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Report of Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)

Contents

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft instrument on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.43.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its fifteenth session in New York from 18 to 28 April 2005. The session was attended by representatives of the following States members of the Working Group: Australia, Austria, Belarus, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Ecuador, France, Germany, Guatemala, India, Iraq, Italy, Japan, Kenya, Kuwait, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Pakistan, Qatar, Republic of Korea, Russian Federation, Serbia and Montenegro, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America and Venezuela.

3. The session was also attended by observers from the following States: Afghanistan, Cuba, Denmark, Ethiopia, Finland, Greece, Holy See, Netherlands, New Zealand, Norway, Philippines, Senegal and Ukraine.

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

(a) **Intergovernmental organizations invited by the Commission**: African Union, Council of the European Union, European Commission (EC);

(b) **International non-governmental organizations invited by the Commission**: Association of American Railroads (AAR), Comité Maritime International (CMI), International Chamber of Commerce (ICC), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), International Union of Marine Insurance (IUMI) and The Baltic and International Maritime Council (BIMCO).

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Co-Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.43);

(b) A note prepared by the Secretariat containing a first revision of the draft instrument (A/CN.9/WG.III/WP.32);

(c) A provisional redraft of the articles of the draft instrument considered in the report of Working Group III on the work of its twelfth session (A/CN.9/WG.III/WP.36) and its thirteenth session (A/CN.9/WG.III/WP.39);

(d) A note prepared by the Secretariat containing a provisional redraft of the scope of application provisions of the draft instrument as submitted for consideration of the Working Group by the informal drafting group during the fourteenth session, along with a slightly revised commentary (A/CN.9/WG.III/WP.44);

(e) A note prepared by the Secretariat on uniform international arbitration practice (A/CN.9/WG.III/WP.45);

(f) Comments received from the UNCTAD Secretariat on the freedom of contract (A/CN.9/WG.III/WP.46);

(g) A note prepared by the Secretariat containing proposed revised provisions on electronic commerce (A/CN.9/WG.III/WP.47).

7. The Working Group adopted the following agenda:

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

I. Deliberations and decisions

8. The Working Group continued its review of the draft instrument on the carriage of goods [wholly or partly] [by sea] ("the draft instrument") on the basis of:

- The text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.32);
- A proposed interim redraft of the articles considered by the Working Group at its twelfth (A/CN.9/WG.III/WP.36), thirteenth (A/CN.9/WG.III/WP.39) and fourteenth (A/CN.9/WG.III/WP.44) sessions; and
- Proposed revised provisions on electronic commerce (A/CN.9/WG.III/WP.47).

9. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

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

Scope of application and Freedom of contract (draft articles 1, 2, 88 and 89)

10. The Working Group was reminded that it had most recently considered the topics of scope of application and freedom of contract at its fourteenth session (see A/CN.9/572, paras. 81-104), and that it had previously considered draft articles 1 and 2 at its twelfth session (see A/CN.9/544, paras. 51-84), and draft articles 88 and 89 at its eleventh session (see A/CN.9/526, paras. 203-218).

11. The Working Group heard a short report from the informal consultation group (see A/CN.9/572, para. 166) which took the initiative of continuing the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in the preparation of the draft instrument. The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to the topics of scope of application and freedom of contract, taking into account the draft text prepared by the informal drafting group as instructed by the Working Group during its fourteenth session (see A/CN.9/572, para. 90) as published in A/CN.9/WG.III/WP.44, and the text of draft articles 88 and 89 as they appeared in A/CN.9/WG.III/WP.32.

General discussion and methodology for continuation of work

12. The Working Group heard that in the course of the intersessional work undertaken by the informal consultation group, a number of drafting suggestions had been made and views regarding some more substantive policy issues had been expressed with respect to the scope of application provisions set out in A/CN.9/WG.III/WP.44, and regarding draft articles 88 and 89 of the draft instrument. Further to the conclusions reached by the Working Group with respect to the issue of Ocean Liner Service Agreements (OLSAs) (see A/CN.9/572, para. 104, and, more generally, A/CN.9/WG.III/WP.42 and A/CN.9/WG.III/WP.34, paras. 18-29 and 34-35), it was suggested that the inclusion of OLSAs within the draft instrument needed not necessarily to be accomplished by way of separate provisions, which could be difficult to draft. Instead, it was suggested that since OLSAs were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. Such a drafting approach was also said to be favourable in that it obviated the need for a definition of OLSAs, which had been an issue of some concern in the Working Group.

13. General support was expressed for this suggested technique for the inclusion of OLSAs into the scope of application scheme for the draft instrument under consideration by the Working Group. The Working Group agreed that an informal drafting group should prepare the necessary adjustments to the existing scope of application provisions in order to improve the drafting and to accommodate the inclusion of OLSAs therein. However, it was noted that certain substantive policy

issues raised by the scope of application provisions should be decided by the Working Group prior to the commencement of the drafting exercise. It was agreed by the Working Group that consideration of these matters should take place on the basis of a list of key issues as set out in the following headings and paragraphs.

Issue 1: Should OLSAs be included within the scope of application of the draft instrument as volume contracts, the inclusion of which would be determined by the character of the individual shipments thereunder?

14. The Working Group considered whether it was acceptable that OLSAs be treated as a type of volume contract in the draft instrument, which would be regulated as part of the general scope of application provisions. It was suggested that the draft instrument would not apply to volume contracts unless the draft instrument would apply to individual shipments thereunder. It was also suggested that those volume contracts that were subject to the draft instrument could derogate from certain of its provisions, provided that certain additional conditions aimed at protecting the parties to the volume contract were met.

15. Support was expressed for this approach to OLSAs in the draft instrument. One advantage of the approach was said to be that it separated the issue of scope of application of the draft instrument from the issue of derogation from certain of the specific provisions of the draft instrument. Another advantage was said to be that the concept of "volume contracts" was preferable to that of OLSAs, as it was a broader and more universal concept. Some concerns were raised about the complexity of the scheme, and about potential confusion thereunder. Other concerns were raised that particularly careful drafting would be necessary to avoid the increased breadth of the concept of volume contracts resulting in the inadvertent inclusion in the draft instrument of some contracts of carriage in the non-liner trade. A question was raised regarding whether the "future carriage of goods in a series of shipments" as appeared in draft article 4 of A/CN.9/WG.III/WP.44 was the same concept as volume contracts, or whether it was broader. In addition, questions were raised regarding how an individual shipment would be classified if it were made pursuant to a contract of carriage in which the carrier agreed to use a liner service, but instead used a non-liner service.

Conclusions reached by the Working Group regarding Issue 1

16. After discussion, the Working Group decided that:

- Issue 1 should be answered in the affirmative; and that
- An informal drafting group should be requested to make adjustments to the provisions on the scope of application based on the views outlined in the paragraphs above.

Issue 2: Under what conditions should it be possible to derogate from the provisions of the draft instrument?

17. It was suggested that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument:

- The contract should be [mutually negotiated and] agreed to in writing or electronically;
- The contract should obligate the carrier to perform a specified transportation service;
- A provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and
- The contract should not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract.

18. While a view was expressed that no derogation from the provisions of the draft instrument should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The view was expressed that the four conditions outlined in the paragraph above were not of sufficient clarity or sufficiently differentiated from other contracts to enable identification of the specific situations in which derogation should be allowed. Other views emphasized that the intention of having to meet the conditions outlined prior to being allowed to derogate from the draft instrument was to avoid a situation where the volume contract could be abused to the detriment of one of the parties to it. It was suggested that this goal was achieved through the combined effect of the conditions set out in the paragraph above that there be mutual agreement to known terms of the contract. Some doubt was expressed whether it was necessary that this agreement be in writing.

Conclusions reached by the Working Group regarding Issue 2

19. After discussion, the Working Group decided that:

- The derogation scheme suggested could form the basis for further discussion, but that the informal drafting group should be requested to take into account the views outlined in the paragraphs above in its consideration of the necessary conditions required for derogation from the draft instrument.

Issue 3: Should there be mandatory provisions of the draft instrument from which derogation should never be allowed, and if so, what were they?

20. The view was expressed that in its discussions with respect to article 14 of the draft instrument, the Working Group had considered and discarded the concept of overriding obligations in the draft instrument. Concern was expressed that establishing provisions of the draft instrument from which derogation was not possible would be tantamount to recreating this concept. It was further suggested that if the parties to a volume contract of the nature being considered were sufficiently protected to derogate from the provisions of the draft instrument, they should be entitled to negotiate all aspects of the agreement, including matters such as seaworthiness.

21. There was support for the contrary view that under no circumstances should derogation be allowed from certain provisions of the draft instrument, particularly those relating to seaworthiness under draft article 13. Some concerns were raised

regarding the implications of never permitting a derogation from the seaworthiness obligations, particularly regarding any provisions of the draft instrument which could be connected to seaworthiness, such as limitations on liability. While a view was expressed that prohibiting derogation from the seaworthiness obligations would not affect the rules with respect to limitations on liability, it was suggested that the overall implications arising from treating the seaworthiness obligations in this manner would require further consideration.

22. More generally, it was suggested that obligations relating to maritime safety should not be open to derogation under the draft instrument, but support was also expressed for the contrary view that safety issues should instead be left to public law. It was noted that certain provisions pertaining to the obligations of the shipper, such as those pursuant to draft articles 25 and 27, and to the draft article 26 obligation of the carrier to provide information to the shipper upon request, were considered to have safety implications, and were thus open to consideration for similar treatment.

Conclusions reached by the Working Group regarding Issue 3

23. After discussion, the Working Group decided that:

- The seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed;
- The informal drafting group should be requested to take into account the views outlined in the paragraphs above in its consideration of this issue.

Issue 4: Should a derogation from the provisions of the draft instrument that is applicable as between the carrier and the shipper extend to third parties to the contract who had expressly consented to be bound, and under what conditions?

24. The Working Group next considered whether a derogation from the draft instrument that was applicable as between the carrier and the shipper should extend to third parties to the contract who had expressly consented to be so bound. There was support for the view that the meaning of the phrase “expressly consented” was ambiguous, and that it would be difficult to adequately protect the interests of third parties absent greater specificity. An example raised in this regard was the commercially feasible situation where one party might purport to consent to a derogation on behalf of all of its buyers. Concern was also raised regarding whether the requirement was one of express consent to be bound by the volume contract in general, or by the specific derogation from the draft instrument. It was thought by some that express consent by the third party to the specific derogation should be required. The general view was that, should such a provision be agreed to by the Working Group, careful drafting would be necessary to adequately enunciate the key requirement that the third party had expressly consented to be bound by the contractual derogation.

25. Support was expressed for the suggestion that a provision along the lines of draft article 5, as it appeared in A/CN.9/WG.III/WP.44, provided sufficient protection to third parties entitled to rights under the contract of carriage, and that no additional provision to protect third parties was required with respect to derogation from the draft instrument by the parties to a volume contract. However, there was also support for the view that draft article 5 was inadequate for the

protection of third parties in this particular context, and that a separate but carefully crafted provision was required. It was suggested that the primary purpose of such a provision in the draft instrument was to limit the ability of the parties to a volume contract to derogate from the provisions of the draft instrument and to avoid binding third parties to that derogation unless they expressly so consented. It was suggested that failure to include such a provision in the draft instrument would leave the matter to national law, resulting in a situation where third parties might only derive rights from the contract. It was further suggested that this situation could thus create the risk in some jurisdictions that third parties could be unprotected and could be bound by contractual derogations from the draft instrument to which they had not agreed. A view was expressed that draft article 5 in A/CN.9/WG.III/WP.44 could be adjusted to deal with these various concerns, thus eliminating the need for an additional provision. It was further suggested that to do otherwise would establish two different regimes for third parties, depending on whether they derived their rights pursuant to a charter party or from a volume contract.

26. Additional concerns were expressed regarding how a derogation that bound a third party to a volume contract might affect that party's rights with respect to choice of forum in jurisdiction or arbitration clauses. It was agreed that this issue should be discussed when the Working Group considered the chapters on jurisdiction and arbitration. Another issue was raised with respect to the agreement expressed by the Working Group at its fourteenth session that a documentary approach should be used for the identification of third parties whose rights should be protected pursuant to the draft instrument (see A/CN.9/572, paras. 91, 94 and 96). It was suggested that this decision was made only with respect to the more general provisions regarding the scope of application for the protection of third parties, and not with respect to the specific situation of the protection of rights of third parties to volume contracts (for further discussion of the documentary approach, see paras. 35 to 44 below.)

27. General agreement was expressed with several of the concerns noted in the above paragraphs regarding binding third parties to contractual derogations from the draft instrument absent their express consent. However, support was expressed for the suggestion that a broader, more commercial approach should be taken to the issue, and that third parties should automatically be bound to contractual derogations as they should have no greater rights than the original parties to the contract. It was also suggested that the Working Group should consider the commercial context, for example, where third parties were not truly strangers to the contracting parties, but where they could be different members of the same corporate group.

Conclusions reached by the Working Group regarding Issue 4

28. After discussion, the Working Group decided that:

- A provision allowing for third parties to a volume contract to expressly agree to be bound by derogations from the draft instrument agreed to as between the parties to the contract should be included in the draft instrument;
- The informal drafting group should draft a provision in this regard for consideration by the Working Group, taking into account the views outlined in the paragraphs above.

Issue 5: The definition of "contract of carriage"

29. The next issue with respect to scope of application and freedom of contract that was considered by the Working Group was the definition of "contract of carriage", as set out in A/CN.9/WG.III/WP.44.

30. It was suggested that the words "[an undertaking for]" should be inserted between the words "against" and "the payment of freight" to avoid the risk that the phrase "against the payment of freight" could be narrowly construed to exclude cases of future payment. While some support was expressed for this addition, it was not thought by the Working Group to add to the clarity of the provision.

31. The Working Group further discussed whether the opening phrase of the second sentence of the definition should be "This undertaking" or "This contract", or whether the word "The" should be used instead of "This". The Working Group expressed a preference for the use of the phrase "The contract".

32. The suggestion was also made that the word "[international]" should be inserted between the phrases "must provide for" and "carriage by sea". The reason for this suggestion was said to be concern that draft article 2 as it appeared in A/CN.9/WG.III/WP.44 did not adequately convey the requirement of internationality of the sea leg of the carriage. While doubts were expressed regarding the necessity for the inclusion of the word "international", the Working Group agreed to keep it in the provision in square brackets pending its consideration of draft article 2.

33. Another issue raised for the consideration of the Working Group was whether to retain or to delete the following final phrase in that definition: "[A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]" A view was expressed in support of retaining this phrase and deleting the square brackets around it. It was suggested that the inclusion of such a phrase would promote certainty regarding the application of the draft instrument to situations where the contract of carriage did not specify how the carriage was to take place, but where the actual carriage was by sea. While some sympathy was expressed for this view, it was suggested that a flexible interpretation of the first sentence of the draft provision could achieve a similar result, and that the final phrase in square brackets could be deleted as unnecessary. Further, it was thought that a contract could implicitly provide for carriage by sea, and that, in any event, the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods. Another view was expressed that, in light of the adoption of a "maritime plus" approach in the draft instrument, the inclusion of such a phrase would be superfluous.

Conclusions reached by the Working Group regarding Issue 5

34. After discussion, the Working Group decided that:

- The phrase "This undertaking" at the start of the second sentence of the definition of the "contract of carriage" should be replaced by the phrase "The contract";
- The word "[international]" should be inserted in square brackets between the phrases "must provide for" and "carriage by sea" pending consideration by the Working Group of draft article 2 of A/CN.9/WG.III/WP.44;

- The bracketed final phrase of the definition should be deleted.

Issue 6: Should a documentary or non-documentary approach be adopted for the protection of third parties in draft article 5 as set forth in A/CN.9/WG.III/WP.44?

35. The Working Group was reminded that it had most recently considered the issue of protection of third parties and a previous draft of draft article 5 as set forth in A/CN.9/WG.III/WP.44 at its fourteenth session (see A/CN.9/572, paras. 91-96 and 105). Based on these discussions, a few amendments to the text of draft article 5 of A/CN.9/WG.III/WP.44 were suggested and the discussion continued on the basis of the following text:

> "Article 5
>
> "If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3 (1)(c), then [such transport document or electronic record shall comply with the terms of this Instrument and] the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record [from the moment at which it regulates] [in] the relationship between the carrier and [the person entitled to rights under the contract of carriage] [the consignor, consignee, controlling party, holder or person referred to in article 31], provided that such person is not [a] [the] charterer or [a] [the] party to the contract under Article 3 (1)(c)."

36. The Working Group discussed whether the documentary approach to the protection of third parties should be retained (see A/CN.9/572, para. 96); and, if so, which third parties would be subject to protection under the draft instrument. A number of delegations expressed support for a documentary approach. It was stated that the need to protect reliance by third parties would arise only in the presence of a document. It was suggested that the documentary approach better provided a commercially viable solution and was more in line with trade practice. It was also stated that in some legal systems reliance was attached to documents other than bills of lading, as well as to documents held by the shipper, and that practice also involved the circulation of non-negotiable instruments. It was indicated that these circumstances called for broadening the scope of application of the draft instrument relating to the protection of third parties. However, the contrary view was also expressed that the scope of application of draft article 5 as set forth in A/CN.9/WG.III/WP.44 was too broad.

37. Significant support was also expressed for a non-documentary approach. It was stated that it was not possible to understand the rationale for protecting third party holders of non-negotiable instruments. It was also stated that in some trades, and, specifically, in the short shipping trade, commercial practice did not foresee the issuance of any type of document, that in other trades the documents never left the hands of the carrier, and that the documentary approach would deprive third parties involved in such trades of any protection. It was further pointed out that the carrier and the shipper were in a position to decide whether to issue a document and to choose the type of document, and that a documentary approach would thus make the protection of third parties dependent on the decision of the parties to the contract.

38. Another line of reasoning in support of a non-documentary approach indicated that freedom of contract could be allowed only insofar as it was limited to parties to the contract and that third parties might even be unaware of these contractual

provisions. It was suggested that it was illogical to base the protection of third parties on the existence of a document. Moreover, it was stated that reliance by third parties was justifiable only when the document provided conclusive evidence, such as for negotiable bills of lading, while no premium on reliance was due to parties willing to take a risk on the basis of less secure documents.

39. It was further suggested that the non-documentary approach was more open to the possible future needs of electronic commerce, and also in light of the fact that electronic transport records might not bear any resemblance to bills of lading. The contrary view was also held, in light of the reference to electronic transport records in draft article 5 as set forth in A/CN.9/WG.III/WP.44, and of the general position of the draft instrument in support of any possible technological development.

40. In contrast, it was stated that the non-documentary approach had a very broad scope of application and that its adoption would have unforeseeable consequences, while the documentary approach was well known and the consequences of its application were easily predictable.

Relationship between the scope of application of draft article 5 of A/CN.9/WG.III/WP.44 and protection of third parties

41. It was indicated that draft article 5 as set forth in A/CN.9/WG.III/WP.44 operated only in favour of third parties to charter parties and other contracts excluded from the scope of application of the draft instrument, and that draft article 5 could be considered a scope of application provision whose effect was to extend protection to third parties otherwise excluded. However, it was also stated that there was no need to place third parties to such contracts in a position more favourable than the parties to the same contracts. In response, it was indicated that the long-standing practice to provide protection to third-party holders of bills of lading issued under charter parties should not be discontinued. It was added that, historically, freedom of contract had been introduced in international maritime transport instruments through the exemption of certain contracts such as charter parties from the scope of application of these instruments, such as, for example, article V of the Hague Rules, which did not intend to protect third parties but merely to exclude charter parties. Further, it was suggested that, while it was possible to achieve the same result by including those excluded contracts in the scope of application of the draft instrument and allowing for freedom of contract, both techniques required provisions for the protection of third parties.

42. It was further indicated that draft article 5 in the text of A/CN.9/WG.III/WP.44 omitted the reference to volume contracts contained in the text of draft article 2 (4) as set forth in A/CN.9/WG.III/WP.36, because it was held that, in practice, transport documents were not issued under framework volume contracts, but only under the individual shipments that were performed under the volume contracts.

Documents requirements under the documentary approach

43. On the assumption that a documentary approach would be adopted, the Working Group discussed matters relating to the types of documents that should trigger the protection of third parties. While there was some consensus that bills of lading would suffice for this purpose, concerns were expressed regarding receipts, and different opinions were expressed with regard to “intermediary” non-negotiable

documents such as sea waybills. It was suggested that the language contained in draft article 3 (2) as set forth in A/CN.9/WG.III/WP.44 could provide useful guidance to clarify this matter.

Conclusions reached by the Working Group on issue 1

44. After discussion, the Working Group decided that:

- The current text, as it appears in paragraph 35 above, should be taken as a basis for further refinement to reconcile the two positions on the basis of a new text to be elaborated by the informal drafting group for the further consideration of the Working Group;
- Failing such drafting effort, text reflecting both positions should be kept in square brackets in the draft instrument for continuation of the discussion at a future session.

Issue 7: Should a "one-way" or a "two-way" mandatory approach be adopted in draft article 88?

45. The Working Group next considered the text of draft article 88 as it appeared in A/CN.9/WG.III/WP.32, with the addition of the words "[maritime]" before the words "performing party" in paragraphs 1 and 2, and of square brackets around the words "[, the shipper, the controlling party, or the consignee under this Instrument]" at the end of paragraph 1. The issue was discussed whether a "one-way" or a "two-way" mandatory approach should be adopted in draft article 88.

46. Support was expressed for the adoption of the "one-way" mandatory approach in draft article 88. Under this approach, the contractual decrease of liability of the carrier and of the other parties mentioned in the draft article would not be possible, while its increase would be allowed. It was indicated that this approach assumed that the shipper should be provided with protection inspired by principles akin to those of consumer protection. It was suggested that in paragraph 1 the words "[, or increase]" should be deleted and the square brackets around the words "or" should be removed.

47. It was further indicated that the "one-way" mandatory approach was compatible with the freedom for the shipper to increase its liability limits. However, the view was also expressed that it should not be possible for the parties to increase the obligations of the shipper. In this line, it was suggested that the position of the shipper regarding its liability should be better clarified in the individual relevant provisions. Moreover, it was suggested that a provision should be inserted in the draft instrument to prevent the shipper from decreasing its obligations.

48. Some support was also expressed in favour of the "two-way" mandatory approach, according to which no contractual change in the liability of the parties would be allowed. It was suggested that this approach better reflected the current economic balance between carriers and shippers, while the adoption of the "one-way" mandatory approach was described as providing shippers with unnecessary protection. However, it was also pointed out that at the international level the "two-way" mandatory approach had been adopted only in the Convention on the Contract for the International Carriage of Goods by Road, 1956 (the "CMR Convention")

with questionable results, as this provision prevented competition among carriers to the detriment of their customers.

Conclusions reached by the Working Group on issue 7

49. After discussion, the Working Group decided that:

- In draft article 88(1) the words "[, or increase]" should be deleted and the square brackets around the words "or" should be removed.

Issue 8: Which parties should be covered under draft article 88?

50. It was suggested that further attention should be dedicated to the determination of the parties covered under the draft article. It was indicated that, for instance, the draft text made no reference to the consignor while referring to the consignee. It was also indicated that consideration should be given to the possibility of extending the protection granted by the article to all performing parties in light of the multimodal nature of the draft instrument. However, in this respect, it was also indicated that non-maritime performing parties did not fall under the scope of application of the instrument. Finally, it was suggested that the reference to maritime performing parties would be necessary to ensure that the carrier would not escape liability by invoking the exclusive liability of the maritime performing parties.

Conclusions reached by the Working Group on issue 8

51. After discussion, the Working Group decided that:

- The square brackets around the word "maritime" in draft article 88 (1) and (2) should be removed;

- The square brackets around the last phrase of draft article 88 (1) should be retained for continuation of the discussion at a future session.

Proposed redraft of provisions regarding scope of application and freedom of contract (draft articles 1, 2, 3, 4, 88, 89 and new draft article 88a)

52. Based upon the discussion in the Working Group (see above, paras. 10 to 51) regarding the provisions of the draft instrument relating to scope of application and freedom of contract as they appeared in A/CN.9/WG.III/WP.44 (draft articles 1, 2, 3, 4 and 5) and A/CN.9/WG.III/WP.32 (draft articles 88 and 89), an informal drafting group composed of a number of delegations prepared a revised version of those provisions that resulted in proposed redraft articles 1, 2, 3, 4, 88 and 89, and a proposed new draft article 88a intended to allow for derogation from the draft instrument in the case of volume contracts that would meet certain prescribed conditions. The proposed new text of those provisions was as follows:

"Article 1

"(a) "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage.

"(x) "Volume contract" means a contract that provides for the carriage of [a specified minimum quantity of] cargo in a series of shipments during an agreed period of time.

"(xx) "Non-liner transportation" means any transportation that is not liner transportation. For the purpose of this paragraph, "liner transportation" means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by vessels operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

"Article 2

"1. Subject to Articles 3 (1), this Instrument applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a State Party; or

(b) The place of delivery [or port of discharge] is located in a State Party; or

[(c) The contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.]

References to [places and][2] ports mean the [places and] ports agreed in the contract of carriage.

"2. This Instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

"Article 3

"1. This Instrument does not apply to:

(a) Charter parties;

(b) Contracts for the use of a ship or of any space thereon;

(c) Except as provided in paragraph 2, other contracts in non-liner transportation; and

(d) Except as provided in paragraph 3, volume contracts.

"2. Without prejudice to subparagraphs 1(a) and (b), this Instrument applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods, except as between the parties to a charter party or to a contract for the use of a ship or of any space thereon.

"3. (a) This Instrument applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter[3] so specify.

(b) This Instrument applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Instrument under subparagraph (a).

“Article 4

“Notwithstanding Article 3, if a transport document or an electronic transport record is issued pursuant to a charter party or a contract under Article 3 (1)(b) or (c), the provisions of this Instrument apply to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 31 that is not the charterer or the party to the contract under Article 3 (1)(b) or (c).

“Article 88

“1. Unless otherwise specified in this Instrument, any provision is null and void if:

(a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Instrument;

(b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Instrument; or

(c) It assigns a benefit of insurance of the goods in favour of the carrier or a person mentioned in Article 14bis.

“[2. Unless otherwise specified in this Instrument, any provision is null and void if:

(a) It directly or indirectly excludes, limits, [or increases] the obligations under Chapter 7 of the shipper, consignor, consignee, controlling party, holder, or person referred to in Article 31; or

(b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in Article 31 for breach of any of their obligations under Chapter 7.]

“Article 88a[4]

“1. Notwithstanding article 88, if terms of a volume contract are subject to this Instrument under Article 3 (3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Instrument provided that the volume contract [is agreed to in writing or electronically],[5] contains a prominent statement that it derogates from provisions of the Instrument, and:

(a) Is individually negotiated; or

(b) Prominently specifies the sections of the volume contract containing the derogations.

“2. A derogation under paragraph 1 shall be set forth in the contract and may not be incorporated by reference from another document.

"3. A [carrier's public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.

"4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Instrument under Article 3 (3)(a).

"5. Paragraph 1 is not applicable to:

(a) Obligations stipulated in Article 13 (1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];

[(b) Rights and obligations stipulated in Articles [19], [25], [26], [27] and [XX] Figure 1[6] [and the liability arising from the breach thereof]].

"6. Paragraph 1 applies:

(a) Between the carrier and the shipper;

(b) Between the carrier and any other party that has expressly consented [in writing or electronically][7] to be bound by the terms of the volume contract that derogate from the provisions of this Instrument. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from provisions of the Instrument and the consent shall not be set forth in a [carrier's public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]

"Article 89

"Notwithstanding chapters 4 and 5 of this Instrument, the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except where it is proved that the loss, damage, or delay resulted from an action or omission of the carrier [or of a person mentioned in Article 14bis] done recklessly and with knowledge that such loss, damage, or delay would probably occur; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods."

53. The Working Group heard a brief report from the informal drafting group outlining the changes that had been made from previous versions of these articles as they appeared in A/CN.9/WG.III/WP.44 and A/CN.9/WG.III/WP.32. In the definition of "contract of carriage", the final bracketed sentence of the previous version of draft article 1 (a) had been deleted as decided by the Working Group (see above, paras. 33 and 34). Further, a definition of "volume contract" was added as proposed paragraph (x), and the definition of "liner service" was deleted as unnecessary in

light of later proposed provisions that referred only to "non-liner transportation". In proposed redraft article 2 (1), the specific references to "[contractual]" were deleted in favour of the final sentence. The previous version of draft article 2 (1)(c) was deleted as having insufficient support. The language in square brackets in proposed redraft article 2 (1)(a) and 2 (1)(b) was intended to emphasize the sea carriage aspect and was included for further discussion by the Working Group. In an effort to improve clarity, the previous version of draft articles 3 and 4 were combined to create proposed redraft article 3. It was noted that the main rule in proposed redraft article 3 (1) enumerated the contracts that were not included within the scope of application of the draft instrument, and that, while subparagraph (b) clearly included charter parties, they were nonetheless named in subparagraph (a) for historical purposes. Proposed redraft article 3 (2) set out a slightly rephrased version of the previous version of draft article 3 (2) with respect to the inclusion of certain contracts in non-liner transportation. Proposed redraft article 3 (3) was intended to bring volume contracts within the scope of application of the draft instrument on the basis of individual shipments performed under such contracts. Proposed redraft article 4 restated the elements of previous draft article 5 using the documentary approach, and specifically enumerated the persons to whom it applied. Like its predecessor in A/CN.9/WG.III/WP.32, proposed redraft article 88 dealt with the mandatory provisions of the draft instrument, dividing the issue into paragraph 1, concerning the carrier and maritime performing party, and paragraph 2, regarding cargo interests. Proposed paragraph 1 reflected the one-way mandatory approach agreed upon with respect to the carrier, and paragraph 2 reflected a more nuanced approach to the obligations of cargo interests for further discussion by the Working Group. Proposed new article 88a was drafted to reflect the discussion in the Working Group regarding the possibility to derogate from the provisions of the draft instrument in certain cases regarding volume contracts, including the necessary conditions for such derogation, as well as some additional requirements. Further, it was noted that pursuant to proposed new article 88a (4), if the volume contract in question met the listed requirements, the valid stipulations derogating from the draft instrument would cover both the volume contract and each individual shipment as specified in proposed new article 88a. Proposed new article 88a (5) set out the mandatory provisions from which there could never be derogation, and proposed new article 88a (6) established to whom the derogation would apply, and the necessary components for "express consent" to the derogation, as well as the added safeguard of placing on the carrier the burden of proving that the conditions for derogation had been met.

Proposed redraft of article 1

54. The Working Group first considered the proposed text for draft article 1 (see paragraph 52 above).

Definition of volume contract (proposed redraft article 1, paragraph x)

55. It was suggested that the words "[a specified minimum quantity of]" in proposed draft article 1 (x) should be deleted to reflect a commercial practice in volume contracts, which does not specify the minimum quantity of goods to be transported but only an estimated quantity. It was emphasized that a reference to the quantity of goods to be transported should be retained although without mentioning a minimum quantity.

56. It was suggested that the words “during an agreed period of time” in proposed draft article 1 (x) should be deleted. However, it was indicated that a limited time period was essential to the definition of volume contracts. It was added that, in practice, it was not possible for carriers to reserve space for a shipper for an indeterminate period of time.

Definition of liner and non-liner transportation (proposed draft article 1, paragraph xx)

57. It was suggested that the order of the sentences in the proposed text of draft article 1 (xx) should be inverted. However, it was also observed that the order of the sentences in the proposed draft article 1 (xx) better reflected the use of the notion of non-liner transportation in the draft instrument. Another drafting suggestion was to delete the definition of “non-liner transportation” completely. In addition, in response to a question, the use of the phrase “includes transportation” in subparagraph (ii) was explained as being necessary to describe only part of the transportation service being offered, which could include other services, such as warehousing.

Conclusions reached by the Working Group on proposed draft article 1

58. After discussion, the Working Group decided that:

- The proposed draft text for article 1 should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

Proposed redraft of article 2

59. The Working Group next considered the proposed redraft of article 2 (see paragraph 52 above).

Definition of geographical scope of application

60. Concerns were expressed that the proposed text for draft article 2 (1) of the draft instrument would not sufficiently clarify the requirement of the internationality of the sea leg of the carriage to trigger the application of the draft instrument. Various views were expressed as to whether both references to sea carriage contained in square brackets in the chapeau of redraft article 2 (1) should be retained, or whether only one or the other of the references should be retained, but no decision was made on this point.

Proposed draft article 2 (1) (c). Contractual choice of application of the draft instrument

61. It was suggested that the proposed bracketed text for the redraft of article 2 (1)(c) should be deleted, since, in the absence of a reference to internationality in the definition of the contract of carriage, the text might enable parties to a contract of domestic carriage to opt for the application of the draft instrument. However, it was also suggested that the proposed bracketed text should be retained as it corresponded to article X (c) of the Hague-Visby Rules, which had wide application in practice, especially for cross-traders carrying goods through States not party to the instrument. In turn, it was observed that article X (c) of the Hague-Visby Rules had created in certain countries difficulties at the constitutional

level, which might be prevented by the deletion of the proposed bracketed text for draft article 2 (1)(c). It was further indicated that article X (c) of the Hague-Visby Rules had been introduced in that instrument by the Visby Protocol, 1968, for reasons which were immaterial to the draft instrument, and that the provision gave rise to different interpretations in various jurisdictions. It was also suggested that retention of the proposed bracketed text for draft article 2 (1)(c) would be incompatible with draft chapters 15 and 16 of the draft instrument since the joint effect of these rules would be to allow parties a choice of procedural rules and this choice would conflict with mandatory provisions of private international law. In this line, it was suggested that further consideration should be given to the possibility of redrafting the proposed bracketed text for draft article 2 (1)(c), so as to limit its effect to contractual matters, such as, for instance, the contractual election of applicable law.

Conclusions reached by the Working Group on proposed draft article 2

62. After discussion, the Working Group decided that:

- The proposed redraft of article 2, including all text within square brackets, would be used as a basis for continuation of the discussion at a future session.

Proposed redraft of article 3

63. The Working Group considered the proposed redraft of article 3 (see paragraph 52 above).

Derogations from the scope of application of the draft instrument

Proposed draft article 3, paragraphs 1 and 2

64. It was observed that the proposed redraft of article 3 (1) was intended mainly to exclude contracts of carriage in non-liner transportation from the scope of application of the draft instrument. The Working Group heard that the intent of the proposed redraft of article 3 (2) was to create an exception to the proposed redraft of article 3 (1) with respect to certain types of carriage in non-liner transportation, where the current practice saw the issuance of a transport document or electronic transport record. The rule in the proposed redraft of article 3 (2), under which these contracts would fall under the scope of application of the draft instrument, was described as consistent with the Hague-Visby Rules insofar as bills of lading were concerned. In addition, the effect of the proposed redraft of article 3 (2) would be to extend the traditional rule to cover all cases where a transport document or electronic transport record was issued.

Proposed draft article 3, paragraph 3

65. Clarification was sought on the use of the words “terms that regulate each shipment” and “terms of a volume contract” in proposed draft article 3 (3) of the draft instrument. It was indicated that the reference to the “terms that regulate each shipment” was meant to circumvent the difficulties that arose from the “shipment” being a mere performance under the contract of carriage, while defining the scope of application of the draft instrument required reference to contractual stipulations. In view of the absence of an individual contract governing each individual shipment, reference had to be made to those stipulations in the volume contract that

governed each individual shipment. The purpose of subparagraph (b) was to make it clear that only those terms of the volume contract governing individual shipments fell under the scope of application of the draft instrument. Conversely, the terms or stipulations of the volume contract that did not regulate individual shipments remained outside the scope of application of the draft instrument. As to volume contracts regulating shipments exempted from the scope of application of the draft instrument (such as, for instance, when charter parties were used for the individual shipments), they would equally remain outside the scope of application of the draft instrument.

Conclusions reached by the Working Group on proposed draft article 3

66. After discussion, the Working Group decided that:

- The proposed text for draft article 3 should be inserted in the draft instrument for continuation of the discussion at a future session in light of the views and clarifications expressed above.

Proposal for the insertion of draft article 4

67. The Working Group considered the proposed text of draft article 4 (see para. 52 above).

Protection of third parties when transport documents or electronic transport records are issued under a contract exempted from the scope of application of the draft instrument

68. It was indicated that the intended effect of the proposed draft of article 4 was to provide protection to third parties under the draft instrument in cases where a transport document or electronic transport record was issued pursuant to a contract that remained outside the scope of application of the draft instrument under its draft article 3 (1)(a), (b) or (c). It was further indicated that the mechanism proposed in draft article 4 was similar to the one in place under the Hague-Visby Rules for cases when bills of lading were issued. However, adjustments to that mechanism were necessary in light of the adoption of a contractual approach to identify the third parties in need of protection pursuant to the draft instrument, and also in view of the need to refer not only to bills of lading but also to all transport documents or electronic transport records in accordance with the wishes of the Working Group.

69. The view was expressed that the proposed draft of article 4 should provide protection only to holders of negotiable documents and to "good faith" holders of non-negotiable documents, in the sense that third-party holders of such non-negotiable documents are likely to be unaware of the actual nature of the relationship between shipper and carrier, and thus in need of protection. It was also indicated that, while the practice had developed a category of transport documents, such as sea waybills, that could be referred to for descriptive purposes as "quasi-negotiable" documents, it was not possible to adequately define such transport documents, thus the proposed draft of article 4 used the broader "transport document or an electronic transport record" category.

70. It was suggested that some tramp trade might fall under the definition in draft article 3 (1)(d) of the draft instrument, and that, in order to protect third parties holding documents issued in this trade, reference to draft article 3 (1)(d) should be

added at the end of the proposed draft of article 4. It was also suggested that, in the case where a consignee assigned its rights to a charterer, further clarification might be required as to whether the charterer would be bound by the terms of the charter party or would be protected as a third party. However, the view was also expressed that a special situation such as that described should not be addressed in the draft instrument.

Notion of transport document and receipts

71. It was suggested that the notion of transport document in the proposed draft of article 4 needed clarification. A view was expressed that the application of the draft instrument to third parties should not be conditional upon the existence of a transport document.

72. Although the term "transport document" defined in draft article 1 (k) included a mere receipt of goods, it was explained that the issuance of such documents did not trigger the application of the draft instrument to a third party because proposed draft article 4 provided that "the provisions of this instrument apply to the contract evidenced by or contained in the transport document or electronic transport record". It was further indicated that the proposed draft of article 4 applied to contracts in non-liner trade exempted from the scope of application of the draft instrument, and that in practice in this trade a receipt would rarely be issued, and then most often in cases where the shipper and the consignee were legally or economically the same entity. However, it was also suggested that a receipt might well provide evidence of a contract, and that third-party holders of a receipt would fall under the scope of application of the proposed text for draft article 4 of the draft instrument insofar as the receipt evidenced the contract.

Conclusions reached by the Working Group on proposed draft article 4

73. After discussion, the Working Group decided that:

- The proposed text for draft article 4 should be used as a basis for continuation of the discussion at a future session;
- The suggestion to insert a reference to draft article 3 (1)(d) at the end of draft article 4 should be considered in the text to be prepared by the Secretariat, as should any necessary clarification of the treatment of receipts.

Proposed redraft of article 88

74. The Working Group first considered the proposed text for draft article 88 (see para. 52 above). As previously noted, paragraph 1 of draft article 88 dealt with the mandatory provisions of the draft instrument regarding the carrier and the maritime performing party, and paragraph 2 of draft article 88 concerned the mandatory provisions of the draft instrument with respect to cargo interests.

Redraft of article 88, paragraph 1—Mandatory provisions regarding the carrier and the maritime performing party

75. General support was expressed in the Working Group for the principles enunciated in the redraft of article 88 (1). It was observed that, while the provision at paragraph (c) duplicated the current state of the law, paragraphs (a) and (b)

represented a slightly new approach in maritime transport law. In effect, pursuant to paragraph (a), the carrier was prohibited from redefining its obligations under the draft instrument by excluding or limiting them, while paragraph (b) prevented the carrier from excluding or limiting its liability for breaching an obligation under the draft instrument. It was said that paragraph (a) preventing a redefinition by the carrier of its obligations was intended to prevent the carrier from circumventing its obligations by doing indirectly what it could not do directly.

76. Certain drafting issues were raised in the Working Group. The question was raised why the language in the chapeau of the redraft of article 88 (1) had deleted the phrase "any contractual stipulation", which had appeared in A/CN.9/WG.III/WP.32, and replaced it in the redraft with "any provision". In response, it was said that no substantive change had been intended by this, and that this change could be further considered by the Working Group. A preference was also noted that the phrase "if and to the extent it is intended" which appeared in A/CN.9/WG.III/WP.32 be reinserted into the redraft of article 88 (1). Further, it was suggested that reference should be made in paragraph (a) to draft articles 10, 11 and 12 of the draft instrument that set out the obligations of the carrier. Further, the question was raised whether the ability of the parties to agree that certain obligations of the carrier were performed on behalf of the shipper, the controlling party or the consignee pursuant to draft article 11 (2) could be said to contradict the redraft of article 88 (1), particularly given that provision's reference to maritime performing parties. By way of explanation, it was noted that reference was made to maritime performing parties in the redraft of article 88 (1) in order to regulate "Himalaya clauses", which could exempt or reduce the liability of a maritime performing party by extending to maritime performing parties certain contractual benefits that they would not otherwise enjoy. Another suggestion made was that the phrase "breach of an obligation" in paragraph (b) could be replaced with "breach of a provision".

Conclusions reached by the Working Group on the redraft of article 88(1)

77. After discussion, the Working Group decided that:

- The proposed redraft of article 88(1) should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

Proposed article 88, paragraph 2—Mandatory provisions with respect to cargo interests

78. Support was expressed in the Working Group for the provision proposed as draft article 88 (2), and the view was expressed that the proposal reflected the discussion on this topic in the Working Group (see above, paras. 45 to 51). It was thought that, since the proposed redraft of article 88 (1) set out mandatory provisions with respect to the carrier and the maritime performing party, in order to be consistent, the draft instrument should also provide mandatory provisions regarding cargo interests. It was suggested that to ensure true equality of treatment in this regard, there was no reason to prohibit a shipper from increasing its responsibilities, and a deletion of the phrase "[or increases]" in paragraphs (a) and (b) was encouraged.

79. Another view was that mandatory provisions should only exist in the draft instrument when truly necessary, and it was suggested that if the purpose of such provisions was to protect small shippers, paragraph 2 should be deleted in its entirety. The view was also expressed that there should not be absolutely equal treatment for carriers and shippers with respect to the mandatory provisions concerning them, since carriers had the advantage of limited liability under the draft instrument, and since paragraph 1 was intended to protect small shippers, but paragraph 2 was intended to protect small carriers and other cargo interests. It was further observed that chapter 7 of the draft instrument contained the obligations of the shipper pursuant to the draft instrument, and the suggestion was made that any treatment of whether those obligations should be mandatory, such as, for example, the draft article 25 obligation to safely stow the goods, should be dealt with on an article-by-article basis in that chapter, rather than in a general provision such as that proposed in article 88 (2). There was support for the suggestion that proposed article 88 (2) should be deleted. However, the contrary view was expressed: that it was more convenient from a drafting perspective to have a general provision like proposed article 88 (2) than to proceed with an article-by-article examination of the shipper's obligations. The suggestion was made that proposed article 88 (2) should be kept in the text in square brackets until the Working Group had examined the obligations of the shipper in chapter 7 and had decided whether it was more convenient to deal with the mandatory obligations of the shipper in an article-by-article approach or by means of a general provision.

Conclusions reached by the Working Group on proposed article 88 (2)

80. After discussion, the Working Group decided that:

- Proposed article 88 (2) should be retained in square brackets for further discussion following an examination of the shipper's obligations in chapter 7 of the draft instrument.

Proposed draft article 88a

Draft article 88a (1)

81. The Working Group next considered proposed draft article 88a (1) (see para. 52 above).

General discussion

82. As a basis for continuation of the discussion at a future session, and subject to possible drafting adjustments in light of the debate, support was expressed for the principle set out in proposed draft article 88a (1), and for its general structure to allow for derogations from the draft instrument under certain conditions. It was observed that proposed draft article 88a (1) had been very delicately drafted, with a view to balancing the need to ensure agreement regarding the derogation in issue with a need to maintain a measure of commercial pragmatism. The view was expressed that this was achieved in proposed article 88a (1) by requiring the volume contract to contain a prominent statement that it derogated from the draft instrument, and that either the volume contract was individually negotiated under paragraph (a) or, under paragraph (b), that it prominently specified the sections of the volume contract containing the derogations. It was thought that, while drafting

adjustments were required, this approach provided an appropriate structure for protecting the parties to the contract without making the conditions of protection so onerous as to be commercially impractical.

83. Some concern was expressed regarding the use of the word "or" between paragraphs (a) and (b) of proposed article 88a (1), since it was thought that an appropriate condition for this derogation was that all such volume contracts would be "individually negotiated". It was suggested that the proposed article could name some indicators to be examined when deciding whether a contract was individually negotiated, such as, for example, the relative bargaining power of the parties. The view was expressed that paragraph (b) should be placed in square brackets, or that it could be deleted entirely in order to require all volume contracts derogating from the draft instrument to be individually negotiated. However, the view was also expressed that this paragraph was of great importance in some jurisdictions, where small shippers were virtually economically compelled to conclude volume contracts, and often on standard terms. Given the danger that these standard terms could pose in terms of hiding derogations from the obligations in the draft instrument, it was thought that paragraph (b) provided practical and indispensable protection for small shippers faced with such standard terms. Another advantage of keeping paragraph (b) in proposed draft article 88a (1) was said to be that, while negotiations regarding the specific obligations of the contract were clearly within the contemplation of paragraph (a) of the provision, paragraph (b) was needed to encompass those situations where the obligations of the contract and the derogations from the draft instrument were accepted and not negotiated, but where the negotiation focused instead on the price to be paid for freight.

84. Other drafting suggestions were raised with respect to proposed article 88a (1). Some doubts were expressed regarding the meaning of the word "prominent", which appeared twice in proposed article 88a (1), and it was thought that the meaning of this term could be clarified. Another suggestion was that proposed article 88a (1) could specifically include in it language that it was "subject to paragraph 5" of proposed article 88a (1).

Conclusions reached by the Working Group on proposed draft article 88a (1)

85. After discussion, the Working Group decided that:

- Proposed draft article 88a (1) would be retained in the text of the draft instrument as a basis for continuation of the discussion at a future session, subject to possible drafting adjustments in light of the above discussion.

Draft article 88a (2) and (3)

86. It was suggested that the requirement that the derogations from the draft instrument should be set forth in the contract of carriage contained in draft article 88a (2) was superfluous, since draft article 88a (1) already mandated that the derogations should be prominent in the contract. However, it was also indicated that the two provisions differed in scope, since draft article 88a (1) required that all the derogations, and the provisions affected by the derogations, should be contained exclusively in the contract of carriage and should be brought to the attention of the other contracting party, while draft article 88a (2) prevented the incorporation of derogations in the contract of carriage by reference.

87. The view was expressed that draft article 88a (3) required further clarification with respect to the relation between the transport document, as defined in draft article 1 (k), and the contract of carriage. It was suggested that the word "is" in draft article 88a (3) should be replaced by the words "does not provide evidence of" or a similar expression to signify that the transport document should not be used to evidence the contract of carriage. It was indicated that a definition of the volume contract should be inserted in the draft instrument. It was also proposed that draft article 88a (3) should be divided into two separate sentences, with the deletion of the connector "but".

88. A concern was expressed that the reference to documents incorporated by reference in the second sentence of draft article 88a (3) could lead to the insertion of derogations to the draft instrument in the incorporated documents. However, it was observed that draft article 88a (2) mandated that all derogations should be contained in the contract of carriage. The view was expressed that draft article 88a (3) should not be inserted in the draft instrument unless it would set conditions for derogations. In response, it was suggested that shippers in certain countries, while being fully aware of the needs of effective contract drafting, felt the need to be protected by a provision along the lines of draft article 88a (3).

Conclusions reached by the Working Group on proposed draft article 88a (2) and (3)

89. After discussion, the Working Group decided that:

- The proposed draft text for article 88a (2) and (3) should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

Draft article 88a (4)

90. It was indicated that draft article 88a (4) was necessary in view of the contractual approach adopted in the definition of the scope of application of the draft instrument. It was further observed that draft article 88a (4) reflected the decision that only those terms of a volume contract regulating shipments falling under the scope of application of the draft instrument would be subject to derogation (see above, para. 52).

91. It was suggested that a reference to draft article 88a (5) should be inserted in draft article 88a (4). It was also suggested that the words "any shipment" should be substituted for the word "shipments" to emphasize that the provision applied to the terms that regulated each of the shipments, effected under a volume contract, that fell under the scope of application of the draft instrument. However, it was also observed that the use of the words "any shipment" could generate misunderstanding since only some terms of the volume contract might be subject to the draft instrument, for example in the case of a volume contract that mixes international and domestic shipments.

Conclusions reached by the Working Group on proposed draft article 88a (4)

92. After discussion, the Working Group decided that:

- The proposed draft text for article 88a (4) would be used as a basis for continuation of the discussion at a future session in light of the considerations expressed above.

Draft article 88a (5)

Effects on other international transport agreements

93. A concern was expressed that under the "network system" for multimodal carriage adopted in the draft instrument, draft article 88a (5) might introduce in the contract of carriage derogations also to international transport agreements not relating to maritime transport, and that this result would conflict with mandatory rules of international law. However, it was pointed out that draft article 8 of the draft instrument was not a conflict of conventions provision, but rather reflected a policy decision to allow certain provisions of other international instruments to apply to land carriage under the draft instrument. In response, it was indicated that only selected provisions of other international agreements would be applicable to the contract of carriage under the draft instrument, and that the proposed text of draft article 88a (5) would allow derogation from these selected provisions in a volume contract. There was general agreement that the point needed further clarification in the text of draft article 88a (5) or of draft article 8.

Relation with other paragraphs of draft article 88a

94. It was suggested that the chapeau of draft article 88a (5) should also contain reference to paragraph 4 of draft article 88a.

Liability for intentional or reckless behaviour

95. It was suggested that the reference in draft article 88a (5)(a) to draft article 19 of the draft instrument should be placed in a separate paragraph and expanded upon to prevent the parties to a volume contract from reducing their liability for any intentional or reckless behaviour.

Non-derogable obligations

96. It was suggested that a reference to draft article 13 (1)(c) should be inserted in draft article 88a (5)(a). It was indicated that the provision in draft article 13 (1)(c) with respect to the cargoworthiness of a ship constituted an important aspect of the duty of seaworthiness, and that therefore the insertion of a reference to this provision would be in line with the rationale of draft article 88a (5)(a). However, the view was also expressed that, unlike the duties in draft article 13 (1)(a) and (b), the duty in draft article 13 (1)(c) was not a public policy and general security issue and that therefore its application should be left to the freedom of the parties.

97. It was indicated that the brackets around the proposed bracketed text in draft article 88a (5)(a) should be removed to clarify that a derogation would not be possible for the articles enumerated in draft article 88a (5)(a) with respect to both the regime and the level of liability. It was also suggested that a reference to the provisions of the draft instrument on jurisdiction and arbitration should be inserted in draft article 88a (5)(b).

98. It was further suggested that the Working Group should give further consideration to the list of non-derogable provisions enumerated in draft article 88a (5), with a view to including in this list other obligations, such as the draft article 35 signature requirement.

Conclusions reached by the Working Group on proposed draft article 88a (5)

99. After discussion, the Working Group decided that:

- The proposed draft text for article 88a (5) would be used as a basis for continuation of the discussion at a future session, bearing in mind the drafting suggestions expressed above on the inclusion of other articles of the draft instrument and to the provisions of the draft instrument on jurisdiction and arbitration;
- The relationship between draft article 88a (5) and the other paragraphs in draft article 88 should be clarified, as well as the interaction of draft article 88a (5) with the provisions of other international transport instruments;
- The possibility of inserting in a separate paragraph of draft article 88a (5) a reference to liability for intentional or reckless behaviour should be the object of further discussion at a future session.

Draft article 88a (6)

100. It was generally felt that the chapeau of paragraph 6 of draft article 88a should refer not only to paragraph 1 but to all other paragraphs of draft article 88a. As a matter of drafting, it was also suggested that the words “any other party” in proposed draft article 88a (6)(b) should be replaced by the words “any party other than the shipper”.

Draft article 88a (6)(b). Protection of third parties.

101. It was observed that the proposed text of draft article 88a (6)(b) represented a compromise position between, on the one hand, excluding the application of contractual derogations to the draft instrument to third parties and, on the other hand, applying these contractual stipulations to third parties without limitation. It was added that this compromise position reflected a delicate balance between the intended goals to protect third parties and to adopt a commercially practical provision. It was suggested that requesting consent to be bound by the terms of a volume contract derogating from the draft instrument would provide sufficient safeguards to third parties. However, the view was also expressed that the consent of third parties to be bound by the terms of a volume contract derogating from the draft instrument was not necessary since third parties such as consignees would wilfully acquire rights under the contract of carriage, and a special regime should be envisaged only in the case of issuance of negotiable transport documents, possibly along the lines of draft article 77 of the draft instrument.

Express consent

102. Concerns were expressed with respect to the meaning of the words “express consent” in proposed draft article 88a (6)(b). The view was expressed that the words “express consent” should not be defined in the draft instrument. It was further

suggested that clarifications were needed to ensure that the consent would be expressed directly and individually by the third party to avoid that the third party would automatically become bound by derogations consented to on its behalf. Broad support was expressed for the notion that consent by third parties should be both express and individual, without being unduly cumbersome for carriers. The need to consult domestic industries regarding this paragraph was expressed during the discussion. However, the view was also expressed that a suitable mechanism should accommodate those cases when numerous individuals would be affected as third parties by the execution of a volume contract, such as when the volume contract that spanned several years was concluded.

103. It was suggested that the second part of proposed draft article 88a (6)(b) needed clarification with respect to the possibility for the third party to consent expressly to be bound by the derogating terms of the volume contract in a transport document. It was indicated that, for example, the handwritten expression of such consent on the front of a transport document should be considered valid for the purposes of proposed draft article 88a (6)(b).

Conclusions reached by the Working Group on proposed draft article 88a (6)

104. After discussion, the Working Group decided that:

- The proposed text for draft article 88a (6) should be used as a basis for continuation of the discussion at a future session in light of the views expressed above;
- The suggestion to insert a reference to paragraphs (1) to (5) of draft article 88a in the chapeau of draft article 88a (6) should be considered in the text to be prepared by the Secretariat.

Draft article 89

105. The Working Group considered the proposed redraft of article 89 (see paragraph 52 above). The Working Group was reminded that it had most recently considered draft article 89 at its eleventh session (see A/CN.9/526, paras. 216-218).

Draft article 89 (1). Carriage of live animals

Freedom of contract approach vs. exemption from liability approach

106. It was recalled that the approach taken in article 5 (5) of the Hamburg Rules was based on exemption from liability and exempted the carrier from liability only for loss, damage or delay in delivery of live animals resulting from any special risks inherent in that kind of carriage. It was also indicated that under the Hamburg Rules the carrier of live animals was subject to all the obligations mandated in that instrument. In contrast, it was observed that draft article 89 (a) was based on a contractual approach, and that under this provision the carrier of live animals was exposed to liability only for reckless actions and omissions and under the additional conditions set forth in the draft provision. Support was expressed for both approaches. It was also indicated that the practical result of the two approaches was similar. Wide support was expressed for the suggestion to complement the reference to the liability of the carrier with a reference to its obligations. In addition, a view

was expressed that the carrier's loss of the right to limit liability was regulated pursuant to draft article 19, independent of draft article 89 (a).

Servants and agents of the carrier and other maritime performing parties

107. A view was expressed that reference to servants or agents of the carrier should be avoided since the need to dispose intentionally of stressed animals arose regularly in this trade. However, the prevailing view was that the bracketed language in draft article 89 (a) should be retained because in practice only servants or agents of the carrier would interact with live animals on board, and that a reference to maritime performing parties should be inserted after the bracketed text. In this line, it was indicated that intentional disposal of stressed animals would be exempt from liability as a reasonable measure to protect property at sea (see draft article 14 (3)(l), A/CN.9/572, para. 64).

Multimodal transport

108. A question was raised as to whether draft article 89(a) would introduce exemption of liability in the non-maritime legs of the carriage in case of multimodal transport. In response it was explained that, while the carriage of live animals was typically multimodal in practice, it was never conducted on the basis of a multimodal contract of carriage and that therefore the non-maritime leg of the carriage was subject to domestic law.

Conclusions reached by the Working Group on proposed draft article 89

109. After discussion, the Working Group decided that:

- The proposed text of draft article 89, including the bracketed text and the additional reference to the maritime performing parties, should be retained for continuation of the discussion at a future session in light of the considerations expressed above;
- A reference to the obligations of the carrier should be inserted in the chapeau of draft article 89;
- The substance of draft article 89 (b) was generally acceptable.

Jurisdiction—Chapter 15

110. The Working Group was reminded that it had considered the provisions of chapter 15 of the draft instrument on jurisdiction at its fourteenth session and that it had agreed to include in the draft instrument a chapter on jurisdiction (see A/CN.9/572, paras. 110-150). Based on those deliberations, and taking into account the decisions made by the Working Group during that session, revised text was proposed for the provisions of chapter 15. With a view to considering both this revised text and certain policy questions that had arisen during intersessional discussions (see A/CN.9/572, para. 166), it was agreed by the Working Group that consideration of these matters should take place by grouping certain of the provisions together on the basis of a list of key issues as set out in the following headings and paragraphs.

Issue 1: Connecting factors—Draft article 72, proposed new definitions, proposed new article 72 bis

Draft article 72

111. The Working Group considered the following text of draft article 72 proposed by a number of delegations in accordance with the decisions taken by the Working Group at its fourteenth session (see A/CN.9/572, paras. 113-134):

> "Article 72.
>
> "In judicial proceedings relating to carriage of goods under this instrument the [cargo claimant], at its option, may institute an action in a court in a Contracting State which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
>
> "(a) The [principal place of business] or, in the absence thereof, the habitual residence of the defendant [or domicile]; or
>
> … [former para. (b) deleted in accordance with decision at A/CN.9/572, para. 126] …
>
> "(b) The [actual/contractual] place of receipt or the [actual/contractual] place of delivery; or
>
> "[(c) the port where the goods are initially loaded on an ocean vessel; or
>
> "(d) the port where the goods are finally discharged from an ocean vessel; or]
>
> "[(e) Any additional place designated for that purpose in the transport document or electronic record.]"

Chapeau of draft article 72

112. While the Working Group was reminded that some held the view that jurisdiction provisions should not be included in the draft instrument, the general view was that the decision taken at the fourteenth session to include a chapter on jurisdiction should be maintained (see A/CN.9/572, para. 113). There was general agreement in the Working Group on the substance of the chapeau in draft article 72. However, there was support for the view that care should be taken in future discussions to ensure that draft article 72 did not restrict the ability of carriers to make claims against the cargo interests. In addition, the Working Group was invited to consider to what extent the jurisdiction rules in chapter 15 should apply to agreements that were excluded from the scope of application of the draft instrument, particularly in light of draft article 5 as set forth in A/CN.9/WG.III/WP.44, through which third parties to contracts excluded from the scope of application of the draft instrument nonetheless received protection under its provisions.

113. There was an exchange of views regarding the appropriate person to institute an action under draft article 72, given the decision in the previous session of the Working Group that this article should be limited to actions by the cargo claimant against the contracting carrier (see A/CN.9/572, para. 117). Some held the view that the "shipper or other cargo claimant" were the appropriate persons, while others felt that the "shipper, consignee or other cargo interest" or "holder of a transport

document" were more appropriate, and still others were dissatisfied with the lack of precision of those terms. There was support for the proposal that the word "plaintiff" should be reinserted as the claimant in the chapeau, and that the insertion of the words "against the carrier" after the phrase "judicial proceedings" would avoid concerns regarding the carrier pre-empting the choice of jurisdiction by taking an action for declaration of non-liability (see A/CN.9/572, para. 118). One view was expressed that this might not achieve the purpose because an action for declaratory relief was not an action "against the carrier".

Conclusions reached by the Working Group regarding the chapeau of draft article 72

114. After discussion, the Working Group decided that:

- The opening phrase of the provision should be amended to read "In judicial proceedings against the carrier relating to carriage of goods under this instrument, the plaintiff, at its option";
- Consideration of the views of the Working Group as outlined in the paragraphs above should be taken into account in future adjustments to the chapeau.

Draft paragraph 72 (a)

115. It was suggested that the language in draft paragraph 72 (a) presented a profusion of different and confusing terms, and that given the short time for commencing an action, clarity was of the essence in the rules for choosing jurisdiction. It was suggested that text drawn from the Brussels I European Regulation (Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) presented a suitable and well-tested alternative. Despite some doubts raised concerning the recognition of the concept of "domicile" in certain jurisdictions, support was expressed in principle for a proposal made to simplify the text by deleting the language in the paragraph in favour of "the domicile of the defendant", and by adding a definition of "domicile" to the definition section of the draft instrument as follows:

> "'Domicile' means the place where: (a) a company or other legal person has its statutory seat or central administration or principal place of business, and (b) a natural person has its habitual residence."

Conclusions reached by the Working Group regarding the draft paragraph 72 (a)

116. After discussion, the Working Group decided that:

- The text of draft paragraph 72 (a) should be revised as indicated in the paragraph above.

Draft paragraph 72 (b) and proposed new definitions

117. In connection with draft paragraph 72 (b), the following definitions were proposed for the consideration of the Working Group:

> "Article 1 (xx)
>
> "[Unless otherwise provided in the Instrument] "the time of receipt" and "the place of the receipt" means the time and the place agreed to in the contract of

carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods."

"Article 1 (xxx)

"[Unless otherwise provided in the Instrument,] "the time of delivery" and "the place of delivery" means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage."

118. There was continued support in the Working Group for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction (see A/CN.9/572, para. 127). It was noted that the definitions in the above paragraphs could assist in the clarification of this draft paragraph. It was suggested that these definitions could be unnecessary given draft paragraphs 7 (2), (3) and (4) in the draft instrument, however some doubt was expressed in this regard as the purpose of draft article 7 was to define the period of responsibility for the carrier, and it was thought to be insufficient for the purposes of draft article 72.

119. With regard to the issue of whether it was more appropriate to refer to the actual or the contractual place of receipt and delivery, some doubts were expressed regarding the actual places, since, for example, the actual place of delivery could be a port of refuge. It was thought that the contractual place of receipt and the contractual place of delivery were preferable in terms of predictability.

Conclusions reached by the Working Group regarding the draft paragraph 72 (b)

120. After discussion, the Working Group decided that:

- The definitions proposed should be introduced in the draft instrument for future discussion; and
- The text of draft paragraph 72 (b) should refer to the contractual place of receipt and the contractual place of delivery.

Draft paragraphs 72 (c) and (d)

121. The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction (see A/CN.9/572, para. 128). In addition to the previous discussion in the last session of the Working Group, it was suggested that the inclusion of ports would be practical for a maritime plus convention that may be in need of a logical place to consolidate multiple actions. Practical factors in support of this proposal included that the ports were often the only place that the cargo interest could sue both the contracting carrier and the performing party, and that the witnesses and documents

were also most likely to be concentrated in the ports, where the damage was most likely to occur. However, another view suggested that protection from a multiplicity of claims could instead be achieved by inserting an exclusive choice of forum clause into the contract of carriage. It was further thought that in order to be consistent throughout the draft instrument, continued reliance on the contractual approach would suggest that only the place of receipt and delivery were relevant. A further suggestion was made that if ports were included in these subparagraphs, the reference should be to contractual ports.

Conclusions reached by the Working Group regarding draft paragraph 72 (c) and (d)

122. After discussion, the Working Group decided that:

- The text of draft paragraph 72 (c) and (d) should be retained in square brackets in the draft instrument.

Draft paragraph 72 (e)

123. The view was expressed that draft paragraph 72 (e) setting out a designated place in the transport document as an additional means for choosing jurisdiction was closely related to the issue of exclusive jurisdiction clauses (see below paras. 156 to 168), and that a decision on the latter would necessarily affect the former. However, there was also support for the suggestion that the Working Group could decide on whether or not to include draft paragraph 72 (e) independently of its decision regarding an exclusive jurisdiction clause. In this vein, it was noted that the inclusion of draft paragraph 72 (e) should be an acceptable option as a possible forum, since it was simply one of the choices on the menu of options presented to the cargo claimant by draft article 72. An additional advantage was thought to be that since the jurisdiction designated would be a standard choice in the transport documents, it could present a means for reducing a multiplicity of possible jurisdictions that a carrier could face. A further suggestion was raised that the designated place in the draft paragraph could be limited to Contracting States. Support was expressed for draft paragraph 72 (e), provided its language did not attempt to override the menu of other choices of jurisdiction available in draft article 72, and provided that it purported to bind only parties to the agreement. A different view was expressed, however, that such a clause should also be valid for third parties.

Conclusions reached by the Working Group regarding the draft paragraph 72 (e)

124. After discussion, the Working Group agreed that:

- The square brackets around draft paragraph 72 (e) should be removed;
- Consideration could be given to replacing the word “designated” with “agreed upon” or similar language;
- Consideration could be given to limiting the operation of the provision to places in Contracting States;
- Matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

Draft article 72 bis

125. The Working Group considered the following text of draft article 72 bis proposed in accordance with the decision taken by the Working Group at its fourteenth session to have a separate provision in the draft instrument on the connecting factors necessary to establish jurisdiction in actions against maritime performing parties (see A/CN.9/572, para. 117):

> "Article 72 bis
>
> "In judicial proceedings by the shipper or other cargo interest against the maritime performing party relating to carriage of goods under this instrument, the claimant, at its option, may institute an action in a court in a State party which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
>
> (a) The principal place of business or [, in the absence thereof,] the habitual/permanent] residence of the defendant; or
>
> (b) The place where the goods are [initially] received by the maritime performing party; or
>
> (c) The place where the goods are [ultimately] delivered by the maritime performing party".

General discussion

126. It was suggested that the Secretariat should prepare a revised version of this provision bearing in mind the comments made to the similar language contained in draft article 72 (see above paras. 111 to 124).

127. However, it was further suggested that some of the connecting factors contained in draft article 72 bis would not apply to maritime performing parties. In particular, it was indicated that reference to contractual relationships would not be appropriate in the case of maritime performing parties, for whom the contract of carriage had less relevance. It was also indicated that draft paragraphs (b) and (c) regarding the place of receipt and delivery of the goods would not apply to those maritime performing parties who performed duties exclusively on the ship.

Conclusions reached by the Working Group

128. After discussion, the Working Group decided that:

- The Secretariat should be requested to make adjustments to the text of draft article 72 bis based on the views outlined in the above paragraphs.

Issue 2: Provisions relating to arrest—Draft articles 73 and 74

Draft article 73

129. The Working Group discussed the text of draft article 73 as contained in A/CN.9/WG.III/WP.32. The Working Group was reminded that at its fourteenth session it had decided to place the text of draft article 73 between square brackets pending further evaluation of its relationship with the International Convention

Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Arrest of Ships, 1999 (the "Arrest Conventions") (see A/CN.9/572, para. 139).

130. The following alternative text of draft article 73 was also offered for the consideration of the Working Group:

> "Article 73
>
> "Nothing in this Chapter shall affect jurisdiction with regard to arrest [pursuant to applicable rules of the law of the state or of international law]".

General discussion

131. The Working Group agreed in principle to avoid any conflict between the draft instrument and the Arrest Conventions. It was indicated that the Arrest Conventions provided uniform rules to a number of State parties and represented a delicate balance of various and complex interests.

132. A large number of delegations expressed a preference for the alternative draft text, set out above in paragraph 130, since it appeared to better and more clearly achieve the goal of avoiding any conflict with the Arrest Conventions, particularly given the number of complex issues and potential areas of conflict that could arise.

133. The view was also expressed that avoidance of a conflict with the Arrest Conventions should be considered not only in a jurisdictional sense, but also in relation to any determination on the merits of the claim for the arrest. In this respect, it was suggested that it might be possible to broaden the avoidance of conflicts beyond jurisdiction conflicts by substituting the word "chapter" with "instrument". The view was also expressed that due attention should be paid to coordinating the draft provision with certain existing provisions regarding jurisdiction on actions relating to liability arising from the use or operation of a ship, such as article 7 of the European Council Regulation (EC) No. 44/2001.

Reference to national legislation

134. A number of delegations expressed preference for removing the brackets in the alternative text of draft article 73, thus referring both to national and international legislation. It was stated that States which did not adopt any international instrument relating to arrest had developed domestic rules on arrest, and that the draft instrument should also avoid interference with these domestic rules.

135. However, views were also expressed against referring to domestic legislation in draft article 73. It was suggested that the rationale for this provision should be to avoid conflicts between international instruments only. It was further stated that reference to domestic law could be interpreted as creating new domestic jurisdiction on arrest with unforeseeable consequences. There was some support for the suggestion that a solution to this problem could be found by adjusting the phrase in issue to read "pursuant to applicable rules of law".

Conclusions reached by the Working Group

136. After discussion, the Working Group decided that:

- Draft article 73 should be maintained in the draft instrument;

- The alternative text of draft article 73 should replace the text contained in A/CN.9/WG.III/WP.32;
- The Secretariat should be requested to clarify the text of draft article 73 with regard to claims underlying the arrest based on the views outlined in the above paragraphs;
- The words "[of the law of the state or]" should be kept in brackets for further consideration.

Draft article 74

137. The Working Group was reminded that it had most recently considered draft article 74 at its fourteenth session (see A/CN.9/572, paras. 140-141). The Working Group considered the text of draft article 74, Variant A, as contained in document A/CN.9/WG.III/WP.32.

General discussion

138. It was suggested that, especially for the benefit of clarity in some languages, the words "of courts" should be inserted after the words "the jurisdiction". It was further suggested that clarification was needed as to whether draft article 74 was intended to cover measures available under certain national laws (e.g. "référé-provision") the use of which might not always coextend to that of "protective" measure. However, it was also felt that such issues were better left to national legislation.

139. With a view to clarifying the notion of "provisional or protective measures", it was suggested that a paragraph 2 should be inserted in draft article 74, containing a definition of provisional or protective measures, with the following text:

"[2. For the purpose of this article 'provisional or protective measures' means:

"(a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or

"(b) An order securing the amount in dispute; or

"(c) An order appointing a receiver; or

"(d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

"(e) An interim injunction or other interim order.]"

140. While support was expressed for the insertion of paragraph 2 in draft article 74, the view was also expressed that any attempt to define "provisional or protective measures" might entail numerous problems while not contributing to the clarity of the draft instrument. The Working Group was reminded of the work currently under way in UNCITRAL Working Group II on arbitration to define provisional measures.

141. It was suggested that draft article 74 should be merged with draft article 73 to clarify that the former provision referred only to protective measures of the shipper

against the carrier for claims related to liability. However, it was also indicated that the first and the second sentence of draft article 74 related to different matters, the second sentence being intended to relate strictly to arrest of ships, and that the second sentence in draft article 74 should therefore be kept in a separate article. It was further suggested that the words "This article does not constitute" should be corrected by replacing them with the words "Nothing in chapter 15 constitutes".

Conclusions reached by the Working Group

142. After discussion, the Working Group decided that:

- The text of the second sentence of draft article 74 should be corrected by replacing the phrase "This article does not constitute" with the phrase "Nothing in chapter 15 constitutes";
- The text of draft article 74 should be retained for further consideration in light of the views expressed above, with particular regard to bringing the first sentence of the provision in line with draft article 73;
- The above-mentioned proposal for a paragraph 2 should be inserted in draft article 74 in square brackets for continuation of the discussion at a future session.

Issue 3: *Concursus*, suits *in solidum*, *litis consortium* and *lis pendens* (proposed new articles 74 bis, 74 ter and draft article 75)

Proposal for the insertion of proposed new article 74 bis. *Concursus*.

143. The Working Group was reminded that it had most recently considered the issue of *concursus*, or the concentration of multiple suits in a single forum, at its fourteenth session (see A/CN.9/572, paras. 120-121). It was reiterated that in the case of major incidents involving a high number of cargo claims, the carrier could be potentially sued in numerous jurisdictions. It was further indicated that these jurisdictions could be geographically very dispersed due to the interplay of the door-to-door regime of the draft instrument and the connecting factors to establish jurisdiction enumerated in draft article 72. Based on the consideration of this issue at the fourteenth session of the Working Group, it was therefore suggested that a provision on concursus should be introduced in the draft instrument to provide for removal of actions to the jurisdiction where the first action had been instituted. The following draft text was suggested for consideration by the Working Group:

> "Article 74 bis
>
> "If an action has been instituted under this instrument by a cargo claimant in a place listed in articles 72 and 72 bis, any subsequent action under this instrument relating to the same occurrence shall at the petition of the defendant be moved to the place where the first action was instituted."

General discussion

144. It was indicated that under the suggested provision, removal of actions could be invoked in any incident involving more than one claim, and while there was some sympathy for the problem in the case of multiple claims, it was thought that this threshold was too low. It was also suggested that the word "occurrence", while

common in the field of collision law, lacked clarity in this context. It was further indicated that the draft provision left a number of issues open, such as, for instance, the definition of "first action", and the interplay between the removal of actions and actions by the carrier for declarations of non-liability and counter-claims. It was suggested that the problem could be rendered less troublesome by allowing the adoption of an exclusive jurisdiction clause by the parties. The view was also expressed that the suggested mechanism for removal of actions could add to the litigation costs of the defendant since it could only be triggered by the first action, while reversing the mechanism to request subsequent plaintiffs to sue in the forum nominated by the defendant would be preferable.

145. It was further suggested that *concursus* of actions was a general problem of litigation dealt with in all national legislation, whose rules the draft instrument should respect. It was suggested that the obligation for courts to remove subsequent actions was worded too strongly, and could conflict with a number of principles relating to judicial discretion. It was further indicated that, given that the first action would govern subsequent actions under proposed new article 74 bis, it could be open to forum-shopping and similar tactical jurisdictional choices by the carrier. In addition, it was pointed out that the matter had been discussed in other international forums without reaching a consensus, and that even with a well-drafted provision, an international legal scheme for the removal of actions between States would still be needed.

146. After discussion, the Working Group decided that:

- A provision on *concursus* of actions should not be inserted in the draft instrument.

Proposal for the insertion of proposed new article 74 ter. Suits *in solidum*. *Litis consortium*.

147. The Working Group was reminded that it had considered the issue of whether the draft instrument should contain a provision on actions brought by cargo interests *in solidum* against the carrier and the maritime performing party at its fourteenth session (see A/CN.9/572, para. 149), and that it had also discussed the benefits of preventing the carrier from establishing jurisdiction by means of an action for declaration of non-liability (see A/CN.9/572, para. 118). Based on that discussion, the following draft text was proposed for consideration by the Working Group:

"Article 74 ter

"[1. If the cargo claimant institutes actions *in solidum* against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 72 bis, where actions can be instituted against the maritime performing party.]

"2. If the carrier or maritime performing party institutes an action under this instrument against the shipper or other cargo interest, then the claimant, at the petition of the defendant, must remove the action to one of the places referred to in articles 72 or 72 bis, at the choice of the defendant."

New article 74 ter(1): Actions brought in solidum against the carrier and the maritime performing party

148. It was indicated that the draft instrument should not hinder the possibility of bringing suit against the carrier and the maritime performing party in the same forum, since this possibility might expedite the resolution of the dispute for the benefit of all parties involved. While the proposed text resolved the problem that the carrier and the maritime performing party may not have a common jurisdiction under draft articles 72 and 72 bis of the draft instrument by resorting to the places set out in proposed new article 72 bis, it was suggested that this matter could also be addressed by the introduction of ports as one of the connecting factors to establish jurisdiction. However, it was also felt that reference to ports as connecting factors to establish jurisdiction might not be fully in line with the "maritime plus" nature of the draft instrument (see, further, paras. 121 and 122 above). It was further suggested that the words "*in solidum*" should be deleted to extend the application of the provision to all actions brought jointly against the contracting carrier and the maritime performing party.

Conclusions reached by the Working Group

149. After discussion, the Working Group decided that:

- The proposed text for draft article 74 ter(1) should be inserted between square brackets in the draft instrument for continuation of the discussion at a future session.

New article 74 ter(2): Declaratory actions brought by the carrier and the maritime performing party

150. It was indicated that the proposed text for draft article 74 ter(2) was intended to prevent the carrier from seeking declaratory relief to circumvent the connecting factors used in the draft instrument to establish jurisdiction. However, it was also suggested that the provision should be limited to carrier actions for declaratory relief and that it should not prevent the carrier from instituting actions other than for declaratory relief, such as actions for the payment of freight, in the appropriate jurisdiction of its choosing. It was further suggested that the reference to the maritime performing party in draft article 74 ter(2) should be deleted, but the contrary view was also held. In addition, it was suggested that the proposed text should be clarified to indicate that subsequent actions should be removed exclusively to a jurisdiction among those indicated by the connecting factors enumerated in draft article 72.

151. The view was again expressed that, in absence of an established regime for the removal of actions between States, the proposed text for draft article 74 ter(2) might require additional clarification. In this context, it was indicated that the proposed text used language inspired, to some extent, from article 21 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (the "Hamburg Rules"). It was suggested that clarification was needed with respect to the possibility for the carrier to bring an action for declaratory relief in one of the jurisdictions established by the connecting factors under draft article 72, and for the cargo claimant to demand removal of such action to another of these jurisdictions.

Conclusions reached by the Working Group

152. After discussion, the Working Group decided that:

- The proposed text for draft article 74 ter (2) should be inserted in the draft instrument for further consideration in light of the opinions expressed above, in particular, limiting its application to declaratory relief sought by the carrier or the maritime performing party.

Draft article 75. *Lis pendens*.

153. The Working Group was reminded that it had most recently considered draft article 75 at its fourteenth session (see A/CN.9/572, paras. 142-144). The Working Group considered the text of draft article 75, Variant A, as contained in document A/CN.9/WG.III/WP.32.

General discussion

154. As discussed at the fourteenth session of the Working Group, it was suggested that draft article 75 of the draft instrument should be deleted, since a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter and the existence of diverse approaches to *lis pendens* in the various jurisdictions. It was widely felt that the matter was better left to national laws, despite the desirability of a uniform provision regarding that issue.

155. After discussion, the Working Group decided that:

- Draft article 75 should be deleted from the draft instrument.

Issue 4: Exclusive jurisdiction clauses

General discussion

156. The Working Group was reminded that it had briefly considered at its fourteenth session (see A/CN.9/572, paras. 130-133) the issue of whether the draft instrument should allow for parties to agree in the contract of carriage to exclusive jurisdiction clauses. It was also recalled that there had been an exchange of views with respect to the relationship between exclusive jurisdiction clauses and draft paragraph 72 (e) regarding the designation in the transport document of a place of jurisdiction as an additional choice of forum (see above, paras. 123 to 124).

Should the draft instrument allow for exclusive jurisdiction clauses?

157. The Working Group considered the general question of whether the draft instrument should allow for parties to the contract of carriage to agree to an exclusive jurisdiction clause. There was strong support for the suggestion that the draft instrument should indeed allow for exclusive jurisdiction clauses, particularly if the possibility for the abuse of such clauses was tempered by addition of certain conditions that would have to be fulfilled in order for such clauses to be valid. The view was also expressed that exclusive jurisdiction clauses should be limited to cases of derogation by certain volume contracts from the provisions of the draft instrument pursuant to proposed new article 88a (see above, para. 52).

158. A smaller number of delegations expressed the strongly held view that the draft instrument should not allow parties to a contract of carriage to agree to

exclusive jurisdiction clauses. It was suggested that it would be difficult to support an exclusive jurisdiction clause that might allow the carrier in some situations to dictate jurisdiction, particularly where a remote geographic location and the costs of litigating disputes could put cargo interests at a disadvantage. Further, it was noted that this issue was of such importance in some jurisdictions that there were domestic provisions in place to override the operation of exclusive jurisdiction clauses.

159. In response to these concerns, it was noted that there were already several conventions in force, such as the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, that allow for exclusive jurisdiction, often without any conditions attached to prevent abuses, and it was suggested that to exclude exclusive jurisdiction clauses from the draft instrument would be unusual in the modern context. While it was admitted that there was a danger that exclusive jurisdiction clauses could pose a danger in adhesion contracts, it was submitted that when contracts were freely negotiated there were strong commercial reasons for making the choice of court provisions exclusive. It was suggested that exclusive jurisdiction clauses were quite common in the commercial context, since they provided a means to increase predictability and to reduce overall costs for the parties. Further, it was suggested that attaching conditions to prevent abuse would eliminate the possibility of surprise, which, it was submitted, was the key concern with respect to exclusive jurisdiction clauses in a commercial context. Additional advantages of providing for exclusive jurisdiction clauses in the draft instrument were said to be a potential reduction of the number of possible jurisdictions in the case of multiple suits, particularly in the absence of concursus provisions, and a reduction in the risk of forum-shopping. It was further suggested that the possibility of having to litigate a claim in a remote location was simply a known risk for parties engaged in the world of international trade.

160. A note of caution was raised regarding the possibility of overstating the importance of including or excluding exclusive jurisdiction clauses in the draft instrument. It was suggested that small claims are usually handled locally, regardless of jurisdiction clauses, and that larger claims are often dealt with on both the cargo and carrier side on a non-local basis by insurers. Of those larger claims, it was suggested that most settle, often to avoid the potentially huge litigation costs involved in pursuing a claim. While some doubts were raised regarding this proposition, there was support for the view that only a small proportion of shipments of goods result in claims, and that only a small proportion of these claims are actually litigated.

Conditions for the validity of exclusive jurisdiction clauses

161. It was suggested that provisions could be included in the draft instrument requiring that certain conditions be fulfilled prior to the valid exercise of an exclusive jurisdiction clause. The conditions suggested were as follows:

- The exclusive jurisdiction clause should contain the name and location of the chosen court;
- The chosen court would have to be in a Contracting State;
- The agreement would be required to indicate the exact name and address of the parties, so that the defendant could be notified of the proceedings against it; and

- The agreement would be required to state that the jurisdiction of the chosen court would be exclusive.

162. An additional condition suggested for inclusion in this regard was that the contract of carriage should be individually or mutually negotiated, such that it would be distinguishable from an adhesion contract. Another view was that it would be more accurate for the requirement to state that the contract must be mutually agreed, rather than mutually negotiated. Further, it was suggested that the other requirements for derogation from the draft instrument set out under proposed new article 88a should also be fulfilled in order to allow for the valid operation of exclusive jurisdiction clauses (see above, para. 52).

163. Views were expressed regarding the suggested conditions, which were, in general, favourably viewed. It was suggested that the requirement that an exclusive jurisdiction clause be expressly agreed might negate the perceived need to limit their validity to proposed new article 88a volume contracts. Further, it was noted that the name and address of the carrier were already required in the contract particulars pursuant to draft article 34 of the draft instrument, and that including that information as necessary for the validity of an exclusive jurisdiction clause would provide an additional incentive for the carrier to comply. However, concern was raised that this requirement could be seen as a hidden "identity of carrier" clause, which was said not to be upheld in many jurisdictions. It was suggested that this requirement could be limited to the name and address of the carrier.

Should exclusive jurisdiction clauses be enforceable against third parties?

164. The view was expressed that, in a commercial context such as that governed by the draft instrument, providing for the application of exclusive jurisdiction clauses to third parties would be justifiable in that it would greatly assist predictability for the parties to the contract, and that the imposition of certain conditions would protect the third party from suffering any hardship. In this vein, it was suggested that the following conditions were appropriate:

- The parties to the initial contract of carriage should expressly agree that they would extend the exclusive jurisdiction clause to the third party;
- The contract of carriage should meet the requirements of proposed new article 88a;
- The third party to be bound should have written or electronic notice of the place where the action could be brought;
- The forum should be one of those specified in draft article 72; and
- The place selected should be in a Contracting State.

165. The view was expressed that the application of exclusive jurisdiction clauses to third parties should not be limited to the context of proposed new article 88a volume contracts, but that the principle should extend to all contracts of carriage. In this connection, it was pointed out that, in order to be effective, an exclusive jurisdiction clause must bind third parties. It was thought that in situations where it was found acceptable for jurisdiction to be exclusive, it should be exclusive for all purposes under the contract of carriage, regardless of who is claiming the benefit under the contract. It was suggested that the third-party consignee is actually a part

of the transaction due to the contract of sale, pursuant to which the consignee is free to negotiate conditions favourable to it, and that to argue that such a party is in need of protection is somewhat artificial. The suggestion was made that thought could be given to a provision along the lines of draft article 77 of the draft instrument, which concerns the application of arbitration provisions to the holder of a negotiable transport document or a negotiable electronic transport record.

166. The contrary view was expressed, that exclusive jurisdiction clauses should never apply to third parties, since they were not parties to the contract. Concern was raised that the application of exclusive jurisdiction clauses to third parties would unfairly take away their right to choose the forum from the options in draft article 72. It was observed that those opposed to exclusive jurisdiction clauses were generally opposed to their application to third parties, and that those in favour of their inclusion in the draft instrument were also generally in favour of extending them to third parties, perhaps with additional conditions. It was also suggested that the discussion in this regard could be somewhat more nuanced, since depending on what type of transport document was issued, a consignee could in some jurisdictions actually be bound by the contract of carriage.

167. It was suggested that the conditions proposed could provide for the building of a compromise position between those firmly opposed to and those firmly in favour of the application of exclusive jurisdiction clauses to third parties. Some reservations were raised with respect to the conditions, such as the timing of the notice, and of its effectiveness if it were included in a bill of lading that arrived after the cargo. In response to this latter point, it was observed that the consignee had no obligation to accept the cargo. In addition, it was said that written notice was both difficult to define and, if it were given in the bill of lading, it could cause difficulties when the bill of lading was repeatedly transferred, such that the ultimate holder might be forced to litigate in a location far away. Further it was suggested that the notice to the third party should be required to be given by the shipper.

Conclusions reached by the Working Group regarding exclusive jurisdiction clauses

168. After discussion, the Working Group decided that:

- Further consideration should be given to the issue of whether exclusive jurisdiction clauses should be allowed pursuant to the draft instrument, and whether they should apply with respect to third parties;
- The attachment of certain conditions to protect parties and third parties from hardship in the face of exclusive jurisdiction clauses could assist the Working Group in coming to a consensus on this issue;
- The Secretariat was requested to prepare draft text on exclusive jurisdiction clauses, bearing in mind the discussion and concerns set out in paragraphs 156 to 167 above.

Issue 5: Agreement on jurisdiction following a dispute—Draft article 75 bis

Draft article 75 bis

169. The Working Group next considered the text of draft article 75 bis as slightly modified from A/CN.9/WG.III/WP.32 following discussion at its fourteenth session

(see A/CN.9/572, para. 150) by the addition of square brackets around the phrase "[after a claim under the contract of carriage has arisen,]".

170. Support was expressed for the principle in this provision. There was support for the suggestion that the word "claim" should be deleted, and that the following phrase should be added after the word "parties": "to the dispute under the contract of carriage after the dispute has arisen," in order to ensure that it was clear that any agreement on jurisdiction should not be reached until after both parties had notice of the dispute. Further, it was observed that the word "agreement" in draft article 75 bis covered both express and implied agreement. It was suggested that this provision should be revisited once the Working Group has made its decision regarding exclusive jurisdiction clauses.

Conclusions reached by the Working Group regarding the draft article 75 bis

171. After discussion, the Working Group decided that:

- A provision along the lines of draft article 75 bis should be included in the draft instrument;
- The Secretariat should consider whether the text of draft article 75 bis should modified by deleting the word "claim", and by adding after the word "parties" the following phrase: "to the dispute under the contract of carriage after the dispute has arisen".

Issue 6: Recognition and enforcement

General discussion

172. It was suggested that, given the decision of the Working Group to include in the draft instrument provisions with respect to jurisdiction, the inclusion of provisions on recognition and enforcement would be desirable in order to reinforce the likelihood that resort could predictably be had to the jurisdiction provisions. While there was support for this view, it was suggested that experience had shown in the context of other negotiations on international instruments that agreement was difficult to reach with respect to provisions on recognition and enforcement. There was support for the concern expressed that reaching consensus on provisions on recognition and enforcement in the context of the draft instrument would require a great deal of time, and that it would further encumber the draft instrument, which was already regulating matters in a large number of areas. In addition, it was said that provisions on recognition and enforcement were not considered a commercial necessity.

173. Another view was expressed that the cargo claimant, in choosing its jurisdiction pursuant to draft article 72, would be aware of the rules on recognition and enforcement applicable in the various possible jurisdictions, and could decide accordingly on which jurisdiction to choose for the greatest likelihood of enforcement. It was also observed that other considerations should be taken into account before a decision is made on whether to include provisions on recognition and enforcement, such as whether or not the Working Group would include exclusive jurisdiction clauses, which could have an impact on recognition and enforcement provisions, and the pragmatic decision that the cargo claimant would often make to commence action in the jurisdiction where the defendant has

sufficient assets. However, the view was expressed that this latter point was less relevant, since assets could be moved quickly from one jurisdiction to the next. Other concerns were expressed that if a rule with respect to recognition and enforcement were introduced with respect to jurisdiction, a similar rule would likely be necessary regarding arbitration, and that this could touch upon sensitive issues in the context of international arbitration rules.

174. It was also suggested that negotiation of rules on recognition and enforcement could be easier in the context of the draft instrument, since it dealt only with the narrow topic of "maritime plus" carriage of goods, rather than trying to find consensus on rules to cover the entire range of commercial matters, which had proven so difficult in other negotiations. In this context, it was suggested that provisions on enforcement in numerous other conventions already in existence with respect to maritime law, such as the Athens Protocol of 2002 (to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974), might be instructive to the Working Group.

Conclusions reached by the Working Group regarding recognition and enforcement

175. After discussion, the Working Group decided that:

- While no decision had yet been made regarding whether or not to include in the draft instrument provisions on recognition and enforcement, the Working Group would examine any text proposed in order to assist it in making that decision.

Arbitration—Chapter 16

General discussion

176. The Working Group next considered draft chapter 16. The Working Group was reminded that it had most recently considered draft chapter 16 at its fourteenth session (see A/CN.9/572, paras. 151-157). The discussion at the fifteenth session was conducted on the basis of a note by the Secretariat (A/CN.9/WG.III/WP.45).

177. At its fourteenth session, the Working Group held a general discussion on the desirability of provisions on arbitration in the draft instrument. The view was expressed that parties should have complete freedom to conclude arbitration clauses and to rely on their application. However, concern was also expressed that recourse to arbitration might hinder the application of the rules of the draft instrument on exclusive jurisdiction. It was further suggested that the regime of the draft instrument should be in line with common trade practices in this field. It was also pointed out that the draft instrument should be in line with arbitration-related UNCITRAL instruments.

178. With a view to reconciling the above views, a proposal was made for a possible solution that would entail the deletion of draft chapter 16 on arbitration of the draft instrument, the application of chapter 15 on jurisdiction of the draft instrument to liner trade only, and the insertion in the draft instrument of a provision allowing the parties to refer any dispute to arbitration, as well as to agree on any jurisdiction, but only after the dispute had arisen. It was observed that this approach would preserve the existing practice in non-liner trade where recourse to arbitration

under charter parties and charter party bills of lading was not uncommon, ensure uniformity of rules, and favour freedom of contract while preventing possible circumvention of jurisdiction rules under the draft instrument. It was further observed that, while in principle under this approach arbitration clauses contained in bills of lading would be unenforceable, specific exemptions should be foreseen for special liner trades.

Conclusions reached by the Working Group on draft chapter 16

179. After discussion, the Working Group decided that:

- A new draft of chapter 16 based on the suggestion expressed above should be submitted for the consideration of the Working Group at a future session.

Revised provisions on electronic commerce

180. The Working Group heard that a joint meeting of experts of Working Group III on transport law and of Working Group IV on electronic commerce was held in February 2005. Following those discussions, the joint meeting of experts suggested that the provisions of the draft instrument with respect to electronic commerce, as they appeared in A/CN.9/WG.III.WP.32, should be slightly revised. The Working Group considered those proposed revised provisions on electronic commerce as they appeared in A/CN.9/WG.III.WP.47.

Definitions (draft article 1)

Draft article 1 (f) "Holder"

181. Concerns were expressed with respect to the identity of the "holder" in draft article 1 (f), and that the definition seemed to include parties who were not always holders. The view was expressed that any drafting difficulties could be resolved, but that the intention of the definition was that subparagraph (i) dealt with paper documents and covered all parties, while subparagraph (ii) concerned electronic transport records, where the issue was not physical possession, but control, and which could include the shipper and the consignee. It was observed that general drafting improvements could be made to subparagraph (ii), such as the inclusion of certain holders such as the documentary shipper in draft article 31. It was also suggested that draft article 1 (f)(ii) should specifically indicate to whom the electronic transport record would be transferable.

Draft article 1 (o) "Electronic transport record"

182. Support was expressed in the Working Group for the definition of "electronic transport record". A suggestion was made that the last paragraph could be simplified.

Draft article 1 (p) "Negotiable electronic transport record"

183. In response to a question, it was clarified that the phrase "consigned to the order of the shipper or to the order of the consignee" in subparagraph (i) was intended to include the situation where goods were consigned to a named party. A

drafting suggestion was made to substitute the phrase "including, but not limited to" for the phrase "that indicates" in subparagraph (i).

Draft article 1 (q) "Non-negotiable electronic transport record" and draft article 1(r) "Contract particulars"

184. The Working Group had no comment on draft articles 1 (q) or (r).

Conclusions reached by the Working Group on the definitions in draft articles 1 (f), (o), (p), (q) and (r)

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1 (f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

Chapter 2: Electronic communication

Draft article 3

186. The Working Group next considered draft article 3. It was explained that paragraph 2 of this draft article was a new provision that was intended to explicitly state what was implicit in the draft instrument, that issuance, possession and transfer of a negotiable document had the same effect as the issuance, control and transfer of an electronic transport record. The Working Group agreed to change the word "communication" to "communications" in paragraph (a), pursuant to footnote 19.

Conclusions reached by the Working Group on proposed draft article 3

187. After discussion, the Working Group decided:

- To change the word "communication" to "communications" in paragraph (a), and to otherwise accept the text of draft article 3 for inclusion and further discussion in the draft instrument.

Draft article 4

188. The Working Group next considered draft article 4. In response to a question, it was clarified that, if more than one original of the negotiable transport document was issued, all of them would have to be collected before the negotiable electronic transport record could be issued in substitution.

Conclusions reached by the Working Group on proposed draft article 4

189. The Working Group approved of the text for further discussion and for inclusion in the draft instrument.

Draft article 5

190. The Working Group next considered draft article 5. There was support for the view that the list of articles which contained references to notices and consents should not be considered closed, since other provisions might have to be included, such as draft articles 88a and 61 bis.

Conclusions reached by the Working Group on proposed draft article 5

191. The Working Group approved of the text for further discussion and for inclusion in the draft instrument, subject to the insertion of additional articles referring to notices and consents.

Draft article 6

192. The Working Group next considered draft article 6 of the draft instrument.

Draft article 6 (1)—Inclusion of registry systems in the draft instrument

193. The Working Group considered the issue set out in footnote 31 of A/CN.9/WG.III/WP.47, where it was suggested that the Working Group might wish to add, after the word "shall" in the chapeau, the phrase "or of the rights represented by or incorporated into that record". This change was suggested in light of concerns that draft article 6, when read with the relevant definitions, envisaged the use of a technology whereby the electronic transport record would be transferred along the negotiation chain, thereby potentially excluding some non-token technologies such as registry systems.

194. There was general agreement in the Working Group that, as a principle, it did not wish to exclude registry systems from the draft instrument. However, concerns were raised that the inclusion of the suggested phrase risked confusing the concepts of transfer of documents under draft article 59, and transfer of rights under draft article 62. There was support for that view.

195. It was suggested that an avenue for bringing registry systems and other non-token technologies clearly within the application of the draft instrument could be to employ the notion of transfer of control of an electronic transport record as the equivalent of the transfer of the record itself. Other possibilities for compromise were suggested, such as adjusting the relevant definitions in draft article 1.

Security

196. A suggestion was raised to add into draft article 6 (1) language to the effect that a secure or a reliable method should be used for the transfer. However, the view was expressed that adding text of this sort to the provision could generate unnecessary case law to interpret it, and that the concept of security was already implicit in the text of the draft article. Some concern was expressed regarding whether, in light of this explanation, the word "assurance" should be used in paragraph (1)(b). By way of further explanation, it was thought that the word "assurance" referred to the integrity of the record, rather than to the system that controlled it, and that it would not, therefore, cause ambiguity.

Conclusions reached by the Working Group on draft article 6 (1)

197. After discussion, the Working Group agreed that:

- A small drafting group should be struck to amend the existing text of draft article 6(1), taking into account the above discussion regarding possible methods to render the provision technologically neutral.

Draft article 6 (2)

198. Support was expressed for draft article 6 (2). The Working Group heard that the phrase "readily ascertainable" had been used in order to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment. It was suggested that providing further detail in the draft instrument was unnecessary, since a more detailed definition would depend upon the type of system and the type of electronic record used, and that it could thus impede future technological development.

Conclusions reached by the Working Group on draft article 6 (2)

199. The Working Group approved of the text of draft article 6 (2) for further discussion and for inclusion in the draft instrument.

Chapter 8: Transport documents and electronic records

Draft article 33—Issuance of the transport document or electronic transport record

200. The Working Group next considered draft article 33, on which it had no comment.

Draft article 35—Signature

201. The Working Group next considered draft article 35. A number of questions were raised in respect of this provision of the draft instrument.

Definition of "electronic signature"

202. The view was expressed that there should be a specific definition of "electronic signature" in the draft instrument, and a view was expressed that, otherwise, States that did not have national law on this topic could have a legal vacuum. It was felt that the definition "electronic signature" in draft article 35 did not add anything to the concept set out in other international instruments, nor did it deal in any specific fashion with transport law. It was suggested that, in the interests of uniformity, the draft instrument should adopt a definition of "electronic signature" based on other UNCITRAL instruments such as the Model Law on Electronic Signatures (2001) and the Model Law on Electronic Commerce (1996). However, a better starting point was thought to be the more modern approach taken in article 9 (3) of the recently-concluded draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577).

203. Other views were expressed that the term "electronic signature" should not be defined, and that it should be left to national law. However, it was suggested that leaving the matter to national law could lead to disharmony, and that an effort should be made to find a unifying international standard. Further, it was thought that, in order to be commercially practicable, a definition of "electronic signature" should be uncomplicated and inexpensively met in practice. It was proposed that the best policy would be to have a functional definition of "electronic signature", rather than to lock in to a specific definition, and to leave the exact standard to national law or to the commercial parties themselves, as long as the functional requirements

were met. There was support for this proposal, particularly in light of ensuring future flexibility for technology that had not yet emerged.

Which law should govern?

204. It was suggested that, if national law was the applicable law, rules would have to be established to determine the choice of law to govern the electronic signature. One view was expressed that this should be the law governing the place of the document, while another view suggested that the proper applicable law would be the one governing the procedures in draft article 6.

Conclusions reached by the Working Group on proposed draft article 35

205. After discussion, the Working Group decided that:

- A small drafting group should be struck to consider revising the existing text of draft article 35, taking into account the concerns expressed above.

Draft articles containing electronic commerce aspects

Right of Control—Draft article 54, Transfer of rights—Draft article 59, Transfer of rights—Draft article 61 bis

206. The Working Group next considered only the electronic commerce aspects of draft article 54 with respect to the right of control, and draft articles 59 and proposed article 61 bis regarding the transfer of rights. The Working Group did not have any specific comment relating to the electronic commerce aspects of these draft articles as they appeared in A/CN.9/WG.III/WP.47.

Proposed redraft of certain provisions pertaining to electronic commerce

207. Based upon the discussion in the Working Group (see above, paras. 180 to 205), an informal drafting group composed of a number of delegations prepared a revised version of certain of the provisions relating to electronic commerce as they appeared in A/CN.9/WG.III/WP.47. Draft article 1 (f) was revised to delete the enumeration of persons in subparagraph (ii) in favour of the phrase “the person”, and the phrase “issued or” was added prior to the word “transferred”. Further, it was thought that the closing sentence of draft article 1 (o) could not be shortened without losing its necessary content. Draft article 6 (1)(a) was deleted in favour of the following phrase, “(a) the method to effect the issuance and the transfer of that record to an intended holder”, and the word “consignee” in draft article 6 (1)(d) was deleted in favour of “holder”. In addition, the second sentence of draft article 35 was deleted in favour of the sentence, “Such signature must identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.” Further, the word “other” was deleted from draft article 61 bis (2). Finally, in addition to the consequential changes to draft article 6 (1)(a) noted above, in order to address the issue raised with respect to ensuring technological neutrality (see above, paras. 192 to 195), the following new definition was proposed for inclusion in draft article 1:

"Article 1(xx)

"The issuance and the transfer of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person who has the rights in the negotiable electronic transport record.]"

208. It was further explained that the informal drafting group inserted square brackets around the closing sentence in proposed article 1 (xx) to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion.

209. The Working Group made general comments with respect to the redrafted provisions. The view was expressed that further thought should be given to the question of whether the second part of draft article 1 (f)(ii) with respect to "exclusive control" was necessary. It was also thought that the intention behind proposed draft article 1 (xx) should be explained in an explanatory note to the draft instrument. Support was expressed for the approach taken in the redraft of article 35 as being flexible and accommodating many different legal systems.

Conclusions reached by the Working Group on proposed redraft of electronic commerce provisions

210. The Working Group approved the approach taken in the proposed revisions to the electronic commerce provisions for inclusion in the draft instrument.

Right of control

211. The Working Group heard a brief report on the informal intersessional consultations held on the issue of the right of control in the draft instrument (draft articles 53 to 58 in A/CN.9/WG.III/WP.32) as an introduction to the Working Group's consideration of those provisions at its next session. It was explained that the Working Group would have to consider a number of different issues. It was indicated that different views had emerged with respect to the nature and the extent of the right of the controlling party to give instructions to the carrier. It was suggested that the draft text did not provide sufficient distinction between the right of the controlling party to give instructions to the carrier and the right to amend the contract of carriage. It was further suggested that the definition of controlling party and of how to designate another entity as a controlling party required further reflection, and it was generally felt that the carrier should be notified of any change in the controlling party. It was observed that other matters open for discussion included the time of cessation of the right of control, the formal requirements for giving instructions in the case of non-negotiable transport documents and non-negotiable electronic transport records, and the obligation of the carrier to follow the instructions of the controlling party, as well as the carrier's liability in this respect.

Transfer of rights

212. The Working Group also heard a brief report on the informal intersessional consultations held on the transfer of rights in the draft instrument (draft articles 59 to 62 in A/CN.9/WG.III/WP.32 and draft article 61 bis in A/CN.9/WG.III/WP.47, para. 12) as an introduction to the Working Group's consideration of provisions on transfer of rights at its next session. Five items relating to transfer of rights were indicated as being of particular importance for future discussion: the regime that should be applicable to the nominative document not issued "to order"; whether to adopt a "general statement" or an "enumerated list" approach to third-party liability; rights exercised by third parties without the assumption of liability; the applicable law; and notification to the carrier of transfer of rights. Moreover, it was indicated that the Working Group could consider at its current session the proposed new text of draft article 61 bis, contained in A/CN.9/WG.III/WP.47, paragraph 12, and begin a discussion on contractual obligations transferable to third parties without their consent.

Conclusions reached by the Working Group on transfer of rights

213. After discussion, the Working Group decided:

- Draft article 61 bis as contained in A/CN.9/WG.III/WP.47, paragraph 12 should be inserted in the draft instrument for consideration at a future session, subject to any drafting suggestion with respect to electronic commerce.

III. Other business

Scheduling of sixteenth and seventeenth sessions

214. It was noted that, subject to approval by the Commission at its the thirty-eighth session (Vienna, 4-15 July 2005), the sixteenth session of the Working Group would be held in Vienna, at the Vienna International Centre, from 28 November to 9 December 2005, and the seventeenth session of the Working Group would be held in New York, at United Nations Headquarters, from 3 to 13 April 2006.

Planning of future work

215. With a view to structuring the discussion on the remaining provisions of the draft instrument the Working Group adopted the following tentative agenda for completion of its second reading of the draft instrument:

Sixteenth session (Vienna, 28 November to 9 December 2005, subject to approval)

- Right of control
- Transfer of rights
- Jurisdiction and Arbitration
- Delivery of goods, including period of responsibility, draft article 11 (2) and draft articles 46-52
- Shipper's obligations

Seventeenth session (New York, 3-13 April 2006, subject to approval)

- Scope of application and Freedom of contract
- Rights of suit and Time for suit
- Limitation levels
- Transport documents
- Pending issues, including issues relating to maritime performing parties (draft article 15), national law (draft article 8) and special limitations (draft article 18 (2))

Methods of work

216. The view was expressed in the Working Group that great progress had been achieved during its fifteenth session, as it had during its fourteenth session, and that starting in May 2004 (see A/CN.9/552, para. 167), that progress was due in large part to the informal consultation work that occurred among delegations between sessions. This informal intersessional work was said to have been extremely useful for educational purposes, exchanging views and narrowing contentious issues. It was said to be essential to the successful completion of the draft instrument that that informal intersessional work continue, bearing in mind the need to ensure that the quantity of documents produced by that process should be compatible with the production by the Secretariat of official documents in all official languages for presentation to the Working Group. The view was also expressed that the use of small drafting groups within the Working Group had been enormously helpful for the Working Group as a whole. There was full support in the Working Group for the above views.

217. The issue of concluding work on the draft instrument was reassessed in light of earlier discussions on this topic in the Working Group (see A/CN.9/552, para. 168). A number of delegations supported the view that, while the completion of work at the end of 2005 was unlikely, with the valuable assistance of the informal consultation process, the Working Group could complete its work at the end of 2006.

Notes

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

[2] If Article 1 included definitions of “place of receipt” and “place of delivery,” the references to “place” would become unnecessary.

[3] Under this draft, proposed articles 2 to 4 would constitute the scope of application chapter, and proposed article 1 would constitute the definitions chapter.

[4] The position of the maritime performing party would have to be further examined in connection with draft article 15.

[5] Article 5 of A/CN.9/WG.III/WP.47 would be expanded to incorporate this provision.

[6] Article XX refers to a new provision on the regulation of dangerous goods which should be incorporated into the Instrument pursuant to a decision taken in 13th session of the Working Group in May 2004 that a specific provision should be inserted at an appropriate place in the

draft instrument to deal with the issue of dangerous goods, based on the principle of strict liability of the shipper for insufficient or defective information regarding the nature of the goods (see A/CN.9/552, paras. 146-148). Such a provision has been proposed in para. 19 of A/CN.9/WG.III/WP.39.

[7] Article 5 of A/CN.9/WG.III/WP.47 would be expanded to incorporate this provision.