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**United Nations Commission  
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## **Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]**

### **Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International**

#### **Note by the Secretariat\***

At its sixteenth session, the Working Group agreed that to further expedite the preparation of the draft convention on the carriage of goods [wholly or partly] [by sea], an explanatory document should be prepared regarding the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications of those provisions. In response to the suggestion that the Comité Maritime International (CMI) should be requested to assist in the preparation of such a document, the CMI expressed its willingness to assist the Working Group in that regard (see A/CN.9/591, para. 244).

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\* The late submission of the document reflects the date on which the proposals were communicated to the Secretariat.



## Annex

### Volume Contracts

#### I. Introduction

1. At the sixteenth session of the Working Group, wide support was expressed for the preparation of an explanatory document on the treatment of volume contracts in the draft convention to further illustrate their legal and practical implications. It was also suggested that the Comité Maritime International (CMI) should be requested to assist in the preparation of such document (see A/CN.9/591, para. 244). This paper is submitted in response to that request.

2. We base ourselves on the draft convention as contained in A/CN.9/WG.III/WP.56, but have also seen and taken into account a final draft proposal by Finland which is to be published as a working paper for the seventeenth session as A/CN.9/WG.III/WP.61 and which proposes alternative drafts of articles 1 (b) and (c), 8, 9, 10, 20, 94, 95 and 96.

#### Definition of “Volume Contract”

3. A “volume contract” is defined in article 1 (b) of the draft convention as contained in A/CN.9/WG.III/WP.56 as meaning:

*“a contract that provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.”*

It is proposed in A/CN.9/WG.III/WP.61 that the beginning of this definition is amended to read:

*“a contract of carriage that provides for a specified quantity of goods ...”.*

#### Background and existing international regulation

4. The notion of volume contracts, which provide for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time, is well established in the dry bulk and oil trades, where they are often described as contracts of affreightment (CoAs) or tonnage contracts. They are commonly used, for example, by FOB buyers under a long term sales contract who wish to secure their tonnage requirements and manage the freight risk. BIMCO issued a standard volume contract of affreightment for the transportation of bulk dry cargoes, code-named VOLCOA, in 1982,<sup>1</sup> which reflects the terms commonly used in the trade. This form provides for an agreed period of the contract, the total quantity to be shipped and the quantity per shipment. It also provides that each and every voyage thereunder shall be governed by the terms and conditions of a voyage charterparty as per an attached pro forma. INTERTANKO issued a standard form tanker contract of affreightment, INTERCOA 80, in 1980 (which is adopted by BIMCO). This form provides for an agreed contractual period, the quantity to be shipped per year and a

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<sup>1</sup> Revised and reissued in November 2004 as the standard contract of affreightment for dry bulk cargoes code-named GENCOA.

quantity per shipment. Each voyage is to be performed subject to the terms of a charterparty on the INTERTANKVOY 76 form. Volume contracts which contain provisions similar to those reflected in the VOLCOA and INTERCOA forms are outside the scope of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. They are therefore not currently subject to an international mandatory regime. Subject to draft article 9 (3), which is considered in paragraph 8 below, the draft convention set out in A/CN.9/WG.III/WP.56 does not alter the current position (see A/CN.9/572, para. 89).

5. However, individual shipments made under a volume contract may currently be subject to a mandatory regime. Article V of the Hague and Hague-Visby Rules provides that “*if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention.*” Similarly, article 2(3) of the Hamburg Rules provides that “*where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.*” In addition, article 2 (4) of the Hamburg Rules provides, “*if a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment*”. Consequently the Hague, the Hague-Visby or the Hamburg Rules, as the case may be, might apply to bills of lading issued under the charterparty governing each voyage under a volume contract or directly under the volume contract itself.

## II. A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61

### Exclusions

6. Draft article 9 (1) (d) in A/CN.9/WG.III/WP.56 provides that the draft convention does not apply to volume contracts, except as provided in draft article 9 (3). A/CN.9/WG.III/WP.61 makes a distinction between liner and non-liner transportation. Draft article 9 (2) (a) as set out in A/CN.9/WG.III/WP.61 provides that, subject to draft article 9 (2) (b), the draft convention does not apply to contracts of carriage in non-liner transportation. A volume contract in non-liner transportation thus remains excluded from the scope of application of the draft convention except in situations covered by draft article 9 (2) (b). In liner transportation, draft article 9 (1) as set out in A/CN.9/WG.III/WP.61 only excludes:

*“(a) charterparties, and (b) contracts for the use of a ship or of any space thereon, whether or not they are charterparties.”*

Volume contracts in liner transportation are considered to be contracts of carriage which would not fall within this exclusion and which would accordingly remain within the scope of application of the draft convention (see A/CN.9/WG.III/WP.61, para. 31).

7. The intention of draft article 10 of the draft convention in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61 is to maintain the current position, at least under the Hague and Hague-Visby Rules, as regards what may loosely be described as third parties (see A/CN.9/572, para. 96 and A/CN.9/WG.III/WP.61, para. 37). It may however be noted that draft article 10 in A/CN.9/WG.III/WP.56 is a provision similar to article 2 (3) of the Hamburg Rules.

Draft article 10 preserves the position described in paragraph 5 above as regards bills of lading, but extends the mandatory regime to apply to non-negotiable transport documents and electronic transport records.

8. Draft article 9 (3) (a) in A/CN.9/WG.III/WP.56 applies the draft convention to the terms that regulate each shipment under a volume contract (to the extent that draft articles 8, 9 and 10 so specify) and is similar to article 2 (4) of the Hamburg Rules. Draft article 9 (3) (b) on the face of it goes further and applies the draft convention to the terms of the volume contract itself, but only to the extent that its terms may regulate a shipment under the volume contract. The intention of this provision is explained in paragraph 65 of A/CN.9/576. Paragraph 24 of A/CN.9/WG.III/WP.61 refers to the problems arising from the drafting of draft article 9 in A/CN.9/WG.III/WP.56 and the commentary goes on to say that the proposed text of draft article 9 in A/CN.9/WG.III/WP.61 is intended to provide a clearer understanding of what is excluded from the scope of application of the draft convention. The intention behind the exception to the exclusion in draft article 9 (2) (b) is explained in paragraph 29 of A/CN.9/WG.III/WP.61.

9. The exclusion from the scope of application of the draft convention of volume contracts in non-liner transportation as outlined above applies equally to volume contracts in trades other than the dry bulk and oil trades. It may be, however, that in some trades sea waybills or other non-negotiable transport documents may be used to which the Hague and Hague-Visby Rules might not apply. Currently, subject to article 2 (3) and (4) of the Hamburg Rules, both the volume contract itself and shipments thereunder may in some trades fall outside the mandatory regimes. However, as noted in paragraph 7 above, the draft convention brings non-negotiable transport documents and electronic transport records within its scope of application.

### **Service contracts**

10. As regards liner transportation, much of the discussion in the Working Group has been focused on the treatment of service contracts and similar arrangements. This expression is neither used nor defined in the draft convention in A/CN.9/WG.III/WP.56 or in A/CN.9/WG.III/WP.61. “Service contract” is however defined in section 3 (19) of the United States Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998 (together, the U.S. Shipping Acts) as meaning:

*“a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.”*

The expressions “common carrier” and “ocean common carrier” are also defined in the U.S. Shipping Acts.<sup>2</sup> A service contract as so defined is considered to be within

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<sup>2</sup> At common law, a common, or public, carrier by sea holds itself out as willing to carry for

the definition of a volume contract in draft article 1 (b) of the draft convention on the basis that “over a fixed time period” implies a series of shipments.

11. An explanation of the regulatory regime for carriage to and from the United States established by the U.S. Shipping Acts is outside the scope of this paper. It is briefly referred to in paragraphs 19 and 20 of the proposal by the United States of America set out in A/CN.9/WG.III/WP.34. In practice, we understand that in the liner trade to and from the United States, volume contracts almost always fall within the definition of service contracts. Outside the United States, we understand that volume contracts are normally entered into in the liner trade only when a shipper wishes to safeguard security of space or regularity of service. In the liner trade to and from the United States, it is possible in service contracts which fall within the definition in the U.S. Shipping Acts to stipulate rates of freight which fall outside the carrier’s rates as set out in its published tariffs. It is therefore necessary to enter into a service contract to obtain this commercial benefit. Outside the United States, this can be achieved by a straightforward rate agreement.

### **Derogation**

12. Draft article 95 of the draft convention sets out special rules for volume contracts which are subject to the draft convention under article 9 (3) (b), in A/CN.9/WG.III/WP.56 or, as provided in A/CN.9/WG.III/WP.61, to which the draft convention applies because volume contracts in liner transportation do not fall within the contracts excluded by article 9 (1). But for draft article 95, the mandatory provisions of the draft convention would apply to shipments thereunder, or under A/CN.9/WG.III/WP.61 to the volume contract itself, from which, under article 94, neither the carrier nor a maritime performing party may derogate. The freedom of the shipper under draft article 94 (2) remains open for further consideration.

13. Draft article 95 sets out the conditions under which, and the extent to which, a volume contract which is subject to the draft convention may by its terms derogate from the draft convention’s mandatory provisions. Support for this principle and the general structure of draft article 95 has been expressed by the Working Group (see A/CN.9/576, para. 82). However, neither the definition of a volume contract in draft article 1 (b) nor of a service contract under the U.S. Shipping Acts refers to a minimum quantity of cargo or containers to be shipped thereunder. The concern has therefore been expressed that service contracts covering a small number of shipments of relatively small quantities of goods, which derogate from the mandatory regime, could disadvantage small or unsophisticated shippers with unequal bargaining power to that of the carrier, possibly by sub-service contracts made under an overarching framework contract.<sup>3</sup> It should, however, be noted that no shipper can be forced to accept a volume contract. A shipper is always entitled to obtain from the carrier an appropriate negotiable transport document or electronic transport record under draft article 37 (except as provided in draft article 37 (b)).<sup>4</sup>

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reward for anyone that wants to use its services. A common carrier is subject to a stringent legal regime, which is normally mitigated by the common carrier, which is free to limit its liability by contract, subject to the constraints imposed by the current mandatory regimes.

<sup>3</sup> See generally the comments from UNCTAD set out in A/CN.9/WG.III/WP.46 and the concerns referred to in paragraph 100 of A/CN.9/572, and the comments thereon, and in paragraph 244 of A/CN.9/591.

<sup>4</sup> This article will be considered further by the Working Group at the seventeenth session.

Moreover, the freedom to derogate under draft article 95 applies to volume contracts to which the draft convention applies which fall within the definition in draft article 1 (b) and not only to volume contracts which are service contracts within the definition in the U.S. Shipping Acts. Draft article 95 could apply to volume contracts used, or which may in future be used, in trades other than to and from the United States. The current practice in trades outside the United States has been referred to in paragraph 11. The conditions under which a volume contract may derogate from the mandatory terms of the draft convention are to be further considered by the Working Group (see A/CN.9/576, paras. 85, 89 and 99).

14. Draft article 95 (6) (b) in A/CN.9/WG.III/WP.56 (draft art. 95 (5) (b) in A/CN.9/WG.III/WP.61) provides for a derogation which complies with the conditions in draft article 95 (2) and (5) (draft arts. 5 (1), (2) and (4) in A/CN.9/WG.III/WP.61) to be binding on a third party that has expressly consented to be bound by the terms of the volume contract. Thus the protection of such third party lies in the terms on which such consent must be demonstrated. This provision is also to be considered further by the Working Group (see A/CN.9/576, para. 104).

#### **Exclusive choice of court agreements**

15. Specific provisions relating to an exclusive choice of court agreement contained in a volume contract which is subject to the draft convention, and whether such an agreement is to be binding on a third party, are contained in draft article 76 (2) and (3) as set out in paragraph 73 of A/CN.9/591 and were accepted by the Working Group at the sixteenth session, although with some reservations regarding the notice to third parties under draft article 76 (3) (see A/CN.9/591, para. 84).

#### **Summary**

16. It would appear that the draft convention attempts to strike a balance as regards volume contracts. On the one hand, it extends the scope of the mandatory regime to cover volume contracts in liner transportation, whilst broadly retaining the present position in non-liner transportation. On the other hand, it allows the parties to a volume contract in liner transportation, subject to certain safeguards, freedom to derogate to a defined extent from its mandatory provisions in order to accommodate current commercial practice in certain trades and the possible development of commercial practice in the future, and, subject to further safeguards, to bind third parties to such derogation. The Working Group is to give further consideration to these safeguards.