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Transport law: preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]

Scope of application and freedom of contract: information presented by the Finnish delegation at the fifteenth session

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the paper attached hereto as an annex was distributed informally by the Finnish delegation during the discussion of scope of application and freedom of contract in the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Finnish delegation informed the Working Group that the text was intended to facilitate consideration of the topics of scope of application and freedom of contract in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group. In addition to some individual comments which were received by the Finnish delegation, the following delegations provided comments which are reflected in the annex: Australia, China, Denmark, Greece, Italy, Japan, the Netherlands, New Zealand, Norway, the Republic of Korea, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The paper in the annex is reproduced in the form in which it was received by the Secretariat.

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Annex

12 April 2005. "THE APRIL 2005 REPORT"
Professor Hannu Honka

UNCITRAL DRAFT INSTRUMENT. SCOPE OF APPLICATION AND FREEDOM OF CONTRACT

REPORT BASED ON DISCUSSIONS AND THE REPLIES TO THE INFORMAL QUESTIONNAIRE DATED 24 JANUARY 2005

1. During the fourteenth session (Vienna 2004) of Working Group III an informal drafting group discussed certain drafting suggestions regarding which types of transactions should fall within the mandatory scope of the draft Instrument on the carriage of goods [wholly or partly][by sea]. The informal drafting group proposed to the Working Group during its fourteenth session a series of new provisions regarding the scope of application of the draft Instrument. The proposal was called "Report of Small Drafting Group on Scope of Application". These new provisions have subsequently been reproduced by UNCITRAL in A/CN.9/WG.III/WP.44 as "scope-of-application draft articles".

2. These draft articles do not address the issue of Ocean Liner Service Agreements and will, according to what is stated in A/CN.9/WG.III/WP.44, need to be reconsidered in light of the Working Group's decision in that regard. In addition, further examination of draft articles 88 and 89 (A/CN.9/WG.III/WP.32) is necessary.

3. After the fourteenth session an informal questionnaire dated 24 January 2005 was sent by the Finnish delegation to the other delegations in order to receive further views on the new provisions proposed during the fourteenth session, and in order to receive further comments on the issue of Ocean Liner Service Agreements (OLSAs) and draft articles 88 and 89. Replies to this questionnaire have been received from Australia, Denmark, Greece, Italy, the Netherlands, New Zealand, Norway and the Republic of Korea. ICS, BIMCO and the International Group of P & I Clubs have provided a reply. Comments have been provided by UNCTAD. Also, replies have been received from Stuart Beare assisted by His Honour Anthony Diamond QC, Professor Tomotaka Fujita (Japan) and Si Yuzhuo (People's Republic of China). I am very grateful for all the constructive comments that have been included in the replies.

4. In the following, the provisions in A/CN.9/WG.III/WP.44 are repeated in *Part I*. A summary of the replies to the questionnaire of 24 January 2005 is included under each provision. The OLSA issue is reported in *Part II*, but there is new development and another proposal how to deal with this matter in a larger context. Articles 88 and 89 are dealt with in *Part III*.

5. In view of the replies and unofficial contacts and discussions, it has been thought necessary to provide a proposal which also includes a new approach where OLSAs are treated as volume contracts. This proposal is intended as a basis for discussions in the fifteenth session of the Working Group in New York. The proposal is included in *Part IV*.

6. The commentaries in A/CN.9/WG.III/WP.44 to each scope-of-application draft article have been omitted below.

PART I. SCOPE OF APPLICATION—DRAFT ARTICLES IN A/CN.9/WG.III/WP.44

7. **Article 1**

(a) "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

[(--) "Liner service" means a maritime transportation service that

(i) is available to the general public through publication or otherwise; and

(ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]

[(--) "Non-liner service" means any maritime transportation service that is not a liner service.]

8. The majority of the replies received support the text in Article 1 (a). The definition of "contract of carriage", on the other hand, has in one reply been thought to be too broad in view of it covering voyage charter parties and a cross reference to the exclusion set out in article 3 (1) has been suggested. Also, the exact wording is proposed to be more exact, especially by emphasizing the mutuality of the shipper's and carrier's obligations and using the word "contract" rather then "undertaking" in the second sentence (see *Part IV* article 1). The requirement of internationality is considered to have been lost by splitting the sea leg provision into two separate articles (1 and 2). The word "international" has been suggested as an addition before the words "carriage by sea" (see *Part IV* article 1). Certain other drafting proposals have also been made.

9. The sentence in 1 (a) within square brackets, however, is controversial. Views supporting the maintaining of the text and deleting the square brackets have been, for example, argued with the fact that the wording will clarify "must provide for carriage by sea" in the previous sentence. Also, it has been stated that, should the text within square brackets not be included, national law would apply in two situations: when the contract contains options as to the mode of carriage and when nothing is said in the contract about the mode of transport. The majority of the comments received support the maintaining in the Instrument of the text within square brackets.

10. The argument speaking for deletion of the whole text within square brackets has been mentioned that as a mere interpretation of the previous part of the provision it is superfluous. The wording might also be confusing, as any actual carriage by sea should not be allowed as the basis for applying the Instrument.

Instead, each convention should have its own contract in order to avoid overlaps with other conventions.

11. The proposed definitions of "liner service" and "non-liner service" are largely found to be in order in principle, but there are views expressing the need to further clarify and specify these definitions. For example, it has been found that the definition should be broader than in A/CN.9/WG.III/WP.44. The term "liner carriage" has also been suggested as well as "liner trade". Also, a refined wording for the whole definition has been suggested (*Part IV*, article 1, alternatives 2 and 3). There is some concern that the definition would not be precise enough in view of the scope of application of the Instrument. There might, according to one opinion, be a risk of confusion between these definitions and article 3 (2).

12. There is one comment in which clear opposition is expressed to including the definitions of "liner service" and "non-liner service". The view is related to the approach taken in article 3.

13. **Article 2**

1. Subject to Articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract. [References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

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

14. The requirement of both the sea leg and the overall carriage being international has the support in the majority of the comments received, but there is an opinion saying that the present drafting in A/CN.9/WG.III/WP.44 does not achieve this. It has also been suggested that for the purpose of the parties informally changing the place of receipt or the place of delivery from the contractual arrangement, the Instrument should apply if the new place is in a Contracting State. In this respect, see the wording in *Part IV*, article 2, paragraph 1. There are, however, also views according to which it should suffice for application of the Instrument that only the overall carriage is international. And, there is an opinion according to which only the sea leg needs to be international, as an overall carriage would in most such cases also be international and as the Instrument is mainly maritime by nature.

15. In one comment it has been maintained that the word “all” should be added before “contracts of carriage”.

16. It has generally been accepted in the comments received that the word “contractual” is necessary, but it has been questioned whether such reference is needed elsewhere than in the chapeau or in the last sentence of paragraph 1. It has also been considered that the word “contractual” is not necessary in the reference to the place of receipt, as it is not possible to envisage such a place without an agreement between the parties. Also, “port of loading” and “port of discharge” might be unnecessary as they are embraced by “place of receipt/delivery”. It has also been stated that 2.1 (c) might be unnecessary in view of the 2(1)(b) and that 2(1)(c) should be deleted. According to one opinion the contractual place/port of trans-shipment might be added in order to broaden the scope of application of the Instrument. A reservation has been expressed as to 2(1)(d) due to the provision making it possible for the contracting parties to choose procedural rules.

17. Paragraph 2 has been considered unnecessary in many replies received, but that view is not argued further. In support of maintaining paragraph 2, reference has been made to Article X(c) of the Hague-Visby Rules. The latter Article is intended to ensure that any Contracting State shall apply the rules as part of statute law of all contracting states, irrespective of the proper law. Also, the maintaining of paragraph 2 is necessary to show that no change in comparison with the Hague-Visby Rules has been intended. The comments, where a corresponding provision is still found of relevance, mean that paragraph 2 should be maintained in the Instrument.

18. **Article 3**

1. This Instrument does not apply to

(a) subject to Article 5, charter parties, whether used in connection with liner services or not; and

(b) subject to Article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

(c) subject to paragraph 2, other contracts in non-liner services.

2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

(a) evidences the carrier’s or a performing party’s receipt of the goods; and

(b) evidences or contains the contract of carriage, except in the relationship between the parties to a charter party or similar agreement.

19. The contractual and trade approach, and as a matter of fact, the documentary approach (charter parties) in paragraph 1, has clear support in the comments received, but some reservations have been expressed and views on details vary. There is opposition to the system in article 3 in two replies, according to which a contractual approach would sufficiently tackle the issues.

20. As far as reservations in the drafting are concerned, for example, one optional wording in 1 (a) would be "charter parties even if used in connection with liner services" (see *Part IV*, article 3(1)(a)). A mere reference to "charter parties" has also been considered to be sufficient. No requirements of defining charter parties have been put forward. However, in one reply a contract of carriage is said to contain voyage charters. Thus, voyage charters should explicitly be specified and excluded.

21. There is some support in the comments received for the present wording in 1(b). The terminology is, however, in some replies found to be problematic concerning the meaning of "volume contracts". The term "contract of affreightment" is in one of the replies understood to be synonymous to "volume contracts". A "contract of affreightment" is also understood to refer to bills of lading and/or to charter parties. It has been stated that volume contracts would need a definition if OLSAs become part of the general provisions on scope of application, as they should. The reference to "in liner services or not" in 1 (b) has in one reply been considered unnecessary.

22. The negative non-liner reference in 1 (c) has been considered problematic in one reply and a positive definition should be found (cf. article 1).

23. There is emphasis in one reply on the fact that one specific form of carriage might cause problems in view of applying or not applying the Instrument, meaning one-off shipments and often concerning large or specialized items, such as transformers, boilers and large pleasure craft. It has been admitted, however, that such forms of carriage might fall under article 89.

24. In *Part IV* the concerns relating to 3(1) (a) to (c) in view of drafting have been taken into consideration to the extent considered reasonably possible.

25. In many replies received, article 3(2) is found acceptable as covering the "gap" that might arise due to the exclusions in article 3(1). In other words, article 3(2) is accepted to catch the situations that need to be within the scope of application of the Instrument. On the other hand, it has been mentioned that Articles 3, 4 and 5 are overly complex and somewhat confusing. For example, the references in Article 3(1) (b) and Article 4 are unclear read together. The intended coverage in article 3(2) of a certain type of common carriage has also been said to be unclear, especially outside the United States. For these reasons, an alternative solution has been suggested (see *Part IV*, alternative 2, for articles 3, 4 and 5 (at the end)). On the other hand, it has been expressed by a non-US source that, for example, pure car carriage would fall under article 3(2). Also, in one reply it has been said that article 3(2) has no independent meaning. Article 3(2) is said to be unnecessary should a contractual approach be accepted and not a mix of contractual and trade (and documentary) approaches.

26. **Article 4**

> **If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in Articles 2, 3(1)(a), 3(1)(c) and 3(2).**

27. Individual voyages under a framework contract fall or do not fall under the Instrument in accordance with what is stated in Article 4. This has generally been accepted in the comments received, even if clarifications in the exact wording have

been suggested, such as "The application of the Instrument to each shipment is governed by the provisions of articles 2, 3 (1) (a)" etc.

28. However, it should be added that if volume contracts are defined and OLSAs become part of volume contracts, article 4 needs redrafting.

29. **Article 5**

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

30. There is consensus among the comments received in providing for protection of the third party (not a charterer or a party to the contract under Article 3(1) (c)) by the mandatory provisions of the Instrument even when the Instrument is not applicable due to the provisions of exclusion relating to the original contract and the original contracting parties.

31. There are still varying views on how this protection should be regulated. The wording in A/CN.9/WG.III/WP.44 has been accepted in most of the replies, but considered unsatisfactory in some others. For example, the reference to the time factor ("... from the moment ..." etc.) has been considered not to be acceptable for a non-negotiable document. Also, "persons entitled to rights ..." has been considered too vague, as well as the reference to "party to a contract ...". It has also been suggested that the time factor should be deleted as unnecessary, when the wording would become acceptable. According to one opinion the wording "such transport document or electronic record shall comply with the terms of this Instrument" is superfluous. Also, the third party should be specified to consignors, consignees, controlling parties, holders and persons referred to in article 31.

32. The above-mentioned views have been further looked into in *Part IV*, article 5, the document alternative.

33. During the fourteenth session of the Working Group in Vienna in 2004, the option of a transport document or an electronic record not being required for the mandatory protection of the third party was discussed, but did not receive clear majority support. Consequently, article 5 was included in the proposal as now repeated in A/CN.9/WG.III/WP.44. Another alternative has again been expressed in one of the replies whereby protection of the third party should be related to specifying that third party rather than providing the requirement of a transport document or an electronic record. This alternative of no transport document or electronic record will still be upheld (see *Part IV*, article 5, the non-document alternative).

PART II. THE OLSA ISSUE

34. The drafting of the OLSA provision is found in the proposal by the United States in A/CN.9/WG.III/WP.42.

35. Most replies received are carefully in support of an OLSA kind of provision in the Instrument. It is emphasized, however, that the provisions of the Instrument should prevent any misuse by entering into an OLSA type of contract with the result that the Instrument would be non-mandatory between the immediate contracting parties. In one opinion it is noted that a substantial part of a particular trade might be based on service agreements. A non-mandatory approach would be no problem between parties with equal bargaining power, but it would be a problem in relation to small shippers. In this opinion it is thought that should an approach as found in A/CN.9/WG.III/WP.34 be accepted, small shippers would not be properly protected. In general, the scope of application provisions are closely linked with the substantive provisions.

36. Most replies received support a stand-alone provision for OLSAs, but there are also views according to which OLSAs really are volume contracts and should, therefore, be regulated as part of the general provisions on scope of application. This latter approach will cause changes in the drafting included in A/CN.9/WG.III/WP.44. The drafting in A/CN.9/WG.III/WP.44 is reconsidered under *Part IV* below.

37. The OLSA definition in A/CN.9/WG.III/WP.42 is generally accepted, but there are views according to which certain aspects of the definition are still not clear enough (reference has been made to “not otherwise mandatorily required by this Instrument”).

38. Reservations have been expressed in the comments received as to third-party consent. It has also been mentioned that an OLSA definition is simply not acceptable, but the issues should be approached on the basis of a volume contract. Also, once a stand-alone option is omitted and OLSAs become part of the volume contract provisions as amended, the question of a precise definition will probably lose its relevance.

39. A stand-alone OLSA provision is accepted in the comments received to have on overriding effect in relation to the more general provisions dealing with volume contracts. But, it is emphasized that should such a conflict occur it would be a sign of unsuccessful drafting.

40. The position of a third party should be coordinated so that Article 5 in A/CN.9/WG.III/WP.44 and the specific OLSA provision concerning the position of the third party are the same (except where there is third party consent as expressed in A/CN.9/WG.III/WP.42).

PART III. ARTICLES 88 AND 89 (REFERRING TO THE NUMBERING IN A/CN.9/WG.III/WP.32)

41. There are divided views in the comments received on the technical placing of Articles 88 and 89. Some replies support the idea of moving these articles to become part of the scope of application provisions, some express the view that the

placing is in order as it stands in A/CN.9/WG.III/WP.32 and some do not find this issue of any particular importance.

42. The one-way mandatory nature of Article 88 has the support of the majority of comments received, but the view is also expressed of a two-way mandatory nature supported in some of the replies.

43. In a one-way approach it should, according to one reply, be seen to that an agreed increase of liability of one party must not lead to a decrease of the mandatory level of liability of another party. The drafting according to one opinion is not satisfactory in article 88 (see another proposal: *Part IV*, article 88, alternative 2).

44. The argument for the two-way mandatory approach is that the market situation since the Hague and the Hague-Visby Rules has radically changed. Shippers today are claimed to have equal commercial power with carriers to influence carriage arrangements and sometimes greater influence than carriers.

45. The two different views have been maintained in *Part IV* as in article 88 in A/CN.9/WG.III/WP.32 in form of square brackets.

46. The specification of whose liability can be increased has not been touched at all in many of the replies, but there is the suggestion that the increase of liability should not cover a performing party as found in paragraph 2 (A/CN.9/WG.III/WP.32). There is a further specification by the statement that article 88 should not cover non-maritime performing parties (see *Part IV*, article 88). It is further expressed that the modification of the carrier's obligation, not only his liability, should be regulated. It is stated that article 88.1 should not contain references to the shipper, the controlling party or the consignee. For these persons, the mandatory nature should be clarified on an article-by-article basis. Article 88.2 is, according to one opinion, unnecessary.

47. Article 89 in A/CN.9/WG.III/WP.32 has generally been considered acceptable in the comments received, but some changes have been suggested. In one opinion it is stated that the present text is simply unreasonable and that for live animals the Hamburg Rules, article 5.5, is more acceptable and that the provision on special cargo should both be specified and removed to the place of "scope of application". The exception to the exclusion of liability where the loss or damage results from recklessness should be moved to the chapeau so that it applies to both live animals and special goods. Also, preference has in one reply been expressed for the wider exclusions permitted under the Hague-Visby Rules.

PART IV. TEXT PROPOSAL AS BASIS FOR FURTHER DISCUSSIONS

48. There is no consensus in the replies received in view of a number of issues concerning scope of application and freedom of contract. The differences on many points are, however, rather related to drafting than substance. In order to develop the issues, a proposal is put forward below. It is intended to provide a basis for discussions in the fifteenth session of the Working Group.

49. To the extent the proposal below differs from the scope-of-application draft articles in A/CN.9/WG.III/WP.44, the text below has been highlighted *in italics*. Different alternatives are proposed based on discussions and the replies that were

received and which provided constructive text proposals. Only additional comments are included. The comments in A/CN.9/WG.III/WP.44 are not repeated.

50. **Article 1**

(a) "Contract of carriage" means a contract in which a carrier, against [*an undertaking for*] the payment of freight, undertakes to carry goods from one place to another. This [undertaking] [*contract*] must provide for [*international*] carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

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

51. Comment: Some alternatives for the drafting have been included in 1 (a) partly based on the replies received. In order to avoid the confusion in Article 3 in A/CN.9/WG.III/WP.44 concerning references to different types of contract and in order to accommodate service contracts (OLSAs) into the general provisions on scope of application, it has been felt necessary to add a definition of "volume contracts" in Article 1. This definition will clarify Article 3.

52. **Alternative 1—A/CN.9/WG.III/WP.44:**

(xx) "Liner service" means a maritime transportation service that

(i) is available to the general public through publication or otherwise; and

(ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.

[(xxx) "Non-liner service" means any maritime transportation service that is not a liner service.]

Alternative 2:

(xx) "Liner Service" means a transportation service subject to the Instrument that

(i) is offered to the public through publication or similar means; and

(ii) includes transportation by vessels operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates

(xxx)"Non-liner service" means any transportation service that is not a liner service.

Alternative 3:

(xx) "Liner service" mean a transportation service subject to the Instrument that

(i) is available to and advertised to the public; and

(ii) operates on a regular basis between specified ports in accordance with published schedules or sailing dates.

53. Comment: The trade approach has made it necessary to consider definitions of "liner service" ("liner trade", "liner carriage"). Alternatives 2 and 3 repeat drafting proposals included in the replies or expressed otherwise. The definition of non-liner service might not be needed. Deletion might mean certain drafting adjustments in the wording at least in article 3.

54. **Article 2**

1. Subject to Articles 3 to 5, this Instrument applies to [*all*] contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract. [References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.] [*References to contractual places and ports mean places and ports provided under the contract of carriage or in the contract particulars or otherwise agreed between the parties to the contract*].

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

55. Comment: The addition of "all" is based on one proposal made and it is included to see whether there is support for this addition. The alternative wording (in italics) at the end of paragraph 1 is based on one of the replies received and is intended to cover any subsequent changes by the parties of the originally agreed places or ports. The square brackets have been removed in paragraph 2 and, thus, the text shall be included in the Instrument.

56. **Alternative 1 for articles 3, 4 and 5:**

Article 3

1. This Instrument does not apply to

(a) subject to Article 5, charter parties, [*even if used in connection with liner services*] [*and agreements between vessel owners or operators concerning the use of all or part of the vessel*];

(b) subject to Articles 4 and 5, volume contracts; or

(c) subject to paragraph 2, other contracts [in non-liner services] [*when not intended for liner services*].

2. [*Notwithstanding paragraph 1 (c),*] [T]his Instrument applies to contracts of carriage [in non-liner services] [*when not intended for liner services*] under which the carrier issues a transport document or an electronic record that

(a) evidences the carrier's or a performing party's receipt of the goods; and

(b) evidences or contains the contract of carriage, except in the relationship between the parties to a charter party or similar agreement.

57. For alternative 2 for articles 3, 4 and 5, see after article 89, in paragraph 85 below.

58. Comment: The structure in A/CN.9/WG.III/WP.44 has been maintained, but, in view of including service contracts in the general provisions of the scope of application and in view of abolishing unclear concepts, such as "contracts of affreightment" and "similar contracts" a further effort of clarification has been made. In 3(1)(a) there is a reference to charter parties with a new drafting concerning specifications. The wording within square brackets has been suggested as an addition, but references to owners and operators might be confusing, as such concepts do not necessarily have a common international understanding.

59. Due to the definition of volume contracts in article 1, there is no need to have any other references in 3(1)(b).

60. Should the definition of "non-liner service" be deleted as unnecessary, the wording in 3(1)(c) and 3(2) might have to be adjusted.

61. Article 3(2) is important in the relationship between the shipper and the carrier, as third party mandatory protection arises in any case under article 5. Concern has been expressed on the relationship between 3(1) and 3(2). Consequently, a clarification effort has been made by 3(2) excepting paragraph 1(c). In 3(2) the reference at the end is within square brackets in A/CN.9/WG.III/WP.44 but the square brackets could be removed and the text retained. It would make it clear that paragraph 2 does not reintroduce the application of the Instrument in cases where its application is originally excluded between the original contracting parties. The wording "similar agreement" might have to be specified.

62. **Alternative A:**

Article 4 (in view of including volume/service contracts)

1. Subject to Article 88a, this Instrument applies to each shipment under a volume contract in accordance with the rules provided in Articles 2, 3.1(a) and (c), 3.2, and 5.

2. Subject to Article 88a and notwithstanding article 3.1 (b), this Instrument applies to a volume contract to the extent that it applies to the individual shipments under the volume contract.

Alternative B:

Article 4 (in view of including volume/service contracts) [Subject to article 88a,] [T]his instrument applies to volume contracts in liner service to the extent that the individual shipments thereunder are subject to this Instrument in accordance with article 2.

Alternative C:

Article 4 (in view of including volume/service contracts) [1.] [Subject to article 88a,] [I]f a volume contract covers individual shipments in liner services [only], this Instrument applies to the volume contract and to each individual shipment in liner services under that volume contract [in accordance with article 2].

[2. If a contract provides for the future carriage of goods in a series of shipments, and provided that an individual shipment does not fall under paragraph 1, this Instrument applies to each individual shipment in accordance with the rules provided for in Articles 2, 3(1)(a), 3(1)(c), and 3(2).]

Comment on Alternatives A, B and C:

Background

63. In previous formal and informal discussions and in developing the issue of the status of service contracts in general it has become obvious that both the coordination of a stand-alone OLSA provision with the rest of the scope of application provisions and the definition of OLSAs present problems. In spite of sympathy for a stand-alone provision of OLSAs, it now seems a better option to accept the fact that an OLSA is nothing more or less than a type of volume contract which should be regulated as part of general scope of application provisions. Volume contracts are defined in article 1. Volume contracts are excluded from the Instrument in article 3.1 (b) as far as the framework contract is concerned, but subject to article 4.

Alternative A

64. Rather than specifying the status of a framework contract in liner trade, article 4(1) first takes a standpoint on when individual shipments fall under the Instrument and when not. The references should make it clear that the position of individual shipments is dependent on whether they are arranged through liner services, by chartering etc. According to paragraph 2, the status of the framework contract is dependent on the position of individual shipments. Thus, if the individual shipments fall under the Instrument, then also the framework contract falls under the Instrument.

Alternative B

65. Alternative B has been proposed during the discussions preparing for New York. It is an effort to simplify the drafting, but maintaining the same structural idea as in alternatives A and C.

Alternative C

66. Article 4(1) is the first part of the provision relating to volume contracts. As the general rule is included in article 3(1), but subject to article 4, there is a possibility of specifying the position of volume contracts intended for liner trade in article 4(1). It might be necessary to clarify application by reference to article 2 in the same way as in alternative B. The liner service reference for the framework volume contracts is the key in alternative C, while in alternative A the position of individual shipments is decisive on the basis of which the position of the framework volume contract is decided.

67. It should be noted that article 4(2) in alternative C, which has been included already in the previous version of the Instrument in A/CN.9/WG.III/WP.32, is taken from the Hamburg Rules, article 2(4), but the Hamburg Rules also refer to "an agreed period", which is not used in the Instrument.

68. The word "only" in article 4(1) indicates the possible need to exclude from the Instrument mixed framework volume contracts where individual shipments might be fixed in liner service or be based on voyage chartering, etc. This problem is perhaps merely theoretical. If this mixed framework contract is not a concern, it might be that 4(2) is unnecessary in alternative C.

The non-mandatory scope of article 4

69. Article 88a derogates in view of article 4 from the mandatory nature of the Instrument found in article 88. Article 88a makes the Instrument non-mandatory for individual shipments that fall under the Instrument and that are under a volume contract provided that the preconditions set out in article 88a have been fulfilled. The framework volume contract is also under the Instrument on a non-mandatory basis.

70. Some provisions in the Instrument are of such fundamental importance that they cannot be derogated from even when article 88a as such is applicable. The carrier's seaworthiness obligation and many of the shipper's obligations could thus be mandatory even when article 88a otherwise is applicable. Such absolute mandatory provisions need to be discussed in further detail.

71. **Article 5/the document alternative**

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

72. Comment: The use of square brackets is intended to show the critical points mentioned in the replies, i.e. the time factor and the persons to be protected and a detailed clarification.

73. **Article 5/the non-document alternative**

Notwithstanding article 3, paragraph 1, the provisions of this Instrument apply between the carrier and the consignor, consignee, controlling party, holder, person referred to in article 31 or notify party, provided the latter persons are not the shipper or have not otherwise agreed to the terms of a contract in article 3, paragraph 1.

74. Comment: This is the alternative that was discussed during the fourteenth session of the Working Group in Vienna and referred to in one of the replies to the informal questionnaire of 24 January, 2005.

75. **Alternative 1 (article 88)**

Article 88

1. Unless otherwise specified in this Instrument, any contractual stipulation that derogates from this Instrument is null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier or a [*maritime*] performing party [, the shipper, the controlling party, or the consignee under this Instrument].

[2. Notwithstanding paragraph 1, the carrier or a [*maritime*] performing party may increase its responsibilities and its obligations under this Instrument.]

3. Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.

76. Comment: There is a majority, but not a unanimous, view in the replies received that the Instrument shall include a one-way mandatory system meaning that it is contractually acceptable to increase the liability of any of the persons mentioned in article 88.1. The two-way mandatory system has some support. Square brackets have been introduced concerning which persons article 88 is to cover. The clarification of maritime performing party has also been proposed.

77. **Alternative 2 (article 88)**

Article 88

Unless otherwise specified in this Instrument, any provision in a contract of carriage shall be null and void if:

(a) it directly or indirectly lessens or relieves from the obligations, liabilities that the carrier or the maritime performing party assumes under this Instrument; or

(b) it directly or indirectly increases the obligations, liabilities that the cargo interests assumes under this Instrument; or

(c) it assigns the benefit of insurance of the goods in favour of the carrier or a performing party. The cargo interests referred to in the preceding paragraph include the shipper, the consignor, the controlling party, the holder of a transport document and the consignee.

78. Comment: Alternative 2 repeats a proposal in one of the replies.

79. **Article 88a**

1. Notwithstanding article 88, a volume contract that is subject to this Instrument under article 4[1][2] may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in this Instrument provided that:

(a) The contract shall be [mutually negotiated and] agreed to in writing or electronically;

(b) The contract shall obligate the carrier to perform a specified transportation service;

(c) A provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities shall be set forth in the contract and may not be incorporated by reference from another document; and

(d) The contract shall not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract. This right of derogation covers the individual shipments under a volume contract and the volume contract to the extent that they are subject to this Instrument under article 4.

2. Paragraph 1 is not applicable to duties, rights, obligations and liabilities under articles [13, 25, 26, 27, ...].

3. Paragraph 1 is applicable between the carrier and the shipper and it covers any third party who has expressly consented to be bound by the volume contract under article 4[1][2] or any contract (or any provision thereof) providing for an individual shipment under article 4[1][2].

80. Article 88a is the derogation provision. It applies to the framework volume contract and the individual shipments under that contract as specified in article 4. Article 88a(1) regulates the preconditions for when derogation is acceptable. There are also provisions establishing that certain obligations and liabilities regulated in the Instrument cannot be derogated from. There are some questions relating to 88a(1)(a) and (d) as to the substance as shown by square brackets.

81. The absolute mandatory provisions in 88a(2) have to be specified.

82. The position of the third party would follow article 5, unless there exists third-party consent in accordance with article 88a(3).

83. **Article 89**

Notwithstanding chapters 4 and 5 of this Instrument, both the carrier and any performing party may by the terms of the contract of carriage:

(a) exclude or limit their liability if the goods are live animals except where it is proved that the loss, damage or delay resulted from an action or omission of the carrier [or its servants or agents] done recklessly and with knowledge that such loss, damage or delay would probably occur, or

(b) exclude or limit their liability for loss or damage to the goods if the character or condition of the goods or the circumstances and terms and

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

84. Comment: In some of the replies received certain adjustments have been proposed. The reference to recklessness should, according to one opinion, relate to the carrier only, but not to his servants or agents. There is also a proposal of moving the reference to recklessness in 89 (a) to the chapeau so as to cover both 89 (a) and (b).

85. **Alternative 2 for articles 3, 4 and 5:**

Article 3

Subject to Articles 4 and 5 this Instrument does not apply so as to govern the relations between the parties to any of the following types of contract whether used in connection with liner services or not:

(a) charter parties;

(b) contracts for the use or employment of a ship or ships or of any space thereon;

(c) contracts for the future carriage of goods in a series of shipments.

86. Comment: This alternative 2 concerning article 3, as presented in one of the replies to the questionnaire, is an effort to simplify and clarify the text. It avoids "volume contracts" and "contracts of affreightment". As such, volume contracts would be excluded by 3(c), slot charters by 3 (a) or 3 (b) and towage and heavy lift contracts by 3 (b). The OLSA part of volume contracts would be reintroduced to the scope of the Instrument by separate reference.

87. **Article 4**

If the carrier issues a transport document or an electronic record under or in connection with any of the types of contract mentioned in Article 3 and if that transport document or electronic record both

(a) acknowledges the carrier's or a performing party's receipt of goods; and

(b) evidences or contains the terms of the contract of carriage

then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument shall apply to the contract save that, as regards the relations between the parties to any of the types of contract referred to in Article 3, the Instrument shall only apply where it is consistent with the terms agreed in that contract and, in the case of inconsistency, the terms agreed in any such contract as is referred to in Article 3 shall prevail.

Article 5

If the carrier issues a transport document or an electronic record under or in connection with any of the types of contract mentioned in Article 3 and

if that transport document of electronic record fulfils conditions (a) and (b) set out in Article 4, then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument shall apply to the contract contained in or evidenced by the transport document or electronic record (notwithstanding the terms of any of such contract as is mentioned in Article 3) from the moment at which it regulates the relationship between the carrier and any person who is not a party to any such contract.

88. Comment to articles 4 and 5 in this alternative 2: In the reply to the questionnaire, articles 4 and 5 in this alternative 2 are intended to distinguish between the situation when the transport document remains with the parties to a contract excluded by article 3 in alternative 2, in which case the terms of the excluded contract prevail, and where third parties are involved, in which case the provisions of the Instrument are mandatory. The articles in alternative 2 also provide that the transport document or electronic record from the time of issue must comply with the provisions of the Instrument, for example, relating to the acknowledgement of the particulars of the goods.