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Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002)

Contents

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I. Introduction

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

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

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

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

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

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

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[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17).
[2] Ibid., para. 210.
[3] Ibid., para. 211.
[4] Ibid., para. 215.
[5] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.
[6] Ibid., para. 415.

7. At its thirty-third session, in 2000, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the Secretariat. It also heard an oral report on behalf of CMI. In cooperation with the Secretariat, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

8. In conjunction with the thirty-third session of the Commission in 2000, a transport law colloquium, organized jointly by the Secretariat and CMI, was held in New York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions.

9. On the occasion of that colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a seaway bill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing. Some issues raised for consideration in any reform process included formulating more exact definitions of the roles, responsibilities, duties and rights of all parties involved and clearer definitions of when delivery was assumed to occur; rules for dealing with cases where it was not clear at which leg of the carriage cargo had been lost or damaged; identifying the terms or liability regime that should apply as well as the financial limits of liability; and the inclusion of provisions designed to prevent the fraudulent use of bills of lading.

10. At its thirty-fourth session, in 2001, the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to the request by the Commission.[7]

11. That report summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The details of possible legislative solutions were not presented because they were currently being worked on by the Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide how it wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper, transport documents,

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

freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

12. The report suggested that consultations conducted by the Secretariat pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission. Considerations of possible legislative solutions by CMI were making good progress and it was expected that a preliminary text containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, would be prepared by December 2001.

13. After discussion, the Commission decided to establish a working group (to be named "Working Group on Transport Law") to consider the project. It was expected that the Secretariat would prepare for the Working Group a preliminary working document containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, which was under preparation by CMI.

14. As to the scope of the work, the Commission, after some discussion, decided that the working document to be presented to the Working Group should include issues of liability. The Commission also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) should also be carefully taken into account. It was also agreed that the work would be carried out in close cooperation with interested intergovernmental organizations involved in work on transport law (such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS)), as well as international non-governmental organizations.

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

para. 21). The Commission expressed appreciation for the work that had already been accomplished by the Working Group.[8]

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

17. With respect to the scope of the draft instrument, strong support was expressed by a number of delegations in favour of the working assumption that the scope of the draft instrument should extend to door-to-door transport operations. It was pointed out that harmonizing the legal regime governing door-to-door transport was a practical necessity, in view of the large and growing number of practical situations where transport (in particular transport of containerized goods) was operated under door-to-door contracts. While no objection was raised against such an extended scope of the draft instrument, it was generally agreed that, for continuation of its deliberations, the Working Group should seek participation from international organizations such as the International Road Transport Union (IRU), the Intergovernmental Organisation for International Carriage by Rail (OTIF), and other international organizations involved in land transportation. The Working Group was invited to consider the dangers of extending the rules governing maritime transport to land transportation and to take into account, in developing the draft instrument, the specific needs of land carriage. The Commission also invited member and observer States to include land transport experts in the delegations that participated in the deliberations of the Working Group. The Commission further invited Working Groups III (Transport Law) and IV (Electronic Commerce) to coordinate their work in respect of dematerialized transport documentation. While it was generally agreed that the draft instrument should provide appropriate mechanisms to avoid possible conflicts between the draft instrument and other multilateral instruments (in particular those instruments that contained mandatory rules applicable to land transport), the view was expressed that avoiding such conflicts would not be sufficient to guarantee the broad acceptability of the draft instrument unless the substantive provisions of the draft instrument established acceptable rules for both maritime and land transport. The Working Group was invited to explore the possibility of the draft instrument providing separate yet interoperable sets of rules (some of which might be optional in nature) for maritime and road transport. After

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[8] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 222.

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

discussion, the Commission approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.[10]

18. Working Group III (Transport Law), which was composed of all States members of the Commission, held its tenth session in Vienna from 16 to 20 September 2002. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Romania, the Russian Federation, Singapore, Spain, Sudan, Sweden, Thailand, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

19. The session was also attended by observers from the following States: Algeria, Australia, Denmark, Finland, Ghana, Greece, Kuwait, Lebanon, Libyan Arab Jamahiriya, the Netherlands, Norway, Peru, the Philippines, the Republic of Korea, Senegal, Slovakia, Switzerland, the Syrian Arab Republic, Tunisia, Turkey, Ukraine and Yemen.

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

(a) **United Nations system**: The International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD).

(b) **Intergovernmental organizations**: The European Commission, the Intergovernmental Organisation for International Carriage by Rail (OTIF) and the Organisation for Economic Co-operation and Development (OECD).

(c) **International non-governmental organizations invited by the Commission**: The Baltic and International Maritime Council (BIMCO), the *Comité international des transports ferroviaires* (CIT), the *Comité maritime international* (CMI), the European Law Student's Association (ELSA), the *Instituto Iberoamericano de Derecho Marítimo*, the International Chamber of Shipping (ICS), the International Federation of Freight Forwarders Associations (FIATA), the International Group of Protection and Indemnity (P & I) Clubs and the International Multimodal Transport Association (IMMTA).

21. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

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

(a) Provisional agenda (A/CN.9/WG.III/WP.22);

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

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[10] Ibid., *Fifty-seventh Session*, Supplement No. 17 (A/57/17), para. 224.

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

(d) Proposal by Canada (A/CN.9/WG.III/WP.23)

23. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft instrument on transport law.
4. Other business.
5. Adoption of the report.

II. Deliberations and decisions

24. The Working Group continued to review the provisions of the draft instrument contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.21). The deliberations and conclusions of the Working Group are reflected in section III below.

A. General discussion

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

26. The Working Group welcomed this contribution to the discussion on the scope of application of the draft instrument. It was, however, questioned if this was the appropriate time to discuss the options proposed for the structure of the draft instrument. Support was expressed for the view that an in-depth discussion on the scope of application would be premature, particularly since the Secretariat had been requested to prepare a background paper on this topic for discussion at a future session of the Working Group. It was suggested that while an in-depth discussion of the issue or the choosing of option might be premature, the options presented in the Canadian proposal, in addition to possible other options, should form part of the

background paper on scope of application to be presented at a future session of the Working Group.

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

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

B. Consideration of draft articles

1. Draft article 6 (Liability of the carrier)

29. The text of draft article 6 as discussed by the Working Group was as follows:

"6.1 Basis of liability

"6.1.1 The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in article 4, unless the carrier proves that neither its fault nor that of any person referred to in article 6.3.2(a) caused or contributed to the loss, damage or delay.

"6.1.2 [Notwithstanding the provisions of article 6.1.1 the carrier is not responsible for loss, damage or delay arising or resulting from

"(a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;

"(b) fire on the ship, unless caused by the fault or privity of the carrier.]

"6.1.3 Notwithstanding the provisions of article 6.1.1, if the carrier proves that loss of or damage to the goods or delay in delivery has been caused by one of the following events it is presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused or contributed to cause that loss, damage or delay.

(i) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(ii) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];

(iii) act or omission of the shipper, the controlling party or the consignee;

(iv) strikes, lock-outs, stoppages or restraints of labour;

(v) saving or attempting to save life or property at sea;

(vi) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(vii) insufficiency or defective condition of packing or marking;

(viii) latent defects not discoverable by due diligence.

(ix) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(x) acts of the carrier or a performing party in pursuance of the powers conferred by article 5.3 and 5.5 when the goods have been become a danger to persons, property or the environment or have been sacrificed; [(xi) perils, dangers and accidents of the sea or other navigable waters;]

"6.1.4. [If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.]

"[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is

"(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and

"(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.

If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]

"6.2 Calculation of compensation

"6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

"6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

"6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in articles 6.2.1 and 6.2.2.

"6.3 Liability of performing parties

"6.3.1 (a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

"(b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 6.4.2, 6.6.4, and 6.7, a performing party is not bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.

"6.3.2 (a) Subject to article 6.3.3, the carrier is responsible for the acts and omissions of

(i) any performing party, and

(ii) any other person, including a performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own. A carrier is responsible under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

"(b) Subject to article 6.3.3, a performing party is responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment.

"6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency.

"6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 6.4, 6.6 and 6.7.

"6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument.

"6.4 Delay

"6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon [or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage].

"6.4.2 If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 6.2, the amount payable as compensation for such loss is limited to an amount equivalent to [. . . times the freight payable on the goods delayed]. The total amount payable under this provision and article 6.7.1 shall not exceed the limit that would be established under article 6.7.1 in respect of the total loss of the goods concerned.

"6.5 Deviation

"(a) The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.

"(b) Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with the provisions of this instrument.

"6.6 Deck cargo

"6.6.1 Goods may be carried on or above deck only if

(i) such carriage is required by applicable laws or administrative rules or regulations, or

(ii) they are carried in or on containers on decks that are specially fitted to carry such containers, or

(iii) in cases not covered by paragraphs (i) or (ii) of this article, the carriage on deck is in accordance with the contract of carriage, or complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.

"6.6.2 If the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier is not liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to article 6.6.1 (ii), the carrier is liable for loss of or damage to such goods, or for delay in delivery, under the terms of this instrument without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under article 6.6.1, the carrier is liable, irrespective of the provisions of article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

"6.6.3 If the goods have been shipped in accordance with article 6.6.1(iii), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier has the burden of proving that carriage on deck complies with article 6.6.1(iii) and, if a negotiable transport

document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.

"6.6.4 If the carrier under this article 6.6 is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in articles 6.4 and 6.7; however, if the carrier and shipper expressly have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods that exclusively resulted from their carriage on deck.

"6.7 Limits of liability

"6.7.1 Subject to article 6.4.2 the carrier's liability for loss of or damage to or in connection with the goods is limited to […] units of account per package or other shipping unit, or […] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, [or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.]

"6.7.2 When goods are carried in or on a container, the packages or shipping units enumerated in the contract particulars as packed in or on such container are deemed packages or shipping units. If not so enumerated, the goods in or on such container are deemed one shipping unit.

"6.7.3 The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

"6.8 Loss of the right to limit liability

"Neither the carrier nor any of the persons mentioned in article 6.3.2 is entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this instrument, [or as provided in the contract of carriage,] if the claimant proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

"6.9 Notice of loss, damage, or delay

"6.9.1 The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars

unless notice of loss of or damage to or in connection with the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within three working days after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

"6.9.2 No compensation is payable under article 6.4 unless notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

"6.9.3 When the notice referred to in this chapter is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to the performing party that delivered the goods.

"6.9.4 In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.

"6.10 Non-contractual claims

"The defences and limits of liability provided for in this instrument and the responsibilities imposed by this instrument apply in any action against the carrier or a performing party for loss of, for damage to, or in connection with the goods covered by a contract of carriage, whether the action is founded in contract, in tort, or otherwise."

(a) Subparagraph 6.1.1

30. It was noted that draft article 6 constituted the core rule of liability for carriers and should be read with draft articles 4 and 5 (which were also relevant in defining the carrier's obligations) and draft article 7 of the draft instrument (since draft article 6 mirrored the provisions regarding the shipper's obligations). It was also noted that paragraph 6.1 contained two types of exceptions to the liability of carrier as set out in subparagraphs 6.1.2 and 6.1.3. It was clarified that even if the carrier had acted in accordance with its obligations under draft article 5, for example by exercising due diligence as required under draft article 5.4, this would not necessarily mean that the carrier bore no fault under draft article 6.1. If, however, the carrier breached its obligations, for example under draft article 5.2.1 or 5.4, then this would constitute fault and the burden of proof would fall on the carrier to prove that there was no fault (if a *prima facie* case could be made).

31. Support was expressed for the content of subparagraph 6.1.1 and the requirement of fault-based liability on the carrier, namely that the carrier was liable unless it proved that the loss, damage or delay was not its fault nor that of any person referred to in subparagraph 6.3.2(a). It was suggested that subparagraph 6.1.1 was closer in substance to the approach taken in article 4.2(q) of the Hague and Hague-Visby Rules than the approach taken in article 5.1 of the Hamburg Rules, which required that the carrier proved that it, its servants or agents, took all measures that could reasonably be required to avoid the occurrence and its

consequences. However, there was some criticism that the reference to the "period of the carrier's responsibility as defined in article 4" would allow the carrier to restrict its liability to a considerable extent. Some concern was expressed as to why it had been considered necessary to deviate from the language used in the Hamburg Rules. A suggestion was made that the basis of liability should be simplified by abolishing the standard of due diligence and replacing it with liability stemming from use of the vessel as such. It was suggested that the reason for the difference in wording from both the Hague Rules and the Hamburg Rules was to improve and provide greater certainty (e.g., as to the fact that the liability of the carrier was based on presumed fault, a matter that had required clarification by way of the common understanding adopted by the drafters of the Hamburg Rules). A contrary view was that combining different languages from both the Hague and Hamburg Rules might increase uncertainty as it was not clear how the provision would be interpreted.

32. It was stated that, whilst a higher standard of liability had been adopted in instruments dealing with other modes of transport (such as COTIF), a higher standard would not be acceptable in the maritime context. In this regard, support was expressed for features in addition to draft article 6.1, such as draft article 5, which set out the positive obligations of the carrier. It was noted that, if the draft instrument were to apply on a door-to-door basis, conflict with unimodal land transport conventions (such as COTIF and CMR) would be inevitable given that both imposed a higher standard of liability on the carrier. However it was suggested that these conflicts could be reduced by adopting suitable wording in draft article 6.4 as well as the language used in respect of the performing carrier. More generally, doubts were expressed as to whether default liability rules applicable in the context of door-to-door transport should be based on the lower maritime standard instead of relying on the stricter standard governing land transport.

33. In response to a question regarding the relationship between draft articles 5.2, 5.4 and 6.1.1, it was noted that if the carrier proved that the event that caused or contributed to the loss, damage or delay did not constitute a breach of its obligations under draft articles 5.2 and 5.4, it would be assumed not to be at fault.

34. Strong support was expressed for the substance of subparagraph 6.1.1. After discussion, the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made, and also to the need for consistency between the various language versions.

(b) Subparagraph 6.1.2

35. It was recalled that subparagraphs (a) and (b) set forth the first two of the traditional exceptions to the carrier's liability, as provided in the Hague and Hague-Visby Rules. It was also recalled that there was considerable opposition to the retention of either. As regards subparagraph (a), it was pointed out that there was little support for the "management" element, which was simply productive of disputes as to the difference between management of the ship and the carrier's normal duties as to care and carriage of the goods. It was also pointed out that a similar exception to the carrier's liability based on the error in navigation existed in the original version of the Warsaw Convention and had been removed from the liability regime governing the air carriage of goods as early as 1955 as a reflection of technical progress in navigation techniques. It was widely felt that the removal of

that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was emphasized that such a step might be essential in the context of establishing international rules for door-to-door transport.

36. A view was expressed by a number of delegations that the general exception based on error in navigation should be maintained since, should it be removed, there would be a considerable change to the existing position regarding the allocation of the risks of sea carriage between the carrier and the cargo interests, which would be likely to have an economic impact on insurance practice. A related view was that, although it was probably inevitable to do away with the general exception based on error in navigation, subparagraph (a) should be maintained in square brackets pending a final decision to be made at a later stage on what was referred to as "the liability package" (i.e., the various aspects of the liability regime applicable to the various parties involved). After discussion, however, the Working Group decided that subparagraph (a) should be deleted.

37. With respect to subparagraph (b), strong views were expressed for the deletion of the traditional exception based on fire on the ship. It was pointed out that, as currently drafted along the lines of the Hague and Hague-Visby Rules, the exception would impose an excessive burden of proof on the shipper, since in most practical cases, it would be impossible for the shipper to prove that fire had been caused by the fault or privity of the carrier. As to the need to cover the situation where fire had been caused by the cargo itself, it was suggested that the issue might be sufficiently taken care of in the context of subparagraph 6.1.3.(vi) ("any other loss or damage arising from inherent quality, defect or vice of the goods"). However, the view was also expressed that further consultations with the industry were needed in order to assess the impact of the deletion of that exception on the general balance of liabilities in the draft instrument. Several delegations also supported the retention of subparagraph (b), as drafted. After discussion, the Working Group did not reach consensus on the deletion of subparagraph (b) and decided to maintain it within square brackets, subject to continuation of the discussion at a later stage.

(c) Subparagraph 6.1.3

38. The Working Group engaged in a general discussion of subparagraph 6.1.3, without entering into a review of each of the elements listed in subparagraphs (i) to (xi), which would be further considered after more discussion had taken place about the ways in which the draft instrument would address the issues of door-to-door transportation. It was recalled that subparagraph 6.1.3 was based on article 4.2 of the Hague and Hague-Visby Rules, which listed situations where the carrier was excused from liability for loss of or damage to the goods, generally for the reason that such loss or damage resulted from events beyond the control of the carrier. It was also recalled that, subparagraph 6.1.3 presented not only a modified but also a somewhat extended version of the excepted perils of the Hague and Hague-Visby Rules, in particular through the inclusion of exceptions that arose from circumstances under the control of the carrier.

39. Doubts were expressed by a number of delegations regarding the need for including such a list in the draft instrument in view of the general principle embodied in subparagraph 6.1.1, under which the carrier's liability was based on fault. It was stated that such a catalogue could not provide an exhaustive list of

those incidents that could occur during transport and possibly diminish the liability of the carrier. It was pointed out that texts such as the UNCTAD/ICC Rules contained no such list and that it would be more satisfactory to refer to exonerations of the carrier's liability in cases involving *force majeure* or other circumstances that were inevitable and unpredictable in nature, damage resulting from inherent vice of the goods or fault of the shipper or of the consignee. The prevailing view, however, was that, although it might be superfluous in certain legal systems, such a list should be retained in view of the useful role it would play in many legal systems in preserving the existing body of case law. It was pointed out that the complete deletion of the catalogue might be taken by judges inexperienced in maritime law as indicating an intention to change the law. It was said that even if the list was not needed in some countries, it was useful in others and did no harm in those countries that did not need it. It was also pointed out that the approach taken in a set of mandatory rules such as those contained in the draft instrument could not rely on party autonomy as heavily as in contractual rules such as the UNCTAD/ICC Rules.

40. Regarding the structure of the list, a suggestion was made that it could be rationalized by grouping those situations where exoneration stemmed from events under the control of the carrier and those circumstances that were beyond the control of the carrier. In that context, serious doubts were expressed by a number of delegations as to whether circumstances under the control of the carrier should give rise to exonerations. Another suggestion was that subparagraph 6.1.3 should be phrased in the form of an illustrative list and not of a prescriptive provision.

41. Regarding the manner in which the carrier would avoid liability, it was pointed out that the excepted perils under subparagraph 6.1.3 appeared only as presumptions, and not as exonerations as in article 4.2 of the Hague and Hague-Visby Rules. The Working Group heard conflicting views as to whether the excepted perils should be retained as exonerations from liability or whether they should appear as presumptions only. In favour of adopting the presumption approach, it was stated that certain events were typical of situations where the carrier was not at fault; and that it was justifiable, where the carrier proved such an event, for the burden of proof to be reversed. However, in favour of maintaining the traditional exoneration approach, it was pointed out that not all of the perils listed in the subparagraph could be interpreted as applicable only where the carrier has not been negligent in incurring the excepted peril. For example, an "Act of God" and a peril of the sea could be defined as acts occurring without a carrier's negligence in circumstances that could not reasonably have been guarded against. To define them for a "presumption" regime without reference to absence of fault was not easy. New definitions might have to be evolved, referring only to serious external events that could raise a (rebuttable) presumption of non-liability. Such a process might involve loss of existing case law in some jurisdictions. Those two excepted perils had been listed in square brackets since they would not fit well in a presumption-based regime and it seemed likely that situations that might attract either of them could fairly easily be dealt with under the basic rule of subparagraph 6.1.1. The Working Group deferred a final decision as to whether the circumstances listed under subparagraph 6.1.3 would be treated by way of presumptions or by way of exonerations until such time as it had reviewed the contents of the individual subparagraphs (i) to (xi) and the drafting of the entire provision had been considered in more detail. In the context of that discussion, it was pointed out that, since exonerations were subject to proof being given of the carrier's fault, the difference

between the presumption approach and the exoneration approach might be very limited in practice.

42. A concern was expressed that, as currently drafted, the chapeau of subparagraph 6.1.3 insufficiently addressed those cases where the carrier proved an event listed under subparagraph 6.3.1 but there was also an indication that the vessel might not have been seaworthy. The shipper would then actually have the burden of proving unseaworthiness. This was believed to be inconsistent with subparagraph 6.1.1 and it was suggested that it might be preferable to treat the events listed as exonerations if, at the same time, the words "has been caused by one of the following events" could be replaced by "has been caused solely by one of the following events". It was also suggested that the words "or contributed" should be deleted. Those suggestions were noted with interest.

43. Although no discussion took place regarding the individual subparagraphs (i) to (xi), the Working Group heard various suggestions and concerns in respect of those provisions. As a matter of drafting, it was suggested that the case of fire on the ship, should it be maintained under subparagraph 6.1.2, might need to be relocated under subparagraph 6.1.3. Regarding the substance of the provision, one suggestion was that the reference to quarantine restrictions should be deleted. Another suggestion was that, in view of the deletion of subparagraph 6.1.2 (a), a new element should be listed in subparagraph 6.1.3, based on "compulsory pilotage". While some support was expressed for exonerating the carrier from liability where it had been placed under an obligation to use possibly incompetent pilotage, the prevailing view was that reliance on pilotage should not exonerate the carrier from its liability, since the pilot should be regarded as assisting the carrier. Although the carrier might indeed be faced with compulsory pilotage or other rule imposed by port authorities, for example with regard to mandatory loading or unloading of goods, it would be unfair to burden the shipper with the consequences of such obligations, since the carrier, unlike the shipper, was actually involved and maintained control of such situations. It was pointed out that exonerating the carrier and creating a recourse against the pilot or any other provider of services to the carrier (mention was made of ice-breaking services) would inappropriately depart from established practice and unduly interfere with the contractual arrangements between the carrier and its suppliers of services. After discussion, the Working Group decided not to create any additional exception under subparagraph 6.1.3 at the current stage, on the grounds that the general rule expressed in subparagraph 6.1.1 sufficiently addressed those situations that were not expressly addressed in subparagraph 6.1.3.

44. Consistent with the view that events under the control of the carrier should not give rise to exonerations, concerns were expressed regarding the appropriateness of including subparagraphs (ix) and (x). It was observed that the discussion of those issues could be reopened in the context of a detailed discussion of subparagraphs (i) to (xi).

45. The Secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of the provision.

(d) Subparagraph 6.1.4

46. Subparagraph 6.1.4 presented the Working Group with two alternative texts with respect to concurrent causes of loss, damage or delay in delivery. The first alternative provided that, where the loss, damage or delay in delivery was caused by two events but the carrier was liable for only one of those events, the carrier was liable for the entire loss, except to the extent that it proved that the loss was caused by an event for which it was not liable. The second alternative stated that, where the loss, damage or delay in delivery was caused by two events, and the carrier was only liable for one of them, the carrier and the party seeking recovery for the loss shared the burden of showing the cause of the loss. The second alternative also provided a fall-back provision to cover the rare situation where adequate proof was lacking, by providing that in these circumstances the two parties would share the loss in equal parts.

47. The Working Group discussed the text of the alternatives with respect to substance and form, focusing their interventions on general legislative policies.

48. While several views were expressed that either option was acceptable, and that the differences between the two options were largely irrelevant, strong support was expressed for the first alternative set out in subparagraph 6.1.4. It was noted that the first alternative was very clear and precise, and envisaged complete liability on behalf of the carrier, while leaving the carrier open to prove that it was not liable for the event causing the loss, damage or delay in delivery.

49. However, there was also strong opposition to the first alternative. A perceived problem with the first alternative was described as very serious. While this alternative was patterned after article 5.7 of the Hamburg Rules, it was suggested that it would not operate in the same fashion, due to the presumption of the absence of carrier fault in article 6.1.3 of the draft instrument, which could result in uncertainty regarding the interaction of draft articles 5 and 6.

50. It was pointed out that the second alternative better dealt with the situation where two concurrent causes resulted in the loss, yet the carrier was responsible for only one of the causes. For example, if the loss was due to both insufficient packing and improper handling of the goods, the first alternative would place the entire burden on the carrier to prove the allocation of loss between the two causes. In contrast, the second alternative would have both parties bear the burden of showing causation.

51. It was further argued that the second alternative was preferable given the Working Group's decision to eliminate error in navigation from the carrier's list of exemptions in subparagraph 6.1.2(a). In most cases of loss, the argument would be made that error in navigation contributed to the loss, which would be difficult for the carrier to disprove. Under the second alternative, if error in navigation were alleged, the cargo owner would bear the burden of proving it as a cause and its extent, and where it was impossible to allocate the cause, the loss would be shared equally. Thus, the heart of the second alternative was a shared burden of proof.

52. However, it was suggested that the second alternative was simplistic in its treatment of the situation where no evidence on the overall apportionment could be established, and the carrier would be liable for one-half of the loss. Concern was expressed that the basic rule regarding burden of proof had already been set out in

subparagraphs 6.1.1, 6.1.2 and 6.1.3, and that the second alternative in subparagraph 6.1.4 appeared to reverse this regime. The suggestion was made that the second alternative as a whole had no parallel in any existing international or national regime for the carriage of goods by sea, and that it would substantially change the risk allocation between carrier and cargo interests. While it was conceded by proponents of the second alternative that this text did shift the burden of proof in favour of the carrier, it was argued that this was a policy choice which was especially appropriate in light of the abandonment of the error in navigation defence.

53. The issue of overriding obligations was raised in the Working Group in conjunction with the discussion of subparagraph 6.1.4. The example was given of the case where the combined causes of the loss were that of inherent vice in the goods, and of unseaworthiness of the vessel. It was suggested that until it was clear whether the obligation of seaworthiness in article 5.4 of the draft instrument was an overriding obligation, it was not possible to allocate the causes for the loss. Opposing views were expressed that subparagraph 6.1.4 should be maintained in order to avoid the doctrine of overriding obligations, and that the doctrine itself did not exist in many legal systems. A further view was that it was questionable whether subparagraph 6.1.4 eliminated the doctrine of overriding obligations. If this was not the case, subparagraph 6.1.4 should make that position clear, for instance by commencing with the words “Without prejudice to draft article 5.1.4”.

54. While some delegations questioned whether it was necessary to envisage a special text on the issue of shared liability or contributing cause, it was widely felt that the apportionment of liability was an important issue that should be dealt with in the draft instrument. It was emphasised that most transport conventions contained such a clause governing the allocation of liability where loss was due to a combination of causes. It was also noted that the current rules dealing with concurrent causes resulted in an extremely heavy burden of proof on the carrier to prove that part of the loss was caused by an event for which the carrier was not liable. While intermediate solutions could be found to ease this heavy burden, this issue appeared to be ready for unification. However, it was suggested that both alternatives as drafted in subparagraph 6.1.4 were somewhat rigid in their treatment of this issue.

55. Other drafting difficulties were noted in both alternatives presented in subparagraph 6.1.4. Confusion was voiced over the ambiguous nature of the “event”, and whether it was intended to be limited to “cause”, and whether it would be limited to the list of presumptions in subparagraph 6.1.3. It was suggested that further study should be conducted on the issue of apportionment of liability due to a combination of causes of the loss.

56. The first alternative in subparagraph 6.1.4 received the strongest support in the Working Group, and the decision was made to maintain the first alternative in the draft instrument for continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage.

(e) Paragraph 6.2

57. It was recalled that paragraph 6.2 defined the scope and amount of compensation that was payable and that delay was dealt with separately under paragraph 6.4. It was also recalled that the provision had been drafted with the intention of clarifying that damages were to be calculated on the "arrived value" being the value of the goods at the place of delivery. It was pointed out that this approach was a well-recognized method for calculating compensation and was used in the marine insurance context. In response, it was stated that, at least in one jurisdiction, compensation was calculated based on the value of the goods at the place where the carrier received the goods and that some jurisdictions also had mandatory regulations including the refunding of freight and costs incurred during the course of carriage as part of the compensation payable. It was suggested that these differences should be taken into account particularly if the draft instrument was to apply on a door-to-door basis. It was generally agreed that, if the draft instrument applied on a door-to-door basis, it would be necessary to determine whether or not customs and related costs should be included within the compensation that was payable. It was stated that, in some jurisdictions, customs-related costs were not generally included in the valuation of goods. The Working Group agreed, notwithstanding the different approaches to the time at which a valuation of goods should be made, that a provision standardizing the calculation of compensation was important to include in the draft instrument.

58. A question was raised whether paragraph 6.2 was intended to exclude all losses which could not be ascertained in the normal valuation of goods as set out in paragraph 6.2 such as, for example, consequential losses. It was suggested that whether or not consequential damages should be included in the compensation payable should depend on what was the intention of the parties. In response, it was explained that the intention of the CMI in preparing the draft was to replicate the Hague-Visby Rules.

59. A further concern raised was that, whilst paragraph 6.2 appeared to set an absolute limit on the amount of damages recoverable, it did not include the qualification set forth in the Hague-Visby Rules that allowed the shipper to declare the value of the goods in the bill of lading. There was support for the view that the calculation of compensation should take account of the intention of the parties as expressed in the contract of carriage.

60. It was observed that paragraph 6.2 was dealt with separately from the limits of liability as set out in draft paragraph 6.7, whereas article 4.5 of the Hague-Visby Rules dealt with both these issues together. It was stated that there was no specific reason for this separation and a future draft could consider combining paragraphs 6.2 with paragraph 6.7. In this respect a concern was raised as to the interaction between paragraphs 6.2 and 6.7, particularly given that the intention of the latter paragraph appeared to be to restrict compensation and exclude consequential damages.

61. A suggestion was made that paragraph 6.2 should contain a cross-reference to draft article 4 which dealt with the period of responsibility including the place of delivery. It was stated that the method for calculating compensation might need to be reviewed if the draft instrument applied on a door-to-door basis.

62. A suggestion was made that consideration should be given to revising paragraph 6.2 to cover loss or damage other than to the goods, a situation which could arise particularly if the instrument applied on a door-to-door basis. A suggestion was also made that, with a view to achieving drafting equilibrium, mirroring provisions for calculation of damages should be drafted with respect to shipper's liability. The Working Group agreed that paragraph 6.2 might be revised to take account of the specific concerns raised, particularly if the draft instrument applied on a door-to-door basis.

(f) Paragraph 6.3

63. It was pointed out that paragraph 6.3 recognized that a contracting carrier might not fully or even partly perform the contract of carriage itself. This provision therefore acknowledged and imposed liability on "performing parties", namely those parties that performed, wholly or partly, the contract of carriage. It was further stated that, whereas the contracting carrier was liable throughout the contract of carriage, a performing party had a more limited liability based on when it had custody of the goods or was actually participating in the performance of an activity contemplated by the contract of carriage. Although a view was expressed that consideration of this paragraph should be deferred until the scope of the draft instrument had been settled, it was agreed that preliminary discussion was useful even if the paragraph would need to be revised once the scope of the draft instrument had been settled. It was widely felt that the paragraph was useful as it recognized the reality of the existence of a performing party and thus protected the shipper and also protected the performing party whose liability was limited according to the criteria set out in subparagraph 6.3.1(a).

64. A concern was expressed that the coverage of performing parties was a novel rule which created a direct right of action as against a party with whom the cargo interests did not have a contractual relationship. It was strongly argued that this innovation should be avoided as it had the potential for serious practical problems. Disagreement was expressed with respect to the statement in paragraph 94 of document A/CN.9/WG.III/WP.21 that a performing party was not liable in tort. In this respect, it was argued that liability of the performing party in tort was a matter of national law to which the present instrument did not extend. Also it was submitted that it was not clear under which conditions liability could be imposed upon the performing party. It was said that even though it appeared that the loss or damage had to be "localized" with the performing party (i.e., the loss or damage had to have occurred when the goods were in the performing party's custody), it was less than clear how the burden of proof on this point was to be dealt with. It was suggested that one interpretation could require that the performing party prove that the loss or damage occurred at a time when the goods were not in that party's custody. As well it was suggested that, whilst subparagraph 6.3.4. created joint and several liabilities, it did not indicate how the recourse action as between the parties was to be determined. This was particularly ambiguous given that there was not necessarily a contractual relationship between the parties concerned. For these reasons, it was suggested that paragraph 6.3 and the definition of "performing party" in draft article 1 should be deleted or, in the alternative, that the definition should be clarified so as to ensure that it was limited to "physically" performing parties. Support was expressed for limiting the scope of paragraph 6.3 to "physically" performing parties. In this respect it was suggested that the words "or

undertakes to perform" should be deleted from subparagraph 6.3.2(a)(ii). However, strong support was expressed for the retention of paragraph 6.3 on the basis that it was an indispensable provision. It was agreed that paragraph 6.3 should be retained, subject to a revision of the text taking account of the concerns expressed and to considering whether further changes were necessary if the draft instrument ultimately applied on a door-to-door basis.

(g) Paragraph 6.4

65. The Working Group heard the view that whilst a provision on delay was a novel one at least if compared with the text of the Hague and Hague-Visby Rules, it was however dealt with in the Hamburg Rules and in a number of transport law instruments of a contractual nature, such as the UNCTAD/ICC Rules and the FIATA bill of lading. It was suggested that it would be appropriate to deal with this matter in the draft instrument. Although it was recognized that time was not as crucial in maritime carriage as in other forms of carriage, it was recognized that, once time was agreed upon in the maritime context, any breach should be regulated in the interests of harmonisation rather than left to national law as was done under the Hague and Hague-Visby Rules. In support of the inclusion of a provision on delay it was said that time was becoming more important particularly in respect of short sea trade. A contrary view was that time was not as important as other factors in the maritime context, and that delay should not be a ground for breach of contract as envisaged in paragraph 6.4.

66. The prevailing view was that a provision on delay should be included in the draft instrument. Regarding the substance of the paragraph, it was observed that the provision included two limbs, the first recognising that delay was a matter left for the parties to agree upon, the second (in bracketed text), which provided a default rule in the absence of such an agreement. It was stated that the first limb of the provision provided clarity in that it allowed parties to raise limitation amounts, a choice that could also be reflected in the amount of freight. Support was expressed for the first limb of subparagraph 6.4.1 and for broad recognition that the matter of delay and duration of a transport was a commercial matter that could be the subject of agreements between the parties. Some support was expressed for the view that the question of how to deal with delay should be left exclusively to the parties. On that basis, it was suggested that the second limb of subparagraph 6.4.1 should be deleted.

67. Additional opposition was expressed to the second limb of subparagraph 6.4.1, which recognized the discretion of courts to find delay if delivery did not occur within the time that it would be reasonable to expect of a diligent carrier and allowed for evidence to be brought taking account of normal trade and communications expectations. It was stated that the second limb was too vague in its reference to reasonableness for determining whether there had been delay and also that it did not serve a useful purpose in modern transport. It was also argued that, given that the error in navigation defence had been omitted from the draft instrument (see above, para. 36), a general provision on delay as set out in the second limb of paragraph 6.4 would impose too heavy a burden on the carrier. It was stated in response that, where the delay was caused by matters outside the control of the carrier, such as thick ice or storms, the carrier still had the protection offered by subparagraph 6.1.1. The prevailing view in the Working Group was that a

provision along the lines of the second limb of subparagraph 6.4.1 should be retained, since the omission of such a provision would result in too rigid a formulation of the rule on delay. In that respect, it was pointed out that almost all international conventions concerning transport law included rules on liability for delay. A widely shared view was that the present wording was balanced because the reference to "reasonable" expectations of a diligent carrier provided shippers with an adequate level of protection. However, it was suggested that the term "reasonable" might require further explanations and that the second limb of the subparagraph should be re-examined once the scope of the draft instrument had been settled.

68. It was observed that one aspect not covered by paragraph 6.4, but dealt with in a number of other conventions, was the legal fiction that, after a certain period of time, delayed goods could be treated as lost goods. Some support was expressed for inclusion of a provision establishing such a fiction in the draft instrument. Strong opposition was expressed to the inclusion of such a clause, particularly in respect of developing countries where the choice of carriers was often non-existent. After discussion, during which strong concerns were raised about the inclusion of this provision, it was agreed that this was a topic worthy of further consideration taking account of industry needs and practices.

69. In relation to subparagraph 6.4.2 it was observed that this provision dealt with amounts payable for losses due to delay but not with compensation for loss or damage to the goods. It was stated that since the value of goods was only relevant for calculating compensation for damage or loss, the method for limiting liability in case of delay should be by reference to the amount of the freight. Differing views were expressed as to the limitation that should apply under this provision ranging from the amount of freight payable to an amount equivalent to four times the freight payable for the delayed goods. The view was expressed that the matter should be left to national law. Another view was expressed that whatever amount was agreed upon with regard to the limitation of liability should be mandatory to avoid a risk that standard clauses would be used to limit carrier liability below the amount specified in subparagraph 6.4.2. It was said that the Working Group should also consider how this provision would operate when combined with the overall limit of liability that could be found in paragraph 6.7. It was decided that the limits should be revisited once the provisions on liability and the scope of the draft instrument had been settled.

70. After discussion, the Working Group agreed that the text of paragraph 6.4. would remain as currently drafted for continuation of the discussion at a later stage.

(h) Paragraph 6.5

71. It was explained that paragraph 6.5 on deviation had been included in the draft instrument with a view to modernizing this area of maritime law. In traditional maritime law, deviation amounted to a breach of contract, further to which the carrier could lose all the benefits it would normally derive from the governing legal regime. Paragraph 6.5 was intended to reflect a policy under which deviations could be justified where they were made in order to attempt to save lives or property at sea, or where the deviation was otherwise reasonable. Paragraph 6.5(b) was intended to harmonize the rules regarding deviation in those countries where national law held that deviation amounted to a breach of contract, and to subject

those domestic provisions to a reading within the provisions of the draft instrument. It was recalled that, in addition, the draft instrument in paragraph 6.8 contained provisions regarding loss of the right to limit liability and fundamental breach of contract.

72. There was strong support for the inclusion of a provision on deviation in the draft instrument. It was pointed out that a deviation by the carrier in order to save property at sea differed from a deviation to save life, and that the carrier should thus be subject to liability for delay when deviating to salvage property, particularly where such a deviation to salvage property was agreed for a price. However, it was also noted that it was often difficult to distinguish between situations involving deviations to save life and those made to salvage property. It was suggested that the draft article could include language to the effect that, when goods are salvaged as a result of the deviation, compensation received as a result of the salvage could be used as compensation for loss caused by the resulting delay. As a matter of drafting, although paragraph 6.5 was being considered in general terms only, translation might need to be reviewed to ensure that "deviation" should be translated as "desvio" in Spanish, and as "déroutement" in French.

73. It was suggested that the phrase "authorized by the shipper or a deviation" should be inserted after the phrase "… in delivery caused by a deviation" in subparagraph 6.5(a). In addition, concern was raised over the meaning of the phrase "or by any other reasonable deviation" at the end of subparagraph 6.5(a). It was recommended that this phrase should be clarified or deleted, since there was no uniform interpretation of the term "reasonable deviation" in all countries. However, it was also stated that it could be difficult to foresee the precise circumstances of each deviation, and that precise language could unduly limit the provision. It was stated that there were often extensive clauses on changes in the route of the ship found in bills of lading, and issue was raised whether it would be consequently possible for contracting parties to define in their contracts what they intended to be a "reasonable deviation". Clarification was given that the concept of "reasonable deviation" was a concept in general law that had existed for some time, without giving rise to many problems of interpretation and that deviation was meant to be a departure from the contractual agreement, rather than an agreed term. The Working Group also heard that deviation to save life and property at sea was an international public law principle with respect to assisting when another vessel was in peril, and was not intended to cover the situation where one's own vessel was in danger.

74. It was suggested that subparagraph 6.5(b) was unnecessary as a result of the international law of treaties, and that it should be deleted. However, subparagraph 6.5(b) received broad support, and was generally welcomed as confirmation of the primacy of international law in the face of national law on this topic.

75. The Working Group decided to retain paragraph 6.5 in its entirety, and the Secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of this provision.

(i) Paragraph 6.6

76. The Working Group heard that paragraph 6.6 had been included in the draft instrument in order to cover the situation of cargo placed on deck, and thus being

exposed to greater risks and hazards than it would have faced had it been placed below deck. It was also noted that in some jurisdictions, placing cargo on the deck without prior agreement could amount to a fundamental breach of contract or a quasi-deviation. Further, some types of cargo could only be reasonably transported on deck, and with respect to other types of cargo, transportation on deck had become the norm. In response to a question regarding the meaning of goods being carried "on" containers, it was explained that the provision was intend to reflect the possible use of a flat container, as defined paragraph 1.4 in the definitions chapter of the draft instrument.

77. It was noted that subparagraph 6.6.1 provided three situations when goods could be carried on deck: when it was required by public law, administrative law, or regulation; when the goods were carried in or on containers on decks that were specially fitted to carry such containers; or when it was in accordance with the contract of carriage or with the customs, usages and practices of the trade. It was explained that subparagraph 6.6.2 provided that where the goods were carried on deck in accordance with subparagraph 6.6.1, the carrier would not be held liable for any loss, damage or delay specifically related to the enhanced risk of carrying the good on deck. In addition, it was clarified that subparagraph 6.6.3 indicated that placing the cargo on deck might be not just in the interest of carriers, but also in the interest of parties to a sales contract, in which case it should be stated clearly in the documentation applying to the contract. It was also noted that subparagraph 6.6.4 set out the consequences for loss or damage incurred in deck cargo.

78. It was explained that approximately 65% of the container-carrying capacity of a vessel was usually on or above its deck, such that for operational reasons it was important for container carriers to have the operational flexibility to decide where to carry the containers. However, in this respect it was stated that in the absence of instructions, the decision whether to carry cargo on or below deck was not a matter entirely in the discretion of the carrier, given other obligations such as the obligation to exercise proper care in respect of the cargo under subparagraph 5.2.1.

79. Paragraph 6.6 received strong support for its structure and content. This provision was welcomed as an appropriate apportionment of liability in conformity with the freedom of contract regime, with the caveat that certain terms needed clarification, and that, as currently drafted, the draft article was too lengthy and complex. A question was raised whether in the case of vessels specially fitted for containers outlined in subparagraph 6.6.1(ii), there could not in some situations be an agreement between the shipper and the carrier regarding whether carriage was to be on or below deck. It was explained that the existence of specially-fitted vessels was not novel, and that the principle enshrined in subparagraph 6.6.1(ii) was intended to allow for carrier flexibility in choosing whether to carry cargo above or below deck. Concerns were raised with respect to alterations to the burden of proof regime that could be caused by subparagraph 6.6.2, since the carrier would have to prove either exoneration under subparagraph 6.6.1, or that the damage was not exclusively the consequence of their carriage on deck. In response, it was explained that pursuant to subparagraph 6.6.2, if the cargo was unjustifiably carried on deck, the carrier was responsible for any loss attributable to deck carriage, regardless of whether or not the carrier was at fault for the actual damage – in other words, strict liability was imposed. A suggestion was made that reference to "failing this" in the second sentence of subparagraph 6.6.3 required that the shipper had to prove that

the goods had been shipped in accordance with subparagraph 6.6.1(iii). Further clarity was sought on where the burden of proof lay in the operation of subparagraph 6.6.3. In response, it was noted that the burden of proof in subparagraph 6.6.3 was not with respect to the damage, but rather with respect to compliance with the contract for deck carriage. In addition, it was suggested that the phrase "exclusively the consequence of their carriage on deck" in the final sentence of subparagraph 6.6.2 was imprecise, because damage or loss rarely has only one cause. A possible remedy for this could be use of the word "solely", taken from article 9.3 in the Hamburg Rules, or alternatively, to place the word "exclusively" in square brackets. The question was raised whether reference should also be made to containers in subparagraph 6.6.4. It was suggested that the limits of liability in the draft instrument should be mandatory and subject to no exception, however, the point was made that subparagraph 6.6.4 allowed for the limit on liability to be broken only when there was an intentional breach of contract regarding where to carry the cargo.

80. The Working Group decided to retain the structure and content of paragraph 6.6 for continuation of the discussion at a later stage.

(j) Paragraph 6.7

81. By way of introduction, it was recalled that paragraph 6.7 was derived from articles 6 and 26 of the Hamburg Rules and article 4.5 of the Hague and Hague-Visby Rules. General support was expressed for the principles on which paragraph 6.7 was based. It was generally agreed that it would not be appropriate to insert any amount for limits of liability in the draft instrument at this stage. It was pointed out that more discussion would be needed on that point, particularly if the draft instrument was to govern door-to-door transport, in view of the difference in the amounts of the limits applicable to different modes of transport, which ranged, for example, from 2 special drawing rights per kilogram in maritime transport to 17 special drawing rights per kilogram in air transport (for weight-based limitations).

82. A suggestion was made that it would be appropriate to include in the draft instrument an article providing for an accelerated amendment procedure to adjust the amounts of limitation, for example along the lines of article 8 of the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims. The suggestion was noted with interest. However, it was stated that the level of the limits ultimately agreed to be inserted in subparagraph 6.7.1 would have a bearing on support for an accelerated amendment procedure.

83. Another suggestion was that, in line with a proposal made at the workshop on cargo liability regimes organized by the Maritime Transport Committee of OECD in January 2001, "before considering new monetary limits, it would be advisable for the sponsoring agency, as part of preparatory work for a diplomatic conference, to commission an independent study on the changes in the value of money since the limits were fixed in the Hague-Visby Rules". Some support was expressed for that suggestion. In that context, however, the view was expressed that, in view of the increase in the level of containerization, the average value of cargo in containerized transport had remained relatively stable over the years. Attention was drawn to the possibility of introducing a limitation amount per container as an alternative to the package limitation.

84. It was recalled that the last part of subparagraph 6.7.1 was between square brackets because it had yet to be decided whether any mandatory provision with respect to limits of liability should be "one-sided or two-sided mandatory", i.e., whether or not it should be permissible for either party to increase its respective liabilities. A widely-shared view was that the text between square brackets should be retained.

85. After discussion, the Working Group decided to retain the entire text of paragraph 6.7 in the draft instrument for continuation of the discussion at a later stage.

(k) Paragraph 6.8

86. By way of introduction, it was recalled that paragraph 6.8 was closely modelled on both article 8(1) of the Hamburg Rules and article 4.5(e) of the Hague-Visby Rules. The provision for breaking the overall limitation was of a type that required a personal fault by the carrier but did not contemplate the consequences of wilful misconduct or reckless behaviour by an agent or servant of the carrier. The need to demonstrate personal fault would require the demonstration of some form of management failure in a corporate carrier. The view was expressed that the absence of a provision on wilful misconduct or reckless behaviour by an agent or servant of the carrier was not acceptable. It was also observed that, as currently drafted, the draft instrument might encourage the consignee to sue directly the master of the ship or another agent of the carrier, where that agent had acted recklessly, since the liability of the agent was not subject to limitation. In addition, it was stated that the system currently contemplated in paragraph 6.8 might raise serious difficulties in the context of door-to-door transport since it was typically inspired by maritime law but did not reflect the approach that prevailed in the law applicable to other modes of transport.

87. A question was raised about the interplay between subparagraph 6.6.4 and paragraph 6.8 and the possible redundancy of those two provisions. It was explained in response that paragraph 6.8 established the general test governing loss of the right to limit liability (i.e., the reckless or intentional behaviour of the carrier), while subparagraph 6.6.4 established as a specific rule that, in case of breach of an agreement that the cargo would be carried under deck, the carrier would be deemed to have acted recklessly. Subparagraph 6.6.4 was thus intended to avoid the shipper being under an obligation to prove the recklessness of the carrier in certain specific circumstances. It was widely agreed that the two provisions served different purposes and were not redundant.

88. With respect to the general policy on which loss of the right to limit liability should be based in the draft instrument, the view was expressed that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules. While examples were given of international instruments where such a policy had been implemented, it was pointed out that such instruments relied on a relatively high-amount limitation. It was also pointed out that in certain countries, unbreakable limits of liability would be regarded as unconstitutional, while in other countries they could be ignored by judges under a general doctrine of fundamental breach.

89. The Working Group was generally of the view that the substance of paragraph 6.8 was acceptable but it was felt by a large number of those delegations that took part in the discussion that further consideration should be given to the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. A note of caution was struck about relying on the concept of reckless behaviour, which might be interpreted differently in different jurisdictions and might thus encourage forum shopping. It was thus suggested that further consideration should be given to the possibility of using the notion of "intentional" rather than "reckless" behaviour. A further point raised was that the relation as between the breakability of the limits of liability and the joint and several liability created in subparagraph 6.3.4 should be further examined.

90. It was suggested that the words "personal act or omission" should be replaced by the words "act or omission", for reasons of consistency with the Athens Convention relating to the Carriage of Passenger and their Luggage by Sea. It was also suggested that this was a matter of drafting.

91. With respect to the words between square brackets, it was observed that the Working Group would need to consider at a later stage whether the limit of liability should be breakable in cases of delay.

92. After discussion, the Working Group took note of the comments and suggestions made and decided to maintain the text of paragraph 6.8 in the draft instrument for continuation of the discussion at a later stage.

(l) Paragraph 6.9

93. The Working Group observed that this provision was of practical importance recognising that a claim for damages in a liability case necessarily started with proof that damage had occurred whilst the goods were in the custody of the carrier. Evidence showing that the cargo had been delivered in a damaged condition would thus be required otherwise the carrier enjoyed a presumption of proper delivery. The article provided that this evidence could be given by the consignee providing a notice of such loss or damage, or by joint inspection of the goods by the consignee and the carrier or performing party against whom the claim was made. Without this notice or joint inspection, there was a presumption that the carrier delivered the goods according to their description in the contract. A point was made that under the present formulation, the presumption would not operate if there was proof to the contrary, even if no notice had been given. It was further observed that the three-day period within which notice was to be provided was intended to assist all parties providing them with early notice of damage. It was also observed that a short notice period retained the greatest evidentiary value for the claimant, while exceeding the notice period would not time-bar the claim but would make its proof more difficult. In response, it was suggested that the view that a relatively short notice period added to the evidentiary strength was a matter of fact to be decided by a court or tribunal. A concern was also expressed that the words "unless notice of loss or damage" did not sufficiently make it clear that the failure to give notice would not constitute a time bar as it did in the pre-Hague Rules era. It was pointed out that the operation of the presumption depended on clear requirements as to the form and content of the notice of loss, damage or delay. It was stated that some refinement of the form and content of that notice should thus be considered. It was pointed out that the presumption was not a precondition to proof of damage during carriage,

however it did provide an incentive to the consignee to give notice in a timely fashion.

94. A question was raised whether or not the notice should be in writing. Support was expressed for this, although it was noted that this could introduce an overly formalistic requirement and that a prudent cargo owner would send a written notice, otherwise it would be up to the cargo owner to prove that it had given notice or that there was constructive notice. It was suggested that, in principle and as a matter of good faith, unless given at the time of delivery, notice should be in writing. It was suggested that account should be taken of electronic communications in reworking this provision. In this respect, it was noted that draft article 2.3 provided that notices might be made using electronic communications. It was agreed that the Secretariat should take account of the broad support for written notice when preparing the revised draft of this text.

95. As well, given the different time periods that applied in different modes of transport, it was considered appropriate that compliance with the time period applicable to the last leg of the transport should suffice in determining whether timely notice had been given. It was noted that the time within which notice should be given differed in various instruments ranging from three, six, and seven to as much as fifteen days. Deep concern was expressed regarding a possible three-day time limit on the basis that in some countries geographical realities would make the period impossible to meet. In response to that concern, it was noted that the consignee would negotiate the place of delivery in the contract and could take into account concerns such as geographical distance and notice periods. This point was also made in response to the suggestion that the length of the time period should depend upon whether or not the goods were containerized. It was noted in response that it was impossible for the parties to choose door-to-door transport with respect to certain cargo or certain destinations. It was also suggested that the use of the term "working days" could result in uncertainty due to differing national holidays and that it would be helpful to specify "working days at the place of delivery" or "consecutive days". Strong support was expressed for the view that a three-day period was too short. However, there was no consensus as to the time period that should apply and a suggestion was made that a reference to a "reasonable time" could be appropriate. It was decided that the reference to "three working" should be placed in square brackets, together with other possible alternatives, in the revised text.

96. It was suggested that the reference to "joint inspection" in subparagraph 6.9.1 was too imprecise and did not cover the situation where a carrier refused to participate in such an inspection. In addition, it was suggested that the phrase "concurrent inspection" or "*inspection contradictoire*" might be more appropriate in a civil law context. Whilst it was agreed that this point was essentially a drafting matter, it was agreed that the matter should be considered in a future draft.

97. In subparagraph 6.9.1 it was suggested that the phrase "or in connection" was redundant and that it should be made clear that it was the consignee that was required to give the notice under this provision. Another drafting suggestion was that consideration should be given to expanding the scope of subparagraph 6.9.1 to allow for notice to be given to the employee or agent of the carrier or performing party. The Working Group observed that the draft instrument had been drafted to avoid encroaching on agency law. It was suggested that it should be clarified

whether the term "delivery" referred to actual delivery or should be given the meaning set out in draft article 4.1.3. It was said that the term "delivery" in draft article 6.9.1 was the contractual point of the delivery but it was questioned why the draft instrument departed from the approach taken in the Hague and Hague Visby Rules which referred to removal of goods. In response, it was stated that the approach taken in the draft instrument was of paramount importance in order to avoid the situation where the consignee would dictate the date of removal, putting the matter beyond the control of the carrier. A question was raised as to how to cover the situation where goods were required under law to be left with an authority upon whom the consignee could not rely to provide the required notice.

98. In respect of subparagraph 6.9.2, the issue was raised whether notice of damages for delay could be given prior to delivery to the consignee. In addition, the issue was raised whether exceeding the twenty-one day notice period would result in a loss of a right to claim damages for delay and how that provision interacted with provision on time for suit in draft article 14. In this regard it was noted that only notice had to be given within twenty-one days and that the consignee had a year from the date of delivery within which to institute judicial or arbitral proceedings under draft article 14. However, it was suggested that the twenty-one day period for giving notice to the person against whom liability was being asserted would be a difficult burden for the consignee.

99. It was clarified that the performing party under subparagraph 6.9.3 could only refer to the person who actually delivered the goods and could not include the warehouse unless it delivered the goods.

100. Support was expressed for subparagraph 6.9.4 on the basis that it contained notions of good faith and cooperation between the parties. It was however suggested that the reference to providing access to "all reasonable facilities for inspecting and tallying the goods" should also include reference to providing access to records and documents relevant to the carriage of the goods. This was said to be particularly important with respect to the transport of temperature-sensitive goods where temperature records might be only in electronic form, accessible only by the carrier, and could be quickly overwritten. There was strong support for this proposal.

(m) Paragraph 6.10

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

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

103. A concern was raised that paragraph 6.10 did not appear to cover non-contractual claims brought against persons other than the carrier, such as handlers or stevedores. This question was felt to require further clarification. A question was raised as to whether other persons mentioned in subparagraph 6.3.3 were also intended to be covered by paragraph 6.10 and thus enjoy the same benefits, defences

and limits. In response, it was noted that the purpose of paragraph 6.10 was to channel all claims that could be brought under the draft instrument into the current provision and that, as these other parties were not subject to suit under the draft instrument, there would be no point to include such parties within the scope of the provision. These other persons were protected by draft article 6.3.3. It was further pointed out that "any person other than the carrier" were those parties that did not fall within the definition of the performing party under draft article 1.17, and therefore had no responsibility under the draft instrument, but according to draft article 6.3.3, such parties could benefit from the defences and limitations in liability available to the carrier.

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

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

2. Draft article 9 (Freight)

106. The Working Group resumed its deliberations regarding draft article 9. Due to the absence of sufficient time, the Working Group had only discussed paragraphs 9.1 to 9.3 at its ninth session (A/CN.9/510, para. 190). The text of draft article 9 as considered by the Working Group was reproduced in the report of the Working Group on the work of its ninth session (A/CN.9/510, para. 171).

107. The general view was expressed that it was necessary to include provisions relating to freight in the draft instrument. It was pointed out that practices in that respect varied widely between different trades and that the payment of freight was a commercial matter that should be left to the parties.

(a) Paragraph 9.4

108. The Working Group heard that paragraph 9.4 consisted of declaratory provisions intended to provide clarity and to put the consignee and others, particularly those outside of the contract of carriage, on notice in advising what the notations "freight prepaid" or "freight collect" meant when found on the bill of lading. Subparagraph 9.4(a) advised that if "freight prepaid" was mentioned on the transport document, neither the holder nor the consignee was liable for payment of the freight. Further, pursuant to subparagraph 9.4(b), if "freight collect" appeared on the transport document, the consignee might be held liable for payment of the freight. General support was expressed for the aim of paragraph 9.4 to ensure that frequently-used contractual wording was understood. It was also considered that paragraph 9.4 could settle uncertainty in international maritime law in a manner consistent with actual practice.

109. However, it was suggested that paragraph 9.4 was so vague as to be of little assistance in the unification of maritime law, and that there were certain

reservations with respect to whether a provision in the draft instrument on freight was necessary.

110. The suggestion was made that the declaration in subparagraph 9.4(a) was too radical in freeing the holder and consignee of any responsibility for the payment of freight, and instead that it would be better to create a presumption of the absence of a debt for freight. However, the alternative view was expressed that subparagraph 9.4(a) should not create a presumption that the freight had been paid.

111. It was pointed out that subparagraph 9.4(b) was particularly problematic, and given the vagueness of the words "may be liable", it was of little utility. It was also said that draft articles 12.2.2 and 12.2.4 were intimately linked with subparagraph 9.4(b), and that consideration of these provisions should be undertaken at the same time. It was suggested that if the consignee took any responsibility for the delivery of the goods, it should also be responsible for the freight. At the same time, it was noted that subparagraph 9.4(b) could serve to provide information or a warning that freight was still payable. However, it was suggested that the payment of freight should be a condition for the consignee to obtain delivery of the goods, rather than an obligation. It was further noted that subparagraph 9.4(b) should focus on the payment of freight in fact, rather than on who should bear the obligation for the unpaid freight.

112. One proposal that was made to remedy the perceived problem in subparagraph 9.4(b) was to replace the words "such a statement puts the consignee on notice that it may be liable for the payment of the freight" with the words, "the payment of freight is a condition for the exercise by the consignee of the right to obtain delivery of the goods."

113. An alternative suggestion for subparagraph 9.4(b) was as follows: "If the contract particulars in a transport document or an electronic record contain the statement 'freight collect', or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight."

114. The Working Group agreed that the text in paragraph 9.4 should be retained, noting that subparagraph (b) should be revisited in light of the comments above, and the texts proposed could be presented as alternatives in future drafts of the instrument. It was further noted that the content of the text would need to be further discussed together with draft article 12.2.2 and 12.2.4.

(b) Paragraph 9.5

115. Paragraph 9.5 was described as one of the essential provisions of the draft instrument. It was explained that the provision was intended to elaborate on the traditional principles applicable in maritime transport that goods should pay for the freight and that the carrier should be protected against the insolvency of its debtors up to the value of the transported goods. The view was also expressed, however, that attempting to legislate by way of uniform law in the field of the right of retention of the carrier might constitute an overly ambitious task. In the context of its preliminary discussion of the issue, the Working Group was invited to consider the following elements: (a) whether a provision regarding the right of retention was needed; (b) the conditions to be met by the carrier to exercise such a right of

retention; (c) the nature of the debts of the consignee that could justify retention of the goods; (d) whether paragraph 9.5 should be formulated as a mandatory provision or be made subject to contrary agreement; and (e) the legal regime governing the right of the carrier to dispose of the goods.

116. Regarding the need for a provision along the lines of paragraph 9.5, doubts were expressed. It was pointed out that, in certain regions, the only right of retention that was known in maritime transport was the right of retention of the ship that could be exercised by naval works to ensure that a shipowner would pay for the costs associated with maintenance or repair of the vessel. It was also observed that no provision along the lines of paragraph 9.5 was found in existing transport conventions. The view was expressed that the provision should be restricted to payments for which the consignee was liable. If the provision would include also payments for which the shipper was liable, that could contradict certain Incoterm practices under which the freight was included in the price for the goods. The prevailing view was that efforts should be pursued toward establishing a uniform regime for the right of retention. It was generally agreed that considerable changes would need to be introduced in paragraph 9.5.

117. A widely shared view was that, to the extent a provision along the lines of paragraph 9.5 should be retained, it should not be made conditional upon the consignee being liable for payment under applicable national law. In that connection, it was pointed out that the recognition of a right of retention might be appropriate in certain cases where the consignee was not liable for the freight, e.g., where the statement “freight collect” was contained in the transport document. It was also pointed out that establishing a right of retention might be appropriate not only where the consignee was the debtor but also in certain cases where another person, for example the shipper or the holder of the bill of lading, was indebted to the carrier. Furthermore, it was explained that the purpose for which a right of retention was established might be defeated if, prior to exercising that right, the carrier had to prove that the consignee was liable under domestic law. A question was raised as to whether paragraph 9.5 should create a right of retention or whether it should merely establish a security to complement a right of retention that might exist outside the draft instrument. In the latter case, the need would arise to determine the national law on the basis of which the existence of the right of retention should be assessed. It was emphasized that reference to applicable national law might raise difficult question of private international law. It was pointed out that various approaches might be taken by existing laws. For example, some laws were based on the rule that the carrier should be protected against insolvency of the consignee. Other laws might be based on a distinction whether a negotiable transport document had been issued, in which case the interest of the third party holder of the negotiable document should prevail over the interest of the carrier. It was generally felt that more discussion would be needed on that issue.

118. The view was expressed that establishing a right of retention might be regarded as affecting the balance of international transport law in favour of the carrier and that balance would need to be closely examined. Concern was expressed about establishing in the draft instrument a unilateral right of the carrier to retain goods on the basis of an alleged claim in the absence of any judicial intervention. In response, it was pointed out that the essential purpose of paragraph 9.5 was to establish at least the right of the carrier to obtain adequate security until payment of

the freight had been made. In that connection, it was suggested that the words "adequate security" might need to be replaced by the words "adequate security acceptable to the carrier". It was suggested that future consideration should be given to the possibility of ensuring that the interests of the carrier would receive adequate protection without affecting the position of any consignee acting in good faith.

119. In the context of that discussion, the view was expressed that paragraph 9.5 should make it clear that the right of retention would not necessarily imply that the goods would be retained on board the ship. Another view was that the right of retention of the goods should be expressly limited to those goods for which freight had not been paid, unless the goods retained could not be identified or separated from other goods.

120. With respect to the individual costs listed in subparagraphs 9.5(a)(i) to (iii) as grounds for exercise by the carrier of a right of retention of the goods, the view was expressed that the list was too extensive. Doubts were expressed about the exact meaning and limit of "other reimbursable costs" under subparagraph 9.5(a)(i). The view was expressed that it might be essential to include a reference, not only to freight but also to associated costs, for example to deal with cases where damage had been caused by the transported goods. While it was acknowledged that those claims were not liquidated at the time when a right of retention would be exercised, it was pointed out that at least a security should be put up for those claims. However, strong support was expressed in favour of limiting the list of costs to freight, demurrage, and possibly damages for detention of the goods. A suggestion was made that subparagraph 9.5(a)(ii) should be deleted since it was insufficiently linked with the issue of freight. As to the reference to general average in subparagraph 9.5(a)(iii), it was stated that the obligation of payment could only be justified if a corresponding clause had been inserted in the contract of carriage or the transport document. It was also suggested that the issue of general average should not be linked with the issue of freight due by the consignee since the owner of the goods at the time of the general average might be different from the consignee. More generally, it was stated that, while payment of the freight might justify retention of the goods, the reimbursement of other costs should be left for commercial negotiation between the parties or for discussion in the context of judicial or arbitral proceedings in case of conflict between the carrier and the consignee or the shipper.

121. Regarding the question whether paragraph 9.5 should be formulated as a mandatory rule or not, a widely shared view was that the rule should be made subject to party autonomy. It was widely felt that mandatory rules would be unnecessarily rigid in respect of the right of retention of the goods, for which the carrier should be free to negotiate with its debtors.

122. With respect to the entitlement of the carrier to sell the goods under subparagraph 9.5(b), various views were expressed. One view was that the matter should not be dealt with through the establishment of a broad entitlement but should somehow involve judicial or other dispute settlement mechanisms to ensure that the right of retention was exercised in good faith and that retention of the goods had legal grounds. Another view was that, as a matter of drafting, the words "the consignee" at the end of subparagraph 9.5(b) should be replaced by the words "the person entitled to the goods" to ensure consistency with the final sentence of draft article 10.4.1(c). Yet another view, was that a cross-reference should be made in

subparagraph 9.5(b) to article 10.4. With respect to the law applicable to the sale of the goods under subparagraph 9.5(b), the view was expressed that the draft instrument should contain an indication that it should be the *lex fori*, i.e., the law of applicable at the location where the goods were retained. Regarding the right of the carrier to "satisfy the amounts payable to it", it was pointed out that such a rule went beyond traditional rules governing the right of retention in a number of countries, where the holder of such a right would merely be given priority over other creditors.

123. After discussion, the Working Group decided that paragraph 9.5 should be retained in the draft instrument for continuation of the discussion at a later stage. Due to the absence of sufficient time, the Working Group deferred its consideration of draft article 4 (see above, para. 27) and the remaining provisions of the draft instrument until its next session.

124. At the close of the session, the Working Group resumed its consultations with representatives from the transport industry, and with observers from various organizations involved in different modes of transport (for earlier discussion, see above, para. 28). Comments from a number of industry representatives are reproduced for information purposes as annexes I and II to this report, in the form in which they were received by the Secretariat.

Annex I

Comments from the representative of the International Chamber of Shipping and the Baltic and International Maritime Council on the scope of the draft instrument

The International Chamber of Shipping and BIMCO represent all sectors of the shipping industry. ICS and BIMCO represent shipowners that are trading tackle-to-tackle, port-to-port and door-to-door as well as every possible combination of those periods e.g. from the port at one end to the door at the other. As such, ICS and BIMCO support the development of an international convention based on the draft prepared by CMI. The instrument as drafted by CMI is a maritime instrument which has the flexibility to apply to all of the above scenarios.

When CMI drafted the instrument it set out to strengthen the unimodal maritime rules—not just the liability regime—but also other aspects which are not currently regulated. However, it was soon recognized that the realities of containerised transport of goods could not be ignored. There would be little added value in developing another unimodal regime. It would be remiss to ignore door-to-door transport. Provided that carriage by sea is contemplated at some stage, the provisions of the instrument should apply to the full scope of the carriage.

The shipping industry does not want to impinge on the regimes applicable to other modes of transport. The instrument is drafted on the basis of a network system which aims at respecting other unimodal regimes and preserving them and we would fully support strengthening the instrument in this direction by appropriate additions to overcome possible conflicts of laws.

The instrument should not really affect the other sectors of the industry i.e. road, rail, air. They have their own regimes which will continue to be applicable to them. Of course the possibility of conflicts needs to be avoided but that should not be too difficult. The instrument should govern the relationship between the shipper and the maritime carrier or MTO. It should not govern the relationship between the shipper and e.g. the CMR carrier.

In sum, ICS and BIMCO support the development of an international "maritime plus" convention based on the draft prepared by CMI.

Annex II

Comments from the representative of the International Group of Protection & Indemnity Clubs

Thank you for the opportunity to indicate our views on the scope of the draft instrument. As some of you may know the thirteen P&I Clubs members of the International Group are mutual organisations which insure the third party liabilities of approximately 92% of the world's ocean-going tonnage.

The International Group has taken an active role in the CMI's deliberations, which have led to the draft instrument that delegates are now considering. The Group has submitted two papers to the CMI, which are available to delegates. We believe that the instrument if it is to meet its intended purpose of promoting uniformity and if it is to attract widespread international support, must provide a regime suitable for both developing modes of transport such as door-to-door carriage which is increasingly common in the context of the container trade and traditional tackle-to-tackle carriage, that remains prevalent in the bulk and break-bulk trades and which continues to predominate in tonnage terms. In other words if the instrument is to be of use to the industry, it must be flexible and cater for all modes of carriage involving a sea-leg.

We recognize that there will inevitably be a degree of conflict between existing unimodal regimes which have been shaped to meet the particular risks and potential liabilities associated with carriage by road, rail and air, just as the sea-carriage regimes have been formulated to meet the particular risks associated with carriage by sea. However we believe that these potential problems are capable of resolution albeit that it may require an innovative approach and we believe that the CMI draft goes a long way towards achieving this. It does so by adopting a network system approach in the context of door-to-door carriage, an approach that respects the unimodal regimes and with which we agree.

The prime objective of this Uncitral initiative is, as we have said, to bring uniformity to an area of the law that is presently subject to a multiplicity of regimes in different jurisdictions. However it should not be forgotten that international conventions are intended to ensure an acceptable and fair balance of rights and liabilities between competing interests, particularly if there is perceived inequality in their bargaining positions. In the present case the competing interests are of course carrier and cargo. In our view their respective bargaining positions have changed considerably over the last 80 years in favour of cargo interests. As I recall, the distinguished delegate from France commented in New York that in a number of instances the balance of power now lay with shippers.

We have already pointed out that if the obligation to exercise due diligence is extended to the period throughout the voyage and the navigational fault defence is excluded, it will substantially affect the allocation of risk between carrier and cargo interests and this is likely to have a very real effect on the economics of both door-to-door and tackle-to-tackle carriage, imposing a greater financial burden on the carrier. It was for this reason that we supported the distinguished delegate from the UK's suggestion that at the very least loss or damage due to pilot error is retained in the catalogue of exceptions.

This alteration in the allocation of risk and the associated costs of the transport adventure to the carrier, is likely to be all the greater if as has been suggested by a number of delegations, although not yet of course decided:

(1) Firstly, the onus is placed on the carrier to prove the extent of loss or damage for which he is not liable, when the loss results in part from a cause for which he is liable and in part from a cause for which he is not liable. That is alternative 1 of draft Article 6.1.4.

(2) Secondly, the carrier is made liable for delay generally, rather than any such liability being restricted to instances of express agreement between carrier and cargo.

(3) Thirdly, the loss of the right to limit is not restricted to the personal act or omission of the carrier but expanded to embrace the acts and omissions for those for whom he may be vicariously liable.

It is for these reasons that we suggested that those Articles dealing with matters affecting the carrier and shipper's respective rights and liabilities be considered as a whole, rather than as at present in isolation. Only then we believe will it be possible to make a fair assessment of whether or not a fair balance has been struck between them.