United Nations A/CN.9/WG.III/WP.76

General Assembly

Distr.: Limited
11 September 2006

Original: English

United Nations Commission on International Trade Law
Working Group III (Transport Law)
Eighteenth session
Vienna, 6-17 November 2006

Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

Rights of suit and time for suit: document presented for information by the Government of Japan

Note by the Secretariat*

In preparation for the eighteenth session of Working Group III (Transport Law), the Government of Japan submitted to the Secretariat the document attached hereto as an annex with respect to rights of suit and time for suit in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Government of Japan advised that the document was intended to facilitate consideration of the topics of rights of suit and time for suit in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group.

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

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

V.06-56924 (E)

Annex

Rights of suit and time for suit: document presented for information by the Government of Japan

I. Introduction

1. The Working Group exchanged preliminary views on the issues of rights of suit and time for suit, at its 9th session (April 2002, see A/CN.9/510, paras. 58 to 60), and it discussed the issues in detail at its 11th session (March-April 2003, see A/CN.9/526, paras. 149 to 182). Based on these discussions, the original text of the draft convention in A/CN.9/WG.III/WP.21 was revised in A/CN.9/WG.III/WP.32 and a few additional changes were made to the text in A/CN.9/WG.III/WP.56. These topics were discussed in an informal seminar held in London arranged on behalf of the Government of Italy ("London Seminar") in January 2006 to which all delegations and observers to the Working Group were invited. After the 17th session of the Working Group (April 2006), an informal questionnaire was circulated by the Japanese delegation among delegations and to observers of the Working Group. Responses were submitted by delegations from Canada, China, Denmark, Italy, Norway, Sweden, Switzerland and the United States. For the convenience of the Working Group, this document summarizes the discussions in the previous sessions of the Working Group and introduces preliminary views exchanged in the informal seminar and in responses to the informal questionnaire.

II. Rights of suit

A. General issues of the chapter

1. Necessity of the chapter on rights of suit

2. In the previous sessions of the Working Group, some delegations suggested the deletion of draft article 67 (see A/CN.9/WG.III/WP.56, footnote 237; and A/CN.9/526, paras.152 and 157). The informal questionnaire asked whether the draft convention should include a chapter on rights of suit. All responses answered in the negative suggested deletion of the entire chapter. One delegation, however, suggested that in addition to the deletion of the chapter, several principles set forth in draft article 67 (Variant A) should be incorporated into the provisions laid out in chapter 6 (liability of the carrier).

2. Relationship with other Conventions

3. It was pointed out at the London Seminar that the provisions on rights of suit might conflict with the rights of suit provided for under other transport law conventions when the contract of carriage was multimodal. For example, other transport law conventions may give rights of suit to a more limited number of persons than provided for in draft article 67. The informal questionnaire asked whether the draft convention should coordinate with other transport conventions on

the issues of rights of suit. Responses to the informal questionnaire varied regarding this point. Many delegations that responded thought it unnecessary to coordinate with other transport conventions. One of them observed that draft article 27 already offered the solution. Some delegations were more cautious about the possible conflict with other conventions and sought coordination, although no specific solution was proposed on how to deal with the issue.

B. Draft article 67

4. Draft article 67 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 67. Parties

Variant A

1. Without prejudice to articles 68 and 68 (b), rights under the contract of carriage may be asserted against the carrier or a performing party[1] only by:

(a) The shipper,[2] to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage; or

(c) Any person to which the shipper or the consignee has transferred its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage.

2. In case of any passing of rights of suit through transfer or subrogation under subparagraph 1 (c), the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Convention.

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.

1. Scope of the draft article

5. Variant A covers only claims against the carrier or the (maritime) performing party.[3] Variant B extends its coverage to claims against cargo interests. The informal questionnaire asked what the scope of the article should be. Responses to the

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[1] "Performing party" in Variant A should probably be replaced by "maritime performing party".

[2] Article 34 provides that the "documentary shipper" is entitled to the shipper's rights under Chapter 14. It might be questioned whether the "documentary shipper" should have the rights for suit.

[3] See footnote 1 above.

question were divided. The majority viewed that claims against the shipper should also be covered. One delegate observed that it might be a good idea to allow only the carrier to sue the shipper under the provisions regarding shipper's obligations. The minority opposed such an extension of the scope. One delegation would like to limit the scope of draft article 67 to claims under draft articles 17 and 20 only.

2. "Loss or damage" requirement

6. Both variants require that the claimant should suffer "loss or damage". However, it was suggested in the previous sessions that this requirement might be problematic. For example, the requirement would be inappropriate for claims by a consignee that demanded the delivery of goods that are in the hands of the carrier (see A/CN.9/526, para.153).

7. At the informal seminar in London a more fundamental question was raised in relation to the "loss or damage" requirement. Draft article 67 was criticized as a confusion of substantive law (What should be ultimately established by the claimant in the litigation?) and of procedural law (What is necessary to be a proper plaintiff?). It was argued that, although it is necessary for the claimant to establish the "loss or damage" in order to win the suit, procedural law does not require such proof at the initial stage in order to file and maintain the lawsuit.

8. The informal questionnaire asked whether the requirement of "loss or damage" was appropriate. Some responses said that it was appropriate. One delegation assumed that the claim for delivery or enforcement of the right of control was covered in an exhaustive manner in other chapters, and since draft article 67 covered only an action for damages, the "loss or damage" required in draft article 67 was not problematic. Another delegation that responded suggested that the problem could be avoided if draft article 67 limited its scope to claims under draft articles 17 and 20. One delegation that responded suggested that the requirement might be unnecessary in that the party would not be interested in litigation if it had not suffered any loss or damage.

3. Choice of the variants

9. As for the choice between the two variants, most responses preferred Variant B, which offers a more general approach. One delegation proposed an additional paragraph to Variant B, which would read as follows: "Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage."

10. One delegation that responded preferred a reduced version of Variant A, which limited its scope to claims under draft articles 17 and 20.

4. Second paragraph of Variant A

11. Variant A contains a second paragraph which provides for defences and limitations with respect to the liability of the carrier and the (maritime) performing party[4] in the case of a transfer of the rights of suit or the acquisition of the rights of

[4] See footnote 1 above.

suit through subrogation. There has been no substantive discussion about this paragraph in the previous sessions of the Working Group or in the London Seminar.

12. The informal questionnaire asked for comments on the paragraph and inquired whether the same paragraph was also necessary in Variant B. Some responses proposed the deletion of this paragraph. One of them argued that the issue should be dealt with in chapter 12 (transfer of rights). Some delegates observed otherwise, and argued that the same paragraph should be included if Variant B is chosen.

C. Draft article 68

13. Draft article 68 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 68. When negotiable transport document or negotiable electronic transport record is issued

In the event that a negotiable transport document or negotiable electronic transport record is issued:

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and

(b) When the claimant is not the holder, it must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.

14. Draft paragraph (a) allows the holder to assert his or her rights against the carrier whether or not the holder suffered loss or damage. The explanatory note to the original draft is as follows: “It seems that under many legal systems claimants under a bill of lading are not confined to claiming their own loss. This article does not provide that only such holder has the right to sue” (see A.CN.9/WG.III/WP.21, para. 204). In a previous session of the Working Group, it was widely accepted that this principle is generally recognized in many jurisdictions (see A/CN.9/526, para. 160).

15. Draft paragraph (b) includes two different components: (1) the claimant other than the holder who is referred to under draft article 67 can make a claim against the carrier even when a negotiable transport document or a negotiable electronic transport record is issued, and (2) in this case, the claimant should prove, in addition to the loss or damage it has suffered, that the holder did not suffer the loss or damage. This provision is probably more controversial than draft paragraph (a). The Working Group agreed at its 11th session that the issue might need to be further discussed at a later stage (see A/CN.9/526, para. 162).

16. The first question asked in the informal questionnaire was whether it was necessary or desirable that the draft convention deal with problems such as those addressed under current draft articles 68 (a) and (b). All responses answered in the negative. One delegate thought draft article 68 (a) was inconsistent with its domestic civil procedure law and if draft article 68 (a) were deleted, draft article 68 (b) would become unnecessary.

17. The informal questionnaire further invited any suggestion regarding both paragraphs. Since most delegations that responded supported the deletion of draft article 68, only a few drafting suggestions were made to the current text. One delegation noted that the carrier was exposed to the danger of double payment under draft article 68 (a) when a person other than the holder that suffered the ultimate loss (e.g., the owner of the goods which are damaged) claimed against the carrier after the carrier had compensated the holder.[5] One delegation suggested that the "holder" should be treated simply as a consignee in the sense of draft article 67 (1)(b).

III. Time for suit

A. General issues of the chapter

18. The necessity of the chapter on time for suit was never questioned in the previous sessions of the Working Group, although certain provisions might possibly be deleted. All responses to the informal questionnaire unanimously agreed in this regard.

B. Draft article 69

19. Draft article 69 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 69. Limitation of actions

Variant A

The carrier[6] is discharged from all liability under this Convention if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper[7] is discharged from all liability under chapter 8 of this Convention if judicial or arbitral proceedings have not been instituted within a period of [one] year.

Variant B

All [rights] [actions] under this Convention are extinguished [time-barred] if judicial or arbitral proceedings have not been commenced within the period of [one] year.

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[5] The original draft has a second sentence, which is intended to deal with this situation, and which reads as follows: "If such holder did not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffered such loss or damage." The original draft's wording was criticized and deleted during the 11th session (see A/CN.9/526, para. 161).

[6] The reference to "maritime performing party" may be added to the first sentence of Variant A although article 20 (1) possibly makes it unnecessary.

[7] The reference to "a person referred to in article 34" may be added to the second sentence of Variant A although draft article 34 possibly makes it unnecessary. However, the current draft article 34 does not refer to the immunities in chapter 15 and the reference should be added.

20. In previous sessions, several different issues have been addressed in relation to draft article 69.

1. Which claim should be subject to the time limitation of this convention?

21. Both Variant A and Variant B limit the time for suit not only regarding claims against the carrier or the maritime performing party, but also with respect to those against the cargo interest.[8] It was discussed at some length at the 11th session of the Working Group whether this approach is appropriate (see A/CN.9/526, para. 166). The Working Group may also wish to consider whether this approach should still be maintained when draft article 67 covers only claims against the carrier or the maritime performing party (see A/CN.9/526, para. 154). It should also be noted that the Working Group decided at its 14th session that the Convention should regulate the jurisdiction and arbitration of claims only against the carrier or the maritime performing party (see A/CN.9/572, paras. 116-117).

22. Second, claims may arise out of the contract of carriage that are not based on the provisions of the draft convention, for example, the carrier's claim against the shipper for freight. In addition, there are several obligations under the draft convention for which the consequences are not provided and which are thus left to applicable national law. Should these claims be subject to the time limitation?

23. In the responses to the informal questionnaire, most delegations supported the suggestion that claims against the shipper should also be covered, while one delegation that responded took the opposing view. One delegation noted that while it might be advisable that draft article 69 should cover claims against shippers etc., the limitation period should be carefully chosen for such claims. It was suggested that in the case of total disaster of the ship caused by the shipper's negligence, the investigation to uncover the real cause of the accident would likely take a long time.

24. Most delegations that responded did not explicitly answer whether only the claims under the draft convention should be covered. One delegation responded expressly that claims under applicable national law should not be covered. Another delegation suggested that the limitation should apply to all rights and actions arising out of the contract of carriage.

25. One delegation that responded proposed that draft article 69 should also cover actions against the ship, as is the case in the Hague-Visby Rules. It was also suggested that a corresponding change in connection with the shipper might be necessary so that the draft article would also cover claims against the cargo interest.

2. Choice of variants and wordings

26. There are several possible formulations for the time limitation of claims. Article 3 (6) of the Hague-Visby Rules adopts the expression "carrier shall be discharged from all liability" while article 20 (1) of the Hamburg Rules states "any action is time-barred". Although the question is more or less a matter of expression,

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[8] To be more precise, there seems to be a slight difference in coverage between Variant A and Variant B with regard to actions against the cargo interest. For example, the claim for reimbursement against the controlling party under draft article 57 (2) is not subject to draft article 69 under Variant A, while it is under Variant B. The Working Group may wish to consider whether a time limit for those claims also needs to be imposed.

it was pointed out that there are several substantive questions related to the choice of variants and wording.

27. These substantive questions regarding the wording of the text include the following:

(a) *The Nature of the Limitation*. The distinction between "limitation period" and "extinguishment of right" was emphasized in a previous session of the Working Group. It was suggested that the difference might affect the applicability of the suspension of the time period or the choice of applicable law (see A/CN.9/526, para.167).

(b) *Availability of the Claim for Set-off*. If the draft convention provides that "the actions are time-barred", it might be ambiguous whether the party can still use the "time-barred" claim by means of set-off without bringing an action. In fact, the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (the CMNI), which uses the term "time-barred", contains an additional provision to clarify the consequence: "A right of action which has become barred by lapse of time may not be exercised by way of counterclaim or set-off."[9] In contrast, if the Working Group adopts such expressions as "the carrier is discharged" or "the rights are extinguished", it is probably unnecessary to address the issue of possible set-off. (It is apparent that an extinguished claim cannot be used even by means of set-off.)

28. The informal questionnaire asked which approach, the "limitation period" or "extinguishment of right" approach, was preferable, as well as which variant and which wording was preferable. Most responses expressed a preference for the "limitation period" approach. One response proposed the following clarification to avoid any doubts concerning the consequences of limitation: "Upon limitation the claimant loses its right to the fulfilment of the claim". One response preferred the "limitation period" approach because it believed that the time-barred claim could be used by means of set-off. In contrast, one delegation that responded preferred the "extinguishment of right" approach to make the time-bar absolute, suggesting that, according to its national law, a limitation period could be easily extended by the mere fact that the party claimed compensation. One delegation noted that "limitation period" was not a term of art in civil law jurisdictions.

29. As for the choice of the variants, responses to the informal questionnaire were evenly divided. Some delegations preferred Variant B and chose the expression "actions are time-barred". The availability of the time-barred claim by means of set-off could be questioned if these wordings are adopted (see above). Others supported Variant A. One of the respondents noted that the expression used in the Hague and Hague-Visby Rules (Variant A) did not seem to have given rise to any problems.

3. Suspension of time period

30. It might be necessary to consider whether and how the issue of the "suspension of time period" should be addressed in the draft convention. Should the draft convention provide its own rules regarding the issue or should the issue be left

[9] CMNI Article 24 (5). The Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol (CMR) has a similar provision (Article 32 (5)).

to national law? In the latter case, which law should govern the problem? For example, CMNI article 24 (3) clarifies that the law applicable to the contract of carriage governs the issue of the suspension and the interruption of the limitation period (see also CMR article 32 (2) and (3)).

31. The informal questionnaire asked how the draft convention should treat the issue of suspension. Most delegations that responded answered that the issue of the suspension of the time period should be left to national law, while one delegation suggested that the draft convention should regulate the issue. However, some delegations that responded thought that it was desirable for the draft convention to clarify at least which law was applicable to the question, and it was suggested that the law governing the contract of carriage should apply. Some delegations that responded reserved their position.

4. Appropriate time period

32. Finally, there is the question of the appropriate time period. Article 3 (6) of the Hague-Visby Rules provide for one year, while article 20 (1) of the Hamburg Rules allows for two. In the responses to the informal questionnaire, most delegations answered that one year was sufficient. One delegation preferred two years, but it was ready to compromise if the Working Group preferred otherwise. Another delegation suggested special consideration for a claim against the carrier, depending on the type of the claim.

C. Draft article 70

33. Draft article 70 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 70. Commencement of limitation period

> The period referred to in article 69 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 11 (4) or 11 (5) or, in cases in which no goods have been delivered, on the [last] day on which the goods should have been delivered. The day on which the period commences is not included in the period.

1. A claim against the carrier

34. Draft article 70 provides for the commencement day of the limitation period. There was a long discussion in a previous session of the Working Group about whether the commencement date should be the date of the actual delivery (see A/CN.9/526, para. 170). One might support the “actual receipt approach” otherwise the time period begins to run before the consignee can check the condition of the goods in the case of delay. However, concerns were raised against this approach. It was pointed out that the actual delivery might be delayed by unilateral action of the consignee or by the local customs authority. In addition, the “actual receipt approach” cannot be maintained in a case where all the goods were lost. The current draft convention includes the second part of the first sentence which deals with the situation.

35. If the Working Group rejects the "actual receipt approach", one possible alternative might be that the time period always commences from "the time of delivery specified in article 11 (4) or 11 (5)". If this approach is taken, the second part of the first sentence becomes unnecessary.[10] However, one might have a concern whether this approach provides an appropriate solution in cases of delay.

36. The Hague-Visby Rules define the commencement date in article 3 (6) as the date "of their [goods] delivery or of the date when they [goods] should have been delivered," while article 20 (2) of the Hamburg Rules define it as "the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered." The two look like a combination of the "actual" and "contractual" approaches.

37. In the response to the informal questionnaire regarding the appropriate commencement date for a claim against the carrier, the majority answered that the date of actual delivery was preferable. One delegation that responded thought that, to avoid unnecessary disputes, the periods should commence when the goods have arrived at the place of delivery and the notice is sent to the consignee that the goods are ready for delivery. Another delegation preferred "the time of delivery specified in article 11 (4) or 11 (5)". Further, one delegation preferred the contractual approach as a starting point, while suggesting that the day of actual delivery should prevail if it is the later of the two. One delegation simply supported the wording of current draft text. However, it was suggested that the current wording, "carrier has completed delivery of the goods concerned pursuant to article 11 (4) or 11 (5)," is problematic when, for instance, the goods are delivered prior to the date agreed in the contract of carriage.

38. Almost all delegations that responded to the informal questionnaire agreed that should the actual delivery approach be taken, it should be supplemented with a special rule in the case of total loss of the goods. In this case, it was suggested that the date on which the goods were supposed to be delivered should be the commencement date. It was also suggested by one delegation that the same should also apply when the consignee does not take delivery.

2. A claim against a maritime performing party

39. It was argued at the London Seminar that the notion of "delivery" should be clarified in connection with a possible claim against a maritime performing party. It was suggested that the limitation period for a claim against a maritime performing party should run from the date of delivery of the goods by the maritime performing party to the subsequent carriers rather than the date of final delivery to the consignee.

40. Taking this suggestion into account, the informal questionnaire asked whether the commencement date for the claim against a maritime performing party should be different from the action against a carrier. All responses agreed that the commencement date should be the same as with respect to the contracting carrier. It was explained that in the case of multimodal transport, the damage to the goods might not be detected until they reach the final destination and the limitation periods

[10] The "actual receipt" is not completely abandoned even under this approach when there is neither contractual agreement nor customs or usages for time of delivery.

should commence at that point even for a claim against the maritime performing party.

3. A claim against cargo interest

41. In a previous session of the Working Group, doubts were raised as to whether the time of delivery was relevant for the limitation period for claims against the shipper or other cargo interest (see A/CN.9/526, para. 173). However, no specific alternative commencement date was suggested for claims against the person other than the carrier. The informal questionnaire asked whether it was appropriate to have the same commencement date for claims against the shipper and the carrier. The majority answered that the commencement date should be the same. One delegation expressed a different view that the limitation period for a claim against the shipper should begin from the date when the loss or damage occurred.

4. Other issues

42. Some delegations that responded to the informal questionnaire expressed a concern with respect to the bracketed word in the first sentence of draft article 70. One of them proposed the deletion of the word "last", and the inclusion of the following text as the last part of the first sentence: "*on the day in which delivery of the goods should have been completed*".

D. Draft article 71

43. Draft article 71 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 71. Extension of limitation period

> The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

1. Difference with Hague-Visby Rules

44. A provision that enables the parties to extend the limitation period exists under the Hague-Visby Rules (article 3 (6)) and the Hamburg Rules (article 20 (4)). There is, however, a slight difference between them. The current draft text is basically identical to the latter. The difference is as follows: first, the Hamburg Rules require a "declaration" while the Hague-Visby Rules require an "agreement"; and second, the extension might be allowed even after the lapse of the time period under the Hague-Visby Rules, while the current draft and the Hamburg Rules clearly deny that possibility.

45. In response to the informal questionnaire, most delegations that responded preferred "declaration" to "agreement", while some delegates took the opposing view. One delegation suggested that an extension after the lapse of time should be possible.

2. Form requirement

46. Draft article 3 provides the form requirement for the declaration under draft article 71. Although the treatment is the same as in article 20 (4) of the Hamburg Rules, it may be questioned whether it is consistent with the treatment of agreement for jurisdiction after a dispute has arisen (draft article 81, as set out in A/CN.9/591, para. 73).[11] In response to the informal questionnaire, most delegations that responded saw the form requirement under the current draft of the convention as appropriate while one suggested that an oral declaration might be sufficient.

E. Draft article 72

47. Draft article 72 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 72. Action for indemnity

An action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if the indemnity action is instituted within the later of:

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

(b) Variant A of paragraph (b)

90 days commencing from the day when the person instituting the action for indemnity has either

(i) settled the claim; or

(ii) been served with process in the action against itself.

Variant B of paragraph (b)

90 days commencing from the day when either

(i) the person instituting the action for indemnity has settled the claim; or

(ii) a final judgement not subject to further appeal has been issued against the person instituting the action for indemnity.

48. Draft article 72 provides for a special extension of the time period with respect to recourse action. The special rule is necessary to ensure, for example, that the carrier has sufficient time to bring an action against the sub-carrier when the action against the carrier was brought immediately before a lapse of the time period. A similar rule exits under both the Hague-Visby Rules (article 3 (6 bis)) and Hamburg Rules (article 20 (5)).

49. All responses to the informal questionnaire supported the basic substance of the provision. However, one delegation that responded thought it necessary for the article to cover situations where the shipper seeks indemnity from the carrier after

[11] It was confirmed that no form requirement is necessary in article 81. See A/CN.9/591, paras. 61 to 62 and 64.

having been held liable by the consignee pursuant to the underlying contract between the shipper and the consignee.

50. There are two variants of draft paragraph (b) which provide for a different commencement date for the additional 90 days. Variant A provides for essentially the same rule as in both the Hague-Visby Rules and the Hamburg Rules. Variant B, which is a new rule, was introduced based on the suggestion at the 11th session of the Working Group that, in certain civil law countries, it was not possible to commence an indemnity action until after the final judgement in the case has been rendered (see A/CN.9/526, para. 176).

51. Most responses to the informal questionnaire preferred Variant A, while some supported Variant B. One delegate stressed that if Variant B were taken, the third party from whom indemnity was being sought might not be approached for many years after the accident, and many things including evidence, witnesses and memories will be lost during the period. In addition, it was also suggested that although Variant B was drafted to meet the concern of certain civil law countries where an indemnity action cannot be commenced until after the final judgement is rendered, paragraph (a) of draft article 72 gives adequate protection.

F. Draft article 73

52. Draft article 73 as set out in A/CN.9/WG.III/WP.56 provides as follows:

Article 73. Counterclaims

> A counterclaim by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.

53. This provision is based on the suggestion at the 11th session of the Working Group that the same consideration should apply to counterclaims as to recourse actions (see A/CN.9/526, para. 177). The informal questionnaire asked whether the draft convention should address the issue of counterclaims and whether the current draft was appropriate for that purpose. Some responses suggested that the draft article should be deleted. One delegation questioned whether there was any counterclaim that deserved extension under this provision. Others that responded thought that the provision was necessary and expressed their basic support for the current draft of the text.

54. There were a number of drafting suggestions. First, one delegation that responded observed that the expression “a counterclaim … may be instituted” gave rise to doubts as to whether the counterclaim should be made in the same proceedings or in separate proceedings, and suggested that it be clarified that the former is the case. Second, it was proposed that the words “or within the longer period allowed by the *lex fori*” should be added at the end of the sentence because in certain jurisdictions a counterclaim may be made only at the time of entering an appearance, and the period between the service of process and the entry of an appearance may be more than 90 days. Finally, a question was raised regarding the scope of the article. One delegation suggested that the scope of draft article 73

should be limited to counterclaims that were instituted for set-off. Another delegation noted that the current draft seemed far-reaching and that an additional condition should be added to the scope of the counterclaim. It proposed the addition of the following text:

> The limitation of a claim does not mean that a right of counterclaim is extinguished, provided that the claim against which the counterclaim is made derives from the same legal context as the time-barred claim and has arisen prior to this claim becoming time-barred.

G. Draft article 74

55. Draft article 74 as set out in A/CN.9/WG.III/WP.56 provides as follows:

> *Article 74. Actions against the bareboat charterer*
>
> [If the registered owner of a ship defeats the presumption that it is the carrier under article 40 (3), an action against the bareboat charterer may be instituted even after the expiration of the period referred to in article 69 if the action is instituted within the later of:
>
> (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
>
> (b) 90 days commencing from the day when the registered owner [both
>
> (i) proves that the ship was under a bareboat charter at the time of the carriage; and]
>
> [(ii)] adequately identifies the bareboat charterer.]

56. This draft article addresses the concern that the limitation period may expire before a claimant has identified the bareboat charterer that is the responsible "carrier" under draft article 40 (3). However, the question of whether article 40 (3) should be deleted or retained is still pending and if the Working Group decides to delete it, then this article should also be deleted.

57. The informal questionnaire asked whether draft article 74 is acceptable assuming that draft article 40 (3) remains in the text. Some responses supported the substance of draft article 74 while others opposed it. One delegate proposed the following new text on the assumption that draft article 40 (3) is redrafted as proposed in A/CN.9/WG.III/WP.70, para.3:

> "If the contract particulars fail to indicate the name and address of the carrier and the plaintiff has requested the registered owner to properly identify the carrier
>
> (a) an action against the registered owner may be instituted within 90 days commencing from the date when the request to identify the carrier is made, and
>
> (b) an action against the carrier may be instituted within 90 days commencing from the date when the registered owner has properly identified the carrier."

H. Possible additional article with regard to the removal of action pursuant to draft article 80 (2)

58. It was suggested at the 16th session of the Working Group that the draft convention should provide for the treatment of the time limitation for suit in connection with the removal of actions pursuant to draft article 80 (2) (see A/CN.9/591, para. 57).

59. One might doubt, however, whether a special rule is necessary to deal with this situation. It was generally accepted that a typical action, which can be removed under draft article 80 (2), is a declaratory action to deny the carrier's liability and does not include "legitimate" actions against the shipper such as a claim for liability under chapter 8 (see A/CN.9/591, paras. 57-59). Suppose that the carrier brings a declaratory action for non-liability against the consignee before the time period has expired and the consignee demands a removal of the action. The carrier brings a new action in another forum specified in draft article 75 or 77 after the time period has expired. Does the carrier want to extend the limitation period in this situation? It is also not clear whether the cargo interest deserves the extension because it could have brought an action against the carrier at any time in the forum specified in draft article 75 or 77. A careful examination seems necessary as to the question of whether any party should have a legitimate interest for the extension of the time limitation in connection with draft article 80 (2).

60. The informal questionnaire asked whether it was necessary to have a special rule in connection with the removal of actions pursuant to draft article 80 (2) and what such a special rule should provide. While some delegations reserved their position, many delegations that responded did not think it necessary to include such a provision. In contrast, one delegation explicitly supported the additional article with regard to the removal of actions under draft article 80 (2). It was suggested that such an article should give the carrier reasonable time (e.g., 90 days) to bring an action before the competent court which the cargo interest has chosen.