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Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]

General remarks on the sphere of application of the draft instrument

Note by the Secretariat

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Introduction

1. In 2001, at its thirty-fourth session, the Commission decided that the scope of the work in relation to Transport Law should include issues of liability. It also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate.[1]

2. At its ninth session, the Working Group on Transport Law devoted much attention to the issue of whether the period of responsibility of the carrier pursuant to the Draft Instrument (Preliminary Draft Instrument on the Carriage of Goods by Sea, A/CN.9/WG.III/WP.21) should be restricted to port-to-port transport operations or whether, if the contract of carriage also included land carriage before and/or after the sea carriage, the Draft Instrument should cover the entirety of the contract (i.e. the door-to-door concept). Upon conclusion of the exchange of views, the Working Group considered that it would be useful for it to continue its discussions of the Draft Instrument under the provisional working assumption that it would cover door-to-door transport operations (A/CN.9/510, paragraphs 26-32).

3. At its thirty-fifth session, in 2002, the Commission, after discussion, approved the working assumption that the Draft Instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the Draft Instrument after the Working Group had considered the substantive provisions of the Draft Instrument and come to a more complete understanding of their functioning in a door-to-door context.[2]

4. At its tenth session, the Working Group deferred its consideration of the article in the Draft Instrument on the period of responsibility to the next session due to the absence of sufficient time (A/CN.9/525, paragraphs 27 and 123). However, it was agreed that the secretariat would prepare a background paper discussing the advantages and disadvantages of the port-to-port versus the door-to-door approach, particularly in light of current and future industry needs and practice.

5. This background paper accordingly addresses the desirability and feasibility of dealing with door-to-door transport operations in the Draft Instrument.

6. In this paper, reference is made at various points to the following international instruments:

(a) the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, and Protocol of Signature, Brussels 1924 (the Hague Rules);

(b) the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 1924 as amended by the 1968 and 1979 Protocols (the

[1] O*fficial Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 345.

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

Hague-Visby Rules);

(c) the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules);

(d) the United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980 (the Multimodal Convention);

(e) the Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol (the CMR);

(f) the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways, 2000 (the CMNI);

(g) the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, Appendix B to the Convention Concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the COTIF-CIM 1999);

(h) the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol signed at The Hague on 28 September 1955 and by the Protocol No. 4 signed at Montreal on 25 September 1975 (the Warsaw Convention); and

(i) the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (the Montreal Convention).

7. The Draft Instrument is intended to govern "contracts of carriage", in which, under article 3.1, the place of receipt and the place of delivery are in different States, and which satisfy certain additional conditions. Article 1.5 defines a "contract of carriage" as "a contract under which a carrier, against the payment of freight, undertakes to carry goods wholly or partly by sea from one place to another." Article 1.1 also defines the "carrier" by reference to the contract of carriage, and article 1.19 defines the "shipper" in similar fashion.

8. Thus, the Draft Instrument follows a contractual approach. It applies to a certain type of contract with specific economic and operational characteristics. This type of contract involves the carriage of goods wholly or partly by sea, which in current practice frequently calls for door-to-door carriage. This means that the goods may be carried not only by seagoing ships, but also by other modes of transport preceding and/or subsequent to the sea carriage. The Draft Instrument's proposed application to door-to-door contracts of carriage has been described as a "maritime plus" approach, since the common factor for the application of the Draft Instrument is a sea leg.

9. Whether or not a door-to-door approach is ultimately retained, it may be noted that neither the contractual approach nor the Draft Instrument's proposed door-to-door scope of application (in which ancillary modes of carriage are to some extent covered by an otherwise unimodal convention) is unique. Most of the existing international transport conventions follow the contractual approach, to a greater or lesser degree, and several of them also apply to ancillary modes of carriage. For example, the Warsaw and Montreal Conventions address ancillary pick-up and delivery services, and the CMR addresses the case in which a road vehicle is carried on a ship or a rail car. More directly on point, the

COTIF-CIM calls for the application of the rail rules in cases in which road or inland waterway carriage supplements rail carriage, and the CMNI addresses cases in which sea carriage and inland waterway carriage are combined. The scope of application of these other international transport conventions is considered in greater detail in section II below, following an examination of the current industry position, and the desirability of a door-to-door regime for contracts of carriage set forth in section I. Section III of the following discussion notes some of the advantages and disadvantages of a door-to-door approach, and of the network system in particular. In section IV of the paper, some of the differences between non-maritime and maritime approaches to the carriage of goods are examined, and, finally, section V sets out general and more specific solution that may be considered by the Working Group.

I. Current industry position and desirability of a door-to-door regime

10. In order for the Working Group to decide whether it is desirable to extend the scope of the Draft Instrument to cover door-to-door transport operations, it is necessary to provide some background on the way in which the industry currently operates. The following section sets out nine specific issues that are particularly relevant in this regard: (1) the current relevant trade practices in the maritime transport of goods; (2) the trade realities of maritime transport, particularly the proportions in weight and value of the trade that are in the form of door-to-door contracts; (3) how the industry is dealing with maritime contracts today; (4) to what extent the current trade practice is door-to-door; (5) to what extent industry is requesting a single contract for door-to-door carriage of goods; (6) the extent to which industry is requesting more than a liability regime, for example, whether industry is asking for the inclusion of certain provisions in contracts and documents; (7) the positions of different industry players on the issues of extending the scope of the Draft Instrument to door-to-door coverage; (8) how current practice in the maritime shipping industry is accommodating door-to-door contracts, to the extent that they exist; and (9) any problems that arise in industry with respect to door-to-door contracts that are not currently addressed by contractual or legal regimes.

11. The following section of this paper discusses these matters and provides background information to them in as complete a fashion as possible. However, it must be noted that the statistical information available in order to address these issues was very limited. The information obtained in order to provide the background for these issues was generalised, but based on very broad experience regarding current industry practice.

A. Current relevant trade practices

12. Current trade practices differ as between the so-called “bulk” trades and the general cargo trades. The bulk trades are further divided in the “wet” and “dry” bulk trades. Carriage of goods in the general cargo trades — apart from the carriage of forest products, steel, vehicles on specialised car/vehicle-carrying ships, and project cargo[3] — is almost completely containerised, at least with respect to carriage between ports that are equipped to handle such containers. The wet bulk trades relate predominantly to the carriage of oil and its derivatives, and of chemicals.

[3] Project cargo may be described as goods and materials in non-standard packages moved by non-standard methods to or from non-standard destinations. Due to the project nature of the cargo, it is often highly time-sensitive, and significant losses can result in terms of the overall project if materials arrive late, incomplete or damaged at their ultimate destination.

13. In addition to the above distinctions, there is the refrigerated, or so-called "reefer" trade, which is further divided into the reefer ship trade, where the entire holds of the vessel are temperature-controlled, and the reefer container trade, where temperature control is limited to individual containers. For the purposes of this paper, the whole-ship trade is categorised as dry bulk, while the reefer container trade is treated as containerised transport.

14. In general, the bulk trades are conducted on the basis of charter parties, under which ships are engaged either on a time or on a voyage basis. Bills of lading are then often issued for the carriage of the various cargoes carried under the charter party. The nature of the cargoes carried usually dictates the period of the ship's responsibility for the cargo. As such, almost without exception, the period of the ship's responsibility for the cargo from loading to discharge is often referred to as "tackle-to-tackle" in the dry bulk trades and as "ship's manifold to ship's manifold" in the wet bulk trades.

15. The general cargo trades — primarily, the container trades — are predominantly conducted on the basis of bills of lading or comparable documents, which may or may not be transferable or negotiable.

16. Because goods in containers can be transferred from one means of conveyance to another without being unloaded from the container, the practice in the container trades is for the goods to be received for carriage and delivered after carriage at a location that is physically removed from the ship's side. This location may be the shipper's factory or the consignee's warehouse, or an inland depot or a terminal within the port area. Generally speaking, it is therefore primarily in the container trades that the possibility of door-to-door transport exists.

B. The trade realities: weight and value of trade using door-to-door contracts

17. Container liner operators have been unable to provide precise information concerning the proportions in weight and value of trade involving door-to-door contracts. From their perspective, the value of the commodities within the containers is not a key financial parameter. Indeed, the liner operator usually has no means of knowing the value of the goods, nor is it necessary that such information be declared to the carrier. From the perspective of cargo interests, information such as the value of the goods is often commercially sensitive. The weight of a container, on the other hand, is a very important factor in the loading and stowage of a container ship, but it is not information that needs to be recorded or collated for other purposes.

18. Having noted the above, a particularly reliable source of information may be found in the data collected by the Maritime Administration of the Department of Transportation of the United States of America, and published as the "U.S. Foreign Waterborne Transportation Statistics"[4]. These data show that the container liner industry carried 68% of the value of all U.S. foreign waterborne cargo in 2001, namely, a value of US$490 billion out of a total of US$720 billion. Further, it has been estimated that at least 75 to 80% of the containers in U.S. trade were carried on a door-to-door basis. From a global perspective, world port container throughput reached 225.3 million moves in 2000[5],

[4] Published electronically at http://www.marad.dot.gov/marad_statistics

principally between Asia, Europe and North America, however there were significant flows within all regions. World seaborne trade is expected to double from 1997 to 2006 to around 1 billion tons[6], and most of this containerised cargo will involve multiple modes of transport in a door-to-door carriage.

19. The overall tonnage of dry bulk cargo (which is rarely carried on a door-to-door basis) is estimated to be roughly twice the tonnage of containerised cargo (which is regularly carried on a door-to-door basis). The total value of the cargo carried in containers is nevertheless significantly higher than that of the dry bulk cargo. One explanation for this result is the high proportion of relatively valuable consumer goods carried in containers. The freight-to-weight ratio of containerised cargo is thought to be about 15 times that of dry bulk cargo.

C. Current maritime contracts

20. The contracts in use today in the carriage of goods by sea depend upon the particular trade in issue. While contracts on a tackle-to-tackle or manifold-to-manifold basis dominate the bulk trades, bills of lading on a tackle-to-tackle basis have virtually disappeared from the general cargo trades (save for those non-containerised commodities to which reference has already been made). This reflects the reality that, in the container trades, the hand-over between cargo and carrier takes place away from ship's side. The container trades are therefore conducted on the basis of either port-to-port or door-to-door bills of lading, or some combination of the two. In fact, receipt or delivery of cargo on a port-to-port basis takes place at a container terminal situated within the port area, often referred to as a "container yard" (CY). Strictly speaking, such traffic should be described as "terminal-to-terminal" and, indeed, some carriers expressly accept responsibility to and from these points.

21. Alternatively, receipt and delivery of cargo may take place at some inland point, which may be near to, or far away from, the port. This inland point may be referred to as a "container freight station" (CFS). They are also often referred to as "depots," or more particularly as "inland container depots" (ICDs). Many container freight stations and inland container depots have facilities for customs clearance, and they are usually operated by the carriers or their sub-contractors, rather than by the cargo interests.

22. Depot-to-depot traffic is not the same as door-to-door traffic. The "doors" referred to in the door-to-door description belong not to the carrier but to the cargo interests. In an export shipment, for example, cargo may be handed over to the carrier at the point of manufacture — the shipper's "door" — and, for import cargo, the carrier may deliver it at a warehouse or even some point of distribution — the consignee's "door." Within this matrix, various combinations are also possible, such as port-to-door and door-to-port, all of which are included in the general door-to-door category in the discussion below in paragraphs 24 to 26.

23. It is important to note this distinction between depot-to-depot transport and door-

[5] Containerisation International Yearbooks.

[6] UNCTAD Review of Maritime Transport, 1997, 13.

to-door transport. Since depot-to-depot carriage refers to carriers rather than to cargo interests, a depot-to-depot scope of application in the new instrument would not provide consignors of goods with the ability to contract for the movement of their containers from door-to-door under a single contract.

D. Extent of current door-to-door practice

24. The extent of the current maritime trade practice that is door-to-door is, of course, relevant primarily with respect to the container trades. The figures discussed below will include both pure door-to-door traffic and the door-to-port and port-to-door variants discussed above in paragraph 22. It is, however, very difficult to generalise, as conditions vary from one trade lane to another. In addition, figures may vary from carrier to carrier. Some carriers, having extended their operations into forwarding and logistics services, issue a higher proportion of door-to-door bills. Other carriers are content to concentrate upon port-to-port services, leaving it to the cargo interests and their freight forwarders and logistics providers to handle the inland transport.

25. Of the 60 million containers carried worldwide in the year 2000, container liner operators carried 50% of them on a multimodal basis. Some countries report a higher percentage: for example, in the United States of America, 75 to 80% of container carriage is on a multimodal basis. As between the individual container liner operators, these figures vary. Thus, one major liner operator estimated the worldwide figure to be 25%, while the figure in other geographical areas, such as in the United States trades, was estimated to be 40 to 50%. In the Asian trades, the dominant mode for the liner operator is port-to-port; the same applies to the Australasian, the Indian sub-continent, the African, and the Latin American trades. Europe is more mixed. In the UK, the trade is 50% door-to-door, particularly on the import side, whereas, in Germany, Austria, and Switzerland, the door-to-door proportion for container liner operators drops to around 25%.

26. Freight forwarders may reduce the estimated door-to-door proportion in the container trades when the question is considered solely from the perspective of the container liner operators, but they in fact raise the proportion significantly when the question is considered from the perspective of the ultimate customer. When a freight forwarder acts as a non-vessel operating carrier (NVOC) it will almost always contract on a door-to-door basis. Accordingly, the proportion of door-to-door shipments is significantly higher from the cargo interests' perspective than it is from the perspective of the container liner operators. In many cases, the container liner operator will carry the cargo on behalf of an NVOC on a port-to-port basis, but the NVOC will have contracted with the cargo owner on a door-to-door basis.

E. Industry desire for a single door-to-door contract

27. The question of the desire of industry for a single door-to-door contract for the entire carriage depends less upon the intellectual tidiness of a single contract than upon the interplay of market forces. Whether the inland carriage is handled by the ocean carrier or by its customer will depend largely upon two things: the service that the customer requires and the price that is charged. For example, a major shipper that wants empty containers available for loading on a round-the-clock basis will not contract with a carrier whose focus is on port-to-port operations, nor will a merchant contract for carrier haulage if it believes that it can arrange inland transport more cheaply by using its own contractors. For this

reason, major shippers will require carriers submitting tenders for door-to-door traffic to break down the cost estimates sector by sector.

28. As a result, the container trades have been conducted for a decade or more on the basis of so-called "combined transport" bills of lading, which can be used for both port-to-port and door-to-door traffic. The COMBICONBILL form[7], a combined transport bill of lading adopted by the Baltic and International Maritime Council (BIMCO) originally in 1971, and updated in 1995, offers a useful illustration of the type of form used by many container liner operators.

29. Under the COMBICONBILL form, the carrier accepts responsibility in accordance with clauses 9, 10, and 11. Clause 9 provides:

> "(1) The Carrier shall be liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time of delivery.
>
> "(2) The Carrier shall be responsible for the acts and omissions of any person of whose services he makes use for the performance of the contract of carriage evidenced by this Bill of Lading.
>
> "(3) The Carrier shall, however, be relieved of liability for any loss or damage if such loss or damage arose or resulted from:
>
> (a) The wrongful act or neglect of the Merchant.
>
> (b) Compliance with the Instructions of the person entitled to give them.
>
> (c) The lack of, or defective conditions of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed.
>
> (d) Handling, loading, stowage or unloading of the goods by or on behalf of the Merchant.
>
> (e) Inherent vice of the goods.
>
> (f) Insufficiency or inadequacy of marks or numbers on the goods, covering, or unit loads.
>
> (g) Strikes or lock-outs or stoppages or restraints of labour from whatever cause whether partial or general.
>
> (h) Any cause or event which the Carrier could not avoid and the consequence whereof he could not prevent by the exercise of reasonable diligence."

30. Clause 10(3) limits compensation to two Special Drawing Rights, or SDRs, per kilo of gross weight of the goods lost or damaged (except in the U.S. trade, where the limitation amount is $500 per package pursuant to clause 24).

31. Clause 11 then introduces the classic "network" principle in respect of any loss or damage identified as having occurred during a specific stage of the transport, giving precedence to any mandatory convention or national law that would have applied to the contract had a separate contract been made between carrier and cargo interests for that

[7] Published electronically at http://www.bimco.dk/BIMCO%20Documents/bl.asp.

specific leg of the journey. In the case of carriage of goods by sea, the Hague-Visby Rules apply when no mandatory international convention or national law is applicable under clause 11(1). The clause is worded as follows:

> "(1) Notwithstanding anything provided for in Clauses 9 and 10 of this Bill of Lading, if it can be proved where the loss or damage occurred, the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined by the provisions contained in any international convention or national law, which provisions:
>
> (a) cannot be departed from by private contract, to the detriment of the claimant, and
>
> (b) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply.
>
> "(2) Insofar as there is no mandatory law applying to carriage by sea by virtue of the provisions of sub-clause 11(1), the liability of the Carrier in respect of any carriage by sea shall be determined by the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - The Hague/Visby Rules. …"

32. Since the introduction of the United Nations Conference on Trade and Development/International Chamber of Commerce Rules for Multimodal Transport Documents (UNCTAD/ICC Rules) in 1992, BIMCO has developed a new form of Multimodal Bill of Lading, under the trade name MULTIDOC 95[8]. Under this form, as under the COMBICONBILL, the multimodal transport operator (MTO) is responsible for the goods from the time it takes charge of the goods until the time of their delivery but the extent of the liability is expressed differently. Clause 10(b) of MULTIDOC 95 provides:

> "Subject to the defenses set forth in Clauses 11 and 12, the MTO shall be liable for loss of or damage to the Goods as well as for delay in Delivery, if the occurrence which caused the loss, damage or delay in Delivery took place while the Goods were in his charge as defined in sub-clause 10(a), unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in sub-clause 10(c) has caused or contributed to the loss damage or delay in Delivery. …"

Clause 11 then applies the Hague-Visby Rules in relation to loss or damage arising during carriage by water. Clause 12 provides for the Hague-Visby limits of liability to apply except when the Carriage of Goods by Sea Act of the United States of America applies.

33. There is an increasing tendency for a freight forwarder or logistics provider to issue a door-to-door bill of lading in its own name, thus acting as an NVOC. NVOCs often contract on the International Federation of Freight Forwarders Associations (FIATA) multimodal bill of lading form. This form also incorporates the UNCTAD/ICC Rules of 1992 and the "network" principle. The NVOC may then take a port-to-port (or a door-to-door) bill of lading from the container liner operator, under which it or an affiliate will be both the shipper and the consignee.

[8] Published electronically at http://www.bimco.dk/BIMCO%20Documents/bl.asp.

34. In sum, the transport industry has responded to the strong demand for door-to-door carriage with a variety of contract forms, and these forms are regularly used. Although it is impossible to quantify precisely how often a shipper requests a single contract door-to-door, it is known to be at least a majority of the time.

F. Industry desire for more than a liability regime

35. There is an increasing tendency worldwide, for cargo interests to seek from their carriers more than just a liability regime. Cargo interests particularly want practical and commercial provisions, covering the frequency of service, the ports to be served directly (i.e., without transshipment), the availability of empty containers, penalties for late deliveries, and guarantees of rates. In some countries, such as the United States of America, these arrangements are now predominantly embodied in what are called "service contracts". An additional advantage of service contracts is that the rates agreed in them remain confidential to the parties. The use of service contracts appears to be increasing: for example, approximately 80 to 85% of container traffic in the United States is now thought to move under these arrangements.

36. In other parts of the world, agreements between shippers and carriers vary in form and are generally less formal. These contracts tend to be called "ocean transportation contracts." Overall, the trend toward ocean transportation contracts is increasing worldwide, and their the focus is on commercial content, such as provisions on the frequency of service, price, timeliness, and the like.

G. Positions of different industry players[9]

37. The increasing trend toward ocean transportation contracts is evidence that both cargo interests and carriers see benefits in their use, particularly in stabilising the relationships between the parties. But on other issues, the parties are divided. Some major multinational shippers have been putting carriers under pressure to change their standard bill of lading terms. The demands tend to focus on:

(a) the amount of the package limitation (currently 666.67 SDRs per package or 2 SDRs per kilo in general, and US$500 per package or unit in the U.S. trades); and

(b) the Hague Rules defenses, particularly that of error in the navigation or management of the ship.

38. The cargo interests are asking for increased limits of liability, up to the full value of the goods, and that the carrier accept liability for any loss or damage arising from its fault or that of its subcontractors. In general, the carriers are resisting these demands. When these demands have been met, the carriers have had to buy additional liability

[9] See also A/CN.9/WG.III/WP.28 for a compilation of responses from industry representatives to the questionnaire circulated by the Secretariat and additional comments regarding the scope of the Draft Instrument, as well as Annex I and II to the Report of the Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002) (A/CN.9/525). Also, see the recent report by the UNCTAD secretariat, "Multimodal Transport: The Feasibility of an International Legal Instrument", UNCTAD/SDTETLB/2003/1, a summary of which is available for the information of the Working Group as A/CN.9/WG.III/WP.30.

insurance, the cost of which they then seek to pass on to the shippers. Shippers may be willing to meet this cost, because the administrative convenience and potential savings could outweigh it.

39. On the carrier side, a few principal issues have been identified as problematic under the contracts of carriage presently in use. These include the following:

(a) There is no obligation upon the cargo interests under the present contracts, or under the general law, to take delivery of the cargo when the carrier tenders delivery at the contractual destination. In view of the speed inherent in container operations, delay by cargo interests in taking delivery of cargo usually leads to additional cost and inconvenience. Carriers therefore see a need for provisions along the lines of those in articles 10.1 and 10.3 of the Draft Instrument.

(b) The carriers' rights with respect to the goods are now regulated, if at all, by the provisions of the bills of lading and by applicable national law. Carriers feel that it would be beneficial to have an agreed international regime governing the circumstances in which the carrier could exercise rights over the goods (including the right to sell them when necessary). The Draft Instrument addresses these issues in articles 9.5 and 10.4.

(c) Existing conventions provide little guidance on the cargo interests' obligations to the carriers, including liability for damages caused by the cargo. Provisions addressing these issues on a uniform and predictable basis would be very valuable.

(d) The carriers' rights with respect to qualifying the description of the goods vary from jurisdiction to jurisdiction, and are unclear in many jurisdictions. For example, when can a carrier qualify a bill of lading description with the statement "shipper's load and count"? The answer is often unclear, and clear guidance would avoid many problems.

(e) Jurisdiction is now governed in part by the terms of the bill of lading and by the law of the court seized of the case. This can give rise to conflict. The addition to the Draft Instrument of provisions regarding jurisdiction would be welcomed.

40. In addition to these more general concerns, other specific issues are important to carriers in particular markets. For example, in the U.S. trade, the right to limit liability is of particular importance to carriers. It is thus important to carriers in the U.S. trade that the Draft Instrument contains a provision carefully defining when the package limitation may be broken.

H. Current accommodation of door-to-door contracts

41. In view of the multiplicity of conflicting regimes, both between different modes of transport and, in the case of carriage by sea, within the same mode, it is not surprising that the transport industry has developed its own pragmatic solutions (some of which have been described above in paragraphs 27 to 34). Views differ as to how well these pragmatic solutions are working. While international trade continues to function despite the lack of uniformity, there are also well-recognised defects in the system that could be corrected with a uniform regime (see above, paragraphs 37 to 40, and below, paragraph 42).

I. Problems in respect of door-to-door contracts that are not addressed by

contractual or legal regimes

42. Some of the major problems in current use of door-to-door contracts were outlined above with respect to section G, but this is not an exhaustive list. Both carriers and cargo interests agree, for example, that the legal regime should facilitate future developments in electronic commerce, which may also include the question of which party is in control of the goods during carriage in cases where no (paper) document is issued. There is also agreement that current contractual and legal regimes are inadequate to resolve a number of other issues that arise in conjunction with the bill of lading or other transport document, including issues relating to the legal effect of the document, the rights that arise under the document, and how these rights may be transferred.

II. Current regimes and feasibility of door-to-door coverage and, in particular, of the network approach[10]

43. The principal difficulty in achieving door-to-door coverage with a new international convention is the prior existence of potentially conflicting national laws and international conventions that already govern various segments of the door-to-door carriage. It is likely that some of these potential conflicts would be resolved by the very creation of a new regime: presumably a State's decision to ratify any new convention would include the decision to supersede the Hague, Hague-Visby, or Hamburg Rules, as the case may be.[11] Other existing regimes, however, are more problematic, and any consideration of the feasibility of dealing with door-to-door transport operations must consider possible conflicts between the Draft Instrument and other existing regimes.

44. The one non-maritime transport convention in force with world-wide application is the Warsaw Convention (which was amended by the 1955 Hague Protocol and by the 1975 Montreal Protocol No. 4), governing carriage by air. In addition, reference may be had to the Montreal Convention 1999, which also governs carriage by air, although that Convention is not yet in force. However, it should be noted that the combination of sea transport and air transport is not a common form of door-to-door transport.

45. There are a number of regional conventions relating to road, rail, and inland waterway transportation. Predominantly in Europe, the CMR regulates carriage by road, the COTIF-CIM regulates carriage by rail, and the CMNI regulates carriage by inland waterway. Two regional multimodal regimes exist in South America (for the Andean Community[12] and Mercosur[13]), and it appears that there will soon be an ASEAN

[10] A comparative table has been prepared by Professor Berlingieri of the Italian delegation (A/CN.9/WG.III/WP.27). The table compares provisions of the Draft Instrument with other maritime texts such as the Hague-Visby Rules, the Hamburg Rules, and the Multimodal Convention, as well as other conventions in the fields of road, rail and air transport such as the CMR, CMNI, COTIF-CIM 1999, the Warsaw Convention, and the Montreal Convention.

[11] In light of this likelihood, the relevant provisions of the Hague, Hague-Visby and Hamburg Rules, as well as those of the Multimodal Convention, will be outlined in footnotes to the text that follows.

[12] Decision 331, Multimodal Transportation.

Framework Agreement on Multimodal Transport for its ten members in Asia. In addition, a number of States have national laws that address one or more modes of transport.

46. The following discussion will address potential conflicts between the Draft Instrument and five other conventions. The Warsaw and Montreal Conventions are included as non-maritime transport conventions with worldwide application. The predominantly European transport conventions are included because they are long-established and affect a large number of countries, including a number of non-European countries that have ratified, for example, the CMR.

47. The analysis of the possible conflicts begins with a description of the scope and period of application of each instrument under consideration. The possible conflict of conventions will then be considered, first, in respect of claims of the shipper or consignee against the contracting carrier (the "door-to-door carrier"); next, with respect to the recourse action of the door-to-door carrier against the carrier to whom the door-to-door carrier has entrusted the performance of one or more legs of the carriage (the "performing carrier"); and, finally, regarding claims of the shipper or consignee against the performing carrier.

A. The scope and period of application of each of the transport conventions

1. The Draft Instrument

48. Pursuant to articles 3.1 and 4.1.1, the provisions of the Draft Instrument apply from the time when the carrier has received the goods until the time when the goods are delivered to the consignee if the parties have entered into a "contract of carriage" (which is limited to a contract performed wholly or partly by sea) in which the place of receipt and the place of delivery are in different States and one of them is in a Contracting State. They also apply if the contract of carriage provides that the provisions of the Draft Instrument (or the law of any State giving effect to them) are to govern the contract.[14]

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[13] International Multimodal Transport Agreement between Mercosur States Parties, Decision Nº 15/94, Signed in Ouro Preto, 17 December 1994.

[14] Pursuant to articles 10 and 1(e), the **Hague Rules** apply from the time when the goods are loaded on to the time they are discharged from the ship, or for tackle-to-tackle carriage, provided that a bill of lading is issued in any of the Contracting States. Matters outside of liability issues are dealt with only to a limited extent.

Pursuant to articles 10 and 1(e), the **Hague-Visby Rules** apply from the time when the goods are loaded on to the time they are discharged from the ship, or for tackle-to-tackle carriage, provided that a bill of lading is issued relating to "the carriage of goods between ports in two different States if: (a) such bill of lading is issued in a Contracting State, or (b) the carriage is from a port in a Contracting State, or the contract contained in or evidenced by the bill of lading provides that the rules of this Convention" are to govern the contract. With regard to liability issues, the Hague-Visby Rules deal with matters other than liability issues only to a limited extent.

Pursuant to articles 2, 4 and 1, the **Hamburg Rules** cover the period during which the carrier is in charge of the goods at the port of loading, during the carriage, and at the port of discharge, or for port-to-port carriage, provided that the parties have entered into a contract for carriage by sea (limited to the sea portion of carriage even where the contract involves another means of carriage) between two different States in

49. Pursuant to articles 6.3.1 and 6.3.3, the provisions of the Draft Instrument apply (at least in so far as the responsibilities and liabilities imposed on the carrier and its rights and immunities are concerned) to all "performing parties" (as defined in article 1.17) and, therefore, to all sub-carriers in respect of any action brought against them by the shipper or consignee (although this broad coverage must be considered in conjunction with article 4.2.1, which is discussed in the next paragraph). The Draft Instrument's provisions do not apply to the recourse action of the contracting carrier against the sub-carrier (unless the contract between those two parties is also a "contract of carriage" that includes the carriage of goods by sea).

50. If loss, damage, or delay occur solely before the goods are loaded on or after they are discharged from the vessel, then article 4.2.1 specifies that the mandatory provisions of other applicable conventions prevail over those of the Draft Instrument, but only to the extent that they regulate the carrier's liability, limitation of liability, and rights of suit[15].

51. Article 4.2.1 thus provides a minimal network system in order to deal with the fact that the great majority of contracts of carriage by sea include land carriage aspects, and that provision must be made for this relationship. The Draft Instrument is only displaced where a convention that constitutes mandatory law for inland carriage is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of the inland carriage.

52. The essence of such a network system is that the provisions mandatorily applicable to inland transport apply directly to the contractual relationship between the carrier on the one hand and the shipper or consignee on the other. If the inland transport has been subcontracted by the carrier, the mandatory provisions also apply to the relation between carrier and subcarrier. But in respect of the first relationship, the provisions of the Draft Instrument may supplement the provisions mandatorily applicable to the inland transport;

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which the port of loading or discharge is in a Contracting State, or where the bill of lading or other document evidencing the contract of carriage is issued in a Contracting State. The Hamburg Rules also apply if the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of the convention are to govern the contract. Note that the Hamburg Rules include a conflict of conventions provision at article 25.5: "Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention." Matters other than liability issues receive somewhat more attention than they do in the Hague-Visby Rules. Pursuant to articles 2, 4 and 1, the **Multimodal Convention** covers the period from the time the multimodal transport operator takes charge of the goods to the time of their delivery, and applies to all contracts of multimodal transport, i.e. where the carriage is conducted by at least two different modes of transport under a single multimodal contract, provided that the carriage is international and the place for taking charge of the goods or for delivery of the goods is in a Contracting State. The definition of multimodal transport in article 1.1 expressly excludes pick-up and delivery services performed under a unimodal transport contract. Further, article 30.4 provides that carriage to which article 2 of the CMR applies (i.e. road vehicle carriage on a ship or a train) or to which article 2 of the Berne Convention of 17 February 1970 concerning the carriage of goods by rail applies (i.e. the 'listed' road or shipping services complementary to railway services) will not be regarded as multimodal carriage under the Multimodal Convention. The Multimodal Convention deals only to a limited extent with provisions other than those regarding the carrier's liability.

[15] See A/CN.9/WG.III/WP.21, paras. 49 to 55. See also the Proposal by Italy at A/CN.9/WG.III/WP.25.

whereas as between carrier and subcarrier the inland provisions alone are relevant (supplemented as necessary by any applicable national law).

53. It should also be noted that the proposed limited network system in the Draft Instrument only applies to provisions directly relating to the liability of the carrier, including limitation and time for suit. Provisions in other conventions that may indirectly affect liability, such as jurisdiction provisions, should not be affected. Also many other legal provisions mandatorily applicable to inland transport are not intended to be replaced by the Draft Instrument because they are directed specifically to inland transport rather than to a contract involving carriage by sea. For example, the requirements of the CMR relating to the consignment note may apply between carrier and subcarrier, but their application to the main contract of carriage regulated by the Draft Instrument would be inconsistent with the document (or electronic record) required by the Draft Instrument for the whole journey.

2. CMR

54. Article 1 of the CMR provides that the Convention applies to every contract for the carriage of goods by road in vehicles for reward when the place of taking over of the goods and the place of delivery are situated in two different countries of which at least one is a contracting country.

55. Article 2(1) then provides that where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways, or air and the goods are not unloaded from the vehicle, the Convention applies except in case it is proved that any loss, damage, or delay that occurs during the carriage by other means of transport was not caused by an act or omission of the carrier by road.

3. COTIF-CIM

56. Article 1.1 of COTIF-CIM 1980 provides that the Uniform Rules apply to all consignments of goods for carriage under a through consignment note made out for a route over the territories of at least two States and exclusively over lines and services included in the list provided for in articles 3 and 10 of COTIF-CIM. Article 2.2 of COTIF-CIM 1980 provides that the COTIF-CIM may also be applied to international through traffic using, in addition to services on railway lines, land and sea services and inland waterways. Special rules in respect of liability relating to rail-sea traffic are set out in article 48 of COTIF-CIM.

57. Article 1.1 of COTIF-CIM 1999 (not yet in force) provides that the Uniform Rules apply to every contract of carriage of goods by rail when the place of taking over of the goods and the place designated for delivery are situated in two different Member States. Article 1.4 then provides that when international carriage, being the subject of a single contract of carriage, includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, the Uniform Rules apply if the carriage by sea or by inland waterway is performed on services included in the list of services provided for in Article 24.1 of the Convention. Such listing is not required for the application of COTIF-CIM 1999 to national road or inland waterway carriage that supplements international rail carriage and is included in the contract of carriage.

58. The issuance of a consignment note is no longer a condition for the application of the Uniform Rules under COTIF-CIM 1999. Article 6.2 explicitly provides that the absence, irregularity, or loss of the consignment note does not affect the existence or

validity of the contract.

4. CMNI

59. Article 1 of the CMNI defines the contract of carriage as the contract whereby the carrier undertakes to carry goods by inland waterways. Article 2(2) then provides that when carriage by sea and inland waterway is performed by the same vessel, without transhipment, the CMNI Convention applies except when a "marine bill of lading" has been issued or the distance travelled by sea is greater than that travelled by inland waterway.

5. Warsaw Convention

60. Article 1.1 provides that the Convention applies to all international carriage of persons, baggage, or cargo performed by aircraft for reward, and to gratuitous carriage performed by an air transport undertaking. Article 1.2 then provides that international carriage means any carriage in which the place of departure and the place of destination, "whether or not there be a break in the carriage or a transhipment," are situated within the territories of two High Contracting Parties. Contrary to the CMR, carriage by different modes of transport is expressly regulated by the Warsaw Convention, which provides in article 31.1:

> "In the case of combined carriage performed partly by air and partly by another mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of article 18, apply only to the carriage by air, provided that carriage by air falls within the terms of article 1."

6. Montreal Convention

61. The Montreal Convention does not change substantially the Warsaw Convention system: article 1.1 and 1.2 are identical, and article 31.1 of the Warsaw Convention became article 38.1 of the Montreal Convention. New, however, is the legal fiction that sanctions the existing practice, at least in Europe, where much of the carriage of goods by air (intended by the agreement between the parties to be carried by air) is actually performed by road. Article 18.4 provides that such carriage, made without the consent of the consignor, is deemed to be within the period of carriage by air.

B. Possible application of competing conventions in respect of claims of the shipper or consignee against the door-to-door carrier

1. CMR

62. It might be argued that a door-to-door contract of carriage pursuant to the Draft Instrument would not be subject to the CMR because it is not a "contract for the carriage of goods by road" and because the place of taking over of the goods and the place of delivery are not related to a specific contract of carriage by road, but rather to the door-to-door contract. The taking over occurs at the place where and the time when the carrier (or a performing carrier) takes over the goods. Delivery occurs at the time when and the place where the carrier (or a performing carrier) delivers the goods to the consignee. If there are two road legs, one before and one after the sea leg, then the taking over and delivery are not related to the same road leg. If there is only one road leg, for example before the sea leg,

then delivery is wholly unrelated to a carriage by road. However, it has also been argued quite strongly that the road leg of a door-to-door contract of carriage would be subject to the CMR (see below, paragraphs 115 and 116).

63. It may also be argued that the reference in article 1(1) of the CMR to the place of taking over and the place of delivery should not be read as a reference to the places that the contract specifies for the taking over and delivery by the carrier in its capacity as an international road carrier. If the road carriage is followed by sea carriage, then there is no delivery at the end of the road carriage, for the goods remain in the carrier's custody until delivery to the consignee at the final destination. In a door-to-door contract from Munich to Montreal via Rotterdam, for example, Rotterdam cannot be qualified as the place of delivery under that main contract of carriage. It will be the place of delivery only under the sub-contract between the door-to-door carrier and the performing carrier that performed the road carriage. The sub-contract would thus be subject to the CMR, but the main door-to-door contract would not. Again, however, strong arguments to the contrary have also been made (see below, paragraphs 115 and 116).

64. If the contrary view were to prevail, it would be necessary to determine whether a provision such as that in article 4.2.1 of the Draft Instrument would avoid the conflict. It is thought that this would probably not be the case, because:

(a) in respect of loss, damage, or delay occurring partly during the road leg and partly at sea, while the burden of proof would in any event be on the claimant, the CMR would not prevail over the Draft Instrument;

(b) in respect of loss, damage, or delay to goods carried by sea on a road vehicle, there are conflicting provisions in the CMR and in the Draft Instrument: pursuant to article 2(1) of the CMR, its provisions apply except if the loss, damage, or delay occurs during the carriage by the other means of transport and is not caused by an act or omission of the road carrier, while under article 4.2.1 of the Draft Instrument its provisions would apply; and

(c) the CMR includes mandatory provisions other than those on the carrier's liability, limitation of liability, and time for suit in respect of which article 4.2.1 of the Draft Instrument operates (see below, paragraphs 74, 80, 86, 96 and 101).

2. COTIF-CIM

65. COTIF-CIM in its 1980 version, which is now in force, applies only to contracts of carriage entered into by railways covered by a through consignment note (article 1). Since a consignment note is not issued under the main door-to-door contract of carriage, the provisions of COTIF-CIM 1980 would therefore not be applicable to the door-to-door contract of carriage covered by the Draft Instrument and consequently no conflict is conceivable.

66. The 1999 version of COTIF-CIM instead provides (article 6.2), similarly to the CMR (article 4), that the absence, irregularity, or loss of the consignment note does not affect the existence or validity of the contract, which remains subject to COTIF-CIM. It is therefore necessary to determine whether COTIF-CIM, in its 1999 version, would apply to the main door-to-door contract of carriage covered by the Draft Instrument if one of the legs of that carriage is performed by rail between places situated in two different COTIF-CIM States. The relevant provision of COTIF-CIM 1999 is article 1.4, which provides:

> "When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24.1 of the Convention."

67. The first condition is, therefore, that the carriage by sea must be a "supplement" to the carriage by rail. It is thought that this condition materialises where the contract is made between the consignor and a railway and that, therefore, COTIF-CIM does not apply where the contracting carrier is not a railway. A potential conflict between the Draft Instrument and COTIF-CIM would thus be conceivable only if the door-to-door "carrier," as defined in article 1.1 of the Draft Instrument, is a railway.

68. Even in such a rather unlikely case, the carriage by sea would need to be included in the list of services provided for in article 24.1 of COTIF-CIM in order for there to be competing coverage over the main door-to-door contract between the Draft Instrument and the COTIF-CIM.

3. CMNI

69. Carriage by different modes of transport, and more specifically by inland waterway and by sea, is regulated pursuant to the CMNI only when it is performed by the same vessel, without transhipment. Article 2(2) provides that in such a case the CMNI applies except where a "marine bill of lading" has been issued or the distance travelled by sea is greater than that travelled by inland waterway. Therefore, because normally both these conditions will apply in the case of a door-to-door carriage under the Draft Instrument, the CMNI would generally not apply to that main contract of carriage.

70. The case of a contract of carriage by sea and by inland waterway with transhipment of the goods from the seagoing vessel to the inland waterway vessel or vice versa is not specifically addressed. It is thought that such a contract is not covered by the definition of "contract of carriage" in article 1(1) of the CMNI, where reference is made to a contract whereby a carrier undertakes to carry goods by inland waterways. If this view is correct, the CMNI would again apply only to the sub-contractual relation between the door-to-door carrier and the carrier that performed the carriage by inland waterway.

4. Warsaw and Montreal Conventions

71. The "combined carriage" mentioned in article 31.1 of the Warsaw Convention and article 38.1 of the Montreal Convention must be a carriage performed by two different modes of transport under one single contract. Insofar as the air carriage is concerned, however, the only requirement is that it fall within the terms of article 1, meaning that the place of departure and the place of destination are situated within the territories of two High Contracting Parties (or States Parties, in the case of the Montreal Convention). Because these places are the places of departure and of destination of the carriage by air, the Warsaw Convention would apply to the air leg of a main door-to-door contract made by a sea carrier (assuming, of course, that the air carriage is performed between two High Contracting Parties). The position would be the same under the new 1999 Montreal Convention.

C. Possible application of competing conventions on issues outside of carrier's liability, limitation of liability and time for suit

72. Under article 4.2.1 of the Draft Instrument, the network system is limited to the subjects of the carrier's liability, limitation of liability, and time for suit. In all other areas covered by the Draft Instrument, its provisions apply irrespective of any different provisions that may exist in other applicable conventions. A non-exhaustive review of such provisions in other transport conventions follows. This review will cover the provisions relating to: (1) the obligations and liability of the shipper for damage caused by the goods; (2) the obligations of the shipper to furnish information; (3) transport documents; (4) freight; (5) the right of control; (6) delivery of the goods; and (7) the transfer of rights. Such a review would, of course, become material if another transport convention were held to apply to a door-to-door contract of carriage covered by the Draft Instrument.

1. Obligations and liability of the shipper for damage caused by the goods

73. Article 7.1 of the Draft Instrument requires the shipper to deliver the goods ready for carriage and in such condition that they will withstand the intended carriage. Article 7.6 provides that the shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1 unless the shipper proves that the loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which it was unable to prevent.

74. The CMR has two distinct provisions, one in respect of the defective packaging of the goods in general (article 10) and one in respect of dangerous goods the nature of which the shipper has failed to indicate together with the precautions to be taken (article 22). The shipper is liable if the defect or the dangerous nature of the goods is not known to the carrier.

75. COTIF-CIM article 14 provides that the consignor is liable to the carrier for any loss, damage, and costs due to the absence of, or defects in, packing, unless the defect is apparent and the carrier has not made any reservation.

76. The CMNI, following the CMR, also provides for two separate obligations of the shipper. The first relates to all goods and is to the effect that, if the nature of the goods so requires, the shipper must properly pack and mark the goods (article 6.3). The second one is to the effect that if dangerous or polluting goods are to be carried, the shipper must inform the carrier of the danger or of the risk of pollution inherent in the goods and of the precautions to be taken. The CMNI then provides at article 8.1 that the shipper is strictly liable to the carrier for its failure to provide information in respect of dangerous goods. Nothing is said in respect of the breach of the general obligation to properly pack and mark the goods, but it is thought that such a breach would entail a similar liability.

77. The Warsaw and Montreal Conventions have no specific provision in respect of damage caused by the improper packing or marking of the goods.

78. In sum, the obligations and liability of the shipper in respect of the condition of the goods under the Draft Instrument differ from those under the other transport conventions, and there seems to be no problem of competing application. However, it is possible that the contrary conclusion may be reached if, for example, the analysis of the application of the

CMR set out in paragraphs 62 and 63 above is found to be inaccurate (see paragraphs 115 and 116 below).

2. Obligations of the shipper to furnish information

79. Article 7.3 of the Draft Instrument requires the shipper to provide the carrier with the information, instructions, and documents reasonably necessary for (a) the handling and carriage of the goods; (b) compliance with rules and regulations in connection with the intended carriage; and (c) compilation of the contract particulars and issuance of the transport documents. Article 7.5 provides that the shipper is liable for any loss or damage caused by its failure to comply with the above obligations.

80. Under CMR article 7.1, the sender is responsible for all expenses, loss, or damage sustained by the carrier by reason of the inaccuracy of the particulars furnished by him in compliance with article 6. Under article 11, the sender must attach to the consignment note the documents necessary for customs or other formalities, and is liable to the carrier for any loss or damage caused by its failure to comply with this obligation.

81. The COTIF-CIM provisions are similar to those of CMR. Article 8.1 provides that the consignor shall be responsible for all costs, loss, or damage sustained by the carrier by reason of the entries made by the consignor in the consignment note being incomplete or incorrect or by reason of the consignor's omitting the entries prescribed by the Regulations concerning the International Carriage of Goods by Rail.

82. CMNI article 6.2 requires the shipper to furnish the carrier with particulars concerning the goods and instructions concerning the customs or administrative regulations applicable to the goods, as well as with information relating to the dangerous character of the goods. Article 8 then provides that the shipper is strictly liable for all damages and costs incurred by the carrier as a consequence of the shipper's failure to comply with its obligations.

83. Article 10(1) of the Warsaw and Montreal Conventions provides that the consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it in the air waybill but, as for the corresponding provision of the CMR, this does not imply an obligation to provide such particulars or statements. Article 10(2) then provides that the consignor must indemnify the carrier against all damages suffered by it or by any other person to whom the carrier is liable by reason of the irregularity, incorrectness, or incompleteness of the information supplied.

84. Although the difference between the provisions of the Draft Instrument and those of the other transport conventions may not be very significant, nevertheless the provisions are not identical. The Working Group may wish to discuss whether absolute uniformity should be realised in respect of the obligations of the shipper. In this regard, a solution similar to that envisaged in article 4.2.1 for the carrier's liability, limitation of liability, and time for suit could be considered by the Working Group.

3. Transport documents

85. Whereas the transport documents and electronic records regulated by the Draft Instrument cover the whole door-to-door transport, the transport documents regulated by the unimodal transport conventions under consideration each cover, as a general rule, only the segment of carriage by means of that particular mode of transport. The consequence appears to be that a conflict cannot arise, because each unimodal convention will continue to govern the document issued by the sub-carrier that sub-contracts to perform a specific non-maritime leg of the transport.

86. Under the CMR, the problem would not arise if, as previously stated (see above, paragraphs 62 and 63), the CMR applies only to sub-contracts entered into by road carriers. But even if this was not the case, and the CMR was held to apply to the main door-to-door transport contract, the problem of conflicting documents should still not arise. It is true that if the shipper were to request a consignment note under CMR article 4, it could conflict with the contract for the main door-to-door carriage, and that if a consignment note were issued under the overall contract for the door-to-door carriage, it could defeat the purpose of that main contract. In practice, however, the shipper in a door-to-door contract involving a maritime leg is unlikely to make such a request. The consignment note could cover only the leg of the road carriage that precedes or follows the sea carriage. At the end of a road leg that *precedes* the sea carriage, the shipper has neither the right to take, nor the interest in taking, delivery of the goods, thus the shipper would not request a consignment note for this particular road leg. At the commencement of a road leg *subsequent* to the sea carriage, the shipper could not obtain the issuance of a consignment note, since the shipper does not have the goods in its possession, as would be required for such an issuance. Of course, the CMR provisions, including those on consignment notes, would continue their full application in respect of the sub-contract between the door-to-door carrier and the road carrier. However, it has also been suggested that while the above analysis will largely hold true, it may be possible to envisage a case where, for example, a door-to-door contract from Munich to Montreal via Rotterdam could involve a road carrier who will issue a consignment note.

87. Under COTIF-CIM, the position is similar to that under CMR. The door-to-door carrier would issue a transport document covering the entire door-to-door carriage, rather than a consignment note for the rail leg, as prescribed by article 6 of COTIF-CIM. Again, there are practical purposes for this. If the railway leg precedes the sea leg, the door-to-door carrier does not undertake to deliver the goods to the consignor at the end of the rail leg, but rather to carry them to the final destination. If the railway leg follows the sea carriage, the carrier will not take over the goods from the consignor at the start of the rail leg. Thus, there would be no legal or practical basis for the door-to-door carrier to issue a separate consignment note for the rail leg of the carriage. Again, however, the consignment note would instead be drawn up for the railway sub-carriage between the door-to-door carrier and the railway.

88. Pursuant to the CMNI, a distinction must be made between (1) the carriage of goods on a seagoing vessel with subsequent transhipment on another vessel performing the carriage by inland waterways and (2) the carriage of goods by sea and on inland waterways without transhipment. In the case of transhipment, the CMNI provisions on transport documents will apply to the sub-contract between the door-to-door carrier and the inland carrier, while the provisions of the Draft Instrument will apply in respect of the transport document or electronic record to be issued by the door-to-door carrier in respect of the

overall carriage. In the case where there is not transhipment, only the provisions of the Draft Instrument will apply. It is thought that the reference in article 2(1)(a) of CMNI to "marine bill of lading" must be interpreted as covering any transport document issued in connection with the carriage of goods by sea.

89. For the reasons stated in respect of CMR, and because the provisions of the Warsaw and Montreal Conventions governing the issuance of a transport document are not mandatory, by agreeing to enter into a door-to-door contract the shipper impliedly waives the right to obtain a separate document for a single leg of the carriage.[16]

4. Freight

90. Neither the CMR nor the Warsaw and Montreal Conventions contain a provision on freight.

91. In COTIF-CIM, article 10.1 provides that, unless otherwise agreed, the costs (the carriage charge, incidental costs, customs duties and other costs incurred) must be paid by the consignor. Article 10.2 then provides that if the costs are payable by the consignee and the consignee has not taken possession of the consignment note nor asserted the right to take delivery, the consignor remains liable to pay the freight. The provisions of the Draft Instrument do not seem to conflict with those of COTIF-CIM.

92. Article 6.1 of CMNI provides only that the shipper shall be required to pay the amounts due under the contract. Therefore no conflict is conceivable.

5. Right of control

93. In the Draft Instrument, the subject of the right of control of the goods is dealt with in some detail in Chapter 11. The "right of control" is defined as the right under the contract of carriage to give instructions to the carrier in respect of the goods during the period of its responsibility. Some of the possible instructions are specified in article 11.1. The rules on identification of the controlling party and on the transfer of the right of control are then set out in article 11.2 according to whether a negotiable transport document or a negotiable electronic record has been issued. There follow in article 11.3 provisions regulating the obligation of the carrier to execute the instructions of the controlling party and its limits. Article 11.4 deals with the effect of the delivery of the goods in the place indicated by the controlling party and article 11.5 deals with the right of the carrier to obtain instructions from the controlling party. Finally, article 11.6 specifies which of the preceding provisions may be varied by agreement, thereby impliedly indicating those that instead are mandatory.

94. Because some of the unimodal transport conventions have provisions on the right of the shipper or other controlling party to give instructions to the carrier, the issue of whether there could be competing application between the Draft Instrument and those conventions in this regard must be examined.

[16] Article 4 of both conventions, in fact, after having stated in paragraph 1 that an air waybill shall be delivered, provides in paragraph 2 that any other means which would preserve a record of the carriage to be performed may be substituted for delivery of an air waybill, but the Warsaw Convention makes this subject to the consent of the consignor.

95. In order that the person entitled to exercise the right of control may invoke the provisions of any of the unimodal transport conventions instead of those of the Draft Instrument, it would be necessary that such person prove that at the time of the exercise of the right of control, the conditions for the application of a transport convention exist. This would require proof that the goods are in the custody of a road carrier, a rail carrier, an air carrier, or an inland navigation carrier.

96. The exercise of the right of control under CMR, called a "right of disposal," is subject, pursuant to article 12(5)(a), to the production by the sender or the consignee of the first copy of the consignment note. As discussed above in paragraph 86, with respect to the overall door-to-door transport, neither the sender nor the consignee would likely be in possession of the consignment note. Thus the provisions of the CMR would not likely apply to the main door-to-door carriage, and they would probably only apply to the sub-contract between the door-to-door carrier and the road carrier.

97. Under COTIF-CIM, the exercise of the "right of disposal" is subject, pursuant to article 19.1, to the production of the duplicate of the consignment note. Again, the same analysis applies as with respect to the CMR.

98. Article 14 of CMNI grants the shipper the right of disposal of the goods and its right ceases when, following the arrival of the goods at the destination, the consignee has requested delivery. Under article 15, the exercise of the right of disposal of the goods is conditional on the shipper's or consignee's (a) submitting all originals of the bill of lading, if a bill of lading had been issued, or the other transport document that may have been issued; (b) reimbursing to the carrier all costs and damages; and (c) paying the agreed freight in case of discharge of the goods prior to arrival at the agreed place of delivery. Again, for the reasons noted above under the section on transport documents (see paragraph 88) with respect to the CMNI, no conflict with the Draft Instrument is conceivable if the carrier by inland waterway is a sub-contractor.

99. Article 12(1) of the Warsaw and Montreal Conventions grants a very wide right of disposal of the cargo to the consignor, subject to its obligation to reimburse any expense incurred by the carrier. If the air carrier is a sub-contractor, however, then the door-to-door carrier will be the Warsaw and Montreal Conventions' "consignor." Because the original shipper will not be the "consignor," no conflict with the Draft Instrument and the overall door-to-door contract of carriage can arise, and the provisions of the Warsaw and Montreal Conventions will apply to the sub-contract between the door-to-door carrier and the air carrier.

6. Delivery of the goods

100. The Draft Instrument contains express provisions on delivery. Article 10.1 provides that if after arrival of the goods at destination the consignee exercises any of its rights under the contract of carriage, then it is obliged to accept delivery. If it leaves the goods in the custody of the carrier, the carrier will act as the agent of the consignee. Article 10.2 provides that, on request of the carrier or of the performing party that delivers the goods, the consignee shall confirm delivery in the manner that is customary at the place of destination. Article 10.3.1 regulates delivery if no negotiable transport document or electronic record has been issued and provides that the controlling party shall advise the carrier of the name of the consignee prior to or upon the arrival of the goods at the place of destination and that the carrier shall deliver the goods upon the consignee's production of

proper identification. Article 10.3.2(a) regulates delivery when a negotiable transport document or electronic record has been issued. It provides that delivery is effected against surrender of one original of the transport document or, if a negotiable electronic record has been issued, upon the holder thereof demonstrating that it is actually the holder. Article 10.3.2(b)-(e) regulates the situation in which the holder does not claim delivery and the consequences of the carrier's delivering the goods upon the instructions of the controlling party or of the shipper and of the carrier's delivering the goods without the surrender of the negotiable transport document or without the demonstration that the holder of the negotiable electronic document is actually the holder. Article 10.4.1 then sets out the rights of the carrier in case the goods after arrival at destination are not taken over by the consignee or the carrier is not allowed to deliver them to the consignee. Finally, complementary provisions are set out in articles 10.4.2 and 10.4.3.

101. Pursuant to CMR article 13(1), the consignee is entitled to obtain delivery of the goods against surrender of the first copy of the consignment note. For the same reasons stated above in respect of the right of disposal (see above, paragraph 96), this provision cannot apply to the overall door-to-door transport. There are, however, two situations in which delivery may take place without production of the first copy of the consignment note. Article 15(1) provides that when circumstances prevent delivery of the goods after their arrival at destination, the carrier must ask the sender for instructions. This seems to imply that the sender may give instructions without being in possession of the first copy of the consignment note. It further provides that if the consignee refuses the goods, then the sender is entitled to dispose of them without being obliged to produce the first copy of the consignment note. However, the CMR provisions would not compete with the Draft Instrument for application to the overall door-to-door contract of carriage because the sender for the road leg either preceding or following the carriage by sea, is the door-to-door carrier who sub-contracts the performance of the carriage by road, and not the consignee. As such, the Draft Instrument would apply to the overall door-to-door carriage and the CMR would apply to the sub-contract for the road leg. Again, however, the opposite conclusion may be reached if the analysis of the CMR set out in paragraphs 62 and 63 is found to be inaccurate (see paragraphs 115 and 116 below).

102. Under article 17 of COTIF-CIM, it would appear that the consignee named in the consignment note is entitled to obtain delivery without the surrender of the duplicate of the consignment note. This, however, does not seem to give rise to any potential conflict with the Draft Instrument, for in respect of the railway leg preceding the carriage by sea, the consignor will be the door-to-door carrier or its agent and the person named as consignee in the note will be either the door-to-door carrier itself or its agent at the place where the railway leg terminates. The position will be similar in respect of the railway leg subsequent to the sea leg. Thus the COTIF-CIM will apply to the sub-contract for the railway leg, while the Draft Instrument will apply to the overall door-to-door contract.

103. Pursuant to CMNI article 13(2), if bills of lading have been issued, the goods must be delivered in exchange for one original bill of lading. Therefore, whenever the carrier by inland waterway is a sub-carrier, the bills of lading that it issued will be in the possession of the door-to-door carrier, which will be the shipper. The situation would be similar if a non-negotiable transport document were issued, because under article 11(5)(b) it must indicate the name of the consignee, which will be the door-to-door carrier or its agent. No conflict between the provisions of CMNI and those of the Draft Instrument should therefore arise, and the Draft Instrument will apply to the overall door-to-door contract of carriage.

104. Although this is not expressly stated in article 13 of the Warsaw and Montreal Conventions, the right of the consignee to obtain delivery of the cargo is conditional on the production of the air waybill. This is impliedly provided by article 6 of the Warsaw Convention and article 7 of the Montreal Convention, pursuant to which one of the three original parts of the air waybill must be marked "for the consignee." If the air carrier is a sub-carrier, the three originals of the air waybill will be handed over to the door-to-door carrier and, therefore, the provisions of the Warsaw and Montreal Conventions would not apply in respect of the shipper, who would not be a party to the contract of carriage by air. Again, only the rules on delivery in the Draft Instrument will apply to the overall door-to-door carriage.

7. Transfer of rights

105. A conflict between the provisions of the Draft Instrument in Chapter 12 and those of the other transport conventions does not appear to be possible. The rules set out in the Draft Instrument for the case in which a negotiable transport document or a negotiable electronic record is issued relate to a contract and to parties different from those in respect of which the relevant rules of the other unimodal transport conventions are applicable. No rule is contained in the Draft Instrument for the case in which no negotiable transport document or electronic record is issued. Article 12.3 instead provides that the transfer of rights in such a case shall be effected in accordance with the national law applicable to the contract of carriage and that law obviously includes the rules of any convention that has been given the force of law.

D. Possible application of competing conventions in respect of recourse actions of the door-to-door carrier against a performing carrier

106. A conflict in this regard could arise only if the contract of carriage between the door-to-door carrier and the performing carrier by a mode other than sea were governed by the Draft Instrument. It is thought, however, that this is not the case, for articles 6.3.1 and 6.3.3 govern the liability of performing parties vis-à-vis only the shipper and the consignee.

107. In any event, it would not be advisable to make the contract between the door-to-door carrier and the performing carrier subject to the provisions of the Draft Instrument. A clear conflict of conventions would arise given the application of the unimodal transport conventions to each of the sub-contracted transport legs. In addition, the performing carrier could be wholly unaware of the fact that it is agreeing to provide transport services within the ambit of a door-to-door contract, which is subject to a specific set of uniform rules.

E. Possible application of competing conventions in respect of claims of the shipper or consignee against the performing carrier

108. There is no privity of contract between the shipper or the consignee and the performing carrier. As such, there is no basis for a claim by the shipper or the consignee against the performing carrier under the existing unimodal transport conventions unless the relevant convention so provides, or if an action may be pursued in tort or delict.

109. This is probably the case for COTIF-CIM 1980 (article 51) and COTIF-CIM 1999 (article 41) but not for the CMR and CMNI because, similarly to the Hague-Visby Rules (article 4 bis) and the Hamburg Rules (article 7), they provide for the application of their

provisions only to the servants and agents of the carrier, but not to independent contractors (CMR article 28; CMNI articles 17.3 and 22).

110. As regards the Warsaw and Montreal Conventions, it is thought that article 24.2 and article 29, respectively, pursuant to which any action, whether in contract or in tort or otherwise, can be brought only subject to the provisions of the convention, applies only to actions against the air carrier. This view is confirmed by the fact that actions brought against the servants or agents of the air carrier are regulated by article 25 and article 30, respectively.

III. Advantages and disadvantages of general door-to-door coverage and of the Draft Instrument's network system

111. The overall advantage of any door-to-door coverage is, of course, that it would provide consignors of goods in international trade with the ability to contract for the movement of their containers from door-to-door smoothly, seamlessly and at a predictable cost, regardless of the mode of transport used. Despite the increase in multimodal transportation worldwide, consignors prefer to deal with only one party under one contract, rather than engaging in a series of contracts with various carriers. It has been noted above that the container trade to which the door-to-door system is most relevant represents an impressive proportion of both the value and the quantity of maritime trade, and that in the absence of unified rules governing door-to-door contracts, industry has filled the vacuum with rules of its own. Still, a unified and predictable system of rules would greatly reduce the uncertainty and expense involved in litigating which contract terms or convention terms apply to a given case.

112. In addition to the general advantages of any door-to-door system outlined above, it has been suggested that some of the existing unimodal transport conventions contain gaps that are filled by the Draft Instrument. For example, the CMR does not apply if the road carrier fails to collect the goods, and the convention fails to define "take over". The Draft Instrument appears to fill these gaps. Further, the CMR does not provide for an extension of the time for suit, except to say, at article 32.3 that it should be governed by the *lex fori*. The Draft Instrument does allow for such an extension (article 14.3). However, it has been suggested that it is unclear whether the CMR provision is considered to be mandatory, and thus there would be competing provisions applicable to this aspect of the overall contract of carriage.

113. In a similar vein, it has been suggested that the issue of title to sue is not apparently within the scope of article 4.2.1 of the Draft Instrument, and both the Draft Instrument and the CMR make provision for title to sue. While it may be that the provisions of the Draft Instrument would prevail, it does not appear in some quarters to be clear enough.

114. It has been suggested that one disadvantage of the network system set out in article 4.2.1 of the Draft Instrument is that it is still necessary to establish when, and of course, during which mode of transport, the loss occurred, and whether any of the laws in force govern the situation mandatorily. However, it should be noted that one of the benefits of a single door-to-door instrument is that it provides a solution for progressive damage during transport, and it is not necessary to detect the cause of damage once it has been established that the damage was caused during custody. However, it is possible that this clarity is

attenuated somewhat in the situation where there is a combination of modes of transport as, for example, if a trailer being towed on a ferry were damaged by hitting a bulkhead.

115. Other criticisms have been made of the uncertain parameters of precisely where coverage by the Draft Instrument would end, and where coverage by other unimodal conventions would begin. As noted above, it has been argued that since the CMR covers only a contract of carriage of goods by road and not by sea, the CMR would not apply to the overall contract for door-to-door transport envisaged by the Draft Instrument, even during the road leg. However, despite the discussion above in paragraphs 62 and 63, it has strongly been suggested that in order for the CMR to govern a given contract of carriage, it is irrelevant whether a land leg follows or precedes a sea leg. Similarly, it has been suggested that the importance or distance of the land leg in comparison with the other legs of the carriage is irrelevant in determining whether the CMR will govern the contract of carriage. Further, it has been suggested that the scope of the CMR is not limited to contracts for the carriage of goods *exclusively* by road, or even *predominantly* by road, since pursuant to article 1.1, the CMR shall apply to every "contract *for* the carriage of goods by road (emphasis added)", and not to every contract of carriage of goods by road.

116. In addition, it has been suggested that the argument that the CMR will not conflict with the Draft Instrument based upon the place of taking over of the goods is not entirely clear either. It has been argued that this is too literal an interpretation of "taking over", and that the context of the CMR is such that a carrier may become liable even though it does not take over the goods in a physical sense. Moreover, it is suggested that article 1.1 of the CMR is a unilateral conflicts rule, and that what is important about the "taking over" is that it marks the beginning of contract performance that must begin in one country and end in another.

117. Another potential problem with the network system is said to be that the liability limit varies according to the applicable regime. These limits vary markedly from the maritime to the non-maritime context: the CMR limit is 8.33 SDRs per kilogramme, the COTIF-CIM limit is 17 SDRs per kilogramme, as are the Montreal and Warsaw Conventions, while the Hague-Visby limit is only 2 SDRs per kilogramme or 666.67 SDRs per package, and the Hamburg limit is 2.5 SDRs per kilogramme or 835 SDRs per package. While the rate for the Draft Instrument has not yet been established, and it is likely that the maritime limit will be increased, it remains uncertain how far up from the traditional 2 SDRs the liability limit will rise.[17] One further aspect that the Working Group may wish to note in this regard is that the liability limit would have to be increased from the established minimum levels in order to allow the regime to be incorporated into unimodal sub-contracts, if desired. One obstacle to this, however, may be that the CMR in article 41 states that a carrier's liability can be neither increased nor decreased. Ultimately, however, some would argue that uniform limits for all stages of carriage in a multimodal regime are inappropriate, and should be left to national and regional policy decision-makers.

118. One other issue that has been raised with respect to the door-to-door approach in general is concern that the regime should operate in harmony with the regimes governing other international contracts, such as contracts of sale. While it is seen as positive that the

[17] However, it should be noted that the limitation on liability for low-weight, high-value packages may be higher when calculated on a per package basis rather than on a per kilogramme basis. For example, if lap-top computers are individually packaged in containers, a liability limit based on 8.33 SDRs per kilogramme would certainly be lower than one based on 666.67 SDRs per package.

mandatory aspects of the Draft Instrument are tackle-to-tackle, since this matches the passing of risk under a FOB contract, a note of caution is raised with respect to the extension of coverage to door-to-door. It is suggested than any door-to-door extension should be matched by changes to the contract of sale regime.

IV. Differences between non-maritime and maritime approaches to the carriage of goods

119. One general criticism that has been levelled at the door-to-door approach has been that it could be seen to represent the application of a maritime regime to other modes of carriage.

120. An important difference between non-maritime and maritime approaches to the carriage of goods is with respect to certain aspects of proof and presumptions regarding responsibility. "Special risks" are triggers that presume fault on the part of the consignor, and which are a distinctive and important feature of the CMR and the COTIF-CIM. The Draft Instrument, however, may be read as establishing a regime that presumes negligence on the part of the carrier.

121. In addition, some aspects of the Draft Instrument are obviously not intended to cover ancillary carriage of goods by other modes. For example, the carrier's defence for perils of the sea in article 6.1.3(xi) is clearly inappropriate in the context of other means of carriage. Nor does the maritime carrier's defence of fire in article 6.1.2(b) of the Draft Instrument translate easily to non-maritime modes.

122. Similarly, the carrier's responsibility for the state of the vehicle being used varies dramatically depending on the mode of carriage. The Draft Instrument requires due diligence to make the ship seaworthy (article 5.4), and the carrier is excused with respect to latent defects in the ship not discoverable by due diligence (article 6.1.3(viii)), but the underlying duty is still barely one level higher than that of reasonable care. In contrast, the CMR level of duty with respect to the vehicle is one of the utmost diligence, while the Montreal Convention holds the air carrier to a strict duty with fewer defences than the maritime carrier (article 18.1 and 18.2).

123. Other, more general issues may arise with respect to differences in the "drafting culture" of non-maritime regimes. For example, the Draft Instrument is quite detailed, more along the lines of the Hague and Hague-Visby Rules than the less specific and more recent Hamburg Rules. The trend with respect to non-maritime regimes appears to be toward less, rather than greater detail, as, for example, with the Montreal Convention and the new COTIF-CIM. In addition, the Draft Instrument currently contains the familiar, and much-litigated, Hague Rules due diligence obligation of seaworthiness (article 5.4(a)), as well as the exceptions (article 6.1.3), although they are cast in the Draft Instrument as presumptions of absence of fault rather than as exonerations. This is in contrast with harmonisation efforts in carriage of goods conventions since 1950, which have largely sought to avoid words or phrases drawn from national law in order to avoid tempting national courts to interpret them in a known and national way and thus thwart the harmonisation efforts.

124. The above discussion would seem to indicate that an overall disadvantage of a door-to-door approach, including the network system set out in the Draft Instrument, is that it could entail the application of a maritime instrument in certain circumstances to other

modes of carriage. However, a review of the criticisms may indicate to the Working Group that most, if not all, of these problems may be attenuated through careful drafting.

V. Proposed solutions

125. The paragraphs below outline a variety of options for consideration by the Working Group. Some of the proposed solutions represent more general suggestions regarding the approach that might be taken by the Working Group, while others present very specific drafting solutions. Although they are considered below under separate headings, the various options outlined are not intended to be mutually exclusive, nor it is suggested that they are necessarily incompatible with each other. The Working Group may wish to consider these options separately, or in combination with each other.

A. Convention or Model Rules?

126. It would be possible to introduce a new international maritime regime by means of a convention, a restatement or by way of a set of model contractual rules. The best means of ensuring the application of a unified system would come by way of an international convention. However, the convention approach has resulted in limited success in recent years, as witnessed by the results garnered by the Multimodal Convention and the Hamburg Rules.

127. Further, it has been suggested that the more detailed the draft and the greater the number of States attempting to reach agreement, the lower is the likelihood of concluding the successful negotiation of an international convention. In addition, conventions may be seen as less flexible, and difficult to change and adapt to new and changing circumstances. Some would argue that reaching agreement on an international instrument might be more easily achieved at a regional, rather than a universal level. While this might be the case, regional development of regimes in this area will only serve to contribute to the current uncertainty, and will most certainly fail to meet the goal of a unified and predictable system for the worldwide carriage of goods by sea.

128. The UNCTAD/ICC Rules came into effect in January of 1992, and it has been suggested that they are becoming increasingly popular. These Rules combine a uniform system with a network system. Their liability provisions are uniform and rather similar in effect to those of the Hague-Visby Rules. In respect of limitation of liability, the UNCTAD/ICC Rules provide for a network system: the limits of the otherwise mandatory applicable convention or national law apply. It would be possible to adopt a new maritime convention that would cover port-to-port carriage of goods, and pair it with model contractual rules that would cover any modes of transport ancillary to the maritime carriage. Clearly, the adoption of model rules rather than a convention would be faster than the adoption and entry into force of a convention. Presumably, this would also hold true when comparing the adoption of a combined convention/model rules with the adoption of a single convention for door-to-door carriage. However, one clear disadvantage of adopting contractual rules rather than a convention is, of course, that rules do not carry the status of mandatory law, and thus would be less likely to achieve a unified approach. In addition, such contractual rules could come into conflict with the mandatory provisions of certain conventions.

129. Study in the area of multimodal regimes is continuing. The United Nations Economic Commission for Europe (UNECE) has been studying the possibility of

reconciling and harmonising the liability regimes for multimodal transport, and UNCTAD is continuing to study the feasibility of a full multimodal regime.[18] The tidiest resolution to the current disharmony would seem to be reaching agreement on a widely-acceptable multimodal convention, however, attempts at the creation of such a system have not been successful to date. As such, one other possibility could be to await the outcome of these studies, and to allow the international carriage of goods by sea to be governed in the interim by the existing maritime conventions along with the UNCTAD/ICC Rules for the ancillary transport, and the other contractual regimes established by industry. However, this approach would provide little in the way of harmonisation and clarity, and there is no indication that work will actually begin on a new multimodal convention. This option does not seem attractive, since it merely reflects the current state of affairs in the industry, which is exerting growing pressure for immediate improvements to the legal regime in this area.

B. Fast-track and slow-track approaches

130. Another possible approach was suggested by one of the respondents to questionnaire circulated by the secretariat in 2002[19]. The option suggested was to approach the issue of reform of the legal regime governing the carriage of goods in two stages. The first stage would be a fast-track approach, under which a new port-to-port convention would be negotiated which would cover the sea leg of carriage only. A second slow-track approach would be used to deal with the more controversial issues, such matters concerning the land leg of the carriage. It was further suggested that this second slow track could be made optional for contracting States.

131. The advantage to this option is clearly the greater speed with which a fast-track instrument limited to port-to-port carriage might be concluded. However, there is no guarantee that the adoption of such an instrument would be significantly faster. Further, postponing the thorny issues in this fashion might be insufficient to provide a resolution to matters that have become quite pressing for industry, nor would it provide the harmonisation sought.

C. Options that preserve the network principle

132. While the network solution set out in article 4.2.1 of the Draft Instrument could present a viable means forward for a door-to-door convention, variations on the approach set out in the Draft Instrument, as well as other options may be possible. The following sections set out several possible options that involve the network approach.

1. A "Unimodal Plus" Approach

133. This proposed approach attempts to serve as a long-term solution to the multimodal problem, and would work in concert with the network system set out in article 4.2.1 of the Draft Instrument. In order to alleviate any uncertainty with respect to perceived conflicts between the scope of the Draft Instrument and the unimodal transport conventions, adjustments could be made to the scope of application provisions of each of the unimodal conventions in order to clarify that they apply to a certain type of contract, which is defined

[18] See the UNCTAD Report, "Multimodal Transport: The Feasibility of an International Legal Instrument,"*supra*, note 9.

[19] See A/CN.9/WG.III/WP.28, page 27.

by reference to one or more modes of transport.

134. In effect, the "maritime plus" approach, wherein the Draft Instrument's proposed application would cover the door-to-door carriage of goods transported wholly or partly by sea (see above, paragraph 8), could be replicated in respect of other modes of transport. In effect, each unimodal convention would be expanded to include any other type of carriage that precedes or is subsequent to the specific mode of carriage that is the subject of that particular unimodal transport convention. Because the scope of application of various unimodal conventions would overlap, the "unimodal plus" approach requires that each unimodal convention contains a similar conflict of convention provision.

135. Such an extension of scope of the unimodal conventions would mean that a multimodal carriage could be covered by one of possibly several conventions, and that parties would be required to choose which convention would apply to the entire carriage. In practice, the market would regulate the choice. If the consignor requested a quotation for multimodal transport from a European rail carrier, it would likely receive a quotation offered under the conditions to which such rail carrier was accustomed, i.e. the COTIF-CIM. Similarly, a European road carrier would be likely to provide a quotation under the conditions of the CMR. For enhanced clarity, each unimodal convention would also have to include a conflict of convention provision.

136. One advantage of this overall scheme is that a single contract and a single set of conditions would apply to the entire carriage. Further, it would be possible for forwarders to offer alternative sets of rules for intermodal carriage, at a different prices, thus allowing the market to govern the conditions over time.

137. The disadvantage of an overall "unimodal plus" system is that it would require the amendment of each of the existing unimodal transport conventions. Moreover, such changes would have to be made in concert, and would have to include a similar conflict of convention provision. This would inevitably take time and would slow down the progress in respect of the work on the Draft Instrument. As a consequence, even if the Working Group were to pursue such a "unimodal plus" system, a provision along the lines of draft article 4.2.1 would have to be retained in the interim. In a later stage (e.g. by additional protocol), draft article 4.2.1 could be replaced with a new conflict of convention provision that would take into account the application of other conventions to the sea leg of an international carriage.

2. The Canadian Proposal

138. In preparation for the tenth session of the Working Group in September 2002, a proposal was submitted by the Government of Canada (A/CN.9/WG.III.WP.23) concerning the scope and structure of the Draft Instrument. In light of the discussion held at the ninth session of the Working Group regarding the scope of application of the Draft Instrument on a door-to-door or on a port-to-port basis, three options were presented as alternatives.

(a) Option 1

139. The first option would be to continue to work on the existing Draft Instrument, including draft article 4.2.1, but to add a reservation that would enable contracting States to decide whether or not to implement this article and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea.

140. One of the advantages of this option would be that it would advance the objective of restoring uniformity of law in the marine mode, and that it would establish uniformity in other ancillary modes of carriage. At the same time, contracting States that do not share the goal of uniform rules for door-to-door transit could still be part of the new marine regime, with the possibility of revoking the reservation in the future to apply the Draft Instrument on a door-to-door basis. An additional advantage of this option is that since the reservation would be declared at the time of ratification, there would be no confusion as to which contracting States apply all provisions of the instrument and which States reserved on the application of the instrument to inland carriage under draft article 4.2.1.

(b) Option 2

141. The second option presented was to continue to work on the existing Draft Instrument, including draft article 4.2.1, but to insert the phrase "or national law" after the phrase "international convention" in draft paragraph 4.2.1.

142. Again, the advantage of this option is that it would allow for the establishment of uniformity during maritime transport, while leaving the rules for the ancillary modes of carriage to national law for those contracting States that so prefer. One disadvantage of this option is that since there would be no record of any declaration, it could be more difficult to establish what law applies in a particular contracting State.

143. It was also suggested that in both Option 1 and 2, draft article 4.2.1. could also be subject to further elaboration regarding liability for non-localised damages.

(c) Option 3

144. The third option in this proposal would be to revise the existing Draft Instrument in a manner that would establish four separate chapters. Chapter 1 would deal with definitions and all provisions common to Chapters 2, 3 and 4. Chapter 2 would contain provisions governing the carriage of goods by sea on a port to-port basis.

145. Chapter 3 would contain provisions governing the carriage of goods by sea *and* by other modes before or after carriage by sea, i.e. on a door-to-door basis. There could be two basic models for establishing the door-to-door coverage. The first possible model would be a uniform system, which would establish a single regime that would apply equally to all modes of transport involved in the door-to-door carriage. The second possible model would be a network system, which would be the same as the uniform system, but it would contain provisions that would displace the uniform system where an international convention was applicable to the inland leg of a contract for carriage of goods by sea, and it was clear that the loss or damage occurred solely in the course of that inland carriage.

146. Chapter 4 would contain the final clauses and reservations, including a provision for *express* reservations for Chapter 2, for those contracting States that wish to implement the new instrument for multimodal carriage of goods on a door-to-door basis; or for Chapter 3, for those contracting States that wish to implement the new

instrument only for the carriage of goods by sea on a port-to-port basis.

147. This third option would, again, have the advantage of harmonising international law for carriage of goods by accommodating both the port-to-port and door-to-door approaches in Chapter 2 and Chapter 3, respectively. A further advantage of this option is that it would be clear which contracting States adhere to the marine regime in Chapter 2 and which contracting States adhere to the multimodal regime in Chapter 3.

148. An additional advantage of this option is that it would improve the prospects of long-term uniformity since contracting States adhering only to Chapter 2 could join Chapter 3 by simply revoking their reservation on the latter. This could be an important improvement over the system presented in Option 1: it would add a further layer of uniformity in the event that a contracting State revoked its reservation, since the provisions in Chapter 3 would automatically apply. Moreover, the automatic application of the Chapter 3 provisions would avoid confusion if the contracting State revoking its reservation had adopted other regional conventions on the carriage of goods.

149. A further potential advantage of this third option is that if it were decided to adopt a network system (as opposed to a uniform system) in Chapter 3, the marine regime in that Chapter could be identical to Chapter 2, thus achieving the widest possible uniformity of law in the marine mode. In addition, adopting a network system in Chapter 3 would enable the simplification of the third option as follows: Chapter 1 could contain the definitions and all of the provisions common to Chapters 2, 3 and 4; Chapter 2 could contain the provisions governing the carriage of goods by sea, i.e. on a port-to-port basis; Chapter 3 could contain the provisions governing the carriage of goods by other ancillary modes before or after the sea carriage, i.e. door-to-door transport; and Chapter 4 could contain the final clauses and reservations, including a provision for express reservation for Chapter 3 for those contracting States that wish to implement the new instrument only for the port-to-port carriage of goods by sea.

3. The Swedish Proposal

150. Should the Working Group decide that the Draft Instrument should cover door-to-door transport, the Swedish proposal (A/CN.9/WG.III/WP.26) aims to better adapt the text of the Draft Instrument to existing international conventions, as well as to existing national mandatory liability regimes, particularly with respect to road and rail carriage. According to the Government of Sweden, the existing text in the Draft Instrument would, if adopted, create a conflict with the CMR and COTIF-CIM. It is noted that in many European countries, the liability regime in the Draft Instrument would also conflict with national mandatory liability regimes that are adapted to the existing regimes set out in the CMR and COTIF-CIM.

151. In order to solve these problems, the Government of Sweden proposed that the text in draft article 3.1 be changed to clarify that the Draft Instrument will only be applicable where the transport agreement is truly a contract for carriage by sea and not a contract for carriage by road or rail, where the truck or the wagon is transported by ferry during the sea leg. It is suggested that as the text stands, both the Draft Instrument and the CMR or COTIF-CIM regimes, respectively, would be applicable in the latter situation. According to the Government of Sweden, this would create a conflict between the conventions.

152. In draft article 4.2.1, an inclusion of an exception for national liability regimes is proposed. The reason for this is to avoid conflicts between the Draft Instrument and national mandatory liability regimes. In many CMR and COTIF-CIM countries, the national liability regimes for these modes of transport are adapted to the corresponding international conventions. If the existing rule in draft article 4.2.1 is adopted, it could require these countries to enact a third liability regime for the carriage of goods by road and rail. This third liability regime would differ from the existing liability regimes that (unlike the Draft Instrument) are built on strict liability.

153. The Government of Sweden also suggested that it was important to adapt the liability regime of the Draft Instrument to the existing regimes for carriage of goods by road and rail in order to create a true multimodal convention. Therefore, the Government of Sweden proposed changes to the provisions in the Draft Instrument on the calculation of compensation, as well as the inclusion of a provision on non-located damages. In order to protect the shipper of the goods, it was proposed that the carrier will only be entitled to make use of the highest limitation level in the national or international mandatory liability regime that governs the transport. It is suggested that the reason for having a rather low limitation level in sea carriage is not relevant in this case, and that non-located damages usually involves rather small amounts of goods and are normally detected at the place of delivery.

D. The Italian proposal

154. After the tenth session of the Working Group in September 2002, a proposal was submitted by the Government of Italy (A/CN.9/WG.III/WP.25). Italy suggested that the ideal solution would be to have a uniform set of rules applicable throughout the carriage, rather than a network system, even if limited in scope, because, it was suggested, the network system creates uncertainty. The Draft Instrument, however, should apply only to the contract between the shipper and the carrier while the recourse action, if any, of the carrier against the performing carrier should remain subject to the specific rules applicable to the particular transport mode, be it carriage by sea, by road or railway. The Draft Instrument should not apply to claims of the shipper against the performing carrier, for this would again give rise to uncertainty, albeit in a different context: in this case, the uncertainty would affect the performing carrier, who may not even know what rules apply to the contract between the carrier and the shipper, since the performing carrier is not a party to that contract.

155. The application of the Draft Instrument to the claims of the shipper against the performing carrier could, moreover, entail a conflict between the Draft Instrument and the transport convention applicable to the transport performed by the performing carrier.

156. Under this proposal, it is suggested that it would be necessary to restrict the definition of “performing party” to persons other than performing carriers and to add a definition of “performing carrier”. This change could be achieved by adding to the present definition at paragraph 1.17 of the Draft Instrument, after the words “Performing party means a person other than the carrier” the words “and the performing carrier(s)” and by adding the following new definition:

"'Performing carrier' means a person that at the request of the carrier performs in whole or in part the carriage of the goods either by sea or by [another mode] [rail or road]."

157. In order, however, to avoid possible actions in tort of the shipper against the performing carrier, it could be provided that the action of the shipper against the performing carrier is subject to the rules that would apply if the action against the performing carrier were brought by the carrier. If this principle is accepted, the Working Group may wish to consider what legal technique could be used in order to achieve that result: for example, a legal subrogation of the shipper into the rights of the carrier against the performing carrier.

158. In line with paragraphs 62 to 71 above, the Italian proposal examines the provisions of other transport conventions (CMR, COTIF-CIM and CMNI) with a view to determining whether a conflict with the Draft Instrument would arise, and a negative conclusion is reached.

E. Options based on the treatment of performing parties

159. It has been suggested that the basic principle underlying this set of options is that the Draft Instrument should be a convention that would apply door-to-door as between the parties to the contract of carriage, i.e. that the "carrier" (as defined in article 1.1 of the Draft Instrument) is liable to the other party to the contract of carriage on the Draft Instrument's uniform terms (not on a "network" basis) from the receipt of the goods (under draft article 4.1.2) to the delivery of the goods (under draft article 4.1.3) (the "door-to-door period").

160. While achieving full door-to-door coverage might not be feasible at the current time, it is suggested under this set of options that at least as between the immediate parties to the contract of carriage the Draft Instrument should apply uniformly and on a door-to-door basis. This is particularly the case if the new Convention is intended to encourage the door-to-door application of a unified regime, to the maximum extent possible. The advantage of making the contracting carrier liable on the same terms from receipt to delivery is that it offers predictability to the contracting parties: the cargo interests know that, as a minimum, they will have a cause of action on the Draft Instrument's terms against the party that undertook to perform the carriage, and the contracting carrier knows in advance the terms on which it will be liable to the cargo interests.

161. It has been suggested that the intention of the network system of liability was not to implement it with respect to the contracting carrier, but rather to provide rules in the event of a conflict between the new Convention and pre-existing unimodal conventions, such as those on road and rail carriage (CMR and COTIF-CIM). Potential conflict is of particular concern with respect to performing parties' liability (to the extent that the relevant performing parties may be, for example, European road or rail carriers). This issue is discussed in paragraphs 166 to 176 and 181 to 185 below. Another potential conflict of concern is the arrangement between the contracting door-to-door carrier and a unimodal carrier. However, this concern would seem to be outside of the scope of the Draft Instrument, since the arrangement would not qualify as a "contract of carriage" in the absence of a sea leg.

162. There should be no conflict between the Draft Instrument and either CMR or

COTIF-CIM with respect to the liability of the contracting door-to-door carrier. Although it is argued that segments of a door-to-door movement might fall within the scope of CMR or COTIF-CIM (or both), as a whole, the door-to-door contract of carriage (which by definition in article 1.5 the Draft Instrument includes carriage by sea) would not generally be subject to either CMR or COTIF-CIM.

163. Furthermore, the application of the network principle might not be limited to potentially conflicting unimodal transport conventions. Some contracting States may wish to preserve their own domestic law with respect to domestic land carriage. In such cases, the network principle could operate to further complicate the issue of which law is applicable to the various segments of the door-to-door movement.

164. In addition, while the higher weight-based liability limits of other regimes for the carriage of goods generally provide for a greater recovery than traditional maritime regimes, there is no guarantee that domestic laws would do the same. In fact, some national laws might permit a land carrier to avoid all liability by contract. Thus, if and to the extent that draft article 4.2.1 would preserve such national laws, such a network principle could permit the contracting carrier to avoid all liability for the land segment of the carriage, and leave the cargo owner with no recovery.

165. It has been suggested that the following options may provide a way to preserve the possibility of higher recovery for a cargo claimant (when the loss or damage occurred during the period of application of some other law with a higher limitation amount) that does not involve including in the Draft Instrument Convention a mandatory network system applicable to the parties to the contract of carriage.

1. Option 1 – Basic Principles

166. The basic principles of this Option 1 are as follows:

(a) A "performing party" (broadly defined, as suggested in A/CN.9/WG.III/WP.21, paragraph 14 following draft article 1.17 of the Draft Instrument defining “performing party”) is subject to the responsibilities and liabilities imposed on the carrier under the Draft Instrument, and entitled to the carrier's rights and immunities provided by the Draft Instrument:

(i) during the period in which it has custody of the goods; and
(ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage;

unless, at the time of its ratification of the Draft Instrument, the Contracting State in which the relevant event occurs opted out of coverage for the relevant performing party.

(b) A Contracting State may not opt out of coverage with respect to:
(i) ocean carriers;
(ii) performing parties to the extent that they have custody of the goods during the port-to-port period of an ocean carriage; or
(iii) performing parties to the extent that they participate in the performance of any of the activities contemplated by the contract of carriage during the port-to-port period of an ocean carriage.

(c) With respect to:
the period (if any) after the receipt of the goods (under draft article 4.1.2) but before the goods arrive at the port of loading (the "door-to-port period"); and
the period (if any) after the goods have been removed from the port of discharge but before delivery of the goods (under draft article 4.1.3) (the "port-to-door period"),
a Contracting State, with respect to the performance of a contract of carriage within its territory, may opt out of coverage for:

(i) all performing parties; or

(ii) specified types of performing parties (e.g., all rail carriers; all motor carriers; all performing parties that do not physically perform any of the
carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods); or

(iii) specified types of performing parties under specified circumstances (e.g., motor carriers to the extent that they are governed by CMR; motor carriers to
the extent that they are governed by a specified national law applicable to motor carriers).

(d) The Draft Instrument pre-empts all other causes of action (whether founded in contract, in tort, or otherwise) against (i) the carrier, and (ii) all performing parties that are subject to the Draft Instrument (i.e., all performing parties with respect to which the relevant contracting State has not opted out of coverage). To the extent that a performing party is not subject to the Draft Instrument, its potential liability is governed by whatever law would have applied in the absence of the Draft Instrument. The Draft Instrument does not pre-empt whatever law would otherwise apply.

2. Option 1 -- Commentary on the Basic Principles

167. Under principle 1(a) in paragraph 166 above, all performing parties are presumptively subject to the new Convention. This is consistent with the fundamental point that the application of the Convention should be as close to "door-to-door" as it is possible to achieve. To the extent that this coverage is too broad, however, principle 1(a) permits a Contracting State to opt out of coverage for inland performing parties that it does not wish to subject to the new Convention. Thus the new Convention would be door-to-door except in those specific cases in which there is a strong governmental interest in restricting its application.

168. Principles 1(b) and 1(c) clarify a Contracting State's ability to opt out of coverage. Under principle 1(b), a Contracting State may not opt out of coverage for the core maritime parties that operate in the port-to-port segment. To allow a reduction in the scope of coverage below port-to-port for the core maritime parties would represent a step backwards from the current regime.

169. As a practical matter, principle 1(b) ensures that at least ocean carriers and those that operate in the port area, such as stevedores and terminal operators, would be fully subject to the new Convention.

170. Under principle 1(c), a Contracting State may opt out of coverage for some or all of the performing parties within its territory. The form of opting out would depend on the rationale for the Contracting State's decision to opt out. For example, if a Contracting State concluded that a cargo claimant would have no direct cause of action against a performing party under existing law and that it would be unwise to recognize a new cause of action under the Convention when none had existed in the past, then the State could opt out under

principle 1(c)(i). In that State, then, no performing parties would be liable under the Convention.

171. Alternatively, if a Contracting State concluded that it did not wish to subject a particular industry (such as railroads) to the Convention, then it could opt out under principle 1(c)(ii). In that State, the industry would continue to operate as it had in the past, and the Convention would have no impact on it.

172. If a Contracting State preferred the narrow definition of "performing party" contained in article 1.17 of the current Draft Instrument, then it could also opt out under principle 1(c)(ii), excluding the application of the Convention with respect to "all performing parties that do not physically perform any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods."

173. Finally, contracting States that wish to preserve the application of unimodal transport regimes like the CMR and COTIF-CIM, and other States that wish to preserve the application of their domestic laws, could opt out under principle 1(c)(iii).

174. Principle 1(d) clarifies the effect of opting out. Under principle 1(d), a class of performing parties would be either within the Convention or outside of the Convention. Performing parties that are within the Convention would be part of the overall compromise that must be made under the regime. They would be subject to liability under the Convention but would be fully protected by its exclusions and limitations, including the automatic "Himalaya"[20] protection.

175. Performing parties outside of the Convention would not participate in the compromise, and the Convention would not affect them. They would not be subject to liability under the Convention and they would not be protected by it. Their liability would remain as it is under current law. To the extent that current law (or domestic law other than the Convention) permits a performing party to claim protection under a Himalaya clause, the Convention would not deny that protection, but nor would it grant automatic protection (as article 6.3.3 of the current Draft Instrument does).

176. The disadvantage of this option is one that could be raised with respect to any regime with less than complete door-to-door coverage: if certain performing parties are outside of the coverage of the convention, then they can be sued under whatever law would otherwise be applicable (unless the Convention bans suits against performing parties altogether, as discussed in Option 2). The result could be a confusing overlay of inconsistent liability regimes and a multiplicity of suits.

3. Option 2 -- Basic Principle

177. The basic principle of Option 2 is that all suits by cargo interests for cargo damage are subject to the terms of the Draft Instrument and can only be brought against the Contracting Carrier. There is no opting out provision in Option 2.

[20] "Automatic 'Himalaya' protection" refers to the type of protection provided by article 6.3.3 of the Draft Instrument, whereby a performing party receives the protection customarily provided by an effective Himalaya clause without the necessity of including a Himalaya clause in the bill of lading. A Himalaya clause in a bill of lading extends to specified third parties the benefit of the exemptions, limitations, defences and immunities of the carrier under the bill of lading.

4. Option 2 -- Commentary on the Basic Principle

178. This option would make suit under the terms of the Draft Instrument the exclusive remedy of a cargo interest against the contracting carrier. Moreover, it would prohibit suits by the cargo interest against the performing party (whether under the Draft Instrument, by contract, by tort, or otherwise). It would then be up to the contracting carrier to collect from the performing party, an action that may or may not be within the scope of the Instrument.

179. There are several advantages to the approach in Option 2. First, shippers are commercial parties who can select the contracting carrier that meets their cargo damage requirements, and consignees can also provide for the same in sales agreements. Second, it is the contracting carrier that offers the service, hires subcontractors and is in the best position to handle claims. Third, there is typically no knowledge of or reliance upon specific performing parties by the shippers. In addition, this approach makes clear in advance what liability regime will apply as well as who will handle a claim and be responsible for resolving suits so all parties can plan accordingly. Further, the approach in Option 2 may avoid complicated litigation and multiple defendants. Finally, this option provides predictability so that parties can negotiate transport terms knowing which rules will apply to dispute resolution.

180. The disadvantage of the approach in Option 2 is that it would eliminate suits (whether under the Draft Instrument, in tort, or otherwise) against the performing party that actually caused the damage. If the contracting carrier is insolvent or amenable to suit only in a jurisdiction that is inconvenient to the cargo interest, that interest may be left with no real remedy. Moreover, it would limit the cargo interest's recovery to the Draft Instrument's liability limits, even if another legal regime that would otherwise be applicable would allow a higher recovery.

5. Option 3 – Basic Principle

181. Like Option 1, Option 3 would allow a State to opt out of the new convention with respect to certain performing parties. The basic principle of Option 3 is that suits under the Draft Instrument will be the exclusive remedy available to a cargo interest against the carrier for cargo damage during door-to-door transport. In addition, no suit could be brought against a performing party for such damage unless at the time of the ratification a State indicates that it is preserving whatever causes of action would otherwise apply. (A State could opt out for certain performing parties, as described under Option 1, see above, paragraphs 166 to 176.)

6. Option 3 -- Commentary on the Basic Principle

182. Option 3 combines aspects of Options 1 and 2. It reverses the default presumption of Option 1, and expands it to include the presumption (which in Option 2 is an outright prohibition) that no suits are allowed by cargo interests against the performing party.

183. The purpose of Option 3 is to make claims against the contracting carrier under the Draft Instrument the general rule. Similarly, the presumption would be that all suits by the cargo interest against performing parties would be prohibited. A country could opt out of the prohibition to permit suits against all or some performing parties in accordance with

domestic law or multilateral agreements.

184. The advantage of the approach in Option 3 is that it would encourage a maximally uniform system, while allowing flexibility for countries with other law applicable to the land portions of the journey.

185. However, the disadvantage of Option 3 is that a country that as a matter of policy does not favour elimination of such causes of action might not want a presumption in favour of this built into the Convention.