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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 convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.100.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its twenty-first session in Vienna from 14 to 25 January 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Czech Republic, Egypt, El Salvador, France, Gabon, Germany, Greece, India, Iran (Islamic Republic of), Italy, Japan, Lebanon, Mexico, Namibia, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Angola, Argentina, Brazil, Burkina Faso, Congo, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Denmark, Finland, Ghana, Indonesia, Netherlands, Niger, Portugal, Romania, Saudi Arabia, Slovakia, Slovenia, Sweden, Tunisia and Turkey.

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

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

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

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

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

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

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.100);

(b) The draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.101);

(c) A proposal by the Government of the Netherlands (A/CN.9/WG.III/WP.102); and

(d) A proposal by the delegations of Italy, the Republic of Korea and the Netherlands (A/CN.9/WG.III/WP.103).

7. The Working Group adopted the following agenda:

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

8. The Working Group decided to establish a drafting group to assist the Secretariat in the preparation of a revised version of the draft Convention, for approval by the Working Group together with the adoption of its report. The revised text should implement in all official languages of the United Nations, the amendments that the Working Group might decide to make in the text. The Working Group expressed its gratitude to a number of delegations that had the official languages of the United Nations as their domestic working languages for their willingness to participate in the meetings of the drafting group.

I. Deliberations and decisions

9. The Working Group commenced its final review of the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in A/CN.9/WG.III/WP.101. The Working Group was again reminded that the text contained in A/CN.9/WG.III/WP.101 was the result of negotiations within the Working Group since 2002. The Working Group agreed that while the provisions of the draft convention could be further refined and clarified, to the extent that they reflected consensus already reached by the Working Group, the policy choices should only be revisited if there was a strong consensus to do so. Those deliberations and conclusions are reflected in section II below (see paras. 11 to 289 below). The Working Group further agreed to review the definitions in draft article 1 in the context of the relevant articles.

10. At the closing of its deliberations, the Working Group approved the text of the draft convention on contracts for the international carriage of goods wholly or partly by sea, as contained in the annex to this report.

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

General comments

11. By way of general comment, it was said that a number of States had expressed concerns with regard to paragraph 2 of draft article 1, draft article 18 and draft article 62. It was suggested that revision of these draft articles would render the draft convention more equitable and should be considered as a package in the final process of the negotiation. The Working Group was encouraged to seek some improvement in those areas with a view to achieving a fairer set of rules for both parties to the contract of carriage. This, it was said, would enhance the political acceptability of the draft convention and would prevent a number of States from seeking a regional alternative for dealing with the international carriage of goods. The Working Group took note of those views.

Chapter 1 – General provisions

Draft article 1. Definitions

12. The Working Group agreed to defer its discussion of the specific paragraphs of draft article 1 until agreement had been reached on the relevant articles regarding the terms defined in draft article 1. The Working Group was also reminded that it had not yet finalized the title of the draft convention and agreed to consider it following its deliberations on the text.

Draft article 2. Interpretation of this Convention

13. The Working Group approved the substance of draft article 2 and referred it to the drafting group.

Draft article 3. Form requirements

14. It was noted that the reference to paragraph 3 of draft article 20 as contained in draft article 3 was incorrect and should be to paragraph 2 of draft article 20. The Working Group approved the substance of draft article 3, with the above-mentioned correction, and referred it to the drafting group.

Draft article 4. Applicability of defences and limits of liability

15. Noting that draft article 4 had received ample discussion in previous meetings, the Working Group approved the substance of draft article 4 and referred it to the drafting group.

Chapter 2 – Scope of Application

Draft article 5. General scope of application

16. The Working Group approved the substance of draft article 5 and referred it to the drafting group.

Paragraphs 1, 5, 8 and 24 of draft article 1

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

Draft article 6. Specific exclusion

18. A concern was expressed that paragraph 2 (a) of draft article 6 did not clarify whether the contract referred to a contract concluded between or applicable between the parties. It was also observed that the draft provision referred to a contract “between the parties”, whereas draft article 7 referred to a contract between the carrier and a party “that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention.” In response, it was pointed out that the parties referred to in paragraph 2 (a) of draft article 6 included the carrier and any party making a claim under the draft convention and to whom the charterparty or other contract referred to in that provision might apply, for instance as a result of succession. Draft article 7, in turn, was intended to make it clear that draft article 6 would not prevent the application of the draft convention to parties that had not themselves been involved in the negotiation of a contract to which the convention did not apply, such as the holder of a bill of lading issued pursuant to the terms of a charterparty and who had not themselves adhered to the charterparty. It was said that a time charter is an example of a charterparty that may not affect the relationship between the parties. The Working Group approved the substance of draft article 6 and referred it to the drafting group.

Paragraphs 3 and 4 of draft article 1

19. With regard to the terms “liner transportation” and “non-liner transportation” used in draft article 6, the Working Group approved the substance of the definitions respectively provided for in paragraphs 3 and 4 of draft article 1 and referred them to the drafting group.

Draft article 7. Application to certain parties

20. The Working Group approved the substance of draft article 7 with the deletion of the reference to “consignor” and referred it to the drafting group.

Paragraphs 10, 11 and 12 of draft article 1

21. With regard to the term “consignor” used in draft article 7, it was proposed that the concept of “consignor” as defined in paragraph 10 of draft article 1 should be deleted so as to make the draft convention less complicated (see A/CN.9/WG.III/WP.103). It was further suggested that any reference to “consignor” in the draft convention should be deleted accordingly. The rationale for the proposal was the following: (i) the consignor did not have any obligations and had only one right under the draft convention, which was the right to obtain a receipt upon its delivery of the goods to the carrier pursuant to subparagraph (a) of draft article 37; (ii) there were no practical difficulties reported regarding the issuance of a receipt for the consignor that might require it to be dealt with on a uniform basis in the draft convention; (iii) confusion with other transport conventions and some national

laws could be avoided; and (iv) the term "transport document" could also be simplified and be aligned with actual maritime practice. Broad support was expressed for this proposal.

22. A contrary suggestion was made that the definition of "consignor" should be retained and that additional provisions on the rights and obligations of the consignor should be added to the draft convention. It was explained that the rights and obligations of the contractual shipper and the consignor (the actual shipper) should be dealt differently, as the rights and obligations of the latter only arose upon the delivery of the goods to the carrier. It was further explained that the relationship between the contractual shipper and the consignor had raised substantial legal issues in certain national legal systems. More specifically, under FOB trade, it would not always be the case that there would be a documentary shipper and, thus it would be impossible for the consignor to be deemed a documentary shipper. However, the prevailing view was that the aforementioned concern should be dealt with most appropriately by domestic law, especially sales law, and the sales contract itself, which would determine to what extent the consignor would be entitled to receive documents.

23. Although broad support was expressed for the deletion of the reference to "consignor" in the draft convention, it was suggested that subparagraph (a) of draft article 37 should be retained in some form so as to protect the right of the FOB seller to obtain non-negotiable transport documents.

24. With regard to the term "consignor" used in draft article 7, the Working Group agreed that the definition provided for in paragraph 10 of draft article 1 should be deleted, as well as any other reference to "consignor" in the draft convention. However, the Working Group further agreed to discuss the suggestion made with regard to subparagraph (a) of draft article 37 at a later stage in its deliberations.

25. With regard to the terms "holder" and "consignee" used in draft article 7, the Working Group approved the substance of the definitions respectively provided for in paragraphs 11 and 12 of draft article 1, and referred them to the drafting group.

Chapter 3 – Electronic Transport Records

Paragraphs 15, 16, 17, 19, 20, 21 and 22 of draft article 1

26. With regard to the terms "transport document", "negotiable transport document", "non-negotiable transport document", "electronic transport record", "negotiable electronic transport record", "non-negotiable electronic transport record" and the "issuance" and the "transfer" of a negotiable electronic transport record used in draft Chapter 3, the Working Group agreed to discuss the definitions of these terms during its consideration of draft Chapter 8.

Draft article 8. Use and effect of electronic transport records

27. The Working Group approved the substance of draft article 8 and referred it to the drafting group.

Draft article 9. Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender

28. It was noted that reference to "the electronic equivalent of a non-negotiable transport document that requires surrender" in the title and in paragraph 1 of draft article 9 might require deletion should the Working Group in its further deliberation decide to delete or revise draft article 49. The Working Group noted that references to "the consignee" in subparagraphs (c) and (d) of paragraph 1 had been added so as to accurately include in draft article 9 coverage of an electronic equivalent of a non-negotiable transport document that requires surrender. The Working Group agreed that those subparagraphs should be revised if draft article 49 were to be deleted. Subject to those deliberations, the Working Group approved the substance of draft article 9 and referred it to the drafting group.

Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record

29. The Working Group approved the substance of draft article 10 and referred it to the drafting group.

Chapter 4 – Obligations of the carrier

Draft article 11. Carriage and delivery of the goods

30. The Working Group approved the substance of draft article 11 and referred it to the drafting group.

Draft article 12. Period of responsibility of the carrier

Proposal to re-insert a revised version of draft article 11 (2) from A/CN.9/WG.III/WP.81

31. In considering the text of draft article 12 as contained in A/CN.9/WG.III/WP.101, it was observed that the Secretariat had revised the text of the draft provision following its consideration by the Working Group at its 19th session (see A/CN.9/621, paras. 28-33). Support was expressed for the drafting changes that had been made in order to clarify the relationship between paragraphs 1 and 2 of the provision as it appeared in article 11 of A/CN.9/WG.III/WP.81, by moving aspects of paragraph 2 regarding the ascertainment of the time and location of delivery for insertion into draft article 45 in chapter 9 on delivery of the goods. However, some concern was expressed that certain aspects of paragraph 2, as it had appeared in article 11 of A/CN.9/WG.III/WP.81, regarding the actual time and location of receipt and delivery should be retained in article 12 of the current text. To that end, it was proposed that former paragraph 11 (2) of A/CN.9/WG.III/WP.81 should be reinserted in the current text as paragraph 1 bis, with the following revised first sentence substituted for the first sentence of the chapeau: "For the purposes of paragraph 1, receipt or delivery shall be receipt or delivery as defined in the contract of carriage, or, failing such agreement, as defined by the customs, practices, or usages of the trade."

32. While some sympathy was expressed for the concerns raised regarding the determination of the time and place of receipt and delivery in the period of responsibility in draft article 12 in order to avoid any possible gap in the period of responsibility, it was observed that the proposal would render the provision too detailed, such that it would be necessary to set out every possible combination of contractual and actual receipt and delivery. It was suggested that such a precise solution would be unworkable in the context of the draft convention. As such, there was agreement in the Working Group that the more general approach taken in the current text of draft article 12 (1) was preferable to such a specific enumeration of possibilities, and the proposal was not accepted.

33. Another proposal made to consider the adoption of the period of responsibility provisions as set out in article 4 of the Hamburg Rules was not taken up by the Working Group.

Deletion of "and subject to article 14, paragraph 2" in paragraph 3

34. Concerns were raised regarding the interaction of the phrase "and subject to article 14, paragraph 2" in the chapeau of paragraph 3, and the phrase "and without prejudice to the other provisions in chapter 4" in draft article 14, paragraph 2. In particular, it was suggested that the presence of both phrases in the draft convention could raise a conflict between the two provisions that would have unintended consequences. In order to ensure that draft articles 12 (3) and 14 (2) operated as intended, so as not to allow for the period of loading or unloading pursuant to draft article 14 (2) to be outside the carrier's period of responsibility, as currently the case in some jurisdictions, it was proposed that the phrase "and subject to article 14, paragraph 2" in the chapeau of paragraph 12 (3) be deleted. The Working Group agreed with that proposal.

Reference to the "consignor" in draft article 12 (2) (a)

35. In light of the decision of the Working Group to delete the concept of the "consignor" from the text of the draft convention (see paras. 21 to 24 above), it was suggested that the term "consignor" should be deleted from draft article 12 (2) (a) and replaced with another term. Strong support was expressed in the Working Group for that proposal, and there was support for the suggestion that the phrase "the consignor" could be replaced with the phrase "the shipper or the documentary shipper". However, concerns were raised that the alternative terms suggested might create additional complications, and could cause confusion in some jurisdictions. An additional proposal was made that the reference to the "consignor" could be dealt with by adjusting the text to delete the phrase "require the consignor to hand over the goods" and to insert in its stead the phrase "requires the goods to be handed over". There was support in the Working Group for that suggestion.

36. Another concern was raised that further refinement of the provision might be necessary in order to define the start of the period of responsibility, for example, in cases where the carrier had received the goods for transport, but was required to turn the goods over to an authority for inspection prior to having them returned to the carrier for transport. It was suggested that in such a situation, it might be unclear when the carrier's period of responsibility began. While there was some support for that concern, it was generally felt that the clarification was not necessary and that a sensible reading of the draft article would affirm the carrier's responsibility

whenever it had actual custody of the goods, but not when they were in the custody of an authority.

"under ship's tackle" clause

37. No affirmative responses were received to a query whether delegations were of the view that "under ship's tackle" clauses would still be admissible given the current text of the draft convention.

Conclusions reached by the Working Group regarding draft article 12

38. Subject to the following adjustments, the Working Group approved the substance of draft article 12 and referred it to the drafting group:

- The substitution of the phrase "requires the goods to be handed over" for the phrase "require the consignor to hand over the goods" in draft article 12 (2) (a); and
- The deletion of the phrase "and subject to article 14, paragraph 2" in the chapeau of paragraph 12 (3).

Draft article 13. Transport beyond the scope of the contract of carriage

39. Concerns were raised regarding the clarity of the text of draft article 13, particularly with respect to the phrase in the first sentence "and in respect of which it is therefore not the carrier", and regarding the whole of the second sentence and the meaning of the phrase "the period of the contract of carriage". Although some support was expressed for the provision as drafted, there was strong support for the view that the current text was unclear, and several proposals were made with the goal of addressing those concerns.

40. Some support was expressed for the suggestion that draft article 13 should simply be deleted from the text. In support of that view, it was suggested that the provision could result in a situation where the carrier would not be responsible for the additional transport, thus potentially causing harm to a third party holder or consignee in good faith.

41. However, the Working Group supported the retention of draft article 13 in order to provide for current practice in the industry whereby at the shipper's request, the carrier agreed to issue to the shipper a transport document for the entire transport of the goods, notwithstanding that the carrier had arranged on behalf of the shipper for a portion of the transport to be carried out by another carrier. In such cases, the carrier had no obligation regarding the goods for that portion of the transport that was performed by another carrier.

42. With a view to retaining such a provision in the text, the Working Group agreed with a proposal that the first sentence of draft article 13 could be clarified by substituting the phrase "and in respect of which it does not assume the obligation to carry the goods" for the phrase "and in respect of which it is therefore not the carrier". Further, it was agreed that the second sentence should be replaced with the following clearer text: "In such event, the carrier's period of responsibility is only the period covered by the contract of carriage". Although there was some support for the retention of the principle in the third sentence that, in such cases, the carrier acted on behalf of the shipper, so as to ensure that the carrier used appropriate care

in choosing a carrier for the additional transport, there was agreement in the Working Group that improved drafting was not possible, and that the best alternative was simply to delete the third sentence.

Conclusions reached by the Working Group regarding draft article 13

43. Subject to the following adjustments, the Working Group approved the substance of draft article 13 and referred it to the drafting group:

- The phrase "and in respect of which it is therefore not the carrier" in the first sentence should be substituted for the phrase "and in respect of which it does not assume the obligation to carry the goods";
- The second sentence should be replaced with: "In such event, the carrier's period of responsibility is only the period covered by the contract of carriage."; and
- The third sentence should be deleted.

Draft article 14. Specific obligations

44. There were expressions of concern that paragraph 2 of draft article 14 was too broad in scope and would eventually shift to the shipper or the consignee the responsibility for the performance of obligations that traditionally had to be performed by the carrier under existing international instruments and domestic laws on carriage of goods by sea. That paragraph, it was noted, deviated for instance from the Hague-Visby Rules, where only the carrier had the obligation of loading, handling, stowing or unloading of the goods. It was also said that such an innovative provision should be amended so as to preclude carriers from routinely disclaiming liability for damage to the goods that occurred during the operations contemplated in the draft article. The potential risk involved in abuse of those clauses was said to be significant, as experience showed that most damage in international maritime carriage occurred during loading or unloading. Another concern raised in connection with paragraph 2 was that it was not clear whether and to what extent the types of clauses it contemplated would affect the carrier's period of responsibility. There was strong support for the deletion of paragraph 2 so as to solve those problems.

45. Another concern was that draft paragraph 2 allowed for clauses that would require the consignee to unload the goods. There was support for the suggestion that the reference to the consignee should be deleted from paragraph 2 of the draft article, so as to protect the consignee, who was not a party to the contract of carriage, from the effects of clauses that it had not negotiated. At the very least, it was said, the draft article should require the consignee's consent in order to be bound by those clauses.

46. In response, it was noted that paragraph 2 of the draft article contained a useful provision that clarified an area of the law where there were significant discrepancies among legal systems in a manner that adequately took into account commercial practice. In practice, shippers often undertook, through "free-in-and-out" or "free-in-and-out, stowed" clauses ("FIO(S)" clauses), to undertake some or all of the carrier's responsibilities in respect of loading, handling, stowing and unloading goods. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell outside the scope of application of

the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft articles 6, paragraph 2, and 7. It was observed that in some jurisdictions FIO(S) clauses were understood as merely allocating the liability for the cost incurred with loading and unloading cargo, whereas in other jurisdictions they were regarded as a contractual limitation to the period of the responsibility of the carrier. In addition, it was observed that paragraph 2 was not meant to create any obligations on the part of the consignee.

47. There was wide support for the view that, as the Working Group had agreed to delete the words "subject to article 14, paragraph 2" from paragraph 3 of draft article 12 (see above, para. 34), it was now sufficiently clear that under the draft convention a FIO(S) clause did not reduce the carrier's period of responsibility for the goods. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier's period of responsibility would be governed by the contract of carriage. Furthermore, article 18, subparagraph 3 (i) expressly provided that the carrier would only be released of liability for damage that occurred during loading or unloading under a FIO(S) clause if it was not the carrier itself that had performed those functions. Another reason for retaining the text, it was said, was that the responsibility for loading and unloading of cargo and the liability for costs incurred as a result of those activities, was a matter that the parties were free to allocate through the sales contract, a freedom which the draft convention should not curtail.

48. During the discussion, three proposals were suggested to achieve a compromise regarding the different views: (i) to add the requirement of the consent of the consignee to the agreement mentioned in paragraph 2 of draft article 14; (ii) to delete "or the consignee"; and (iii) to revise the last sentence of paragraph 2 of draft article 14 to specify that it referred to an agreement that had been negotiated separately and that was not part of the original contract.

Conclusions reached by the Working Group regarding draft article 14

49. Notwithstanding the proposals to revise or delete paragraph 2 of draft article 14, the Working Group decided to retain draft article 14 in its current form as there was not enough support for such modification. The Working Group, therefore, approved the substance of draft article 14 and referred it to the drafting group.

Draft article 15. Specific obligations applicable to the voyage by sea

50. It was pointed out that, by making the carrier's obligation to provide a seaworthy ship a continuous one, the draft convention had made a significant step as compared to the Hague-Visby Rules, where such obligation only applied up to the beginning of the voyage. There was very wide support for the draft article, which was said to reflect the Working Group's recognition that present technological developments warranted a modernization of principles on responsibility. It was also noted, at the same time, that such a result had been the subject of some controversy and had only been achieved as a result of the spirit of compromise of those who had

initially advocated the retention of the traditional rules on seaworthiness of the Hague-Visby Rules.

51. The Working Group approved the substance of draft article 15 and referred it to the drafting group.

Draft article 16. Goods that may become a danger

52. The draft article did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 17. Sacrifice of the goods during the voyage by sea

53. There was not sufficient support for a suggestion to re-insert the phrase "or inland waterways" following the phrase "at sea" in the draft article. Accordingly, the Working Group approved the substance of draft article 17 and referred it to the drafting group. One delegation renewed its concerns regarding draft article 17 and its relationship with draft article 87.

Chapter 5 – Liability of the Carrier for Loss, Damage or Delay

Draft article 18. Basis of liability

Proposal to revise draft article 18

54. There were several expressions of support for the view that draft article 18 still required some amendment in order to ensure that it preserved an equitable balance between carrier and cargo interests. In particular, the following revisions were proposed:

(a) Paragraph 3 (e) of draft article 18 should be deleted, because paragraph 2 of draft article 18 already provided sufficient protection to the carrier, and strikes, lock-outs, stoppages or restraints of labour should not diminish the responsibilities of the carrier;

(b) Paragraph 3 (g) of draft article 18 should be deleted, because it was said to be unfair to make the cargo owner liable for any latent defects of the goods;

(c) Paragraph 5 of draft article 18 should be deleted and paragraph 4 should be amended to the effect that the carrier would be liable for all or part of the loss, damage, or delay if the claimant proved that the event set forth is subsequent to a fault of the carrier or a maritime performing party. Such an amendment, it was said would better protect the interests of shippers and remove from them the heavy burden to have to prove the unseaworthiness of the ship whenever the carrier invoked one of the defences mentioned in paragraph 3 of the draft article.

55. Although not all of the above proposals received an equal level of support, some sympathy was expressed for improving the draft article so as to achieve a better balance of interests, in particular with regard to the burden of proof on cargo claimants, who were said to have little means of proving the unseaworthiness of the ship. Instead, it was said, it should be for the carrier to prove that it had complied with draft article 15.

56. The Working Group took note of those views, but did not consider that there was sufficient consensus for reopening the debate on draft article 18. It was widely felt that draft article 18 was one of the most important articles in the draft convention with significant practical implications. In response to the proposal above to revise draft article 18, the Working Group was reminded that draft article 18 was a well-balanced compromise which the Working Group had been able to achieve through serious deliberations during the previous sessions. In addition, concerns were raised that the deletion of subparagraphs 3 (e) and (g) would lead to a substantial increase in the carrier's liability, in certain cases even to an absolute liability. It was also noted that caution should be taken when revising a text which had been fully considered and approved by the Working Group, especially because draft article 18 was a central element in the whole package of rights and obligations.

57. It was noted that the term "the consignee" in subparagraph 3 (h) of draft article 18 should be deleted, as reference to "the consignee" was unnecessary.

Conclusion reached by the Working Group regarding draft article 18

58. The Working Group approved the substance of draft article 18 with the deletion of "the consignee" in subparagraph 3 (h) and referred it to the drafting group.

Draft article 19. Liability of the carrier for other persons

59. The Working Group recalled that at its nineteenth session, it agreed, inter alia, to review the treatment of "agents" in the draft convention, as the definition of "performing party" included agents (see A/CN.9/621, paras. 141, 150 and 153). Consequently, the Working Group approved the substance of draft article 19 with the deletion of "or agent" in subparagraph (c) and referred it to the drafting group.

Draft article 20. Liability of maritime performing parties

60. A question was raised with regard to paragraph 4 of draft article 20 whether liability would be imposed on the "master or crew of the ship". The Working Group recalled that the draft convention had previously defined "maritime performing party" to include employees and that paragraph 4 of draft article 20 was drafted in order to exempt employees from liability. It was pointed out that if the intent of the draft convention was to exempt individual masters or crew from liability as can be implied from subparagraph (b) of draft article 19, a separate exemption for those parties should be provided accordingly in paragraph 4 of draft article 20. After discussion, the Working Group approved the substance of draft article 20 with the inclusion of reference to "master or crew of the ship" in paragraph 4 and referred it to the drafting group.

Paragraphs 6, 7 and 25 of draft article 1

61. With regard to the terms "performing party" and "maritime performing party" used in draft article 20, the Working Group approved the substance of the definitions respectively provided for in paragraphs 6 and 7 of draft article 1 and referred them to the drafting group.

62. With regard to the term "ship" used in draft article 20, it was suggested that the term should be changed to "seagoing vessel"["any vessel designed to be used to

carry goods by sea”], in order to differentiate it from inland navigation vessels and that “vessel” in paragraph 2 of draft article 5 should be changed to “ship”. In response, it was pointed out that this could lead to confusion, as vessels designed for inland navigation could also be used for sea. After discussion, the Working Group approved the substance of the definition provided for in paragraph 25 of article 1 and agreed that the drafting group should look at the aforementioned issues to make sure that vessel and ship were used consistently and that the appropriate terms were used in the various language versions.

Draft article 21. Joint and several liability

63. The Working Group approved the substance of draft article 21 and referred it to the drafting group.

Draft article 22. Delay

Proposal to reconsider the issue of delay

64. The Working Group was reminded that it had last considered the issue of liability for delay in the delivery of the goods at its 19th session (see A/CN.9/621, paras. 177-184). At that time, and in light of previous discussions in the Working Group regarding liability for delay in delivery (see A/CN.9/616, paras. 101-113), a number of proposals were presented and considered with a view to coming to an agreement regarding the treatment of delay in the draft convention (see A/CN.9/621, para. 180). The compromise agreed upon by the Working Group following those discussions at its 19th session was reflected in the text of the draft convention in draft articles 22 and 63, and in the deletion of the shipper’s liability for delay in the draft convention. However, it was suggested that that compromise had been made hastily, that there did not seem to be a common understanding of its effects, and that it was thought to have produced the undesirable result of requiring the carrier to agree to be liable for delay in delivery by way of the text in draft article 22 that delay occurred when the goods were not delivered within the time agreed in the contract of carriage. Since the legal regime in a number of jurisdictions already set out mandatory liability on the part of the carrier for delay, whether by way of the Hamburg Rules or through national law, it was suggested that now subscribing to a regime such as that of the draft convention where there was no mandatory liability for delay on the part of the carrier would place those States in a politically untenable situation. Further, it was suggested that where draft article 27 allowed the operation of unimodal regimes that provided for mandatory liability of the carrier for delay, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956 (“CMR”) or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (“CIM-COTIF”), it would be illogical to have such mandatory liability only for certain portions of the transport. As such, it was suggested that, since past experience had shown that it was not possible to reach consensus on how to deal with the issue of delay in the draft convention, the best option would be to simply delete draft articles 22 and 63, as well as all other references to delay in the draft convention, and to leave the matter entirely to applicable law. There was some sympathy expressed for the concerns raised, and the proposal met with some support.

65. However, the Working Group was generally of the view that, after the lengthy and numerous discussions that had taken place in previous sessions with respect to the treatment of delay pursuant to the draft convention, the compromise reached as reflected in the text was genuine and that it formed part of the delicate balance of rights and obligations in the text as a whole. The proposal to delete draft articles 22 and 63, as well as all other references to delay, was not accepted by the Working Group, nor was the suggestion that resort could be had to a "reasonableness" approach in terms of the time required for delivery, such as had been deleted pursuant to the compromise made at the 19th session, as reflected in footnote 49 of A/CN.9/WG.III/WP.101.

66. Some concerns were raised in the Working Group regarding the interpretation of draft article 22. Specifically, there seemed to be some confusion regarding whether express or implied agreement with respect to the time for delivery was required for the operation of the provision. However, it was noted that the requirement for "express" agreement had been deleted as part of the compromise agreed to at the 19th session of the Working Group (see A/CN.9/616, paras. 184), and that the phrase "unless otherwise agreed" with respect to the limitation on the amount of compensation for loss or damage due to delay in draft article 63 had also been deleted as part of that compromise (see A/CN.9/616, paras. 180 (b) and 184). A number of delegations agreed with the view that draft article 18 set out the carrier's general obligation in respect of delay, that that obligation could not be contracted out of pursuant to draft article 82, that the date of delivery was not a required element of the contract particulars, that the carrier's agreement to deliver by a certain date might be inferred from the communications exchanged by the parties, including the carrier's public schedule of arrivals and departures, and that draft article 22 only determined when delay had occurred. The Working Group declined to take a definitive position regarding that, or any other, interpretation of the draft provisions on delay.

Conclusions reached by the Working Group regarding draft article 22

67. The Working Group approved the substance of draft article 22 and referred it to the drafting group.

Draft article 23. Calculation of compensation

68. The Working Group approved the substance of draft article 23 and referred it to the drafting group.

Draft article 24. Notice of loss, damage or delay

Paragraph 4

69. Although the Working Group was generally of the view that draft article 24 was acceptable, a drafting issue was raised with respect to the reference in paragraph 4 to "articles 22 and 63". It was observed that compensation for loss due to delay was not actually payable pursuant to those provisions, but rather that it was payable pursuant to draft article 18, and that reference to draft articles 22 and 63 could create ambiguity. The Working Group agreed with a suggestion that paragraph 4 should be made more accurate in that respect, and a proposal to simply delete the reference to articles 22 and 63 received considerable support. However, it

was pointed out that care had to be taken in the reformulation of the remainder of the paragraph, such that it did not require that the notice contain the specific amount of the loss claimed, which would be difficult to quantify, but rather provided notice that loss resulting from the delay had occurred. While a precise formulation was not agreed upon, the Working Group agreed that the drafting group should consider text for paragraph 4 along the following lines: "No compensation [due to] [arising from] [resulting from] delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods."

Title of draft article 24

70. It was observed that the drafting group should consider whether the title of draft article 24 was appropriate, given the agreement in the Working Group that the notice should concern the loss due to the delay, and not the delay itself. There was some support for that suggestion.

Conclusions reached by the Working Group regarding draft article 24

71. Subject to the following adjustments, the Working Group approved the substance of draft article 24 and referred it to the drafting group:

- the title of the draft provision should be considered with a view to adjusting it to reflect that the notice should be of the loss rather than of the delay; and
- the text of paragraph 4 should be amended along the lines noted in the final sentence of paragraph 69 above.

Chapter 6 – Additional Provisions Relating to Particular Stages of Carriage

Draft article 25. Deviation during sea carriage

72. It was suggested that the title of the provision would better reflect its placement in chapter 6 if the phrase "during sea carriage" were deleted. Subject to that adjustment, the Working Group approved the substance of draft article 25 and referred it to the drafting group.

Draft article 26. Deck cargo on ships

Proposal for expanding the definition of "containers"

73. The Working Group was reminded that a proposal had been made regarding a suggested improvement to be made to the definition of "container" currently in draft article 1 (26) (see A/CN.9/WG.III/WP.102), and that it would seem logical to discuss that proposal in connection with draft article 26. It was explained that the proposal was to adjust the definition of "container" in the draft convention by adding to it the term "road cargo vehicle", and that that change would primarily have an effect on draft articles 26 (1) and (2) and 62 (3). It was noted that road cargo vehicles were often carried overseas in large numbers, usually on specialized trailer carrying vessels that were designed to carry both such vehicles and containers either on or below deck. It was explained that the current text of the draft convention treated road cargo vehicles pursuant to draft article 26 (1) (c), rather

than grouping them with containers pursuant to draft article 26 (1) (b), such that the carrier might not be liable for damage to the goods in road cargo vehicles due to the special risk of carrying them on deck as part of the category in paragraph (c). It was suggested that road cargo vehicles should instead be treated in the same fashion as containers, such that the normal liability rules would apply to them regardless of whether they were carried on or below deck.

74. By way of further explanation, it was noted that adjusting the definition of "container" so as to include road cargo vehicles would ensure that it would not be possible to consider a road cargo vehicle as one unit pursuant to draft article 62 (3), but that, as in the case of containers, each package in the road cargo vehicle could be enumerated for the purposes of the per package limitation on liability. It was noted that that particular problem had been raised by the International Road Transport Union (IRU) (see A/CN.9/WG.III/WP.90) as being of particular concern. Further, it was suggested that adjusting the definition of "container" as proposed could have the additional benefit of treating containers and road cargo vehicles in an equitable fashion.

75. An additional proposal was made to extend the definition of "container" to include not only "road cargo vehicles", but to include "railroad cars" as well. While it was noted that railroad cars were seldom carried on deck, it was suggested that the inclusion of that term in the definition of "container" could have certain advantages, for example, in respect of the shipper's obligation to properly and carefully stow, lash and secure the contents of containers pursuant to draft article 28.

76. Broad support was expressed for both proposals, as they entailed practical benefits, reflected the current practice and were especially reasonable from the viewpoint of the industry. It was observed that the proposal did not cause any change in the conflict of conventions provision of the draft convention and that there would be in particular no conflict with the CMR. It was further noted that if the proposals were to be approved, the drafting group should review the entire draft convention on the use of the terms "container" and "trailer".

77. However, some concerns were raised with regard to extending the definition of "containers". From the viewpoint of carriers, it was said, the expanded definition might result in an increase of the carrier's level of liability, thus upsetting the balance currently reflected in the draft convention.

78. From the viewpoint of shippers, the concern was expressed that an expanded definition of "containers" might have undesirable implications on draft article 62 on limitation of liability especially with regard to sea transport of a road cargo vehicle. For example, if the bill of lading did not include the enumeration of the goods on the vehicle, the vehicle and its contents would be regarded as a single package and thus all the owners of the goods on the truck would lose the per package limitation. This danger would also be a matter of concern for road haulers. It was pointed out that the CMR provided for a higher weight limitation of liability than currently contemplated in the draft convention. Thus, in case of cargo loss or damage during a sea journey while the goods were loaded on a truck, the road carrier might be liable to compensate cargo owners at an amount higher than it could recover from the sea carrier. Another concern was the possible implication that the inclusion of road vehicles in the definition of containers might have for loss or damage to a road cargo vehicle which was transported by sea without any goods loaded on it. For

those reasons, rather than amending the definition of "containers" it was suggested that it would be preferable to take an article-by-article approach and add the words "road cargo vehicles" and "railroad cars" whenever the context so required.

79. In response to those concerns, it was stated that goods in "road cargo vehicles" would need to be enumerated to benefit from the per package limitation and that that was already the practice, especially under the CMR. As regards damage to the vehicle itself, it was pointed out that the definition of "goods" as provided in paragraph 24 of draft article 1 addressed that issue as it included containers not supplied with cargo. Furthermore, from a practical point of view, it was noted that an amendment in the definition of containers had the advantage of avoiding the need for adding the expressions "road cargo vehicles" and "railroad cars" every time the term "container" was used (draft articles 1 (25), 1 (26), 15 (c), 18 (5) (a), 26 (1) (b), 28 (3), 42 (3), 42 (4), 42 (4) (a)(i), 42 (4) (b)(i), 42 (4) (b)(ii), 43 (c)(ii), 51 (2) (b), 62 (3)).

80. In view of the concerns that had been raised, and noting the relationship between some of the arguments and the notion of "package" in draft article 62, paragraph 3, the Working Group agreed that it should postpone its deliberations on the matter until it had examined that other provision.

Fitness for carriage on deck

81. It was pointed out that, regardless of whether or not the definition of "container" in the draft convention was to include "road cargo vehicles" and "railroad cars", they would in any event need to be fit for carriage on deck and this should be reflected in paragraph 1 (b) of draft article 26. There was general agreement in the Working Group that the carrier should only be allowed to carry on deck road cargo vehicles and railroad cars that were fit for such carriage and that the ship's deck should be specially fitted to carry them.

Conclusions reached by the Working Group regarding draft article 26

82. The Working Group approved the substance of draft article 26, subject to inclusion of reference to "road cargo vehicles" and "railroad cars" in subparagraph 1 (b). The Working Group agreed to revert to the proposed amendment to the definition of containers after it had examined draft article 62, paragraph 3.

Draft article 27. Carriage preceding or subsequent to sea carriage

83. Some concern was raised that draft article 27 did not provide for a declaration provision whereby a contracting State might declare that it would apply mandatory provisions of its domestic law in essentially the same circumstances under which a contracting State could apply an international instrument in accordance with paragraph 1 of draft article 27. In response, the Working Group was reminded that at its nineteenth session it had requested the inclusion of such a draft article (see A/CN.9/621, paras. 125-126) and that, at its twentieth session, it had decided, as part of its provisional decision pending further consideration of the compromise proposal on the level of the limitation of the carrier's liability, to reverse that decision (see A/CN.9/642, paras. 163 and 166), which is why the text before the Working Group did not contain any such provision.

84. A question was raised whether the use of the different terms "international instruments" in draft article 27 and "international convention" in draft article 85 was intentional. It was clarified that the differentiation was intentional, because not all relevant international instruments in this context were regarded as international conventions, for example, a regulation issued by a regional economic integration organization.

85. With regard to paragraph 3 of draft article 27, it was suggested that the paragraph should be deleted entirely, in light of the Working Group's decision at its nineteenth session to choose the Variant B approach with regard to limits of liability (see A/CN.9/621, para. 191). The Working Group was reminded that draft paragraph 3 had been added for greater clarity regarding the applicability of inland transport conventions when the only approach in subparagraph 1 (a) of the text was the conflict of laws approach set out in Variant A. It was pointed out that, since the draft article currently reflected a different approach, namely the "hypothetical contract" approach, draft paragraph 3 had become superfluous and might even interfere with the operation of subparagraph 1 (a).

86. In response, there was some support for retaining paragraph 3 as it had been part of a compromise arrived at after extensive debate. The Working Group was invited to consider carefully possible implications of deleting draft paragraph 3, in particular in connection with draft article 62, paragraph 2, before making final decision on the matter.

Conclusions reached by the Working Group regarding draft article 27

87. After discussion, the Working Group approved the substance of draft article 27 and referred it to the drafting group. The Working Group agreed to postpone a decision on paragraph 3 of draft article 27 until it had further deliberated on matters relating to limits of liability in paragraph 2 of draft article 62 (see below, para. 204).

Chapter 7 – Obligations of the Shipper to the Carrier

Draft article 28. Delivery for carriage

88. As noted in footnotes 62 and 101 of A/CN.9/WG.III/WP.101, the obligation to properly and carefully unload the goods had been deleted from paragraph 2 of draft article 28 and moved to paragraph 2 of draft article 45 in the chapter on delivery of the goods, since it was thought that the obligation to unload the goods under an agreement pursuant to draft article 14 (2) would usually be performed by the consignee and was not an obligation of the shipper. However, a concern was raised that there might be a gap in the draft convention with regard to the obligation to unload the goods, since under draft article 45, the consignee only had obligations pursuant to the draft convention when it had exercised its rights under the contract of carriage. It was thought that if the obligation to unload the goods was no longer one of the shipper's obligations, and if the consignee had not exercised any of its rights under the contract of carriage, no party would be required to perform this obligation. Therefore, two proposals were put forward: (a) to re-insert "unload" into paragraph 2 of draft article 28; or (b) to replace "load, handle or stow the goods" with "perform its obligations under that agreement".

89. A contrary view was expressed that there was in fact no gap with regard to the obligation to unload the goods. Although the consignee might have this obligation as a result of an agreement pursuant to draft article 14 (2), it was traditionally not the obligation of the shipper to discharge the goods. It was further pointed out that the only situation where the shipper would be under an obligation to discharge the goods would be in an FOB sale, in which case the shipper would also be the consignee. Therefore, the obligation to unload the goods should not be dealt with in draft article 28 in any event.

90. However there was recognition that the discrepancy between the obligations listed in draft article 14 (2) and those listed in draft article 28 (2) might cause confusion, and the Working Group agreed with the proposal to replace "load, handle or stow the goods" with a phrase along the lines of "perform its obligations under that agreement" in order to avoid such concerns.

91. In addition, a preference was expressed in the Working Group for the clarity that would be lent draft article 28 (2) by deleting the phrase "the parties", and by re-inserting the terms "the carrier and the shipper". Further, it was proposed that, in the interests of consistency, such an amendment would require a similar amendment to the provision in draft article 14 (2). The Working Group supported those proposals, and agreed that further discussion regarding what would trigger the consignee's obligation to unload the goods could be considered under draft article 45.

92. Further, the Working Group was reminded that paragraph 3 of draft article 28, contained the phrase "container or trailer", which would require amendment depending on the Working Group's decision whether to include "road and rail cargo vehicles" in the definition of "container" in draft article 1 (26), or whether to make the necessary adjustments to the substantive provisions in the draft convention (see above, paras. 73 to 80).

93. Subject to the implementation of the above changes, the Working Group approved the substance of draft article 28 and referred it to the drafting group.

Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions

94. It was noted that the reference to "article 31" in the opening phrase of draft article 29 appeared to be inaccurate, and that the reference should be amended to "article 30". Following further discussion, it was suggested that the entire opening phrase "Without prejudice to the shipper's obligations in article 31," was unnecessary and could be deleted. There was strong support in the Working Group for that suggestion.

95. Subject to the deletion of the opening phrase, the Working Group approved the substance of draft article 29 and referred it to the drafting group.

Draft article 30. Shipper's obligation to provide information, instructions and documents

96. The Working Group approved the substance of draft article 30 and referred it to the drafting group.

Draft article 31. Basis of shipper's liability to the carrier

97. The Working Group approved the substance of draft article 31 and referred it to the drafting group.

Draft article 32. Information for compilation of contract particulars

98. The Working Group approved the substance of draft article 32 and referred it to the drafting group.

Paragraph 23 of draft article 1

99. With regard to the term "contract particulars" used in draft article 32, the Working Group approved the substance of the definition of that term provided in paragraph 23 of draft article 1 and referred it to the drafting group.

Draft article 33. Special rules on dangerous goods

100. It was observed that the term "consignor" was used in paragraph (a) of draft article 33, and that the Working Group had agreed to delete all references to the consignor (see above, paras. 21 to 24). It was proposed that the draft provision could be adjusted by deleting the phrase "the consignor delivers them" and replacing it with text along the lines of: "they are delivered". The Working Group agreed with that general approach.

101. Subject to that adjustment to the text in order to delete the reference to the "consignor", the Working Group approved the substance of draft article 33 and referred it to the drafting group.

Draft article 34. Assumption of shipper's rights and obligations by the documentary shipper

102. The Working Group approved the substance of draft article 34 and referred it to the drafting group.

Paragraph 9 of draft article 1

103. With regard to the term "documentary shipper" used in draft article 34, the Working Group approved the substance of the definition of that term provided in paragraph 9 of draft article 1 and referred it to the drafting group.

Draft article 35. Liability of the shipper for other persons

104. It was observed that the term "the consignor" appeared in draft article 35, and that the Working Group had agreed to delete all references to the consignor (see above, paras. 21 to 24). The Working Group agreed that the phrase "the consignor or" should simply be deleted.

105. Some concerns were raised in the Working Group regarding the clarity of the text since the phrase "as if such acts and omissions were its own" had been deleted as redundant as noted in footnote 76 in A/CN.9/WG.III/WP.101. It was suggested that the text was unclear regarding whether the provision concerned fault-based or strict liability, and regarding on whose part that liability ought to be considered. In response, it was noted that the provision simply stated the general principle of

vicarious liability, rendering the shipper responsible for the acts of its employees, agents, subcontractors and the like, and that the liability standard would depend upon the particular obligation breached pursuant to the terms of the draft convention. In addition, it was observed that the re-insertion of a phrase such as that suggested could be rather complicated, since it could raise questions regarding the attribution of fault of the shipper under draft article 31, and since similar treatment would have to be given to draft article 19 regarding the liability of the carrier for other persons, which could raise significant complications throughout the text. After discussion, the Working Group decided that the provision was sufficiently clear, particularly in light of the well-known principle that was enunciated therein.

106. The Working Group approved the substance of draft article 35 and referred it to the drafting group.

Draft article 36. Cessation of shipper's liability

107. The view was expressed that draft article 36 should be deleted, since it was felt that the liability provision in paragraph (a) had been dealt with under other articles of the draft convention, and that the freight provision in paragraph (b) was inappropriate in the context of the draft convention. While there was support for that view with respect to paragraph (b), and a remaining question regarding the underlying rationale of the provision, the Working Group declined to change its existing consensus and agreed to maintain the provision.

108. The Working Group approved the substance of draft article 36 and referred it to the drafting group.

Chapter 8 – Transport Documents and Electronic Transport Records

Draft article 37. Issuance of the transport document or the electronic transport record

109. It was observed that the term "consignor" was used in paragraph (a) of draft article 37, and that the text of that provision would have to be adjusted following the Working Group's agreement to delete all references to the consignor (see above, paras. 21 to 24). A suggestion that the appropriate amendment could be accomplished by deletion of the chapeau of draft article 37 and of the whole of paragraph (a), but it was noted that while paragraph (a) could be deleted, the content of the chapeau of the text should be retained in order to cover the situation in some trades where no transport document or electronic transport record was issued.

110. The Working Group agreed to delete paragraph (a) and to request the drafting group to make such consequential changes to the remaining text as were necessary. The Working Group was also reminded that simple deletion of paragraph (a) might not be sufficient to implement the decision to delete the notion of the consignor from the text, and that further regard might have to be had to additional consequential changes throughout the text.

111. Subject to the deletion of paragraph (a) containing the reference to the "consignor" and to any necessary further adjustments to the text to effect that

deletion, the Working Group approved the substance of draft article 37 and referred it to the drafting group.

112. After having concluded its deliberations on the substance of draft article 37, the Working Group proceeded to examine a number of related definitions.

Definition of "transport document"(draft article 1, paragraph 15)

113. It was pointed out that, in light of the deletion of paragraph (a) of draft article 37 (see above, paras. 109 to 110) and of the decision of the Working Group to delete all references to the consignor (see above, paras. 21 to 24), certain adjustments would also have to be made to the definition of "transport document" in paragraph 15 of draft article 1.

114. It was suggested that the "or" between paragraphs (a) and (b) of draft article 1 (15) should be replaced with an "and" in order to reflect the Working Group's agreement that a mere receipt would not constitute a transport document for the purposes of the draft convention. Therefore, the Working Group agreed that the two conditions set forth in paragraph 15 of draft article 1 should be made conjunctive rather than disjunctive. The Working Group was satisfied that such adjustments to the definition of "transport document" would not have adverse implications for other provisions in the draft convention, except for a minor redrafting of paragraph (a) of draft article 43.

115. Subject to those amendments, the Working Group approved the substance of paragraph 15 of draft article 1 and referred it to the drafting group.

Consequential amendments to draft article 6 (2) (b)

116. An additional consequential change proposed in light of the deletion of the concept of the "consignor" and of the amendments to the definition of "transport document" was to delete the text of paragraph 2 (b) of draft article 6 and replace it with the phrase "a transport document or an electronic transport record is issued".

117. The Working Group agreed to amend paragraph 2 (b) of draft article 6 accordingly and referred it to the drafting group.

Definition of "negotiable transport document" (draft article 1, paragraph 16)

118. With regard to the term "negotiable transport document" used in draft article 37, a suggestion was made to replace "to the order of the consignee" with "to the order of the specified/named person", as the consignee would be the endorsee of an order bill of lading and it would be important to indicate who the endorser would be, in particular, if the bank was the consignee. Further, it was stated that such a change would not be a change in substance and would solve the perceived inconsistency that lay between paragraphs 12 and 16 of draft article 1.

119. In response, it was pointed out that that would introduce a new term, "specified/named person", which would in turn need to be defined and could be inconsistent with the definition of "holder" in paragraph 11 of draft article 1. The term, it was also said, would introduce greater uncertainty and would be less advantageous for banks financing foreign trade contracts. Under current practice, transport documents usually contained space for inserting the name of the "consignee", so that banks already had the opportunity to protect their rights by

seeing to it that they were named as consignees in transport documents. The draft convention not only accommodated that practice, but also offered additional protection for banks that might be reluctant to accept being named as consignees out of concerns over possible liability or burden in respect of the goods by providing, in draft article 45, that the consignee was only obliged to take delivery of the goods if it had exercised its rights under the contract of carriage.

120. In response to a question as to what law was meant by the expression "the law applicable to the document" in paragraph 16 of draft article 1, it was observed that the draft convention refrained from determining which law should govern the instrument, a question to which domestic systems of private international law offered conflicting answers. In any event, it was also pointed out that the scope of the reference to applicable law was limited to the question of which expressions might legally be equivalents of words such as "to order" or "negotiable".

121. The Working Group agreed to retain the definition provided for in paragraph 16 of draft article 1 and referred it to the drafting group.

Definition of "non-negotiable transport document" (draft article 1, paragraph 17)

122. The Working Group approved the substance of the definition provided for in paragraph 17 of draft article 1 and referred it to the drafting group.

Definition of "electronic communication" (draft article 1, paragraph 18)

123. In response to a question concerning the rationale for the differences between the definition of "electronic communication" in paragraph 18 of draft article 1 and the definition provided in the United Nations Convention on the Use of Electronic Communication in International Contracts (ECC), it was pointed out that the definition used in the draft conventions combined elements of the definitions of "electronic communication" and "data messages" as contained in the ECC with the criteria for functional equivalence of electronic communications set forth in the ECC.

124. The Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

Definition of "electronic transport record" (draft article 1, paragraph 19)

125. The Working Group approved the substance of the definition of "electronic transport record", subject to the necessary amendments to align it with the revised version of the definition of "transport document" (see above, paras. 113 to 114), and referred it to the drafting group.

Definition of "negotiable electronic transport record" (draft article 1, paragraph 20)

126. With regard to the term "negotiable electronic transport record" used in draft article 37, the Working Group took note of the concern that had been expressed with regard to paragraph 16 of draft article 1 (see above, paras. 118 to 120). Nevertheless, the Working Group approved the substance of the definition provided for in paragraph 20 of draft article 1 and referred it to the drafting group.

Definition of "non-negotiable electronic transport record" (draft article 1, paragraph 21)

127. With regard to the term "non-negotiable electronic transport record" used in draft article 37, the Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

Definition of "issuance" and "transfer" of negotiable electronic transport records (draft article 1, paragraph 22)

128. With regard to draft article 1, paragraph 22, a question was raised whether this paragraph did in fact provide definitions of "issuance" and "transfer" and whether it dealt with a matter of substance. It was further noted that the provision was not clear, because whereas it was possible to transfer exclusive control, it was impossible to "issue" exclusive control.

129. Suggestions made in the contexts of the definition were: (i) to delete "issuance" entirely from the definition; and (ii) to refer to the "creation" of exclusive control. Other suggestions were made that paragraph 22 of draft article 1 should be moved to the other chapters of the draft convention, as it was a substantive issue. Proposals were made to move paragraph 22 to draft articles 8 or 9 or as a separate article in chapter 3.

130. The Working Group agreed to the suggestion that the concepts mentioned in paragraph 22 of draft article 1 would be more clearly understood if "issuance" and "transfer" of a negotiable electronic transport record were to be defined separately and if the definition of "issuance" of a negotiable electronic transport record would refer to the requirement that such a record must be created in accordance with procedures that ensured that the electronic record was subject to exclusive control throughout its life cycle. The Working Group referred paragraph 22 of draft article 1 to the drafting group with the request to formulate appropriate wording to that effect.

Draft article 38. Contract particulars

131. Draft article 38 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 39. Identity of the carrier

132. The draft article did not elicit comments. The Working Group approved the substance of draft article 39 and referred it to the drafting group.

Draft article 40. Signature

133. Draft article 40 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 41. Deficiencies in the contract particulars

134. The Working Group agreed that paragraph 3 of the draft article needed some adjustment to reflect the decision of the Working Group not to use the term "the consignor" in the draft convention (see above, paras. 21 to 24). Subject to the required amendments, the Working Group approved the substance of draft article 40 and referred it to the drafting group.

Draft article 42. Qualifying the information relating to the goods in the contract particulars

Proposal to deal with certain situations regarding inspection or actual knowledge of goods in a closed container

135. It was noted that draft article 42 set up a system through which the carrier could qualify information referred to in draft article 38 in the contract particulars. It was further noted that paragraph 3 addressed the context of goods delivered for shipment in a non-closed container, whereas paragraph 4 addressed goods delivered in a closed container.

136. In that connection, the view was expressed that draft article 42 left a possible gap, namely, in situations where the goods were delivered in a closed container but the carrier had actually inspected them, albeit not fully, for example when the carrier opened a container to ascertain that it indeed contained the goods declared by the shipper but was not able to verify their quantity. Such a situation, it was said, would be similar to the situations contemplated in paragraph 3 and deserved to be treated in essentially the same manner. Thus, it was suggested that the following additional paragraph should be inserted after paragraph 4:

> When the goods are delivered for carriage to the carrier or a performing party in a closed container, but either the carrier or a performing party has in fact inspected the goods inside the container or the carrier or a performing party has otherwise actual knowledge of its contents before issuing the transport document or the electronic transport record, paragraph 3 shall apply correspondingly in respect of the information referred to in article 38, subparagraphs 1 (a), (b), and (c).

137. In response, some concerns were expressed. In a situation where the carrier or a performing party had actual knowledge of the goods in a closed container, paragraph 2 of draft article 42 would apply and the carrier or a performing party would not be able to qualify the information. Another concern was that the relationship between the suggested additional paragraph and paragraph 1 was not clear. However, broad support was expressed for the rationale behind the proposal with regard to the situation in which the carrier or a performing party had actually inspected the goods. Therefore, it was suggested that a more appropriate and efficient way of addressing that situation was to add the phrase “or are delivered in a closed container but the carrier or the performing party has in fact inspected the goods” after the phrase “in a closed container” in the chapeau of paragraph 3. That proposal found broad support.

Proposal to clarify the conditions for the carrier to qualify the information in paragraph 4 (a)

138. A proposal was made to replace the word “or” at the end of paragraph 4 (a)(i) with the word “and” in order to clarify the conditions of the carrier to qualify the information relating to the goods in the contract particulars. It was widely felt that paragraph 4 in its current form was not clear and caused confusion. The Working Group was in agreement that with regard to the situation in paragraph 4, the carrier would not be able to qualify the information referred to in draft article 38, subparagraphs 1 (a), (b) or (c), if the carrier or a performing party had inspected the

goods or if the carrier or a performing party otherwise had actual knowledge of the goods.

Conclusions reached by the Working Group regarding draft article 42

139. Subject to the following adjustments, the Working Group approved the substance of draft article 42 and referred it to the drafting group:

- the phrase along the lines of "or are delivered in a closed container but the carrier or the performing party has in fact inspected the goods" should be inserted in the chapeau of paragraph 3 after "in a closed container"; and
- paragraph 4 (a) should be drafted more clearly in order to reflect the cumulative approach, in which the carrier may not qualify the information referred to in draft article 38, subparagraphs 1 (a), (b) or (c) if the carrier or the performing party had in fact inspected the goods inside the container [and/or] had otherwise actual knowledge of its contents before issuing the transport document or the electronic transport record.

Draft article 43. Evidentiary effect of the contract particulars

140. A concern was raised with respect to the estoppel rules in subparagraphs (b) and (c) of draft article 43, because the respective requirements of a third party and a consignee were different. Subparagraph (b) required a third party to act in good faith only, whereas subparagraph (c) required the consignee acting in good faith to also have acted in reliance on any of the contract particulars mentioned in subparagraph (c). A question was raised whether that discrepancy was the intention of the Working Group. In order to address that discrepancy, it was suggested that the requirements of subparagraph (b)(i) and (ii) should be aligned with subparagraph (c) following the approach taken in paragraph 3 of article 16 of the Hamburg Rules.

141. Despite some sympathy expressed for that proposal, the Working Group was reminded that draft article 43 had been the subject of intense negotiations during the second reading of the draft convention and that the draft article in the current form reflected the compromise reached. That compromise led to a distinction between the holder of a negotiable transport document and the holder of a non-negotiable transport document. While in the first case it had been accepted that the holder acting in good faith should generally be protected, in the second case the protection should only be available for a holder who in good faith had acted on reliance on the information contained in the non-negotiable transport document. It was further observed that an additional reliance requirement to subparagraph (b) with regard to a negotiable transport document or a negotiable electronic transport record would result in a substantial change to that common understanding.

142. The Working Group approved the substance of draft article 43, subject to the deletion of the phrase "that evidences receipt of the goods" following the revision of the definitions of "transport document" and "electronic transport record" (see above, paras. 113 to 114 and 125), and referred it to the drafting group.

Draft article 44. "Freight prepaid"

143. In response to a question whether draft article 44 was intended to be a substantive provision or an evidentiary rule, it was noted that the provision was

intended as a substantive one. In response to a further question regarding the meaning of the phrase "or a statement of a similar nature", it was explained that the precise phrase "freight prepaid" need not appear in the contract particulars for the provision to apply, but that an equivalent term, such as "freight paid in advance" or a similar phrase, would suffice.

144. The Working Group approved the substance of draft article 44 and referred it to the drafting group.

Chapter 9 – Delivery of the Goods

Draft article 45. Obligation to accept delivery

145. The Working Group recalled its decision in relation to draft article 28 (2) to entertain further discussion under draft article 45 (2) regarding the necessary trigger for the consignee's obligation to unload the goods pursuant to an agreement made by the parties to the contract of carriage under draft article 14 (2) (see above, para. 91). In that context, two proposals were made: first, that, in keeping with the changes made to draft articles 14 (2) and 28 (2), the phrase "the parties" should be replaced with "the carrier and the shipper", and secondly, that the phrase "and the consignee provides its consent" should be inserted before the phrase "the consignee shall do so properly and carefully." Strong support was expressed for the first part of that proposal, and some support was expressed for the second part of the proposal. Some concern was expressed regarding what the result would be if the consignee did not consent, but it was suggested that the solution to that problem could be found in the carrier's rights with respect to undelivered goods pursuant to draft article 51 (2). Further, support for the two proposals was urged, since the situation at issue in paragraph 2 was thought to be rather exceptional, and that requiring the consent of the consignee was thought to have a neutral effect in practice, while assuaging some of the broader concerns expressed in the Working Group with respect to agreements made pursuant to draft article 14 (2).

146. It was observed that the requirement for the "consent" of the consignee might be too onerous, since, for example, if a provision in the bill of lading required the consignee to unload the goods at its own risk and expense, it would be unnecessary for the consignee to provide a separate consent. As such, it was suggested that any revision to paragraph 2 should instead focus on the agreement under draft article 14 (2) "binding" the consignee, rather than requiring its "consent". There was some support for that suggested approach.

147. However, strong concerns were raised regarding both the proposal to insert an element of "consent" into the draft provision, and to focus on "binding" the consignee. In particular, it was observed that in some jurisdictions, the contract of carriage was a three party contract, and the consignee was bound by its terms. It was further noted that any additional requirement for "consent" on the part of the consignee could have very serious consequences in respect of commercial practices or customs of a particular trade. For example, it was observed that in the bulk trades, a provision requiring the consent of the consignee regarding an obligation to unload the goods would constitute a marked change from existing practice. As a result, a strong preference was expressed for leaving the text of paragraph 2 as drafted in the text, or for the deletion of the paragraph altogether, leaving the matter of the

consignee's obligations to national law. Strong support was expressed for that perspective.

148. It was observed that paragraph 2 should be considered in two respects: first, with respect to any consent that should be required from the consignee prior to it being subject to the obligation to unload the goods pursuant to an agreement between the parties to the contract of carriage, and secondly, with respect to the standard of care that should be required of the consignee in unloading the goods. It was suggested that the focus of the draft provision should be on the standard of care rather than on whether the consignee had given its consent, and that the text of paragraph 2 should be adjusted in order to reflect that. It was suggested, in particular, that draft article 45 (2) could be amended along the following lines: "When the consignee unloads the goods, it shall do so properly and carefully." If that approach were taken, it was thought that it would be clear that the issue of whether or not the consignee had to consent to any obligation on it pursuant an agreement under draft article 14 (2) would be subject to national law.

149. As a further clarification, it was noted that the Working Group should consider specifically whether the standard of care required of the consignee in unloading the goods would be with respect to the goods themselves, with respect to the goods of others, or with respect to the ship. If the standard of care was intended to be focused on the goods, it was observed that the consignee was likely the owner of the goods, and that it would seem illogical to set out a standard of care with respect to one's own goods.

150. Given the strongly-held views expressed in the Working Group, an attempt to form consensus on the basis of the proposal that the paragraph should focus on the standard of care and not on whether the consignee had given its consent was not successful. There was agreement with the view expressed that setting out a standard of care in that limited sense was somewhat redundant, since all obligations undertaken pursuant to the contract of carriage ought to be carried out properly and carefully. Rather than maintain the text of paragraph 2 as drafted, the Working Group decided to delete paragraph 2 of draft article 45 in order to make it abundantly clear that the matter of the consignee's obligation resulting from any agreement between the carrier and the shipper was left to national law.

151. Having decided to delete paragraph 2, the Working Group approved the substance of paragraph 1 of draft article 45 and referred it to the drafting group.

Draft article 46. Obligation to acknowledge receipt

152. The Working Group approved the substance of draft article 46 and referred it to the drafting group.

Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

153. The Working Group approved the substance of draft article 47 and referred it to the drafting group.

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

154. The Working Group was reminded that alternative text remained in the chapeau of draft article 48 in square brackets, "[provides] [indicates]", and that a decision should be made as to the preferred term to be retained in the text. It was recalled that the Working Group had last considered the issue of which term to use at its 20th session, when it had a lengthy discussion regarding the merits of each alternative (see A/CN.9/642, paras. 31 to 33). Mindful of that discussion, the view was reiterated that the provision had been inserted in the text to preserve existing law regarding a particular type of document, and that in some jurisdictions, the applicable law provided that the simple title "bill of lading" meant that surrender of the document was required upon delivery of the goods. Thus, it was suggested, the only acceptable term to preserve that body of existing law was the term "indicates".

155. In response, the Working Group was reminded that the particular type of document for which draft article 48 was created was still intended to fall within the existing taxonomy of documents in the draft convention, and that to preserve the clarity of that categorization, the word "indicates" should be avoided as potentially importing uncertainty into the system. As such, a preference was expressed that the word "provides" be chosen instead. There were strongly held views in support of each of those positions, with a slight preference expressed for the term "indicates".

156. Subject to the deletion of the alternative "[provides]" and the deletion of the square brackets surrounding the word "indicates", the Working Group approved the substance of draft article 48 and referred it to the drafting group. Further, it was observed that in the interests of consistency, the word "indicates" should be retained in the other provisions in the text in which the two alternatives were present, in particular, in draft articles 43 (b)(ii), 49 and 54 (2).

Draft article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued

157. It was proposed that draft article 49 should be deleted, since unlike the document provided for in draft article 48, there was no existing practice of using the electronic equivalent of a non-negotiable transport document that required surrender that required support in the text of the draft convention. In light of that absence, the Working Group agreed to delete draft article 49 and requested the drafting group to make consequential amendments to the draft convention, in particular, to draft article 9 and 43 (b)(ii).

Draft article 50. Delivery when a negotiable transport document or negotiable electronic transport record is issued

158. The view was expressed that the opening phrase "without prejudice to article 45" in paragraph (a) of draft article 50 was unnecessary and should be deleted as potentially misleading, as there was another reference to draft article 45 at the end of paragraph (a). In response, it was noted that the first reference helped readers understand the relationship between draft article 45, which stated the obligation of the consignee, and draft article 50, which stated the right of the holder. However, after discussion, the Working Group agreed to delete that phrase from draft article 50 (a).

159. A proposal was made to delete all reference to "the controlling party" in paragraphs (d) and (e), because those paragraphs would not make sense in the following situations: (i) when one or more original negotiable transport documents were issued and one person held all the originals, the holder would be the same person as the controlling party; and (ii) when more than one original were issued and several persons held each of them, there would be no controlling party, because there would be no one holding all the originals. Although some support was expressed for that proposal, the Working Group agreed to defer deliberation of it until draft article 54 was under consideration, which had a more direct bearing on the meaning of "controlling party" in paragraph 14 of draft article 1.

Paragraph 11 of draft article 1

160. In light of the Working Group's decision to amend the definitions of "issuance" and "transfer" in draft article 1 (22) (see above, paras. 128 to 130), it was suggested that the phrase "and that has exclusive control of that negotiable electronic transport record" in paragraph 11 (b) of the definition of the "holder" was no longer necessary, as the new definitions of "issuance" and "transfer" prepared by the drafting group both included the concept of exclusive control. The Working Group approved that suggestion.

161. With regard to the term "holder" used in draft article 50, the Working Group approved the substance of the definition of that term provided in paragraph 11 of draft article 1, subject to the above amendment, and referred it to the drafting group.

Draft article 51. Goods remaining undelivered

162. A question was raised to the meaning and purpose of the phrase "otherwise undeliverable" in paragraph 1 (e) of draft article 51. It was suggested in response that that subparagraph could be deleted entirely, since subparagraphs 1 (a) to (d) sufficiently covered all of the possible circumstances in which goods could remain undelivered, and that there could be potential for abuse by the carrier if subparagraph 1 (e) were retained.

163. However, it was pointed out that subparagraph 1 (e) was useful, as it would apply to situations, for instance, where weather conditions caused the goods to be undeliverable. It was also noted that there might be additional situations where paragraphs 1 (a) to (d) would not be applicable, for example if the consignee simply did not claim delivery, and that an open clause such as paragraph 1 (e) would be helpful. In support of that view, it was pointed out that the term "undeliverable" would likely be interpreted narrowly in any event. Broad support was expressed to retain subparagraph 1 (e) of draft article 51.

164. A suggestion was made that it would be preferable to require a specific period of time to pass before the carrier could destroy the goods pursuant to paragraph 2 (b) of draft article 51. Although there was sympathy for that suggestion, it was noted that the "reasonable notice" requirement in paragraph 3 of draft article 51 was sufficient to address any concern regarding abuse of that right.

Conclusions reached by the Working Group regarding draft article 51

165. The Working Group approved the substance of draft article 51 subject to the deletion of reference to draft article 49 in paragraph 1 (b) and (c) and referred it to the drafting group.

Draft article 52. Retention of goods

166. A proposal was made to include the "shipper" in draft article 52 between "the carrier" and "a performing party", because there were instances when the shipper might want a right of retention, such as when faced with the draft article 28 obligation to deliver the goods to a carrier, when the ship was in particularly bad condition. In order to address that concern, a more neutral proposal was made to delete the reference to the "the carrier or performing party" and simply refer to "a right that may exist pursuant to the contract of carriage …". Although some support was expressed for that proposal, doubts were expressed regarding the need to grant the shipper a right of retention, and that, in any event, the inclusion of the shipper in draft article 52 would be misplaced since the provision was located in chapter 9 on delivery.

167. After discussion, the Working Group approved the substance of draft article 52 and referred it to the drafting group.

Chapter 10 – Rights of the Controlling Party

Draft article 53. Exercise and extent of right of control

168. The Working Group approved the substance of draft article 53 and referred it to the drafting group.

Paragraph 13 of draft article 1

169. With regard to the term "right of control", the Working Group approved the substance of the definition, subject to correcting the reference to "chapter 11" to "chapter 10" provided for in paragraph 13 of draft article 1 and referred it to the drafting group.

Paragraph 14 of draft article 1

170. With regard to the term "controlling party", the Working Group approved the substance of the definition provided for in paragraph 14 of draft article 1 and referred it to the drafting group.

Draft article 54. Identity of the controlling party and transfer of the right of control

171. A question that had been deferred for discussion under draft article 54 (see above, para. 159) was reiterated regarding whether the reference to the "controlling party" could be deleted in draft articles 50 (d) and (e), since, in the case of a negotiable transport document or electronic transport record, the holder and the controlling party were the same person. In response, it was noted that simply deleting that term would alter the meaning of the provisions because it would omit

the current practice requiring the notification of the holder of the arrival of the goods, even if the holder did not appear to take delivery. It was thought that that change would not be desirable.

172. Subject to retaining the word "indicates" in paragraph 2 and deleting the alternative "provides", the Working Group approved the substance of draft article 54 and referred it to the drafting group.

Draft article 55. Carrier's execution of instructions

173. The Working Group approved the substance of draft article 55 and referred it to the drafting group.

Draft article 56. Deemed delivery

174. The Working Group approved the substance of draft article 56 and referred it to the drafting group.

Draft article 57. Variations to the contract of carriage

175. Subject to the deletion of paragraph 3 as superfluous as suggested in footnote 159, the Working Group approved the substance of draft article 57 and referred it to the drafting group.

Draft article 58. Providing additional information, instructions or documents to carrier

176. The Working Group approved the substance of draft article 58 and referred it to the drafting group.

Draft article 59. Variation by agreement

177. The Working Group approved the substance of draft article 59 and referred it to the drafting group.

Chapter 11 – Transfer of Rights

Draft article 60. When a negotiable transport document or negotiable electronic transport record is issued

178. The Working Group approved the substance of draft article 60 and referred it to the drafting group.

Draft article 61. Liability of the holder

179. A question was raised with regard to the reference "without prejudice to article 58" at the beginning of paragraph 1 of draft article 61 and its meaning, as the reference seemed irrelevant. It was observed that it left the consequence unclear if the controlling party did not provide the information as requested in draft article 58. It was further noted that the reference created problems of interpretation and it was thus suggested to delete the reference entirely.

180. In response, it was explained that draft article 61 established the obligation of the holder qualified by draft article 58, as the holder was in fact the only person in possession of the information mentioned in draft article 58. Further, it was noted that the reference to draft article 58 should be retained in paragraph 1 of draft article 61, as it served the purposes of clarity. Broad support was expressed for the retention of the reference to draft article 58 in paragraph 1 of draft article 61.

181. With respect to paragraph 2 of draft article 61, the Working Group was reminded that, at its 20th session, no definite decision had been taken and that paragraph 2 had been put into square brackets because of divergences in the Working Group. Subsequently, some support was expressed for the deletion of paragraph 2, in particular because the concern was raised that the phrase "exercise any rights" might be interpreted in a way that minor action would be deemed as an exercise of rights and would thus cause liability. However, broad support was expressed to retain paragraph 2, as it was desirable for the carrier to ascertain if the holder had assumed any liabilities under the contract of carriage and to which extent it had done so. It was noted that that approach also reflected the current practice and it was viewed as clear that minor actions would not be seen as an exercise of rights.

Conclusions reached by the Working Group regarding draft article 61

182. Despite the proposal to delete the phrase "without prejudice to article 58" in paragraph 1, the Working Group approved the substance of draft article 61, subject to the deletion of the square brackets around paragraph 2 and subject to the deletion of the square brackets in the phrase "for the purpose of paragraph[s] 1 [and 2] of this article" in the chapeau of paragraph 3, and referred it to the drafting group.

Chapter 12 – Limits of Liability

Draft article 62. Limitation of liability

Proposal regarding the limitation on the carrier's liability

183. The Working Group was reminded that draft article 62 on limitation of liability had been subject to intense discussion at its previous session (see paras. 136 ff. of A/CN.9/642). It was further reminded that in light of the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a provisional compromise proposal had been made, which was to be treated as an entire package (see para. 166 of A/CN.9/642). This package included the figures as set out in paragraph 1 of draft article 62, the deletion of paragraph 2 of draft article 62, the deletion of draft article 99, the adjustment of draft article 63 to include a figure of "2.5 times" into the remaining square brackets of draft article 63 and to delete "one times" and the reversal of the Working Group's earlier decision to draft a new provision allowing for the application of national law in situations similar to those contemplated in draft article 27.

184. There was wide support for the efforts made by the Working Group, at its twentieth session, to arrive at a consensus solution for the question of liability limits. Nevertheless, there was strong support for the view that the liability limits currently stated within square brackets in the draft article should be regarded as a starting point for further negotiation. In order to ensure that draft article 62 would preserve

an equitable balance between carrier and cargo interests and to achieve a wider consensus and thus acceptability of the draft convention, a proposal was made to (i) adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 Special Drawing Rights ("SDR") per package and 8 SDR per kilogram, and (ii) the deletion of paragraph 2 of draft article 62.

185. There was support for the view that the liability limits set forth in the Hamburg Rules and included in the provisional compromise as contained in paragraph 1 of draft article 62 were out of date. It was further observed that other international conventions that also dealt with transport of goods included higher figures than the draft convention. In that light, reference was made to CIM-COTIF and CMR, of which the latter contained liability limits of 8.33 SDR per kilogram of gross weight. Moreover, it was noted that the draft convention covered not only the carriage by sea, but that it covered multimodal transport, which made the application of the limits above the Hamburg Rules necessary. In addition, it was pointed out that the current wording of paragraph 1 of draft article 62 included all breaches of obligations and was not limited to loss or damage to goods, so that the Hamburg Rules were no longer sufficient.

186. In response, it was noted that the draft convention already represented a major shift in the allocation of risks, in particular in the increase in the carrier's liability, as the carrier was now under a continuing obligation of seaworthiness and could no longer avail itself of the defence based on nautical fault. It was also noted that the figures in the provisional compromise as contained in paragraph 1 of draft article 62 had been a real compromise, as many jurisdictions had limitations according to the Hague-Visby Rules, which were below the Hamburg Rules, or even lower ones. It was added that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated, since the value of most cargo carried by sea was lower than the Hague-Visby limits. Further, it was observed that, in an age of containerized transportation by larger ships, the increased figures would raise the carrier's financial exposure to a level that would make the carrier's liability nearly incapable of being insured at acceptable rates, thus, increasing the costs for transport and ultimately for the goods. In this light, the view was expressed by several delegations that the proposal for limits higher than currently contemplated was unrealistic and only motivated by political, not trade reasons. Some delegations expressed the concern that a move beyond the Hamburg Rules could eventually impede their countries' accession to the draft convention. It was added that the increase of figures as proposed could prevent the draft convention from becoming a global, effective instrument, which harmonized international trade. The Working Group was cautioned not to destroy the important work, which they had so far reached by upsetting the previous provisional compromise.

187. In response it was observed, however, that the impact of increased liability limits on carriers' liability insurance should not be overstated, as ship owners also benefited from global limitation of liability pursuant to the London Convention on Limitation for Maritime Claims (LLMC) and several domestic regimes to the same effect. The Working Group was invited not to flatly reject any proposal for increases in liability limits, but to explore avenues for further improving its earlier compromise on the matter. It was suggested, for example, that the Working Group could consider adopting the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation to 8 units of

account per kilogram of the gross weight of the goods that were the subject of the claim or dispute. The view was expressed that that proposal could be a bridge between the two positions, as many of the States that had favoured lower figures saw the per package limitation as the one that protected the carrier most. Alternatively, the Working Group might wish to agree on a higher limit per package, while retaining the limits per kilogram in the vicinity of the limit provided for in the Hamburg Rules.

188. In view of the different views that were expressed, the Working Group agreed to suspend its discussions on the issue of liability limits and the provisions which, according to the compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations.

Scope of paragraph 1 of draft article 62

189. The Working Group recalled that the phrase "for loss of or damage to [or in connection with] the goods" was deleted throughout the text of the draft convention and the phrase "for breaches of its obligations under this Convention" had been added in its stead, with appropriate footnotes (see fn. 169 of A/CN.9/WG.III/WP.101). The rationale for those changes was that the phrase deleted had caused considerable uncertainty and a lack of uniformity in interpretation following its use in the Hague and Hague-Visby Rules, particularly concerning whether or not it had been intended to include cases of misdelivery and misinformation regarding the goods. It was noted that the Secretariat had upon request reviewed the drafting history of paragraph 1, and had made the appropriate proposal as contained in A/CN.9/WG.III/WP.101, including the limitation on liability for misinformation and misdelivery.

190. In that context, some concern was voiced that misinformation should be left to national law. In response, it was stated that there should be no exception, as this would create uncertainty and unpredictability.

Declaration of value

191. It was proposed to move the phrase "except when the value of the good has been declared by the shipper and included in the contract particulars" to a separate provision, in order to distinguish more clearly between a normal hypothesis and a declaration of value. Some support was expressed in favour of the proposal, but the Working Group agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

Paragraph 2 of draft article 62

192. The views on paragraph 2 of draft article 62 differed and were linked to the respective view taken on paragraph 1. Support was expressed on its deletion, but only if the figures in paragraph 1 increased above the Hamburg Rules according to the aforementioned proposal. Other views expressed were that paragraph 2 should be deleted with the figures in paragraph 1 as contained in A/CN.9/WG.III/WP.101, because that formed part of the provisional package compromise. Another view expressed was to increase the figures in paragraph 1 as contained in the proposal, but to keep Variant B. A different view expressed was that national law should regulate the contents of paragraph 2. The Working Group took note of those views

and agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

Paragraph 3

193. In keeping with the Working Group's earlier decision to add road and rail cargo vehicles to draft article 26 (1) (b) on deck cargo in order to give them equivalent status with containers (see above, paras. 73 to 82), a proposal was made to include road and rail cargo vehicles in the text of paragraph 3 of draft article 62. Although some concern was reiterated from the earlier discussion that adding road and rail cargo vehicles to the text of draft article 62 (3) could have unintended consequences in terms of limiting the per package limitation (see above, paras. 78 to 82), the Working Group was of the view that such a change would constitute an improvement to the text.

194. Subject to that adjustment, the Working Group approved the substance of draft article 62 (3) and referred it to the drafting group.

Paragraph 4

195. The Working Group approved the substance of draft article 62 (4) and referred it to the drafting group.

Further consideration of draft article 62

196. Following its earlier agreement to suspend discussions on the issue of liability limits and the provisions which, according to the provisional compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations (see above, paras. 183 to 188), the Working Group resumed its consideration of draft article 62.

197. A proposal was made by a large number of delegations for the resolution of the outstanding issue of the compromise package relating to the limitation levels of the carrier's liability in the following terms:

- The limitation amounts to be inserted into paragraph 1 of draft article 62 would be 875 SDR per package and 3 SDR per kilogram and the text of that paragraph would be otherwise unchanged;
- Draft article 99 and paragraph 2 of draft article 62 would be deleted;
- No draft article 27 bis would be included in the text providing for a declaration provision to allow a Contracting State to include its mandatory national law in a provision similar to that in draft article 27 (see footnote 56, A/CN.9/WG.III/WP.101); and
- The definition of "volume contract" in paragraph 2 of article 1 would be accepted.

198. There was widespread and strong support for the terms of the proposal, which was felt to be a very positive step forward towards resolving the outstanding issues surrounding the limitation of the carrier's liability and related issues. The Working Group was therefore urged to adopt that proposal in final resolution of those outstanding issues. There was also strong support expressed for that view.

199. Concerns were expressed that the proposed levels for the limitation of the carrier's liability were too high, and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for that view, particularly given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes, and that the provisional compromise reached at the 20th session of the Working Group to include the limitation levels of the Hamburg Rules had been acceptable but only as a maximum in order to achieve consensus. The view was also expressed that the levels proposed were so high as to be unacceptable, and it was observed that the higher levels could result in higher transportation costs for the entire industry.

200. Other concerns were expressed that, while the proposed increase in the limitation levels for the carrier's liability was welcome, other aspects of the proposal were not acceptable. The view was expressed that the definition of "volume contract" in draft article 1 (2) should be further amended in order to provide greater protection for small shippers in light of the overall balance of the draft convention, particularly since freedom of contract provisions were thought to be destructive to provisions on mandatory protection for such shippers. Further, it was observed that the shipper was thought to bear a greater burden of proof than in previous regimes, particularly with respect to proving seaworthiness, and that, pursuant to draft article 36, the shipper was not able to restrict its liability. Other concerns were raised regarding the aspect of the compromise that would approve the text of paragraph 1 of draft article 62 as written, rather than deleting the phrase "for breaches of its obligations under this Convention" and re-inserting the phrase "for loss of or damage to the goods", and the perceived broader ability to limit liability that that text would afford the carrier. The particular example of draft article 29 concerning the obligation of the shipper and the carrier to provide information to each other was raised, where it was suggested that a failure to fulfil that obligation could result in unlimited liability for the shipper, but only limited liability for the carrier. In addition, concern was expressed regarding the deletion of draft article 62 (2), since it was thought that the shipper would bear an unfair burden of proof by having to prove where the damage occurred, and that that provision should only have been deleted if a much higher limitation per kilogram had been agreed upon.

201. Other delegations expressed dissatisfaction with the proposal, but expressed a willingness to consider it further.

202. The Working Group, in general, expressed its broad support for the proposal, despite it not having met the expectations of all delegations. In response to concerns that the revised limitation levels should appear in square brackets in the text, since there had also been strong objections to the revised limits, it was decided that there was sufficient support to retain the revised limits in the text without square brackets. It was noted that, according to the practice of the Working Group, provisions were kept in square brackets only when no clear support was expressed in favour of the text in brackets.

203. Subject to implementation into the text of the proposal as outlined in paragraph 197 above, the Working Group approved the substance of draft article 62, paragraph 1, and referred it to the drafting group.

Draft article 27. Carriage preceding or subsequent to sea carriage (*continued*)

204. Following its decision to delete paragraph 2 of draft article 62, the Working Group agreed to delete paragraph 2 of draft article 27. In addition, the Working Group agreed to delete paragraph 3 of draft article 27.

Draft article 63. Limits of liability for loss caused by delay

205. Since draft article 63 formed a part of the provisional agreement on the compromise package regarding the limitation on liability considered during its 20th session, the Working Group agreed to defer consideration of the provision pending agreement on that compromise package (see above, paras. 183 to 188).

206. A proposal to replace the "two and one-half times" found in square brackets in draft article 63 with the amount "three times" in order to place the provision more in line with the similar provision of CIM-COTIF was not supported.

207. Subject to the deletion of the square brackets and the retention of the text contained in them, the Working Group approved the substance of draft article 63 and referred it to the drafting group.

Draft article 64. Loss of the benefit of limitation of liability

208. The Working Group approved the substance of draft article 64 and referred it to the drafting group.

Chapter 13 – Time for Suit

Draft article 65. Period of time of suit

209. A concern was expressed that the Working Group might have unintentionally created a problem in the text of the draft convention by setting a two-year time period for the institution of proceedings for breaches of obligations, while at the same time failing to require that notice of the loss or damage be given to the carrier under draft article 24. It was suggested that such an approach would put the carrier at a disadvantage by allowing for the possibility that without such notice, the carrier could be surprised by a claim at any time within the two years, and that it might not have preserved the necessary evidence, even though prudent cargo interests would usually notify the carrier as soon as the loss or damage was discovered. It was noted that the Working Group had considered the operation of draft article 24 in a previous session (see, most recently, A/CN.9/621, paras. 110-114), and that it had been decided that a failure to provide the notice in draft article 24 was not intended to have a specific legal effect, but rather that it was meant to have a positive practical effect by encouraging cargo interests claiming loss or damage to provide early notice of that loss or damage. Support was expressed by the Working Group for the text as drafted.

210. The Working Group approved the substance of draft article 65 and referred it to the drafting group.

Draft article 66. Extension of time of suit

211. The Working Group approved the substance of draft article 66 and referred it to the drafting group.

Draft article 67. Action for indemnity

212. The Working Group approved the substance of draft article 67 and referred it to the drafting group.

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

213. The Working Group approved the substance of draft article 68 and referred it to the drafting group.

Chapter 14 – Jurisdiction

Draft article 69. Actions against the carrier

214. The Working Group approved the substance of draft article 69 and referred it to the drafting group.

Paragraphs 28 and 29 of draft article 1

215. With regard to the terms "domicile" and "competent court" used in draft article 69, the Working Group approved the substance of the definitions respectively provided for in paragraphs 28 and 29 of draft article 1 and referred them to the drafting group.

Draft article 70. Choice of court agreements

216. It was proposed that, for greater certainty, the opening phrase of draft article 70 (2) (d) "the law of the court seized" should be deleted in favour of the clearer phrase "the law of the court named in the volume contract", or, in the alternative, that paragraph (d) should be deleted in its entirety. However, it was observed that the issue of binding third parties to the volume contract to a choice of court agreement had been the subject of considerable discussion in the Working Group, and that the consensus as represented by the current text should not be reconsidered.

217. It was observed that, following the decision of the Working Group to amend the definition of "transport document" (see above, paras. 113 to 114), the text of draft paragraph 2 (b) should be amended by deleting the phrase "that evidences the contract of carriage for the goods in respect of which the claim arises". There was support for that suggestion.

218. Subject to the deletion of that phrase, the Working Group approved the substance of draft article 70 and referred it to the drafting group.

Draft article 71. Actions against the maritime performing party

219. The Working Group approved the substance of draft article 71 and referred it to the drafting group.

Draft article 72. No additional bases of jurisdiction

220. The Working Group approved the substance of draft article 72 and referred it to the drafting group.

Draft article 73. Arrest and provisional or protective measures

221. The Working Group approved the substance of draft article 73 and referred it to the drafting group.

Draft article 74. Consolidation and removal of actions

222. The Working Group approved the substance of draft article 74 and referred it to the drafting group.

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

223. The Working Group approved the substance of draft article 75 and referred it to the drafting group.

Draft article 76. Recognition and enforcement

224. The Working Group approved the substance of draft article 76 and referred it to the drafting group.

Draft article 77. Application of chapter 14

225. The Working Group approved the substance of draft article 77 and referred it to the drafting group.

Chapter 15 – Arbitration

Draft article 78. Arbitration agreements

226. It was observed that following the decision of the Working Group to amend the definition of "transport document" (see above, paras. 113 to 114), it might be necessary to amend the text of paragraph 4 (b) in similar fashion to that agreed with respect to draft article 70 (2) (b). There was support for that suggestion, subject to the caveat that the drafting group should consider carefully whether such a change was recommended, since paragraph 4 (b) must in any event ensure that it referred to the transport document or electronic transport record regarding the goods in respect of which the claim arose.

227. Subject to that possible amendment, the Working Group approved the substance of draft article 78 and referred it to the drafting group.

Draft article 79. Arbitration agreement in non-liner transportation

228. It was observed that the Working Group had in its previous session, agreed to seek further consultation regarding the operation of draft article 79 (2) (see footnote 199 and A/CN.9/642, paras. 213 and 214). The Working Group was advised that such consultations had taken place and that the view was that paragraph 2 (a)

was not logical in light of industry practice, and that it should be deleted. There was support for that suggestion.

229. A further question was raised whether the reference in draft article 2 (b)(i) should be to draft article 6 rather than 7, and it was agreed that the drafting group would consider the matter.

230. Subject to the deletion of paragraph 2 (a) and to that possible amendment to paragraph 2 (b)(i), the Working Group approved the substance of draft article 79 and referred it to the drafting group.

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

231. The Working Group approved the substance of draft article 80 and referred it to the drafting group.

Draft article 81. Application of chapter 15

232. The Working Group approved the substance of draft article 81 and referred it to the drafting group.

Chapter 16 – Validity of contractual terms

Draft article 82. General provisions

233. A concern was expressed that paragraph 2 of draft article 82 had a mandatory effect on the shipper and consignee that was considered to be unsatisfactory. In particular, a shipper would be prohibited by that provision from agreeing on an appropriate limitation on its liability, and it was thought that such an agreement should be allowed pursuant to the draft convention.

234. Subject to the deletion of the references to the "consignor" in draft paragraph 2 in keeping with its earlier decision (see above, paras. 21 to 24), the Working Group approved the substance of draft article 82 and referred it to the drafting group.

Draft article 83. Special rules for volume contracts

Summary of earlier deliberations

235. The Working Group was reminded of its past deliberations on the matter and the evolution of the treatment of freedom of contract under the draft convention. It was pointed out that special rules for volume contracts and the extent to which they should be allowed to derogate from the draft convention had been under consideration by the Working Group for a number of years. Following the approach taken in previous maritime instruments, the draft convention had been originally conceived as a body of law incorporating essentially mandatory rules for all parties. Thus, the initial version of the draft convention had provided, in relevant part that "any contractual stipulation that derogates from this instrument is null and void, if and to the extent that it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee" (A/CN.9/WG.III/WP.21, article 17.1).

236. At the twelfth session of the Working Group (Vienna, 6-17 October 2003), however, it had been suggested that more flexibility should be given to the parties to so-called "Ocean Liner Service Agreements" in the allocation of their rights, obligations and liabilities, and that they should have the freedom to derogate from the provisions of the draft convention, under certain circumstances (A/CN.9/WG.III/WP.34, paras. 18-29). It was proposed that such freedom should be essentially granted whenever one or more shippers and one or more carriers entered into agreements providing for the transportation of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agreed to pay a negotiated rate and tender a minimum volume of cargo (A/CN.9/WG.III/WP.34, para. 29). At that session, there was broad agreement that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. It was considered that such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law. The Working Group agreed, however, that the definition of the scope of freedom of contract and the types of contracts in which such freedom should be recognized needed further consideration (A/CN.9/544, paras. 78-82).

237. The Working Group considered a revised proposal on freedom of contract under "Ocean Liner Service Agreements" (A/CN.9/WG.III/WP.42) at its fourteenth session Working Group (Vienna, 29 November-10 December 2004). At that time, the Working Group heard a number of concerns regarding freedom of contract under Ocean Liner Service Agreements. In particular, it was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was also said that in current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns (A/CN.9/572, paras. 99-101). The Working Group concluded its deliberations at that stage by deciding that it was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally. The Working Group further decided that particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA. Lastly, the Working Group invited the original proponents of the OLSA proposal to work with other interested delegations on refining the OLSA definition (A/CN.9/572, para. 104).

238. The Working Group reverted to the matter of freedom of contract under "Ocean Liner Service Agreements" at its fifteenth session (New York, 18-28 April 2005). The Working Group was then informed of the outcome of the consultations that had taken place pursuant to the request made at its fourteenth session. It was then suggested that since "Ocean Liner Service Agreements" 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. The Working Group concurred with that suggestion (A/CN.9/576, paras. 12, and 14-16). The Working Group then proceeded to consider manners of addressing the concerns that had been expressed at its earlier session, as regards the conditions under which it should be possible to derogate from the provisions of the draft convention. While a view was expressed that no derogation from the provisions of the draft convention should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The Working Group generally accepted 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: (a) the contract should be [mutually negotiated and] agreed to in writing or electronically; (b) the contract should obligate the carrier to perform a specified transportation service; (c) 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 (d) 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 (A/CN.9/576, paras. 17-19). The Working Group proceeded to consider the question as to whether there should be mandatory provisions of the draft convention from which derogation should never be allowed, and if so, what were they. In this respect, the Working Group decided that the seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed (A/CN.9/576, paras. 17-19).

239. The Working Group considered the matter of volume contracts again at its seventeenth session (New York, 3-13 April 2006), on the basis of a revised version of the draft convention (A/CN.9/WG.III/WP.56) and amending proposals that had been made following informal consultations (A/CN.9/WG.III/WP.61). At that session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1) (b) did not provide sufficient protection for the parties to such contracts (A/CN.9/594, para. 155). Overall,

however, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided an appropriate balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties (A/CN.9/594, para. 156). The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95 (4) in paragraph 49 of A/CN.9/WG.III/WP.61. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume contract regime in the draft convention. It was felt that including a provision such as draft paragraph 95 (4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework (A/CN.9/594, para. 160). As regards which provisions should be included in such a list, it was agreed that all of the references in the then draft paragraph 95 (4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text (A/CN.9/594, para. 161).

240. The last time that the Working Group had discussed matters related to volume contracts had been at its nineteenth session (New York, 16-27 April 2007), when it considered a proposal for amendments to the provisions dealing with volume contracts that included essentially three elements (see A/CN.9/WG.III/WP.88 and A/CN.9/612). Firstly, it was proposed to amend the definition of volume contracts in draft article 1, paragraph 2, as it appeared in A/CN.9/WG.III/WP.81, so as to provide for a minimum period and a minimum quantity of shipments, or at least require such shipments to be "significant". Secondly, it was proposed that the substantive condition for the validity of a volume contract (that is, that it should be "individually negotiated"), and the formal condition for validity of derogations (that the derogation should be "prominently" specified), as provided in draft article 89, paragraph 1, as it appeared in A/CN.9/WG.III/WP.81, should be made cumulative, rather than alternative, so as to make it clear that both parties to the contract must expressly consent to the derogations. Thirdly, it was proposed that the list of matters on which no derogation was admitted, which currently included only the carrier's obligation to keep the ship seaworthy and properly crew the ship (art. 16 (1)), and the loss of the right to limit liability (art. 64), should be expanded so as to cover draft article 17 (basis of the carrier's liability), draft article 62 (limits of liability), draft article 30 (basis of the shipper's liability to the carrier), chapter 5 (obligations of the carrier); and draft articles 28 to 30, and 33 (obligations of the shipper).

241. At that time, there were various expressions of support for the proposition that, even if the Working Group were not to accept all of those elements, at least a revision of the definition of volume contracts should be considered, so as to narrow down its scope of application and protect smaller shippers, in view of the potentially very wide share of international shipping that might, in practice, be covered by the current definition of volume contracts (A/CN.9/616, para. 163). However, the

prevailing view within the Working Group was that the text of what was then draft article 89 reflected the best possible consensus solution to address those concerns in a manner that preserved a practical and commercially meaningful role for party autonomy in volume contracts (A/CN.9/616, para. 170). It was at that time noted that a number of delegations that advised against revisiting the matter had shared at least some of the concerns expressed by those who proposed amendments and had been originally inclined towards a stricter regime for freedom of contract. While those delegations did not regard the draft provisions on the matter in all respects as an ideal solution, it was said that their major concern, namely the protection of third parties, had been satisfactorily addressed by the provisions of paragraph 5 of what was then draft article 89. Furthermore, the use of the words "series of shipments" in the definition of volume contracts in draft article 1, paragraph 2, provided additional protection against the risk of unilateral imposition of standard derogations from the draft convention, since occasional or isolated shipments would not qualify as "volume contract" under the draft convention (A/CN.9/616, para. 171).

242. After extensive consideration of the various views expressed, the Working Group rejected the proposal to reopen the previously-agreed compromise and approved the text of draft article 89 that had previously been accepted in April 2006, as it appeared in A/CN.9/WG.III/WP.81 (A/CN.9/616, para. 171).

Deliberations at the present session

243. The Working Group noted from its earlier deliberations that its agreement to allow the parties to volume contracts to derogate from the draft convention, under certain conditions, had been consistently reiterated every time the Working Group had discussed the issue in the past. Nevertheless, in the interest of obtaining a broader consensus in support of the issue of freedom of contract, the following revised text of draft article 83 was proposed by a number of delegations:

"Article 83. Special rules for volume contracts

"1. Notwithstanding article 82, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those imposed by this Convention.

"2. A derogation pursuant to paragraph 1 is binding only when:

"(a) The volume contract contains a prominent statement that it derogates from this Convention;

"(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

"(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

"(d) The derogation is not (i) incorporated by reference from another document or (ii) included in a contract of adhesion that is not subject to negotiation.

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

"4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, paragraphs (1) (a) and (b), 30 and 33 or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 64.

"5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraphs 1 and 2 of this article, apply between the carrier and any person other than the shipper provided that:

"(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

"(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

"6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled."

244. It was stated that the proposal provided additional explicit protection to shippers, with the intention that the amended text would address the concerns expressed by some during the previous sessions of the Working Group (see, for example, A/CN.9/642, paras. 279-280; and A/CN.9/621, paras. 161-172). In light of the many competing interests that were balanced as part of the attempts to clarify the concepts expressed in draft article 83 in A/CN.9/WG.III/WP.101, there was strong support for the view that, at such a late stage of its deliberations, it would be highly unlikely that the Working Group would be in a position to build an equally satisfactory consensus around a different solution. The Working Group was strongly urged not to take that direction and not to revert to proposals that in that past had failed to gain broad support, since that might in turn result in a failure to find sufficient support for the improved text, with its expanded protection for shippers. With respect to the contents of the proposal, the following explanations were provided:

- paragraph 1 had been split into two paragraphs with the chapeau of the former text of draft article 83 constituting paragraph 1 of the proposal;
- paragraph 2 of the proposal enumerated the cumulative preconditions for a derogation from the draft convention;
- paragraph 2 (c) was new text that provided shippers with the opportunity, and the requirement that they be given notice of that opportunity, to conclude a contract of carriage on the terms and conditions that complied with the draft convention without any derogation;
- paragraph 2 (d) prohibited the use of a contract of adhesion in setting out such derogations; and

- the definition of “volume contracts” in paragraph 2 of draft article 1 would be maintained without amendment.

245. Strong support was expressed for the proposal as containing a number of clarifications of the previous text which were key to establishing an appropriate balance between the rights of shippers and carriers in the negotiation of volume contracts. Further, the clarifications and refinements in the revised text were said to contribute greatly to the understanding of the provision and to the overall protection offered shippers against possible abuses pursuant to the volume contract provision. In particular, delegations that had most often and consistently expressed concerns regarding the provision of adequate protections for shippers in the volume contract provisions on several previous occasions expressed complete satisfaction with the proposed refinements of the draft article. Others speaking in support of the proposed text emphasized the importance of finding an adequate and flexible means for the expression of party autonomy in order to assure the success of a modern transport convention, while at the same time ensuring that any party whose interests could be open to abuse was adequately protected.

246. However, disappointment was expressed by some delegations that, while applauding the effort to further protect shippers that resulted in the proposal for the refinement of draft article 83, felt that further efforts were needed to ensure adequate protection of those parties. Reference was made to the historical imbalance of market power which led to the gradual introduction of mandatory law that eventually became the norm for all earlier conventions regulating the carriage of goods by sea. The suggestion was made that even under the refined text it would still be possible for strong parties to impose their will on weaker interests, such as small shippers. It was suggested that the reduced freight rates that might be generated by volume contracts would be offset by higher insurance rates for shippers, coupled with disadvantageous jurisdiction provisions and a possible lack of market choices. With a view to addressing that perceived enduring imbalance, the following suggestions, for which there was some support, were made:

- to provide a more precise definition of volume contracts in draft article 1 (2) which would require a minimum number of shipments, such as 5, or containers, such as 500;

- to make the conditions in paragraph 2 (b) conjunctive by replacing “or” between subparagraphs (i) and (ii) with “and” in the revised text;

- to revise the chapeau of paragraph 2 by changing the phrase “a derogation” to “a volume contract” in order to make certain that the entire volume contract would not be binding if the conditions for derogation from the draft convention were not met; and

- the phrase “individually” should be deleted from paragraph 2 (b)(i).

247. Some sympathy was expressed for those delegations that felt that the refined text did not go far enough in terms of protecting shippers and it was suggested that the inclusion of specific numbers in the definition of “volume contract” was dangerous, since it would lead to uncertainty. If, for example, fewer containers than stated in the volume contract were actually shipped would the volume contract be held to be retroactively void? Further, it was pointed out that any shipper that was dissatisfied with the terms of the volume contract presented always had the right to

enter into a transport agreement on standard terms. In addition, it was noted that the fact that the derogation in paragraph 2 would not be binding if the conditions were not met effectively meant that the entire contract would be subject to the provisions of the draft convention, because no derogation from it would be binding. It was also pointed out that the chapter on jurisdiction would be binding only on Contracting States that declared that chapter to be binding, so that disadvantageous choice of court agreements should not be a particular problem.

248. A number of delegations were of the view that the proposed refinements to draft article 83 were a good, but somewhat insufficient, start toward satisfying their concerns regarding the possible effects of volume contracts on small shippers. However, the general view of the Working Group was that the refined text of the proposed article 83 was an improvement over the previous text and should be adopted. In addition, emphasis was placed in the Working Group on the fact that it had in previous sessions approved the policy of providing for volume contracts in the draft convention (see, most recently, A/CN.9/621, paras. 161-172), and that that decision should not be revisited in the face of insufficient consensus to do so.

249. Following a lengthy discussion on the proposal for refined text for draft article 83, the Working Group approved the substance of the text of draft article 83 set out in paragraph 243 above, and referred it to the drafting group.

Definition of "volume contract" – Paragraph 2 of draft article 1

250. While the proponents of the proposed refined text of draft article 83 insisted that one of the key components of that compromise was that the definition of "volume contract" in draft article 1 (2) remained unamended, a significant minority of delegations were of the view that the definition should be revised. The rationale for that position was that the existing definition was too vague, and that it would be in the interests of the parties to know precisely what would trigger the application of the volume contract provision. Further it was thought that the threshold for the operation of volume contracts should be high enough so as to exclude small shippers, notwithstanding the additional protections built into the refined text of draft article 83.

251. In addition to the proposal for the amendment of the definition of "volume contract" noted in paragraph 246 above, other proposals for amendment were made as follows:

- instead of a "specified quantity of goods" the text should refer to a "significant quantity of goods"; and
- the specified quantity of goods referred to should be 600,000 tons and the minimum series of shipments required should be 5.

252. While there was a significant minority of delegations of the view that the definition of "volume contract" should be amended, possibly along the lines suggested in the paragraph above, there was insufficient consensus to amend the existing definition. The Working Group was urged to be realistic about what could be achieved on the matter. Proposals for amending the definition, in particular by introducing a minimum shipment volume below which no derogations to the convention could be made, it was said, had been considered and discarded at earlier

occasions and there was no reason to expect that they could be accepted at the present stage.

253. The Working Group approved the substance of the definition of the term "volume contract" in paragraph 2 of draft article 1 and referred it to the drafting group.

Draft article 84. Special rules for live animals and certain other goods

254. A question was raised whether the reference to the "maritime performing party" in paragraph (a) was necessary, since the "performing party" was already included in the text by way of the reference to "a person referred to in article 19". It was observed that maintaining the specific reference to the "maritime performing party" would signal the Working Group's intention to narrow the application of the provision to that party, but that deletion of the phrase would broaden the application to all "performing parties". The Working Group agreed that it intended that the provision should apply to all performing parties, and that retaining the reference to the "maritime performing party" was potentially confusing, and thus should be deleted.

255. Subject to the above deletion, the Working Group approved the substance of draft article 84 and referred it to the drafting group.

Chapter 17 – Matters not governed by this Convention

256. The view was expressed that the title of the chapter "matters not governed by this convention" would be better expressed in a positive sense, such as "matters governed by other instruments", or perhaps simply "other instruments". The Working Group agreed that the drafting group would consider the advisability of an amended title for chapter 17.

Draft article 85. International conventions governing the carriage of goods by other modes of transport

257. It was suggested that draft article 85 should make reference to draft article 27 in terms such as, "without prejudice to article 27", so that its relationship with draft article 27 would be clear. However, it was observed that the revised approach taken by the Working Group in draft article 27 was no longer as a conflict of convention provision, but rather as the establishment of a network approach on the basis of a hypothetical contract. There was support for the view that, as such, a cross-reference to draft article 27 was unnecessary.

258. The Working Group approved the substance of draft article 85 and referred it to the drafting group.

Draft article 86. Global limitation of liability

259. The Working Group approved the substance of draft article 86 and referred it to the drafting group.

Draft article 87. General average

260. The Working Group approved the substance of draft article 87 and referred it to the drafting group.

Draft article 88. Passengers and luggage

261. The Working Group approved the substance of draft article 88 and referred it to the drafting group.

Draft article 89. Damage caused by nuclear incident

262. A concern was expressed that subparagraph (a) of draft article 89 made reference not only to existing conventions regarding civil liability for nuclear damage, but also to later amendments of those conventions or to future conventions. It was observed that such "dynamic references" were strictly forbidden by legislators in some States, as allowing the State to be bound by future modifications or future instruments. Although some sympathy was expressed for that concern, it was observed that a similar approach had also been taken with respect to revised or amended conventions in paragraph 5 of article 25 of the Hamburg Rules, and that it had been acceptable in practice. A further observation was made that the chapeau of draft article 89 would regulate any potential problem, since it limited the operation of the provision to cases where the operator of a nuclear installation was liable for damage, and would thus require that the new or amended convention had come into force in the specific State in issue. Although possible drafting methods to resolve the potential problem were suggested, the Working Group concluded that such solutions were unnecessary.

263. In addition, it was noted that draft article 89 in its chapeau referred to "the operator of a nuclear installation." It was suggested that the drafting group consider instead a more precise formulation, such as "if the carrier is considered the operator of a nuclear installation and is liable."

264. Subject to that possible amendment, the Working Group approved the substance of draft article 89 and referred it to the drafting group.

Chapter 18 – Final clauses

Draft article 90. Depositary

265. Draft article 90 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 91. Signatures, ratification, acceptance, approval or accession

266. A question was raised with respect to the reason for having the draft convention open for signature at the same time as for accession as provided in paragraph 3 of draft article 91. It was noted that the usual practice was that a convention was only opened for accession after the time for its signature had passed. In response, it was pointed out that according to the practice of the United Nations, the final clauses had to be submitted for examination to the Treaty Section of its Office of Legal Affairs, which exercised the Secretary-General's depositary

functions, and that the Secretariat would ensure that the final clauses were in accordance with the depositary's practice.

267. The Working Group approved the substance of draft article 91 and referred it to the drafting group.

Draft article 92. Denunciation of other conventions

268. In response to a question, the Working Group was reminded that the current text of draft article 92 had been the result of extensive discussion and that the Working Group had decided to take the same approach in paragraph 3 as that provided for in paragraph 1 of article 31 of the Hamburg Rules (see A/CN.9/642, paras. 221-227). It was recalled that the entry into force of the draft convention had been made conditional on the denunciation of previous conventions in order to prevent any legal vacuum from arising for States.

269. The Working Group approved the substance of draft article 92 and referred it to the drafting group.

Draft article 93. Reservations

270. Draft article 93 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 94. Procedure and effect of declarations

271. A question was raised whether the reference to modification in paragraph 5 of draft article 94 was necessary. It was noted that the reference to withdraw a modification did not apply equally to the various declarations mentioned in paragraph 5 of draft article 94, as the declarations under draft articles 77 and 81 could be simply declared or withdrawn, whereas the declarations under draft articles 95 and 96 could be declared, modified or withdrawn. In this light, it was suggested to add adequate cross-references in paragraph 5 of draft article 94 with regard to declarations under draft articles 95 and 96.

272. Subject to the aforementioned amendment of paragraph 5, the Working Group approved the substance of draft article 94 and referred it to the drafting group.

Draft article 95. Effect in domestic territorial units

273. Draft article 95 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 96. Participation by regional economic integration organizations

274. Draft article 96 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Draft article 97. Entry into force

General comment

275. The Working Group was reminded of its extensive discussion of draft article 97 in its previous session (see A/CN.9/642, paras. 264-271). It was observed that draft article 97 contained two sets of alternatives in square brackets in its

paragraphs 1 and 2: the time period from the last date of deposit of the ratification to the entry into force of the convention, and the number of ratifications, acceptances, approvals or accessions required for the convention to enter into force.

Number of ratifications required

276. The views for having a high number of ratifications, such as 30, and the views for having a lower number, closer to 3 or 5 ratifications, as discussed in the previous session of the Working Group, were reiterated (see paras. 265-269 of A/CN.9/642). In general, the rationale given for preferring a high number of ratifications was mainly to avoid further disunification of the international regimes governing the carriage of goods by sea, and the rationale given for favouring a lower number was mainly to allow the draft convention to enter into force quickly amongst those States that wished to enter rapidly into the new regime. Both positions presented suggestions aimed at achieving consensus: one suggestion was to require 20 ratifications prior to entry into force, and the other one was to require 10. The former proposal found broad support.

Time for entry into force

277. Virtually uniform support was given to the suggestion to retain one year as time period from the last date of deposit of the ratification to the entry into force of the draft convention.

Conclusions reached by the Working Group

278. The Working Group approved the substance of draft article 97 and referred it to the drafting group, subject to the following adjustments in paragraphs 1 and 2:

- the square brackets around “one year” should be deleted and the text retained;
- the words “six months” and the square brackets surrounding them should be deleted;
- the square brackets around “twentieth” should be deleted and the word retained; and
- the word “fifth” and the square brackets surrounding it should be deleted.

Draft article 98. Revision and amendment

279. The question was raised as to whether there should be an automatic time period with respect to draft article 98 to the effect that 5 years after entry into force of the draft convention, its revision or amendment would be considered. In response, it was pointed out that draft article 98 fully adopted the approach taken in article 32 of the Hamburg Rules with no need for such a requirement.

280. The Working Group approved the substance of draft article 98 and referred it to the drafting group.

Draft article 99. Amendment of limitation amounts

281. The Working Group deferred consideration of the substance of draft article 99 pending agreement regarding the compromise package regarding the limitation on liability (see above, paras. 183 to 188 and 196 to 203). In keeping with its

agreement regarding the compromise package, the Working Group agreed to delete draft article 99.

Draft article 100. Denunciation of this Convention

282. Draft article 100 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

Title of the draft convention

283. The Working Group was reminded that the title of the draft convention still contained two sets of square brackets and that a definite decision should to be taken.

284. In the subsequent discussion, there was wide support for the deletion of the square brackets around the words "by sea", to distinguish the draft convention from transport by road or rail.

Proposal to remove the words "wholly or partly"

285. It was proposed to remove the words "wholly or partly" from the title of the draft convention, as the draft convention was not a true multimodal convention, but a predominantly maritime convention. It was noted that the wording "wholly or partly" sounded awkward and that no other convention, covering different transport modalities, used such wording. It was also observed that the inclusion of the words "wholly or partly" appeared to make the title cumbersome and that practical reasons required the shortest title possible. Some support was expressed for that proposal.

Proposal to delete the square brackets around the words "wholly or partly"

286. Another suggestion was made to retain the words "wholly or partly" and to remove the square brackets surrounding them, as the title would then better reflect the contents of the draft convention as a maritime plus convention, covering door to door transport. It was noted that the scope of application of the draft convention had been extensively debated and that the decision had been taken for a maritime plus convention. It was further emphasized that it was important to mark the difference between a unimodal and a maritime plus convention in order to distinguish the draft convention from other international instruments. It was added that the length of the title should not be given too much attention, as an international convention was usually referred to by the name of the city in which it had been formally adopted. Broad support was expressed for the proposal to delete the square brackets around the words "wholly or partly".

Proposal to insert the word "international"

287. The Working Group accepted a proposal to insert the word "international" before the word "carriage", in order to mirror the international character of the carriage.

Proposal to include the word "contract"

288. Another proposal was made to include the word "contract" after the words "convention on the", in order to emphasize the essential element of the draft, which was its focus on the contract of carriage unlike other conventions such as CIM COTIF, which also focused on harmonized technical aspects or the Hague Rules,

which only governed carriage where a bill of lading had been issued. It was further noted that the inclusion of "contract" in the title would single out that the draft convention dealt with private international law and not public international law. In addition, it was stated that the inclusion of the word "contract" in the title would reflect the latest practice with respect to international transport conventions.

Conclusions reached by the Working Group regarding the title of the draft convention

289. Subject to the inclusion of the phrase "contract for the international" and the deletion of the square brackets around the words "wholly or partly" and "by sea", the Working Group approved the title of the draft convention and referred it to the drafting group.

III. Other business

Planning of future work

290. The Working Group took note that its work was concluded and that the draft convention that appeared in an annex to this report would be circulated to Governments for comment, and would be submitted to the Commission for possible approval at its forty-first session scheduled for 16 June to 3 July 2008 in New York.

Annex

Draft convention on contracts for the international carriage of goods wholly or partly by sea

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

1. "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 shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

2. "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

3. "Liner transportation" means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. "Non-liner transportation" means any transportation that is not liner transportation.

5. "Carrier" means a person that enters into a contract of carriage with a shipper.

6. (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. "Shipper" means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 53 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier or a performing party that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. "Negotiable electronic transport record" means an electronic transport record:

(a) That indicates, by statements such as "to order", or "negotiable", or other appropriate statements recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. "Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record.

21. The "issuance" of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The "transfer" of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. "Ship" means any vessel used to carry goods by sea.

26. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. "Freight" means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

28. "Domicile" means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration, or (iii) principal place of business, and (b) the habitual residence of a natural person.

29. "Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Article 2. Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3. Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 20, paragraph 2; 24, paragraphs 1 to 3; 38, subparagraphs 1 (b), (c) and (d); 42, subparagraph 4 (b); 46; 50, paragraph 3; 53, subparagraph 1 (b); 61, paragraph 1; 65; 68; and 82, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Article 4. Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

(a) The carrier or a maritime performing party;

(b) The master, crew or any other person that performs services on board the ship; or

(c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

CHAPTER 2. SCOPE OF APPLICATION

Article 5. General scope of application

1. Subject to article 6, this Convention 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, according to the contract of carriage, any one of the following places is located in a Contracting State:

(a) The place of receipt;

(b) The port of loading;

(c) The place of delivery; or

(d) The port of discharge.

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

Article 6. Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

(a) Charterparties; and

(b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and

(b) A transport document or an electronic transport record is issued.

Article 7. Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 49, subparagraphs (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10. Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

Article 11. Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purposes of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13. Transport beyond the scope of the contract of carriage

On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it does not assume the obligation to carry the goods. In such event, the period of responsibility of the carrier for the goods is only the period covered by the contract of carriage.

Article 14. Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 27, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 15. Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 16. Goods that may become a danger

Notwithstanding articles 11 and 14, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Article 17. Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 14, and 15, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

Article 18. Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 19;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 34 or 35;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 14, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

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

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 16 and 17.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 19.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried (including any containers supplied by the carrier in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) that it complied with its obligation to exercise due diligence pursuant to article 15.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 19. Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 20. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 21. Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 63, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 22. Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Article 23. Calculation of compensation

1. Subject to article 61, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 45.

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

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 24. Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 18.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

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

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 25. Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 63.

Article 26. Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:

(a) Such carriage is required by law;

(b) They are carried in or on containers or road or railroad cargo vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or road or railroad cargo vehicles; or

(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages, and practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 18.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

Article 27. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

Article 28. Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 14, paragraph 2.

3. When a container is packed or a road or railroad cargo vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container, or road or railroad cargo vehicle, and in such a way that they will not cause harm to persons or property.

Article 29. Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Article 30. Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Article 31. Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 32, paragraph 2, and 33, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 35.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 35.

Article 32. Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance

of the transport documents or electronic transport records, including the particulars referred to in article 38, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Article 33. Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Article 34. Assumption of shipper's rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 57, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Article 35. Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

Article 36. Cessation of shipper's liability

A term in the contract of carriage according to which the liability of the shipper or the documentary shipper will cease, wholly or partly, upon a certain event or after a certain time is void:

(a) With respect to any liability pursuant to this chapter of the shipper or a documentary shipper; or

(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security for the payment of such amounts.

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS

Article 37. Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, practice or usage in the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage, or practice in the trade not to use one.

Article 38. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 37 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods; and

(d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall also include:

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

(b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

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

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

Article 39. Identity of the carrier

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 38, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

Article 40. Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.

Article 41. Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 38, paragraphs 1 or 2, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

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

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

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

Article 42. Qualifying the information relating to the goods in the contract particulars

1. The carrier shall qualify the information referred to in article 38, paragraph 1 to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 38, paragraph 1 in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container, or when they are delivered in a closed container and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 38, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container, the carrier may qualify the information referred to in:

(a) Article 38, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 38, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container, and the shipper and the carrier had not agreed prior to the shipment that the container

would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container.

Article 43. Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 42:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith.

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 38, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 38, paragraph 2.

Article 44. "Freight prepaid"

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

CHAPTER 9. DELIVERY OF THE GOODS

Article 45. Obligation to accept delivery

When the goods have arrived at their destination, the consignee that exercises its rights under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 46. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 45. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) If the name or the address of the consignee is not known to the carrier or if the consignee, after having received a notice of arrival, does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 48. Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 45 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) If the consignee, after having received a notice of arrival, does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

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

When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 45 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 11 (a)(i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record.

(b) The carrier shall refuse delivery if the conditions of subparagraph (a)(i) or (a)(ii) are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1;

(d) If the holder, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods;

(e) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper in accordance with subparagraph (d) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(f) The person giving instructions under subparagraph (d) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph (h) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(g) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph (e) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(h) Notwithstanding subparagraphs (e) and (g) of this article, a holder that becomes a holder after such delivery, and who did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 50. Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 45;

(b) The controlling party, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 47, 48 and 49;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 46, 47, 48 and 49;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

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

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods, including by moving the goods or causing them to be destroyed; and

(c) To cause the goods to be sold in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 51. Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

Article 52. Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 53. Identity of the controlling party and transfer of the right of control

1. When no negotiable transport document or no negotiable electronic transport record is issued:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 59. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 11 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1;

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 54. Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 52 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 18 to 24, and the amount of the compensation payable by the carrier shall be subject to articles 61 to 63.

Article 55. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 54, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 56. Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 52, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 52, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 40.

Article 57. Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to

the goods not yet provided by the shipper and not otherwise reasonably available to the carrier, that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide them.

Article 58. Variation by agreement

The parties to the contract of carriage may vary the effect of articles 52, subparagraphs 1 (b) and (c), 52, paragraph 2, and 54. The parties may also restrict or exclude the transferability of the right of control referred to in article 53, subparagraph 1 (b).

CHAPTER 11. TRANSFER OF RIGHTS

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

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) A bearer document or a blank endorsed document; or (ii) A document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 60. Liability of holder

1. Without prejudice to article 57, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

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

3. For the purpose of paragraphs 1 and 2 of this article and article 45, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 59.

CHAPTER 12. LIMITS OF LIABILITY

Article 61. Limits of liability

1. Subject to articles 62 and 63, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods, or in or on a road or railroad cargo vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

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

Article 62. Limits of liability for loss caused by delay

Subject to article 63, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 23 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 61, paragraph 1 may not exceed the limit that would be established pursuant to article 61, paragraph 1 in respect of the total loss of the goods concerned.

Article 63. Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 19 is entitled to the benefit of the limitation of liability as provided in article 61, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 19 is entitled to the benefit of the limitation of liability as provided in article 62 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

CHAPTER 13. TIME FOR SUIT

Article 64. Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods, or, in cases in which no goods have been delivered, or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 65. Extension of time for suit

The period provided in article 64 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 66. Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 64 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 67. Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 39, paragraph 2, may be instituted after the expiration of the period provided in article 64 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 39, paragraph 2.

CHAPTER 14. JURISDICTION

Article 68. Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 69 or 74, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 69. Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 68, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated; or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is only bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article if:

(a) The court is in one of the places designated in article 68, paragraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 70. Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party or the port where the goods are delivered by the maritime performing party, or the port in which the maritime performing party performs its activities with respect to the goods.

Article 71. No additional bases of jurisdiction

Subject to articles 73 and 74, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 68 or 70.

Article 72. Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(a) The requirements of this chapter are fulfilled; or

(b) An international convention that applies in that State so provides.

Article 73. Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 69 or 74, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 68 and article 70. If there is no such court, such action may be instituted in a court designated pursuant to article 70, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 69 or 74, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 68 or 70 shall at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 68 or 70, whichever is applicable, where the action may be recommenced.

Article 74. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

1. After the dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Article 75. Recognition and enforcement

1. A decision made by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of that Contracting State when both States have made a declaration in accordance with article 76.

2. A court may refuse recognition and enforcement:

(a) Based on the grounds for the refusal of recognition and enforcement available pursuant to its law; or

(b) If the action in which the decision was rendered would have been subject to withdrawal pursuant to article 73, paragraph 2, had the court that rendered the decision applied the rules on exclusive choice of court agreements of the State in which recognition and enforcement is sought.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgments as between member states of the regional economic integration organization, whether adopted before or after this Convention.

Article 76. Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 93 that they will be bound by them.

CHAPTER 15. ARBITRATION

Article 77. Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and either

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Article 78. Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this Chapter unless such an arbitration agreement:

(a) Incorporates by reference the terms of the arbitration agreement contained in the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6;

(b) Specifically refers to the arbitration clause; and

(c) Identifies the parties to and the date of the charterparty or other contract.

Article 79. Agreement to arbitrate after the dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 80. Application of chapter 15

The provisions of this chapter shall be binding only on Contracting States that declare in accordance with article 93, that they will be bound by them.

CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS

Article 81. General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

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

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits, or increases the obligations under this Convention of the shipper, consignee, controlling party, holder, or documentary shipper; or

(b) Directly or indirectly excludes, limits, or increases the liability of the shipper, consignee, controlling party, holder, or documentary shipper for breach of any of its obligations under this Convention.

Article 82. Special rules for volume contracts

1. Notwithstanding article 81, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is not (i) incorporated by reference from another document or (ii) included in a contract of adhesion that is not subject to negotiation.

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

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, subparagraphs (a) and (b), 30 and 33 or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 63.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 83. Special rules for live animals and certain other goods

Notwithstanding article 81 and without prejudice to article 82, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery resulted from an act or omission of the carrier or of a person referred to in article 19, done recklessly and with knowledge that such loss or damage, or that the loss due to delay, would probably result; 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 such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION

Article 84. International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Article 85. Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Article 86. General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

Article 87. Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Article 88. Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

CHAPTER 18. FINAL CLAUSES

Article 89. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 90. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States [at […] from […] to […] and thereafter] at the Headquarters of the United Nations in New York from […] to […].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 91. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 92. Reservations

No reservation is permitted to this Convention.

Article 93. Procedure and effect of declarations

1. The declarations permitted by articles 76 and 80 may be made at any time. The declarations permitted by article 94, paragraph 1, and article 95, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 94. Effect i*n domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 95. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of

any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 96. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 97. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 98. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at […], this […] day of […], […], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.