during the discussion that under the national law of some States challenges of arbitrators were decided initially by the arbitral tribunal and finally by the competent court.

Article 12, paragraph 1

"1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be

appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in article 7 or 8."

68. The Committee adopted this provision without modifications.

Article 12, paragraph 2

"2. In the event that an arbitrator is incapacitated or fails to act, the procedure in respect of the challenge and replacement of an arbitrator as provided in articles 10 and 11 shall apply."

69. After deliberation, the Committee decided to retain the substance of this paragraph.

70. It was noted, however, that the word "incapacitated" was unduly ambiguous in that it was not clear whether both physical incapacity, such as a serious illness, and legal incapacity, such as minority or insanity on the part of an arbitrator, were covered. The Committee was agreed that this word should be replaced by an objective statement establishing that article 12, paragraph 2, extended to all circumstances that made it legally or physically impossible for an arbitrator to perform his functions.

Article 12, paragraph 3

"3. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal."

71. There was general agreement that this paragraph should constitute a separate article and should extend to the replacement of arbitrators under both article 11 and article 12 of the Rules.

72. The view was expressed that the Rules should provide that, unless the parties agreed otherwise, all hearings would be repeated if any arbitrator was replaced. According to another view, such a provision was undesirable since it would delay the proceedings and increase the costs of arbitration.

73. The Committee also considered a suggestion that hearings held previously should be repeated mandatorily only where the sole arbitrator was replaced, and that in all other cases the question whether prior hearings should be repeated should be left to the discretion of the arbitral tribunal.

74. After deliberation, the Committee decided to retain the provision that hearings held previously were to be repeated if the sole or presiding arbitrator was replaced and that such hearings would be repeated at the discretion of the arbitral tribunal if any other arbitrator was replaced.

Article 13

"Where, in connexion with the appointment of arbitrators, the names of one or more persons are proposed by the parties or by an appointing authority, their full names, addresses and their nationality shall be furnished,

together with, as far as possible, a description of their qualifications for appointment as arbitrator."

75. After deliberation, the Committee decided to retain the substance of this article but to place it immediately after article 8 in the Rules.

Article 14, paragraph 1

"1. Subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate, provided that the parties are treated with equality and with fairness."

76. It was agreed that the concept of "fairness" concerning the treatment of the parties by the arbitrators required amplification. The Committee decided that an explanatory clause should be added to article 14, paragraph 1 to the effect that the arbitrators had to grant each party full opportunity to present his case and to participate in every stage of the arbitral proceedings.

77. It was suggested that article 14 should contain a provision empowering the arbitrators to delegate to the appointing authority or to the Secretary of the arbitral tribunal the administrative and secretariat tasks that arose during the course of arbitral proceedings. The Committee decided not to retain this suggestion on the ground that such a provision was unnecessary because of the discretion granted to the arbitrators under article 14, paragraph 1, to "conduct the arbitration in such manner as they consider appropriate". It was noted that the Rules do not preclude such delegation.

Article 14, paragraph 2

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

78. The Committee considered the question of the circumstances under which the arbitrators were to hold hearings during the course of the arbitral proceedings.

79. It was suggested that as a general rule the arbitrators should hold hearings unless both parties requested that no hearings be held. The suggestion was also made that, in the absence of a request for hearings by both parties, the arbitrators should have discretion to decide whether to hold hearings. The Committee decided to retain the compromise solution contained in article 14, paragraph 2, and to specify that either party could request at any stage of the arbitral proceedings that hearings be held.

Article 14, paragraph 3

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

80. The Committee considered the suggestion that this paragraph should provide that any information supplied to the arbitrators by a party could only be acted upon by them if it was shown to have also been communicated to the other party. This suggestion was not adopted on the grounds that it would create serious problems in practice for arbitrators. The Committee decided to retain article 14, paragraph 3 in its present wording.

Article 15, paragraph 1

"1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators."

81. The Committee considered the desirability of adding to this paragraph a provision describing one or more of the factors that the arbitrators had to take into account when deciding upon the place of arbitration in cases where the parties failed to make this choice.

82. The view was expressed that article 15, paragraph 1, should advise the arbitrators that in selecting the place of arbitration they should pay regard to the requirements of the particular arbitration. According to another view, however, such a provision would be too restrictive, since the arbitrators also had to consider, inter alia, their own convenience and, even more importantly, the costs involved.

83. The Committee decided to add wording to article 15, paragraph 1, which would indicate that, when called upon to select the place of arbitration, the arbitrators should have regard to the particular circumstances of the arbitration.

Article 15, paragraph 2

"2. The arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties. They may hear witnesses and hold interim meetings for consultation among themselves at any place they deem appropriate, having regard to the exigencies of the arbitration."

84. After considering drafting suggestions, the Committee decided to retain the substance of article 15, paragraph 2.

Article 15, paragraph 3

"3. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection."

85. After deliberation, the Committee decided to retain article 15, paragraph 3, in its present wording.

Article 15, paragraph 4

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

86. The Committee considered whether the present wording of the paragraph

required that arbitral awards be decided upon, written and signed by all the members of the arbitral tribunal at the place of arbitration. It was noted that often in arbitral practice the arbitrators departed from the place of arbitration upon the conclusion of their deliberations and then wrote and signed the award at localities other than the place of arbitration.

87. The Committee noted that article 15, paragraph 4, was intended to ensure compliance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for that reason closely followed its language. In order to foster the recognition and enforcement of arbitral awards under that Convention, the Committee decided to retain in substance the present text of article 15, paragraph 4.

88. The Committee did not adopt a suggestion that article 15, paragraph 4, be incorporated in article 27 of these Rules, which dealt with the form and effect of arbitral awards. It was noted that the place of arbitration was important also in respect of matters other than the form and effect of arbitral awards, such as the determination of the applicable procedural law governing the conduct of the arbitral proceedings.

Article 16, paragraphs 1 and 2

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

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

89. The Committee, after deliberation, decided to retain article 16 in its present wording.

90. It was noted that in cases where the arbitrators selected the language or languages to be used in the arbitral proceedings, the arbitrators could consult with the parties before reaching their decision.

Article 17, paragraph 1

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

91. The Committee, after deliberation, retained the substance of this paragraph. However, as a result of its decision taken in regard to article 4, the Committee decided to modify article 17, paragraph 1, to the effect that no statement of

claim would have to be submitted under article 17 if a claimant had annexed such a statement to his notice of arbitration.

Article 17, paragraph 2

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

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

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

92. The discussion of this paragraph centred on the question whether the claimant should be required to include in his statement of claim a full statement of the facts he relied on for his claim and a summary of the evidence supporting these facts. It was argued that such a requirement would speed up the arbitral proceedings by permitting early discovery of the evidence the other party intended to adduce. According to another view, however, such a requirement would be impractical and serve no useful purpose, since it was only after the exchange of the statement of claim and the statement of defence that the parties could realistically decide upon the evidence that they would be relying on to support their respective positions.

93. The Committee decided against the imposition of a rule mandating that the claimant include in his statement of claim a summary of the evidence on which he intended to rely to support his claim. It was agreed, however, to add a paragraph to article 20, specifically authorizing the arbitrators to demand from the parties a summary of the evidence supporting the facts set forth by that party in his statement of claim or statement of defence.

94. The Committee did not retain a suggestion that the claimant should be required, under article 17, paragraph 2, to annex to the statement of claim the documents or a list of the documents on which he relied. The Committee was however agreed that the claimant should be permitted, at his option, to include a reference "to the documents or other evidence" which he intended to present.

Article 17, paragraph 3

"3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered, provided the respondent is given the opportunity to exercise his right of defence in respect of the change."

95. The Committee considered the desirability of retaining this paragraph. According to one view, the claimant should be given the right to supplement or alter his claim without requiring the permission of the arbitrators. According to another view, the provision requiring that the claimant obtain the

permission of the arbitrators before being permitted to amend his claim served a useful purpose, since it prevented the claimant from delaying the arbitral proceedings by repeatedly amending his claim.

96. It was agreed to restructure article 17, paragraph 3, so that it would in general terms authorize a claimant to supplement or alter his claim, but would also provide that a claim could not be amended if the amended claim fell outside the scope of the arbitration clause or separate arbitration agreement or if the arbitrators determined that the particular amendment was inappropriate.

97. One representative noted his reservation regarding the provisions of article 17, paragraph 3, and expressed his preference for a system which did not permit a claimant to supplement or alter his claim.

Article 18, paragraph 1

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

98. After considering whether to include in this paragraph a minimum period that the arbitrators were to grant to the respondent for the communication of his statement of defence, the Committee decided to retain this paragraph in its present wording.

Article 18, paragraph 2

"2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 17, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents he will submit."

99. The Committee was agreed to retain the substance of this paragraph. However, consequent upon the decision taken concerning article 17, paragraph 2 (see para. 94 above), the Committee decided to modify article 18, paragraph 2, so as to permit the respondent to make a reference in his statement of defence to the "documents or other evidence" that he intended to submit.

Article 18, paragraph 3

"3. In his statement of defence the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off."

100. The Committee considered the question whether the respondent should be permitted to assert a counter-claim or set-off subsequent to the time when he communicated his statement of defence.

101. The view was expressed that counter-claims and claims relied on as set-offs should only be considered by arbitral tribunals if they were raised in the statement of defence and that, therefore, paragraph 3 should be retained in its present wording. In order to accord to respondents the flexibility enjoyed by

claimants to amend their claims under article 17, paragraph 3, it was suggested on the other hand, that article 18, paragraph 3, should provide that a counter-claim or set-off could be raised in the statement of defence "or at a later stage in the arbitral proceedings if the arbitrators decided that the delay was justified under the circumstances".

102. After consideration of this question the Committee decided to modify article 18, paragraph 3, so that a respondent would be permitted to assert a counter-claim or set-off subsequent to the time when he communicated his statement of defence, provided that the arbitrators found that the delay in raising the counter-claim or set-off was justified.

Article 18, paragraph 4

"4. The provisions of article 17, paragraphs 2 and 3, shall apply to a counter-claim and a claim relied on for the purpose of a set-off."

103. The Committee considered the desirability of permitting respondents to amend or supplement their statements of defence.

104. According to one view, respondents should be permitted to amend their statements of defence, with the permission of the arbitrators, in the same way and under the same conditions as claimants were permitted under article 17, paragraph 3, to amend their statements of claim. According to another view, respondents should not be given this right because of the likelihood that it would be used to delay the proceedings and to increase the costs of arbitration.

105. After deliberation, the Committee was agreed that since claimants had the right to amend their statement of claim, respondents should be given the right to amend their statement of defence. The Committee also decided to include the provisions on the right to amend or supplement claims and defences in a new article 18 bis and, consequently, to delete article 17, paragraph 3, and to retain in article 18, paragraph 4, only a cross-reference to article 17, paragraph 2.

106. One representative noted his reservation and expressed his preference for not permitting any amendment of claims or defences.

Article 19, paragraphs 1 and 2

"1. The arbitrators shall have the power to rule on objections that they have no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

"2. The arbitrators shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 19, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

107. After deliberation, the Committee decided to retain the present wording of article 19, paragraphs 1 and 2.

Article 19, paragraph 3

"3. A plea that the arbitrators do not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. If such a plea is raised at a later stage, the arbitrators may nevertheless admit the plea, provided the delay in raising it is justified under the circumstances."

108. The Committee considered the suggestion that the second sentence in this paragraph, dealing with the raising of a plea alleging lack of jurisdiction of the arbitrators later than in the statement of defence, was unnecessary and should be deleted. It was noted that the substance of this sentence was already contained in new article 18 bis, which permits modification of the defence, and article 14, paragraph 1, which gives to the arbitrators the discretion to "conduct the arbitration in such manner as they consider appropriate".

109. The Committee was agreed that the second sentence of article 19, paragraph 3, be deleted.

Article 19, paragraph 4

"4. The arbitrators may rule on such a plea as a preliminary question, or they may proceed with the arbitration and rule on it in their final award."

110. The Committee considered the suggestion that arbitrators should be required to rule on pleas alleging their lack of jurisdiction as preliminary questions. It was stated that adoption of the suggestion would result in substantial savings to the parties in cases where the arbitrators upheld pleas as to their jurisdiction. It was observed, in reply, that the flexibility granted to the arbitrators under the present wording of article 19, paragraph 4, was preferable, since it corresponded to provisions on this point in international conventions and many national laws.

111. The Committee, after deliberation, decided to retain the flexibility granted to the arbitrators under article 19, paragraph 4, to rule on pleas as to their jurisdiction either as a preliminary question or in their final award, but that the paragraph should specify that as a general rule the arbitrators should rule on such pleas as preliminary questions.

Article 20, paragraph 1

"1. The arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods of time for communicating such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements."

112. The Committee decided to retain the first sentence of this paragraph in its present wording but to delete the second sentence dealing with the exchange of pleadings between the parties (réplique and duplique) in addition to the exchange of the statements of claim and defence. There was general agreement that the arbitrators should have the discretion to admit such further pleadings upon a request from only one party and that therefore the second sentence of article 20, paragraph 1, should be deleted.

Article 20, paragraph 2

"2. If in the statement of defence a counter-claim is raised, the arbitrators shall afford the claimant an opportunity to present a written reply of such claim."

113. The Committee was agreed that article 18 already covered the matter dealt with in article 20, paragraph 2, and that therefore this paragraph should be deleted.

Article 20, paragraph 3

"3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period of time as the arbitrators shall determine."

114. The Committee considered a suggestion that this paragraph should be deleted since under the general provision of article 14, paragraph 1, the arbitrators were already authorized to require that the parties furnish documents or other evidence during the course of the arbitral proceedings.

115. The Committee, after deliberation, was of the opinion that article 20, paragraph 3, was useful and that its substance should therefore be retained. The Committee decided, however, that since paragraph 3 concerned the right of the arbitrators to demand that the parties furnish documents or other evidence, while paragraph 1 of this article concerned their right to demand further written pleadings from the parties, paragraph 3 of article 20 should be placed in a separate article that would appear immediately following article 20.

116. The Committee was agreed that the new article should be supplemented by:

(a) A paragraph stating the general principle that each party had the burden of proving the facts on which he relied in his claim or in his defence;

(b) A paragraph making it clear that the arbitrators could require from each party a summary of the documents and other evidence which that party intended to present in support of his claim or defence.

117. The Committee further decided that the substance of article 21 should be added to article 20 as a separate paragraph, so that article 20 would consist of the first sentence of the present paragraph 1 of article 20 and of the substance of the present article 21.

118. The Committee agreed that in order to prevent surprise at hearings the arbitral tribunal may require delivery in advance to the other party and to the

arbitral tribunal of a summary of the documents and other evidence which a party intends to present.

Article 21

"The periods of time fixed by the arbitrators for the communication of written statements should not exceed 45 days, and in the case of the statement of claim, 15 days. However, the arbitrators may extend the time-limits if they conclude that an extension is justified."

119. After considering the desirability of shortening the maximum period of time that the arbitrators should normally grant to the parties for the communication of written statements from 45 days to 30 days, the Committee decided to retain the 45-day period.

120. The Committee was agreed that this article should not contain any special provision concerning the communication of the statement of claim.

Article 22, paragraph 1

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

121. After deliberation, the Committee decided to retain the present wording of this paragraph.

Article 22, paragraph 2

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

122. Consideration was given to a proposal to add to this paragraph a provision that would require that a party, at least 15 days before a hearing, communicate to the arbitrators and to the other party not only the names and addresses of the witnesses that party intended to present at the hearing but also the subjects concerning which the witnesses would be asked to testify.

123. The Committee was of the view that such information prior to a hearing as to the subjects on which witnesses would be testifying at the hearing was useful in that it permitted the arbitrators and the other party to properly prepare for the hearing and it therefore adopted this suggestion.

Article 22, paragraph 3

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

124. The Committee considered the suggestion that this paragraph should be deleted on the ground that its subject-matter was already adequately dealt with by the provisions of article 16 on the language to be used in the arbitral proceedings and of article 14, paragraph 1, on the discretion granted to the arbitrators as to the conduct of the arbitration.

125. There was general agreement that the provisions of article 22, paragraph 3, were useful, because the important matters covered by it, i.e. arrangements by the arbitrators for translation services and for the maintaining of an official record, were not mentioned specifically in the Rules anywhere else. The Committee therefore decided to retain the substance of article 22, paragraph 3. Although the Committee changed the words "verbatim record" to "record", it was agreed that verbatim records were not thereby precluded.

Article 22, paragraph 4

"4. Hearings shall be held in camera unless the parties agree otherwise. With the consent of the parties, the arbitrators may permit persons other than the parties and their counsel or agent to be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated."

126. There was general agreement that the second sentence in this paragraph, providing that with the consent of the parties the arbitrators could permit persons other than the parties or persons connected with one of the parties to be present at a hearing, should be deleted since its content was subsumed in the more general rule found in the first sentence, which established that hearings would be held in camera unless the parties agreed otherwise.

127. Consideration was given to the question whether witnesses should be excluded from a hearing during the testimony of other witnesses. It was noted that in some legal systems witnesses were permitted to be present only when testifying, while in other legal systems witnesses, particularly expert witnesses, were not formally excluded. The Committee decided to retain the third sentence of article 22, paragraph 4, which provided that the arbitrators could require that witnesses not be present during the testimony of other witnesses.

128. The Committee also considered the manner in which witnesses could be examined at a hearing. It was agreed that the arbitrators should have full discretion to decide upon the manner in which witnesses were to be examined and that therefore the substance of the last sentence in article 22, paragraph 4, should be retained.

Article 22, paragraph 5

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

129. The Committee considered a suggestion advocating the deletion of this paragraph on the ground that in some legal systems evidence of witnesses had to be presented by those witnesses in person. After deliberation, the Committee decided to retain article 22, paragraph 5, because the presentation of evidence by written statements of witnesses may sometimes be advantageous.

Article 22, paragraph 6

"6. The arbitrators shall determine the admissibility, relevance and materiality of the evidence offered."

130. The Committee decided to retain the substance of this paragraph. The Committee also decided to clarify that the arbitrators had complete discretion to decide on the weight they would give to the evidence offered, in addition to the discretion they had to determine the admissibility, relevance and materiality of such evidence.

Article 23, paragraphs 1 and 2

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

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

131. After deliberation, the Committee decided to retain paragraphs 1 and 2 of article 23 in their present wording.

Article 23, paragraph 3

"3. A request for interim measures may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration agreement, or as a waiver of that agreement."

132. After considering drafting suggestions concerning the wording of this paragraph, the Committee was agreed to retain the substance of article 23, paragraph 3, and to combine its provisions into a single sentence.

Article 24, paragraphs 1, 2 and 3

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

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

"3. Upon receipt of the expert's report, the arbitrators shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall

be entitled to examine any document on which the expert has relied in his report."

133. After deliberation, the Committee decided to retain the present wording of paragraphs 1, 2 and 3 of article 24.

Article 24, paragraph 4

"4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties and their counsel or agent shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 22 shall be applicable to such proceedings."

134. Consideration was given to the desirability of retaining the second sentence of this paragraph, authorizing either party to present expert witnesses. The Committee was of the view that this sentence should be maintained, since it served to inform the parties of their right to present experts as witnesses without, however, inferring that the parties could present expert witnesses only at those hearings at which experts appointed by the arbitrators were testifying.

135. As a result of its decision in article 5 of the Rules to eliminate reference to the "counsel or agent" of the parties, the Committee deleted this phrase from the first sentence of article 24, paragraph 4. With this modification, the Committee retained the provisions of article 24, paragraph 4.

Article 25, paragraph 1

"1. If the claimant, within the period of time determined by the arbitrators under article 17, fails to communicate his statement of claim, the arbitrators may afford the claimant a further period of time to communicate his statement of claim. If, within such further period of time, he fails to communicate his statement of claim without showing sufficient cause for such failure, the arbitrators shall issue an order for the discontinuance of the arbitral proceedings."

136. There was general agreement that the language of this paragraph should be modified to indicate more clearly that the sanction envisaged in the second sentence of this paragraph for failure to communicate the statement of claim was the termination of the arbitral proceedings. It was noted that such termination would not be based on the merits of the dispute and that therefore the claimant was not barred from commencing new arbitral proceedings.

137. The Committee was of the view that the costs of an arbitration that was terminated by reason of the claimant's failure to submit his statement of claim should in principle be borne by the claimant and that article 33 dealing with the determination and apportionment of the costs of arbitration should be amended to cover the termination of arbitral proceedings pursuant to article 25, paragraph 1.

Article 25, paragraph 2

"2. If the respondent, within the period of time determined by the arbitrators under article 18, fails to communicate his statement of defence without showing sufficient cause for such failure, the arbitrators may proceed with the arbitration."

138. The Committee was agreed that respondents should be accorded the same right to an extension of the time for the communication of the statement of defence as was accorded to claimants under article 25, paragraph 1, for the communication of the statement of claim.

139. The Committee decided to combine into one paragraph the provisions of paragraphs 1 and 2 of article 25, in order to ensure that claimants and respondents would have the same opportunity to obtain an extension of the period initially fixed by the arbitrators for the communication, respectively, of the statement of claim or the statement of defence.

Article 25, paragraph 3

"3. If one of the parties fails to appear at a hearing duly called under these Rules, without showing sufficient cause for such failure, the arbitrators shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties."

140. The Committee was of the view that the rule of construction set forth in this paragraph was unnecessary and should not be retained. It was emphasized that the sanction for such non-appearance lay in the authorization granted to the arbitrators "to proceed with the arbitration".

141. Subject to this deletion, the Committee was agreed to retain the substance of article 25, paragraph 3.

Article 25, paragraph 4

"4. If one of the parties, after having been duly notified, fails without showing sufficient cause, to submit documentary evidence when an award is to be made solely on the basis of documents and other written materials, the arbitrators may make the award on the evidence before them.

142. After considering drafting suggestions concerning the wording of this paragraph, the Committee decided to retain the substance of article 25, paragraph 4.

Article 26

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

143. The Committee considered the desirability of adding to article 26 the concept of constructive waiver by a party who "should have known" that a requirement under the Rules has not been complied with.

144. The view was expressed that such an addition would be useful in order to avoid the difficulty of proving the time when a party first "knew" that a provision of the Rules was violated. It was noted that a number of other sets of procedural rules intended for international commercial arbitration contained provisions on constructive waiver.

145. According to another view, article 26 should not be extended to cover constructive waiver by a party who "should have known" that the Rules were being violated, since the parties were assumed to know the Rules under which they had agreed to arbitrate.

146. After deliberation, the Committee decided to retain the present wording of article 26, and not to add a provision dealing with constructive waiver. The Committee was of the view that the article served a useful purpose in that it was designed to protect the validity of the arbitral proceedings or of the ensuing award against allegations of minor violations of the procedures established in the Rules.

147. It was suggested that, since article 26 on waiver applied to all provisions in the UNCITRAL Arbitration Rules, it should be placed in the part of the Rules entitled Section I: Introductory Rules. After deliberation, the Committee decided to keep article 26 where it now appeared in the Rules, since in practice it would be invoked primarily in connexion with violations of provisions in the Rules that occurred during the conduct of the arbitral proceedings.

Proposed additions to section III: arbitral proceedings

(a) Termination of hearings

148. The Committee considered the desirability of adding an article 25 bis to section III of the Rules on the termination of hearings. It was suggested that such an article should provide that after giving sufficient notice to the parties, the arbitrators were empowered to declare that hearings and the taking of evidence were closed, while retaining the right to reopen the hearings if they considered it necessary due to exceptional circumstances. It was observed that articles 33 and 34 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission, 1969, could be used as a model.

149. It was noted that the proposed article 25 bis would ensure that no party could unreasonably delay the arbitral proceedings by repeated requests for hearings and the taking of further evidence. It was also noted that the provisions in article 25 bis, authorizing the arbitrators to reopen the hearings if they considered it necessary under exceptional circumstances, were designed to prevent a party from successfully asserting that he could not present his case and that therefore under article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards the award should not be enforced.

150. After deliberation, the Committee decided to retain the suggestion to add an article on the termination of hearings.

(b) Decisions of the arbitrators on procedural questions

151. The Committee considered a proposal to add to section III of the Rules an article dealing with the degree of consensus required among the members of an arbitral tribunal for the taking of decisions on procedural matters. It was agreed that, as a general rule, all decisions by the arbitrators, including decisions on procedural questions, should be made by at least the majority of arbitrators.

152. It was suggested that a separate article on decision-making by the arbitrators on procedural questions should provide that the presiding arbitrator could decide procedural questions in cases where no decision by majority could be reached.

153. After deliberation, the Committee decided not to add a separate article to section III dealing with decision-making by the arbitrators on procedural questions. The Committee, however, decided to add a new article to section IV of the Rules, designed to regulate all decision-making by the arbitrators, including any decisions on procedural questions.

Article 27, paragraph 1

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

154. After deliberation, the Committee decided to retain the present wording of article 27, paragraph 1.

Article 27, paragraph 2

"2. An award shall be binding upon the parties. An award shall be made in writing and shall state the reasons upon which it is based, unless both parties have expressly agreed that no reasons are to be given."

155. Consideration was given to whether it should be required by the Rules that an arbitral award state the reasons upon which it was based. It was noted that in some legal systems usually no such reasons were given in arbitral awards, while in other legal systems an arbitral award had to include the reasons upon which it was based.

156. The view was expressed that, in order to ensure its enforceability, an award should include reasons and that therefore the option given to the parties under article 27, paragraph 2, to agree that no reasons be given should be deleted. However, according to another view, the present wording of article 27, paragraph 2, requiring that an award state the reasons upon which it is based unless the parties expressly agreed to the contrary, should be retained.

157. The Committee decided to restructure article 27, paragraph 2, to the effect that arbitrators would not be required to include in the award itself the reasons upon which it was based, but could elect to give these reasons in a statement accompanying, but not forming part of, the award. It was also agreed that the parties could agree, expressly or by implication (e.g. when they selected as the place of arbitration a country under whose national law reasons were not generally given in arbitral awards), that the arbitrators need not give the reasons for their award.

Article 27, paragraph 3

"3. When there are three arbitrators, an award shall be made by a majority of the arbitrators."

158. Consideration was given to the desirability of dealing with the eventuality that the three members of an arbitral tribunal were unable to agree on an award by majority.

159. The view was expressed that in such a case the decision of the presiding arbitrator should govern. It was noted in this connexion that the arbitration rules established by the International Chamber of Commerce had contained such a provision for many years without causing any problems in practice.

160. It was observed, in reply, that a rule providing that in the case of deadlock among the arbitrators on the award the decision of the presiding arbitrator would govern, was subject to abuse by presiding arbitrators who might make extreme awards. It was also noted that requiring that awards be made by a majority of the arbitrators would force them to continue their deliberations, when they were initially deadlocked, and was likely to lead to a compromise award that a majority of the arbitrators could accept.

161. After deliberation, the Committee retained the substance of paragraph 3, which required that awards be made by a majority of the arbitrators. The Committee, however, decided that this rule should form paragraph 1 of a new article in section IV on decisions, and that paragraph 2 of that new article should provide that on procedural questions, if there was no majority, the presiding arbitrator could decide on his own subject to review, if any, by the arbitral tribunal.

162. One representative noted his reservation and expressed his preference for the inclusion of a provision dealing specifically with the case where no majority of the arbitrators could agree on an award.

Article 27, paragraph 4

"4. An award shall be signed by the arbitrators. When there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the validity of the award. The award shall state the reason for the absence of an arbitrator's signature."

163. There was general agreement that all the arbitrators, including an arbitrator who dissented from the award, should be required to sign the award. It was noted that in some legal systems an arbitral award was enforceable only if it had been signed by all the arbitrators, whereas in some others two signatures were sufficient for this purpose.

164. The Committee observed that the date on which and the place where the award was made were matters of great importance for the enforcement of awards. For this reason, it was agreed that paragraph 4 should provide that an award had to include the date on which and the place where it was made.

165. The Committee considered the desirability of maintaining the provision in the second sentence of paragraph 4, which dealt with the legal effect of the failure of one arbitrator to sign the award. After deliberation, the Committee was agreed that the legal effect of one arbitrator's failure to sign the award should be left to the applicable national law for resolution and that therefore the Rules should be silent on this point. However, the Committee retained the provision requiring that an award state the reason for the absence from the award of one arbitrator's signature.

166. Consideration was also given to the possible addition of a specific provision authorizing the inclusion in the award of an arbitrator's dissenting opinion. A majority of the Committee was of the view that no specific mention should be made of dissenting opinions, thereby in effect permitting but not requiring that a dissenting opinion be included in an arbitral award.

Article 27, paragraph 5

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

167. After deliberation, the Committee decided to retain the present wording of this paragraph. It was noted that an arbitral award could become public in certain cases even in the absence of the consent of both parties, e.g. during proceedings for the recognition and enforcement of the award.

Article 27, paragraph 6

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

168. Consideration was given to the desirability of providing for a time-limit, commencing on the date the award was made, within which copies of the award must be communicated to the parties.

169. The Committee was of the view that it was not necessary to prescribe a time-limit for the communication of an award to the parties, on the ground that awards should not be invalidated solely because the arbitrators failed to observe this time-limit.

Article 27, paragraph 7

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

170. After deliberation, the Committee was agreed to retain the substance of paragraph 7, but to clarify that the arbitrators were obliged to file or register their award only if the arbitration law of the country where the award was made required that such filing or registration be done by the arbitrators.

Article 28, paragraph 1

"1. The arbitrators shall apply the law designated by the parties as applicable to the substance of the dispute. Such designation must be contained in an express clause, or unambiguously result from the terms of the contract."

171. There was general agreement that the principle contained in the first sentence of this paragraph, which recognized the freedom of the parties to designate the law applicable to the substance of their dispute, should be retained. It was agreed, however, that the method by which the parties could effect such designation should not be regulated by the UNCITRAL Rules, but should be left to the applicable national law.

172. It was noted that the reference in paragraph 1 to "the law designated by the parties as applicable to the substance of the dispute" was intended as a reference to the internal law of that country not including its rules on conflict of laws or renvoi.

Article 28, paragraph 2

"2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable."

173. There was general agreement to retain the substance of this paragraph, which provided that if the parties failed to designate the law applicable to the substance of their dispute the arbitrators would select that law through reliance on conflict of laws rules.

174. Consideration was given to the question of the determination of the conflict of laws rules that would be utilized by the arbitral tribunal. After deliberation, the Committee adopted the phrase "the conflict of laws rules which it considers applicable".

Article 28, paragraph 3

"3. The arbitrators shall decide ex aequo et bono or as amiables compositeurs only if the parties have expressly authorized the arbitrators to do so and the arbitration law of the country where the award is to be made permits such arbitration."

175. It was agreed to retain in this paragraph the references to arbitral decisions both ex aequo et bono and as amiables compositeurs, since these terms had different connotations in the various national legal systems.

176. It was noted that "the law of the country where the award is to be made" was not in all cases also the law governing the arbitral procedure, and that some national laws together with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards appeared to envisage a choice by the parties of the law that was to govern the arbitral proceedings.

177. After deliberation, the Committee was agreed that the arbitral tribunal would decide ex aequo et bono or as amiables compositeurs only if expressly authorized to do so by the parties and if "the law applicable to the arbitral procedure" permitted such arbitration.

178. One representative noted his reservation and stated his preference for authorizing the arbitral tribunal to decide ex aequo et bono or as amiables compositeurs only if such arbitration was permitted by the law of the country where the arbitral award was to be enforced.

Article 28, paragraph 4

"4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade."

179. The Committee considered a proposal that paragraph 4 should be placed in a separate article entitled "effect of contract". It was also suggested that the provisions of article 28, paragraph 4, obligating the arbitrators to take into account the terms of the contract and the usages of the trade, should not apply to arbitral decisions taken ex aequo et bono or as amiables compositeurs.

180. After deliberation, the Committee decided that paragraph 4 should remain a paragraph within article 28 and that its provisions should also apply to arbitrations ex aequo et bono or as amiables compositeurs. One representative noted his reservation and stated that, in his view, especially in ex aequo et bono arbitration, the arbitrators (the arbitral tribunal) should not be obliged to follow rigidly the terms of the contract, the literal application of which might be unjust because it gave rise to an excessive burden.

181. Consideration was also given to the desirability of formulating in stricter terms the arbitrators' obligation to observe the provisions of the contract than their obligation to observe the usages of the trade. It was stated that such a distinction would be useful, since it would place greater emphasis on the terms of the contract.

182. After consideration of this issue, the Committee determined that the Rules should provide that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction.

Article 29, paragraph 1

"1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award. If, before the award is made, the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason, the arbitrators shall inform the parties of their intention to issue an order for the discontinuance of the proceedings. The arbitrators shall have the power to issue such an order unless a party objects to the discontinuance."

183. After deliberation, the Committee decided to retain the substance of article 29, paragraph 1.

184. There was general agreement that the provisions of paragraph 1 should be placed in two separate paragraphs, the first paragraph to cover settlements agreed on by the parties and the second to cover the cases where the continuance of the arbitral proceedings became unnecessary or impossible.

185. After considering suggestions that article 29 appear earlier in the Rules, the Committee decided to keep this article at its present location in the Rules, for reasons of logical presentation.

Article 29, paragraph 2

"2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of arbitration as specified under article 33. Unless otherwise agreed to by the parties, the arbitrators shall apportion the costs between the parties as they consider appropriate."

186. The Committee decided to expand the scope of this paragraph so that it also covered the fixing of the costs of arbitration for arbitral proceedings that were terminated, pursuant to article 25, paragraph 1, by reason of the claimant's failure to submit a statement of claim.

187. The Committee was agreed that the general rules in article 33 on the fixing of the costs of arbitration and their apportionment between the parties should be made applicable to all cases where the proceedings concluded with an order for the termination of the arbitral proceedings (article 25, para. 1, or article 29, para. 1) or with an arbitral award on agreed terms (article 29, para. 1).

Article 29, paragraph 3

"3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators shall be communicated by the arbitrators to the parties. Where an arbitral award on agreed terms is made, the provisions of article 27, paragraph 7, shall apply."

188. After deliberation, the Committee was agreed to retain article 29, paragraph 3 in its present wording.

Article 30, paragraph 1

"1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitrators give an interpretation of the award. Such interpretation shall be binding on the parties."

189. Consideration was given to the desirability of extending the period of 30 days provided for in this paragraph for the communication of a request that the arbitrators give an interpretation of their award.

190. After deliberation, the Committee decided to retain the 30-day time-limit for the communication of a request for the interpretation of an award, so that the arbitrators would know reasonably quickly that some further action in respect of the award would be requested of them.

Article 30, paragraph 2

"2. The interpretation shall be given in writing within 45 days after the receipt of the request, and the provisions of article 27, paragraphs 3 to 7, shall apply."

191. In recognition of the fact that, when given, an interpretation by the arbitral tribunal of its award was necessarily and authoritatively linked to the award, the Committee decided to provide in paragraph 2 that such interpretation formed part of the award. For the same reason, it was agreed that paragraphs 2 to 7 of article 27 on the form and effect of an award should be made applicable to an interpretation of the award.

192. It was agreed that the arbitrators should not be entitled to extra remuneration for issuing an interpretation of their award, since it was the vagueness of their award that gave rise to the request for its interpretation. The Committee was of the view that this result could best be accomplished by adding a provision to this effect to article 33, which dealt with the costs of arbitration.

Article 31, paragraph 1

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

193. After considering a suggestion that the 30-day time-limit for the communication of a request for the correction of an award should be eliminated, the Committee decided to retain the present wording of article 31, paragraph 1.

Article 31, paragraph 2

"2. Such corrections shall be in writing, and the provisions of article 27, paragraphs 6 and 7, shall apply."

194. It was agreed that, in order to emphasize the immediate connexion between the award and the correction of that award by the arbitral tribunal that had made the award, paragraphs 2 to 7 of article 27 on the form and effect of an award should be made applicable to a correction of the award.

195. There was general agreement that the arbitrators should not be entitled to extra remuneration for having corrected errors in their award, and that article 33 on the costs of arbitration should include a provision to this effect.

Article 32, paragraph 1

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

196. After deliberation, the Committee decided to retain the substance of article 32, paragraph 1.

Article 32, paragraph 2

"2. If the arbitrators consider the request for an additional award to be justified and consider that the omission can be rectified without any further hearing or evidence, they shall complete their award within 60 days after the receipt of the request."

197. Consideration was given to the elimination of the provision that the arbitrators could issue an additional award only if they considered that an additional award rectifying the particular omission did not necessitate any further hearing or evidence.

198. It was noted that under the present wording of paragraph 2, if any further hearings or the taking of evidence was necessary, the party who requested the additional award would be forced to commence new arbitral proceedings. It was also noted that, even if an additional award could be issued although further hearings or evidence were necessary, the arbitrators would still have discretion to decide whether to issue an additional award in a particular case.

199. It was observed in reply, however, that losing parties would endeavour to reopen the arbitral proceedings by means of requests for additional awards, if the requirement were removed that additional awards could be issued only if no further hearings or evidence would be required. The view was also expressed that frequently it was due to the negligence of the party requesting the additional award that the necessary hearings did not take place or the evidence was not received by the arbitral tribunal.

200. After deliberation, the Committee decided to retain in substance the present wording of article 32, paragraph 2.

Article 32, paragraph 3

"3. When an additional award is made, the provisions of article 27, paragraph 2 or 7, shall apply."

201. After deliberation, the Committee decided to retain paragraph 3 in its present wording.

202. There was general agreement that the arbitrators should not be entitled to an extra fee for the making of an additional award, since it was an omission in their original award, as a result of their own action, that had to be rectified in the additional award. It was agreed that article 33 on the costs of arbitration should include a provision to this effect.

Article 33, paragraph 1 and subparagraph 1 (a)

"1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

(a) The fee of the arbitrators, to be stated separately and to be fixed by the arbitrators themselves;".

203. There was general agreement that this article should contain a separate paragraph dealing with the costs of arbitration, including the costs of proceedings that ended with an order for the termination of the arbitral proceedings (article 25, para. 1 and article 29, para. 1) or with an arbitral award on agreed terms (article 29, para. 1).

204. It was also agreed that a paragraph should be added to article 33, stating expressly that arbitrators may not charge a fee for the interpretation, correction or completion of their award pursuant to articles 30 to 32 of the Rules.

205. The question was raised whether the items listed as included in the costs of arbitration and set forth in subparagraphs (a) to (f) were the only items that would be considered under the Rules as constituting costs of arbitration. After deliberation, the Committee decided to make it clear that subparagraphs (a) to (f) were intended as an inclusive listing of the types of costs and expenses incurred during an arbitration that would be considered as costs of arbitration for the purposes of the UNCITRAL Arbitration Rules.

206. Consideration was given to the desirability of incorporating in the UNCITRAL Arbitration Rules either a schedule governing the costs of administration and the fees of the arbitrators, or reference to a schedule established by an existing arbitration institution.

207. The view was expressed that a schedule, whether set out in the Rules in full or incorporated by reference, was necessary as it would serve as a guide to the parties and the arbitrators concerning the costs of arbitration. It was also stated that such a schedule would prevent the possibility that some arbitrators would charge unreasonably high fees for their services.

208. It was stated in reply, however, that no schedule of costs and fees of arbitrators should be included in the Rules for the following main reasons:

(a) The Rules were intended to be applied world-wide and the expectations of parties and arbitrators as to costs and fees differ widely in different parts of the world; and

(b) All existing schedules had large ranges between maximum and minimum charges and provided for control over the actual fees charged by reliance on an administering authority.

209. After deliberation, the Committee decided not to include in the Rules either a schedule of costs and fees of arbitrators or reference to such a schedule established by an existing arbitral institution. The Committee decided, however, to add a separate article explaining in detail that arbitrators should fix their fees in reasonable amounts and consider certain factors in that connexion.

210. Under this new article, the fees of the arbitrators must be reasonable in amount, taking into account the particular circumstances of the case. Furthermore, if an appointing authority was agreed upon by the parties or designated pursuant to article 7, paragraph 4, the arbitrators should take into account, to the extent appropriate in the circumstances of the case, any schedule of fees or other customary basis for establishing the fees of arbitrators in international cases that was followed by that authority. The new article also permits a party to request that the arbitrators consult with such appointing authority before fixing their fees.

Article 33, paragraph 1, subparagraphs (b) and (c)

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

"(c) The costs of expert advice and of other assistance required by the arbitrators;"

211. After deliberation, the Committee decided to retain the present wording of subparagraphs (b) and (c).

Article 33, paragraph 1, subparagraph (d)

"(d) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;"

212. The Committee considered the desirability of retaining subparagraph (d), which included the travel expenses of witnesses in the costs of arbitration to the extent the arbitrators approved these expenses.

213. It was stated that witnesses were generally presented by one of the parties and that each party decided which and how many witnesses it wanted to present. In order to ensure that no party would call witnesses without regard to the costs involved, the view was expressed that either subparagraph (d) should be deleted or its scope should be limited to the expenses of witnesses who were called by the arbitrators.

214. It was observed in reply, however, that the costs involved in calling witnesses may be considerable and a successful party should be compensated for the expenses incurred in calling the witnesses who were instrumental in establishing the correctness of his position.

215. After deliberation, the Committee decided to retain the substance of subparagraph (d), but to clarify that both the travel and other expenses of witnesses were included in the costs of arbitration only to the extent they were approved by the arbitrators and that under article 33, paragraph 2, the arbitrators could apportion between the parties the costs of arbitration, including the expenses of witnesses.

Article 33, paragraph 1, subparagraph (e)

"(e) The compensation for legal assistance of the successful party if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators."

216. Consideration was given to a suggestion that subparagraph (e) should state as a general rule that each party was to bear its own expenses for legal assistance, but should authorize the arbitrators to include these expenses in the costs of arbitration in appropriate cases.

217. It was noted that the present wording of subparagraph (e) required that the legal expenses of the successful party be included in the costs of arbitration and was based on the assumption that the successful party would in every case recover his legal expenses. The view was expressed that the arbitrators should be given discretion to decide whether to include the legal expenses of a party in the costs of arbitration.

218. It was stated in reply, however, that the arbitrators enjoyed sufficient flexibility under the present wording of subparagraph (e), since they were free to apportion between the parties the costs of arbitration, including the legal expenses of the successful party, pursuant to the provisions of paragraph 2 of this article.

219. After deliberation, the Committee decided to retain the substance of subparagraph (e), so that if during the arbitral proceedings the successful party had claimed costs for legal assistance, these costs were included in the costs of arbitration to the extent that their amount was deemed reasonable by the arbitrators. The Committee decided, however, to add a new paragraph to article 33, establishing that, as to the legal expenses of the successful party, there was no presumption that these costs shall be borne by the unsuccessful party and that the arbitral tribunal had full discretion to apportion these costs in the light of the circumstances.

Article 33, paragraph 1, subparagraph (f)

"(f) Any fees charged by the appointing authority for its services."

220. The Committee decided to retain the substance of subparagraph (f) and to extend its scope to cover any expenses that might be incurred by the Secretary-General of the Permanent Court of Arbitration at The Hague when it was requested to designate an appointing authority under article 7, paragraph 4 of the Rules.

Article 33, paragraph 2

"2. The costs of arbitration shall in principle be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties if they consider that apportionment is reasonable."

221. Consideration was given to the desirability of deleting from paragraph 2 the general rule that normally the costs of arbitration shall be borne by the unsuccessful party.

222. It was stated that paragraph 2 should be neutral on the question of which party was to bear each of the costs of arbitration, leaving the apportionment of these costs fully to the discretion of the arbitral tribunal. It was stated in reply, however, that the rule that normally the costs of arbitration be borne by the unsuccessful party was fair and correct, and it gave a good indication to the parties of the way in which the costs of arbitration would be apportioned in most cases.

223. After deliberation, the Committee decided to retain the substance of paragraph 2. It was also agreed that a separate paragraph would be added to deal with the apportionment of the legal expenses incurred by the successful party.

Article 34, paragraph 1

"1. The arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of the arbitration."

224. The Committee decided to retain the substance of paragraph 1, but to clarify that the deposits that the arbitrators could require from each party were intended to ensure that the fees and expenses of the arbitrators and of experts appointed by the arbitrators would be paid at the conclusion of the arbitral proceedings.

225. Consideration was also given to a proposal permitting an appointing authority to require from the parties a deposit to ensure the payment of its fee and expenses. It was noted that some appointing authorities may charge fees for their services and others may not.

226. After deliberation, the Committee decided not to include in the Rules a provision expressly authorizing an appointing authority to demand a deposit. It was noted, however, that an authority could in any event insist that it will only agree to serve as an appointing authority if its fee for this service is paid in advance.

Article 34, paragraph 2

"2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties."

227. After deliberation, the Committee decided to retain the substance of paragraph 2.

228. The Committee was also agreed that a new paragraph should be added to article 34, obligating the arbitrators under certain circumstances to consult with the appointing authority agreed upon by the parties or designated pursuant to article 7, paragraph 4 of the Rules, before fixing the amounts of any required deposits or supplementary deposits. It was noted that this provision corresponded to the possibility under the new article discussed at paragraphs 209-210 above, to require that the arbitrators consult the appointing authority before fixing their fee.

Article 34, paragraph 3

"3. If the required deposits are not paid in full within 30 days after the communication of the request, the arbitrators shall notify the parties of the default and give to either party an opportunity to make the required payment."

229. Consideration was given to the consequence of the failure of one or both parties to pay the deposit required by the arbitrators.

230. It was noted that the arbitrators had no power to force the parties to pay the required deposits. It was therefore agreed that the arbitrators should be expressly authorized to order the suspension or termination of the arbitral proceedings if the deposits required by them were not paid in accordance with the provisions of paragraph 3.

Article 34, paragraph 4

"4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties."

231. The Committee decided to retain the substance of paragraph 4, and to clarify that it was after the award was made that the accounting by the arbitrators for the deposits they had received was to take place.

Titles of sections and articles

232. The Committee decided to retain descriptive headings for sections and articles in the UNCITRAL Arbitration Rules as an aid to the users of the Rules.

Model arbitration clause

233. The model arbitration clause as it appeared in A/CN.9/112 read as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL arbitration rules which the parties declare to be known to them. Judgement upon the award made by the arbitrator(s) may be entered by any court having jurisdiction thereof.

"The parties also agree that:

"(a) The appointing authority shall be ... (name of person or institution);

"(b) The number of arbitrators shall be ... (one or three);

"(c) The place of arbitration shall be ... (town or country);

"(d) The language(s) to be used in the arbitral proceedings shall be ...;

"/(e) Authorization, if considered desirable, for the arbitrators to act ex aequo et bono or as amiables compositeurs/."

234. There was general agreement to include a model arbitration clause which parties could insert into their contract so that disputes arising out of their contract would be settled in accordance with the UNCITRAL Arbitration Rules.

235. It was agreed to simplify the present model arbitration clause in the following respects:

(a) To delete the phrase "which the parties declare to be known to them" from the first sentence; and

(b) To delete the second sentence dealing with entry of judgement upon the award.

236. Consideration was also given to the addition of a phrase, clarifying the version of the Rules to which reference was made in the model arbitration clause. It was noted that this question would become of considerable practical importance if in the future the UNCITRAL Arbitration Rules were to be revised. For this reason, the Committee decided to add the phrase "as at present in force" to the end of the first sentence of the model clause in order to make clear that the applicable Rules were those in effect on the date of the agreement to arbitrate.

237. The Committee considered the desirability of retaining as parts of the model clause paragraphs (a) to (d), wherein the parties were given the opportunity, by filling in blanks, to agree on, respectively, the appointing authority, the number of arbitrators, the place of arbitration, and the language to be used. It was stated, on the one hand, that the model arbitration clause should be brief and it would be sufficient to alert the parties by a note to the possibility that they might find it desirable to agree on the matters covered by those paragraphs. It was stated in reply, however, that paragraphs (a) to (d) should be retained in their present form in order to encourage and make it easy for the parties to denote their agreement on matters that would be of great importance during the course of arbitral proceedings.

238. The Committee decided to retain paragraphs (a) to (d) of the model arbitration clause, but to preface them with a note that these were provisions which the parties may wish to consider adding to that clause.

239. After deliberation, the Committee decided to delete paragraph (e) of the model arbitration clause, which reminded the parties that if they wished the arbitral tribunal to decide their disputes ex aequo et bono or as amiables compositeurs, they had to add to the model arbitration clause an express authorization to this effect.

ANNEX III

List of documents before the Commission

A. General series

A/CN.9/109 and Add.1	International legislation on shipping: comments by Governments and international organizations on the draft convention on the carriage of goods by sea: note by the Secretary-General
A/CN.9/110	International legislation on shipping: analysis of comments by Governments and international organizations on the draft convention on the carriage of goods by sea: report of the Secretary-General
A/CN.9/111	Training and assistance in the field of international trade law: note by the Secretary-General
A/CN.9/112 and Add.1	International commercial arbitration: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules): report of the Secretary-General
A/CN.9/113	International commercial arbitration: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules): alternative draft provisions for the draft UNCITRAL Arbitration Rules: working paper prepared by the Secretariat
A/CN.9/114	International commercial arbitration: draft UNCITRAL Arbitration Rules: schedule of fees of arbitrators: note by the Secretariat
A/CN.9/115 and Add.1	International legislation on shipping: draft convention on the carriage of goods by sea: draft provisions concerning implementation reservations and other final clauses: report of the Secretary-General
A/CN.9/116	Report of the Working Group on the International Sale of Goods on the work of its seventh session (Geneva, 5-16 January 1976)

A/CN.9/117	International payments: negotiable instruments: report of the Working Group on International Negotiable Instruments on the work of its fourth session (New York, 2-12 February 1976)
A/CN.9/118	Ratification of or adherence to conventions concerning international trade law: note by the Secretary-General
A/CN.9/119	Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General
A/CN.9/120	Provisional agenda, annotations thereto, and tentative schedule of meetings: note by the Secretary-General
A/CN.9/121	Training and assistance in the field of international trade law: note by the Secretary-General
A/CN.9/122	Relevant provisions of the resolutions of the sixth and seventh sessions of the General Assembly: note by the Secretary-General
A/CN.9/123	International sale of goods: note by the Secretary-General
A/CN.9/124	Date and place of the tenth session: note by the Secretary-General

B. Restricted series

Plenary

A/CN.9/IX/CRP.1	UNCITRAL Arbitration Rules: report of the Committee of the Whole II
A/CN.9/IX/CRP.2	UNCITRAL Arbitration Rules: report of the Committee of the Whole II: amendments suggested by the representative of Norway
A/CN.9/IX/CRP.3	UNCITRAL Arbitration Rules: article 1, paragraph (2): proposal by the Working Group composed of the representatives of Ghana, Mexico, the United States and the USSR
A/CN.9/IX/CRP.4 and Add.1 to 5	Draft report of the United Nations Commission on International Trade Law on the work of its ninth session

A/CN.9/IX/CRP.5 and Add.1 and 2 . . .	Part III of the Report of the Committee of the Whole I: draft convention on the carriage of goods by sea: text adopted by the Committee
Committee of the Whole I	Draft Convention on the Carriage of Goods by Sea
A/CN.9/IX/C.1/CRP.1	Proposal for article 1, paragraph 5 submitted by the delegation of the United Kingdom
A/CN.9/IX/C.1/CRP.2	Proposal for new article 2, paragraph 5 submitted by the delegation of the United Kingdom
A/CN.9/IX/C.1/CRP.3	Amendments submitted by the representative of Norway (articles 1, 4, 6 and 11)
A/CN.9/IX/C.1/CRP.4	Proposal concerning article 1, submitted by the representative of Austria
A/CN.9/IX/C.1/CRP.5	Amendments proposed by the representative of Singapore (articles 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 19 and 21)
A/CN.9/IX/C.1/CRP.6	Texts proposed by the Working Group for article 1, paragraphs 1, 2, 3 and 4
A/CN.9/IX/C.1/CRP.7	Text proposed by United Kingdom for article 4, paragraph 2
A/CN.9/IX/C.1/CRP.8	Japan: proposal to amend article 2, paragraph 4
A/CN.9/IX/C.1/CRP.9	Proposal concerning article 1, paragraph 5, submitted by the representative of France
A/CN.9/IX/C.1/CRP.10	Texts proposed by Norway for articles 2 and 16
A/CN.9/IX/C.1/CRP.11	Amendment to article 5, paragraph 1, proposed by the representative of Japan
A/CN.9/IX/C.1/CRP.12	Amendment to article 2, proposed by the representative of Poland
A/CN.9/IX/C.1/CRP.13	Articles 1 to 5: decisions adopted by the Committee and texts proposed by Working Groups
A/CN.9/IX/C.1/CRP.14	Proposal concerning article 2, paragraph 4, submitted by the representative of France
A/CN.9/IX/C.1/CRP.15	Article 5: proposal by Germany (Federal Republic of), Japan, the USSR and the United Kingdom

A/CN.9/IX/C.1/CRP.16	Amendments proposed by the United Kingdom (articles 5, 10, 11, 19, 20, 21 and 25)
A/CN.9/IX/C.1/CRP.17	Text of article 4, paragraphs 1 and 2: proposed by the Federal Republic of Germany, Norway, the Union of Soviet Socialist Republics and the United States of America
A/CN.9/IX/C.1/CRP.18	Amendments proposed by the representative of the Philippines (articles 5 and 6)
A/CN.9/IX/C.1/CRP.19	Amendment proposed by the representative of Hungary (article 8)
A/CN.9/IX/C.1/CRP.20	Proposal by the Ad Hoc Working Group for a new paragraph 5 of article 2 (Belgium, France, Nigeria, Norway and United Kingdom)
A/CN.9/IX/C.1/CRP.21 and Corr.1 . .	Amendments submitted by the representative of Norway (article 20)
A/CN.9/IX/C.1/CRP.22	Amendments submitted by the representative of the United States (article 11)
A/CN.9/IX/C.1/CRP.23	Amendment proposed by the representative of Belgium (article 5)
A/CN.9/IX/C.1/CRP.24	Amendment proposed by the representative of Japan (article 9)
A/CN.9/IX/C.1/CRP.25	Amendment proposed by the representative of Japan (article 12)
A/CN.9/IX/C.1/CRP.26	Amendment proposed by the representative of France to article 5
A/CN.9/IX/C.1/CRP.27	Proposal by Norway concerning article 8
A/CN.9/IX/C.1/CRP.28	Proposals relating to articles 16, 17 and 23 submitted by the representative of Japan
A/CN.9/IX/C.1/CRP.29A	Texts of article 6 proposed by Drafting Group (Ghana, Japan, Norway, the Philippines, the United States of America and the USSR)
A/CN.9/IX/C.1/CRP.29B	Amendment to article 21, submitted by the representative of Japan
A/CN.9/IX/C.1/CRP.30	Amendment proposed by the representative of the Federal Republic of Germany (final clauses)
A/CN.9/IX/C.1/CRP.31	Joint proposal by Ghana, Norway, and the United Kingdom (article 24)

A/CN.9/IX/C.1/CRP.32	Joint proposal by Norway and the United States (article 11)
A/CN.9/IX/C.1/CRP.33	Agreed text proposed by the Chairman of the Working Group on article 8 (Australia, France, Ghana, Greece, Hungary, Norway, Singapore, United Kingdom, the United States and the USSR)
A/CN.9/IX/C.1/CRP.34	Amendments to article 13, paragraphs 1 and 2: proposed by the representative of Greece
A/CN.9/IX/C.1/CRP.35 and Add.1 to 12 .	Draft report of Committee I
A/CN.9/IX/C.1/CRP.36	Articles 1 to 6: texts proposed by the Working Group composed of the representatives of Argentina, Czechoslovakia, France, Ghana, Hungary, Japan, Norway, Sierra Leone, Singapore, the United Kingdom, the United States and the USSR
A/CN.9/IX/C.1/CRP.36/Add.1	Articles 7 to 11: texts proposed by the Working Group
A/CN.9/IX/C.1/CRP.36/Add.2	Articles 1 to 11: texts proposed by the Working Group
A/CN.9/IX/C.1/CRP.36/Add.3	Articles 12 to 18: texts proposed by the Working Group
A/CN.9/IX/C.1/CRP.36/Add.4	Articles 19 to 22: text proposed by the Working Group
A/CN.9/IX/C.1/CRP.36/Add.5	Article 5, paragraph 6; article 21, paragraph 3; articles 23, 24 and 25: texts proposed by the Working Group
A/CN.9/IX/C.1/CRP.37	Article 21: amendment submitted by the representative of France
A/CN.9/IX/C.1/CRP.38	Amendment proposed by Australia (final clauses)
A/CN.9/IX/C.1/CRP.39	Article 13: joint proposal by Norway and the United Kingdom
A/CN.9/IX/C.1/CRP.40	Article 13: proposal for definition of "dangerous goods"
A/CN.9/IX/C.1/CRP.41	Proposal by Norway concerning article 22, new paragraph 1 bis

A/CN.9/IX/C.1/CRP.42	Article 20: amendment submitted by the representative of France
A/CN.9/IX/C.1/CRP.43	Article 19, paragraph 1: amendments submitted by the representatives of Japan and the United Kingdom

Committee of the Whole II — UNCITRAL Arbitration Rules

A/CN.9/IX/C.2/CRP.1	Report of Drafting Group on articles 1 and 2 (Belgium and United Kingdom)
A/CN.9/IX/C.2/CRP.2	Report of the Drafting Group on article 9 (Belgium, Mexico and United Kingdom)
A/CN.9/IX/C.2/CRP.3	Report of the Drafting Group on article 5 (France and Mexico)
A/CN.9/IX/C.2/CRP.4	Report of the Drafting Committee on article 14 (Czechoslovakia, Germany (Federal Republic of), India, USSR and International Chamber of Commerce)
A/CN.9/IX/C.2/CRP.5	Report of the Drafting Group on article 12, paragraph 2 (France and Mexico)
A/CN.9/IX/C.2/CRP.6	Report of the Drafting Committee on article 15 (France and Nigeria)
A/CN.9/IX/C.2/CRP.7	Redraft of article 17, paragraphs 1 and 3, in accordance with decisions of the Committee (Secretariat)
A/CN.9/IX/C.2/CRP.8	Action of Committee II in respect of article 18, paragraph 3
A/CN.9/IX/C.2/CRP.9	Action taken by Committee II in respect of article 11
A/CN.9/IX/C.2/CRP.10	Drafting Group on article 17(2) and 18(2) (Hungary and United Kingdom)
A/CN.9/IX/C.2/CRP.11	Report of drafting changes in article 10 (Secretariat)
A/CN.9/IX/C.2/CRP.12	Report of the USSR on article 12, paragraph 3
A/CN.9/IX/C.2/CRP.13	Report of Drafting Group on article 3 (Germany (Federal Republic of), Norway United States)

A/CN.9/IX/C.2/CRP.14	Report of the Drafting Group on articles 17(3), 18(4) and 19(3) (the Federal Republic of Germany, India, the United Kingdom, the USSR)
A/CN.9/IX/C.2/CRP.15	Report of the Drafting Group on an amendment to article 1
A/CN.9/IX/C.2/CRP.16	Report of the Drafting Group on articles 20 and 21 (United Kingdom and the USSR)
A/CN.9/IX/C.2/CRP.17	Report of Drafting Group on article 23 (United States)
A/CN.9/IX/C.2/CRP.18	Report of actions taken by Committee II and text proposed for article 22 (Bulgaria, the United States)
A/CN.9/IX/C.2/CRP.19	Report of action taken by Committee II on article 24, paragraph 4
A/CN.9/IX/C.2/CRP.20	Report of drafting changes on article 10 (Secretariat)
A/CN.9/IX/C.2/CRP.21	Report of Drafting Group on articles 7, 8 and 8 bis (France, Germany (Federal Republic of), Union of Soviet Socialist Republics and United States)
A/CN.9/IX/C.2/CRP.22	Report of Drafting Group on article 4 (Austria and the United Kingdom)
A/CN.9/IX/C.2/CRP.23	Report of Drafting Group on article 19 (Ghana, Mexico and Poland)
A/CN.9/IX/C.2/CRP.24	Report of the Drafting Group on article 27, paragraph 2 (Germany (Federal Republic of), Union of Soviet Socialist Republics and United Kingdom)
A/CN.9/IX/C.2/CRP.25	Proposals by Belgium and the United Kingdom for a new article 25 bis
A/CN.9/IX/C.2/CRP.26	Report of drafting group on article 25 (Belgium, Mexico and Philippines)
A/CN.9/IX/C.2/CRP.27	Report of Drafting Group on a new article 26 bis in section IV (France, Germany (Federal Republic of))
A/CN.9/IX/C.2/CRP.28	Changes made or suggested in article 29, paragraphs 1 and 2

A/CN.9/IX/C.2/CRP.29 . . . . . Report of actions taken in respect of article 27, paragraphs 4 and 7

A/CN.9/IX/C.2/CRP.30 and Add.1-9 . . . Draft report of the Committee of the Whole II on its discussion of the UNCITRAL Arbitration Rules

A/CN.9/IX/C.2/CRP.31 . . . . . Report of changes in articles 30 and 31

A/CN.9/IX/C.2/CRP.32 . . . . . Action of Committee II in respect of article 28

A/CN.9/IX/C.2/CRP.33 . . . . . Report of Drafting Group on part of article 33 (France and United States)

A/CN.9/IX/C.2/CRP.34 . . . . . Report of Drafting Group on part of article 34 (France and United States)

A/CN.9/IX/C.2/CRP.35 and Add.1 and 2 . Text of UNCITRAL Arbitration Rules

A/CN.9/IX/C.2/CRP.36 . . . . . Report of Co-ordinating Group on article 33, paragraph 1 (c) (Austria, Belgium, Nigeria, Philippines, the Soviet Union, United Kingdom, and the United States)

C. Information series

A/CN.9/INF.8 and Corr.1 . . . . . List of participants

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13146—July 1976—4,300