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Transport Law

Draft instrument on the carriage of goods [wholly or partly] [by sea]

Note by the Secretariat

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[i] At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.[ii]

2. At its thirty-sixth session, in July 2003, the Commission had before it the reports of the tenth (Vienna, 16-20 September 2002) and eleventh (New York, 24 March-4 April 2003) sessions of the Working Group (A/CN.9/525 and A/CN.9/526, respectively).

3. The Commission was mindful of the magnitude of the project undertaken by the Working Group and expressed appreciation for the progress accomplished so far. It was widely felt that, having recently completed its first reading of the draft instrument on transport law, the Working Group had reached a particularly difficult phase of its work. The Commission noted that a considerable number of controversial issues remained open for discussion regarding the scope and the individual provisions of the draft instrument. Further progress would require a delicate balance being struck between the various conflicting interests at stake. A view was stated that a door-to-door instrument might be achieved by a compromise based on uniform liability, choice of forum and negotiated contracts, which would not deal with actions against performing inland parties. It was also stated that involving inland road and rail interests was critical to achieve the objectives of the text. A view was expressed that increased flexibility in the design of the proposed instrument should continue to be explored by the Working Group to allow for States to opt-in to all or part of the door-to-door regime.

4. The Commission also noted that, in view of the complexities involved in the preparation of the draft instrument, the Working Group had met at its eleventh session for a duration of two weeks, thus making use of additional conference time that had been made available by Working Group I completing its work on privately financed infrastructure projects at its fifth session, in September 2002. The Chairman of Working Group III confirmed that, if progress on the preparation of the draft instrument was to be made within an acceptable time frame, the Working Group would need to continue holding two-week sessions. After discussion, the Commission authorized Working Group III, on an exceptional basis, to hold its twelfth and thirteenth sessions on the basis of two-week sessions. It was agreed that the situation of the Working Group in that respect would need to be reassessed at the thirty-seventh session of the Commission in 2004. The Working Group was invited to make every effort to complete its work expeditiously and, for that purpose, to use every possibility of holding inter-session consultations, possibly through electronic mail. The Commission realized, however, that the number of issues open for

discussion and the need to discuss many of them simultaneously made it particularly relevant to hold full-scale meetings of the Working Group.[iii]

5. The annex to this note contains revised provisions for a draft instrument on the carriage of goods [wholly or partly] [by sea] prepared by the Secretariat for consideration by the Working Group. Changes to the text previously considered by the Working Group (contained in document A/CN.9/WG.III/WP.21) have been indicated by underlining and strikeout.

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

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

[iii] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 205-208.

Annex

Draft instrument on the carriage of goods [wholly or partly] [by sea]

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions[1]

For the purposes of this instrument:

(a)~~1.5~~ "Contract of carriage"[2] means a contract under which a carrier, against payment of freight, undertakes to carry goods **wholly or partly**[3] by sea from one place to another.

(b)~~1.1~~ "Carrier"[4] means a person that enters into a contract of carriage with a shipper.

(c)~~1.3~~ "Consignor"[5] means a person that delivers the goods to ~~a~~ the carrier or a performing party[6] for carriage.

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[1] Paragraph 72 of the Report of the 9th session of the Working Group on Transport Law (A/CN.9/510) noted that it was generally agreed that the readability of the draft instrument would be improved if the definitions were arranged according to a more logical structure by first listing the various parties that might intervene in the contractual relationships covered by the draft instrument and then listing the technical terms used in the draft provisions. The order of the definitions has been changed as suggested. The Working Group may also wish to consider titles for those articles in the draft instrument that do not currently have them.

[2] It was suggested in paragraph 83 of A/CN.9/510 that this definition was too simplistic and might require a more detailed consideration of the various obligations of the carrier. It was further suggested that the shipper also be mentioned, and that the definition should refer to a "person" rather than to a "carrier". No decisions were made on these matters, and the suggestions have not, therefore, been incorporated.

[3] It is noted in paragraph 85 of A/CN.9/510 that the Working Group decided that the words "wholly or partly" would be maintained in the draft provision, but that the words "wholly or partly" would be identified by adequate typographical means as one element of the draft instrument that might require particular consideration in line with the final decision to be made regarding the scope of the draft instrument. The Working Group may also wish to consider whether the phrase "wholly or partly" should appear in the title of the draft instrument.

[4] It was recalled in paragraph 73 of A/CN.9/510 that this definition followed the same principle as the Hague-Visby and Hamburg Rules. Concern was expressed that the definition did not make sufficient reference to parties on whose behalf a contract was made, nor did it adequately cover the case of freight forwarders, nor did it make clear that it intended to cover both legal and natural persons. No agreement was reached on these issues, but it was agreed in paragraph 74 of A/CN.9/510 that the current definition constituted an acceptable basis for continuation of the discussion.

[5] Support was expressed in paragraph 78 of A/CN.9/510 for the introduction of a mention that the consignor delivered the goods "on behalf" of the shipper. It was also suggested in paragraph 79 of A/CN.9/510 that additional language should be introduced to clarify that the consignor should deliver the goods to the "actual" or "performing" carrier, but the view was expressed that the words "a carrier" sufficiently addressed the possibility that a performing party might intervene in addition to the original carrier. Finally, a view was expressed in paragraph 80 of A/CN.9/510 that the Working Group might consider the text of article 1, paragraph 5 of the Multimodal Convention in revising the definition. The Working Group did not reach any agreement with respect to revising this provision.

(d)~~1.19~~ "Shipper"[7] means a person that enters into a contract of carriage with a carrier.

(e)~~1.17~~ "Performing party"[8] means a person other than the carrier that physically performs [or undertakes to perform][9] ~~[or fails to perform in whole or in part]~~[10] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.

(f)~~1.12~~" Holder"[11] means a person that ~~(a)~~ is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and ~~(b)~~ either:

(i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or

(ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or

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[6] An oversight was carried over from the original draft of the instrument from CMI, which had intended to correct the phrase "a carrier" to read "the carrier or a performing party" in those situations where such a change was necessary. This adjustment has been made at various points in this iteration of the draft instrument.

[7] As noted in paragraph 107 of A/CN.9/510, bearing in mind the concerns expressed in the context of the definition of "carrier" in paragraph 1.1 (now paragraph (b)), it was generally agreed that the draft definition of "shipper" constituted an acceptable basis for continuation of the discussion at a future session.

[8] While some views were expressed to the contrary, it is noted in paragraph 99 of A/CN.9/510 that wide support was expressed for the presence of this notion in the draft instrument; its concept was also widely supported, including the use of the term "physically performs" as a way to limit the categories of persons to be included within the definition. As noted in paragraph 104 of A/CN.9/510, suggestions were made to simplify and shorten the drafting of the definition, and it was suggested to delete the words "regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage" as unclear and as adding nothing substantial to the definition. However, it is unclear whether this suggestion received sufficient support in the Working Group.

[9] As noted in paragraph 100 of A/CN.9/510, it was suggested that all of the options for the definition of "performing party" contained in the draft text and commentary should be retained for the time being. Paragraph 16 of A/CN.9/WG.III/WP.21 suggested as a possible alternative to the relatively restrictive definition represented in the original text of A/CN.9/WG.III/WP.21, a relatively inclusive definition that might be drafted with the following language at the start of the sentence: "a person other than the carrier that performs or undertakes to perform any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that …".

[10] It is noted in paragraph 104 of A/CN.9/510 that the Working Group considered that these words should be deleted.

[11] The suggestion was made in paragraph 91 of A/CN.9/510 that the term "for the time being" was unnecessary, and support was expressed for maintaining a requirement that the holder should be in "lawful" possession of a negotiable transport document. Again, it is unclear whether this suggestion received sufficient support in the Working Group.

(iii) if a negotiable electronic record is used, is pursuant to article 6 ~~2.4~~ able to demonstrate that it has [access to] [control of] such record.

(g)~~1.18~~ "Right of control"[12] has the meaning given in article 49 ~~11.1~~.

(h)~~1.7~~ "Controlling party"[13] means the person that pursuant to article 50 ~~11.2~~ is entitled to exercise the right of control.

(i)~~1.2~~ "Consignee"[14] means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record.

(j)~~1.11~~ "Goods" means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]][15] and includes the packing and any equipment and container not supplied by or on behalf of ~~a~~ the carrier or a performing party.

(k)~~1.20~~ "Transport document"[16] means a document issued pursuant to a contract of carriage by ~~a~~ the carrier or a performing party that

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[12] It was noted in paragraph 105 of A/CN.9/510 that this was more a cross-reference than a definition, and it was proposed that it could therefore be deleted. However, it was agreed by the Working Group to retain the definition for further consideration at a later stage. See also *infra* note 13.
The Working Group may wish to consider whether the first sentence of the chapeau in paragraph 11.1 (now article 53) should be moved to paragraph 1.18 (now paragraph (g)) as the definition of "right of control". Should the Working Group decide to do so, paragraph (g) could read: "'Right of control' means (i) the right to give instructions to the carrier under the contract of carriage and (ii) the right to agree with the carrier to a variation of such contract."

[13] Noting the concerns expressed in paragraph 87 of A/CN.9/510 regarding the use of index referencing in the definition section, the Working Group agreed that the definition should be retained for further discussions.

[14] As noted in paragraph 75 of A/CN.9/510, it was suggested that the definition might be redrafted along the following lines: "'Consignee' means a person entitled to take delivery of the goods under a contract of carriage, which may be expressed by way of a transport document or electronic record", while another suggestion was that a reference to the controlling party might need to be introduced in the definition of "consignee". As noted in paragraph 76 of A/CN.9/510, the Working Group took note of those questions, concerns and suggestions for continuation of the discussion at a later stage.

[15] In paragraph 90 of A/CN.9/510, a concern was expressed that the reference in the definition of "goods" that a carrier or a performing party "received for carriage" rather than "undertakes to carry" may mean that the definition failed to cover cases where there was a failure by the carrier to receive the goods or load cargo on board a vessel. It was said that the current reference only to receipt of goods was too narrow, and, alternatively, that the definition should be simplified by removing any reference to receipt of the goods. The Working Group decided that the Secretariat should prepare two alternative texts taking account of each of these approaches, however, the Working Group may wish to consider whether the amendment made above could accommodate the concerns of the Working Group, without the need for either of the two alternative texts.
The Working Group may also wish to note that if the phrase "undertakes to carry under a contract of carriage" is adopted, the complete phrase must be limited to "whatsoever that a carrier undertakes to carry under a contract of carriage", since the performing party does not undertake to carry the goods under the contract of carriage. However, if the phrase "received for carriage" is adopted, then the complete phrase should be "whatsoever that a carrier or a performing party received for carriage".

[16] In paragraph 86 of A/CN.9/510, it was suggested with respect to the paragraph 1.6 (now paragraph (r)) definition of "contract particulars" (see, *infra*, note 23) that the text should indicate more clearly to what the phrase "relating to the contract of carriage" referred. In this respect, it

(i)~~(a)~~ evidences ~~a~~ the carrier's or a performing party's receipt of goods under a contract of carriage, or

(ii)~~(b)~~ evidences or contains a contract of carriage,

or both.

(l)~~1.14~~ "Negotiable transport document"[17] means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable" or "not negotiable".

(m)~~1.16~~ "Non-negotiable transport document"[18] means a transport document that does not qualify as a negotiable transport document.

(n)~~1.8~~ "Electronic communication"[19] means communication by electronic, optical, or digital images or by similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. Communication includes generation, storing, sending, and receiving.

(o)~~1.9~~ "Electronic record"[20] means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party that

(i)~~(a)~~ evidences ~~a~~ the carrier's or a performing party's receipt of goods under a contract of carriage, or

(ii)~~(b)~~ evidences or contains a contract of carriage,

or both.

It includes information attached or otherwise linked to the electronic record contemporaneously with or subsequent to its issue by the carrier or a performing party.

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was suggested that when the Working Group considered draft paragraphs 1.9 and 1.20 (now paragraphs (o) and (k)) it consider whether the requirement that an electronic communication or a transport document evidences a contract of carriage was really necessary. This definition may be based on s. 5(1) of the UK Carriage of Goods by Sea Act, 1992, but there does not seem to be any doubt that the transport document is also usually evidence of the contract of carriage. It would not, therefore, seem advisable to place square brackets around articles 1.20(b) (now paragraph (k)(ii)) or 1.9(b) (now paragraph (o)(ii)).

[17] It was suggested in paragraph 93 of A/CN.9/510 that there be a clearer explanation of the differences between negotiability and non-negotiability, particularly in order to provide for appropriate rules on negotiable electronic records. In response, it was noted that whilst it was important to be precise in this area, particularly because it was a new area and was affected by national law, the Working Group should keep in mind that it could not regulate all consequences.

[18] As noted in paragraph 94 of A/CN.9/510, although a suggestion was made that this definition was not necessary and should be deleted, the Working Group agreed to retain the definition for further consideration.

[19] As noted in paragraph 88 of A/CN.9/510, a number of concerns have been raised with respect to this provision and to the definition of "electronic record". It should be noted that the discussion of the electronic commerce aspects of the draft instrument have been postponed until later in the Working Group's discussions.

[20] See *supra* notes 16 and 19.

(p)~~1.13~~ "Negotiable electronic record"[21] means an electronic record

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

(ii) is subject to rules of procedure as referred to in article 6 ~~2.4~~, which include adequate provisions relating to the transfer of that record to a further holder and the manner in which the holder of that record is able to demonstrate that it is such holder.

(q)~~1.15~~ "Non-negotiable electronic record"[22] means an electronic record that does not qualify as a negotiable electronic record.

(r)~~1.6~~ "Contract particulars"[23] means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that appears in a transport document or an electronic record.

(s)~~1.4~~ "Container" ~~includes~~ means[24] any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, [capable of being carried by sea][designed for carriage by sea] and any equipment ancillary to such unit load.[25]

(t)~~1.10~~ "Freight"[26] means the remuneration payable to ~~a~~ the carrier for the carriage of goods under a contract of carriage.

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[21] As noted in paragraph 92 of A/CN.9/510, the Working Group accepted the definitions of "negotiable electronic record" and "non-negotiable electronic record" as a sound basis for further discussions.

[22] Correction to original text following paragraph 13 of A/CN.9WG.III/WP/21. Also, see *supra* note 21.

[23] In paragraph 86 of A/CN.9/510, it is noted that the Working Group agreed that the following concerns should be considering in redrafting the definition: that the definition could contain contradictions when read together with paragraph 1.20 (now paragraph (k)), and that the text should indicate more clearly to what the phrase "relating to the contract of carriage" referred (see *supra* note 16). However, the existence of a contradiction between the definition of "contract particulars" in paragraph 1.6 (now paragraph (r)) and "transport document" is in paragraph 1.20 (now paragraph (k)) is unclear. Further, the phrase "relating to the contract of carriage" would seem to be clear.

[24] It is noted in paragraph 82 of A/CN.9/510 that the Secretariat was requested to prepare a revised definition for "container" with possible variants reflecting the views and concerns expressed. The first such concern expressed in paragraph 81 of A/CN.9/510 was that the word "includes" made the definition open-ended, and the second, expressed in paragraph 82 of A/CN.9/510, was that the definition should be limited to containers designed for sea transport. The suggested changes present alternative language and are an attempt to reflect these views.

[25] To avoid the apparent circularity in the words "'Container' means any type of container…", the Working Group may wish to consider the following alternative text: "'Container' means any unit load used to consolidate goods that is [capable of being carried by sea][designed for carriage by sea] and any equipment ancillary to such unit load, [such as][including] transportable tank or flat, swapbody, or any similar unit load."

[26] A concern was expressed in paragraph 89 of A/CN.9/510 that the definition of freight was incomplete in that it failed to state the person who was liable to pay the freight. However, it was agreed that the role of the definition was simply to describe what freight was and that issues relating to the freight could be dealt with elsewhere.

Article 2.~~3~~. Scope of application

1.~~3.1~~ Variant A of paragraph 1[27]

Subject to[28] ~~article~~ paragraph 3 ~~3.3.1~~, ~~the provisions of~~ this instrument appl~~y~~ies to all contracts of carriage in which the place of receipt and the place of delivery are in different States if

(a) the place of receipt ~~[or port of loading]~~[29] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery ~~[or port of discharge]~~ specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

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

(d) [the contract of carriage is entered into in a Contracting State or the contract particulars state that the transport document or electronic record is issued in a Contracting State, or][30]

(e) the contract of carriage provides that ~~the provisions of~~ this instrument, or the law of any State giving effect to them, ~~are~~ is to govern the contract.

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[27] Variant A of paragraph 1 is based on the original text of the draft instrument.

[28] The Working Group may wish to review all articles and paragraphs in the draft instrument that begin with the phrase, “Subject to article/paragraph …”, or “Notwithstanding article/paragraph …” and the like, in order to assess whether, in each case, the clause is necessary or whether it may be deleted. In the interests of achieving consistency, it is suggested that this review be completed by examining the instrument as a whole with this sole purpose in mind.

[29] It was noted in paragraph 244 of A/CN.9/526 that the Working Group agreed on a provisional basis that the draft instrument should cover any type of multimodal carriage involving a sea leg, and that no further distinction would be needed, based on the relative importance of the various modes of transport used for the purposes of the carriage. It was also agreed that draft article 3 (now article 2) might need to be redrafted to better reflect that the internationality of the carriage should be assessed on the basis of the contract of carriage. The Secretariat was requested to prepare revised provisions, with possible variants, for continuation of the discussion at a future session. However, in view of the definition of “contract of carriage” in paragraph 1.5 (now article 1(a)), there would seem to be no need to change the text of paragraph 3.1(a) and (b) (now articles 2(1)(a) and (b)) except that the words in brackets could be deleted.

[30] As noted in paragraph 34 of A/CN.9/510, it was widely held in the Working Group that, in modern transport practice, the place of conclusion of the contract was mostly irrelevant to the performance of the contract of carriage and, if electronic commerce was involved, that place might even be difficult or impossible to determine.

Variant B of paragraph 1[31]

Subject to ~~article~~ paragraph 3 ~~3.3.1~~, ~~the provisions of~~ this instrument appl~~y~~ies to all contracts of carriage of goods by sea[32] in which the place of receipt and the place of delivery are in different States if

(a) the place of receipt [or port of loading] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

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

(d) [the contract of carriage is entered into in a Contracting State or the contract particulars state that the transport document or electronic record is issued in a Contracting State, or][33]

(e) the contract of carriage provides that ~~the provisions of~~ this Instrument, or the law of any State giving effect to them, ~~are~~ is to govern the contract.

1 bis. This instrument also applies to carriage by inland waterway before and after the voyage by sea as well as to carriage by road or by rail from the place of receipt to the port of loading and from the port of discharge to the place of delivery, provided that the goods, during the sea voyage, have been unloaded from the means of transport with which the land segment of the carriage is performed.[34]

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[31] In paragraphs 245 to 249 of A/CN.9/526 , the relationship of the draft instrument with other transport conventions and with domestic legislation is discussed. The Working Group instructed the Secretariat in paragraph 250 of A/CN.9/526, inter alia, to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1 (now paragraph 1) of the draft instrument (see A/CN.9/WG.III/WP.26). This variant is reflected in Variant B.

[32] If Variant B is adopted by the Working Group, the use of the phrase “of goods by sea” may require an amendment to the paragraph 1.5 (now article 1(a)) definition of “contract of carriage”.

[33] See *supra* note 30.

[34] The Working Group may wish to consider the relationship of this paragraph 1 bis with article 83.

Variant C of paragraph 1[35]

Subject to ~~article~~ paragraph 3 ~~3.3.1~~, ~~the provisions of~~ this instrument appl~~y~~ies to all contracts of carriage in which the ~~place of receipt and the place of delivery~~ port of loading and the port of discharge are in different States if

(a) the ~~place of receipt~~ port of loading specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the ~~place of delivery~~ port of discharge specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or]

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

(d) [the contract of carriage is entered into in a Contracting State or the contract particulars state that the transport document or electronic record is issued in a Contracting State, or][36]

(e) the contract of carriage provides that ~~the provisions of~~ this instrument, or the law of any State giving effect to them, ~~are~~ is to govern the contract.[37]

2.~~3.2 The provisions of t~~This instrument appl~~y~~ies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.[38]

3.~~3.3.1The provisions of t~~This instrument do~~es~~ not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

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[35] A suggestion reflected in paragraph 243 of A/CN.9/526 was that the draft instrument should only apply to those carriages where the maritime leg involved cross-border transport. Under that suggestion, it was said to be irrelevant whether the land legs involved in the overall carriage did or did not involve cross-border transport. The Working Group took note of that suggestion and requested the Secretariat to reflect it, as a possible variant, in the revised draft to be prepared for continuation of the discussion at a future session. Variant C is intended to reflect this approach. As noted in paragraph 243 of A/CN.9/526, the prevailing view, however, was that, pursuant to draft article 3 (now article 2), the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States.

[36] See *supra* note 30.

[37] The Working Group may also wish to consider the addition of paragraph 1 bis to Variant C, as follows: “1 bis. If under the contract of carriage, the goods are carried only partly by sea, this instrument applies however only if (a) the place of receipt and the port of loading are in the same State, and (b) the port of discharge and the place of delivery are in the same State.” This suggestion may be in conflict with subparagraph 4.2.1 (now article 8). In addition, as indicated in note 35, *supra*, the prevailing view in the Working Group was that the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States.

[38] It has been suggested that in the interests of uniformity and for the avoidance of doubt, it would be desirable to also include a reference to the applicable law (paragraph 37 of A/CN.9/WG.III/WP.21/Add.1).

4.~~3.3.2~~ Notwithstanding ~~the provisions of~~ ~~article~~ paragraph 3 ~~3.3.1~~, if a negotiable transport document or a negotiable electronic record is issued pursuant to a charter party, [contract of affreightment, volume contract, or similar agreement], then the provisions of this instrument apply to the contract evidenced by or contained in that document or that electronic record from the time when and to the extent that the document or the electronic record governs the relations between the carrier and a holder other than the charterer.

5.~~3.4~~ If a contract provides for the future carriage of goods in a series of shipments, ~~the provisions of~~ this instrument apply~~ies~~ to each shipment to the extent that ~~articles~~ paragraphs 1, 2, 3 and 4 ~~3.1, 3.2, and 3.3~~ so specify.

CHAPTER 2. ELECTRONIC COMMUNICATION[39]

Article 3.

~~2.1~~ Anything that is to be in or on a transport document in pursuance of this instrument may be recorded or communicated by using electronic communication instead of by means of the transport document, provided the issuance and subsequent use of an electronic record is with the express or implied consent of the carrier and the shipper.

Article 4.

1.~~2.2.1~~ If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic record,

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

(b) the carrier shall issue to the holder a negotiable electronic record that includes a statement that it is issued in substitution for the negotiable transport document,

whereupon the negotiable transport document ceases to have any effect or validity.

2.~~2.2.2~~ If a negotiable electronic record has been issued and the carrier and the holder agree to replace that electronic record by a negotiable transport document,

(a) the carrier shall issue to the holder, in substitution for that electronic record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic record; and

(b) upon such substitution, the electronic record ceases to have any effect or validity.

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[39] The discussion of this chapter has been postponed to a future consideration of the draft instrument. This chapter has been kept in its original position. However the Working Group may wish to consider the optimum placement of it within the draft instrument when its provisions are considered. Further changes to this chapter are expected following those discussions.

Article 5.

~~2.3~~ The notices and confirmation referred to in articles 20(1), ~~6.9.1~~, 20(2), ~~6.9.2~~, 20(3),~~6.9.3~~, 34(1)(b) and (c), ~~8.2.1 (b) and (e)~~, 47, ~~10.2~~, 51, ~~10.4.2~~, the declaration in article 68 ~~14.3~~ and the agreement as to weight in article 37(1)(c) ~~8.3.1 (e)~~ may be made using electronic communication, provided the use of such means is with the express or implied consent of the party by whom it is communicated and of the party to whom it is communicated. Otherwise, it must be made in writing.

Article 6.

~~2.4~~ The use of a negotiable electronic record is subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 1(p)[40] ~~2.2.1~~. The rules of procedure shall be referred to in the contract particulars and shall include adequate provisions relating to

(a) the transfer of that record to a further holder,

(b) the manner in which the holder of that record is able to demonstrate that it is such holder, and

(c) the way in which confirmation is given that

(i) delivery to the consignee has been effected; or

(ii) pursuant to articles 4(2) ~~2.2.2~~ or 49(a)(ii) ~~10.3.2(i)(b)~~, the negotiable electronic record has ceased to have any effect or validity.

CHAPTER 3. ~~4~~. PERIOD OF RESPONSIBILITY

Article 7.[41]

1.~~4.1.1~~ Subject to ~~the provisions of~~ article 9 ~~4.3~~, the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.

2.~~4.1.2~~ The time and location of receipt of the goods is the time and location agreed in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

3.~~4.1.3~~ The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or

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[40] This is a correction to the original version of the draft instrument set out in A/CN.9/WGIII/WP21, which should have made reference to the definition of "negotiable electronic record" in article 1(p).

[41] The Working Group may wish to note paragraph 40 of A/CN.9/510, which sets out the arguments against, and in favour of, the approach taken in article 7.

usages, the time and location of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.

4.~~4.1.4~~ If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to whom, pursuant to law or regulation applicable at the place of delivery, the goods must be handed over and from whom the consignee may collect them, such handing over will be regarded as a delivery of the goods by the carrier to the consignee under ~~article~~ paragraph 3 ~~4.1.3~~.

[Article 8. ~~4.2.1~~Carriage preceding or subsequent to sea carriage[42]

1. Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:

(a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;

(b) from the time of their discharge from the vessel to the time of their delivery to the consignee;

and, at the time of such loss, damage or delay, there are provisions of an international convention [or national law] that

(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and

(ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and

(iii) cannot be departed from by private contract either at all or to the detriment of the shipper,

such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this instrument.]

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[42] It is noted in paragraph 250 of A/CN.9/526 that the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 (now article 8) as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The Secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 (now chapter 18) of the draft instrument, and to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1 (now article 2(1)). The exchange of views regarding the relationship between the draft instrument and national law was inconclusive, and the decision was made to consider this issue further in light of anticipated future proposals. Given the level of support with respect to the issue of national law, however, the Working Group requested the Secretariat to insert a reference to national law in square brackets into the text of subparagraph 4.2.1 (now article 8) for further reflection in the future. Further, both the text of the Swedish proposal with respect to article 3 (now article 2) and a conflict of law provision in article 16 (now chapter 18), have been inserted in the text of the draft instrument in square brackets.
The Working Group may also wish to consider whether this article is appropriately place within the draft instrument, or whether it should be moved to another chapter, such as, perhaps, chapter 5 on the Liability of the Carrier.

[2. The provisions under article 8 ~~subparagraph 4.2.1~~ shall not affect the application of article 18(2) ~~6.7.1 *bis*~~.][43]

[3.~~4.2.2~~ Article 8 ~~4.2.1~~ applies regardless of the national law otherwise applicable to the contract of carriage.]

Article 9. ~~4.3~~ Mixed contracts of carriage and forwarding[44]

1.~~4.3.1~~ The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers.

2.~~4.3.2~~ In such event the carrier shall exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.

CHAPTER 4. ~~5.~~ OBLIGATIONS OF THE CARRIER

Article 10.

~~5.1~~ The carrier shall, subject to ~~the provisions of~~ this instrument and in accordance with the terms of the contract of carriage, [properly and carefully] carry the goods to the place of destination and deliver them to the consignee.[45]

Article 11.

1.~~5.2.1~~ The carrier shall during the period of its responsibility as defined in article 7 ~~4.1~~, and subject to article 8 ~~4.2~~, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.[46]

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[43] In the discussion of the treatment of non-localised damages in paragraphs 264 to 266 of A/CN.9/526, it was suggested in paragraph 266 that the draft instrument might need to reflect more clearly the legal regimes governing localized damages under subparagraph 4.2.1 (now article 8) and non-localized damages under subparagraph 6.7.1 (now article 18(1)). The Secretariat was invited to consider the need for improved consistency between those two provisions when preparing a revised draft of the instrument.
The "improved consistency" between subparagraph 4.2.1 and the new provision subparagraph 6.7.1 bis (now article 18(2)) suggested in paragraph 264 for insertion after subparagraph 6.7.1 (now article 18(1)) (reading as follows: "Notwithstanding the provisions of subparagraph 6.7.1 (now article 18(1)), if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.") could be realized by adding paragraph (2) as indicated.

[44] The Working Group may wish to consider whether article 9 is properly placed within chapter 3 on period of responsibility.

[45] It was noted in paragraph 116 of A/CN.9/510 that the Working Group provisionally agreed to retain the text of paragraph 5.1 (now article 10) as drafted. It was widely thought that the concerns and drafting suggestions mentioned in paragraphs 113 to 116 of A/CN.9/510 should be revisited at a later stage.

[46] As discussed in paragraph 117 and as noted in paragraph 119 of A/CN.9/510 that, notwithstanding that there was some support for omitting paragraph 5.2.1 (now article 11(1)), the Working Group provisionally agreed to retain the draft article given the extensive experience with analogous provisions in existing conventions such as article 3(2) of the Hague Rules. It was also agreed that

[2.~~5.2.2~~ The parties may agree that certain of the functions referred to in ~~article~~ paragraph 1 ~~5.2.1~~ shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.][47]

Article 12.

~~5.3~~ Variant A[48]

Notwithstanding ~~the provisions of~~ articles 10 ~~5.1~~, 11 ~~5.2~~, and 13(1) ~~5.4~~, the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, a danger to persons or property or an illegal or unacceptable danger to the environment.[49]

Variant B

Notwithstanding articles 10 ~~5.1~~, 11 ~~5.2~~, and 13(1) ~~5.4~~, the carrier may unload, destroy or render dangerous goods harmless if they become an actual danger to life or property.

Article 13. Additional obligations applicable to the voyage by sea[50]

1.~~5.4~~ The carrier ~~is~~ shall be[51] bound, before, at the beginning of, [and during][52] the voyage by sea, to exercise due diligence to:

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further study of the draft article should be undertaken to assess the interplay and the consistency between paragraph 5.2.1 (now article 11(1)) and draft article 6 (now chapter 5), as well as the effect of the various possible definitions of the period during which the obligation in paragraph 5.2.1 (now article 11(1)) would apply. The Working Group may wish to note that there does not appear to be a particular maritime orientation to the use of the terms in sub paragraph 5.2.1 (now article 11(1)), and that deletion of the terms could result in a provision setting out only a general standard of care.

47 It was noted in paragraph 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to articles 10 and 11(1).
It was suggested that written information about the practice of FIO(S) clauses should be prepared for a future session of the Working Group to assist it in its considerations.

48 Variant A of article 12 is based on the original text of the draft instrument.

49 It was noted in paragraph 130 of A/CN.9/510 that the Working Group generally agreed that the text of paragraph 5.3 (now article 12) required further improvement. As an alternative to the current text of the provision as represented by Variant A, the Secretariat was requested to prepare a variant, reflected in Variant B, based on the principles expressed in article 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods. It was also agreed that the issue of compensation that might be owed to the carrier or the shipper in such circumstances might need to be further discussed in the context of paragraph 7.5 (now article 29).

50 In light of the wide support expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port (see paragraph 239 of A/CN.9/526), it was thought that separating out provisions of the draft instrument that should apply only to carriage by sea might assist the restructuring of the draft instrument. As a consequence, articles 5 and 6 (now chapters 4 and 5, and a new chapter 6, entitled “Additional provisions relating to carriage by sea [or by other navigable waters]”) of the draft instrument have been reorganized in this fashion.

51 This is the first of several instances where mandatory language has been inserted into the draft instrument in order to use a consistent approach throughout.

(a) make [and keep] the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make [and keep] the holds and all other parts of the ship in which the goods are carried, including containers where[53] supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.[54]

[2.~~5.5~~ Notwithstanding ~~the provisions of~~ articles 10 ~~5.1~~, 11 ~~5.2~~, and 13(1) ~~5.4~~, the carrier ~~in the case of carriage by sea [or by inland waterway]~~[55] may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving other property involved in the common adventure.][56]

CHAPTER 5. ~~6.~~ LIABILITY OF THE CARRIER

Article 14. ~~6.1~~ Basis of liability[57]

Variant A of paragraphs 1 and 2[58]

1.~~6.1.1~~ The carrier ~~is~~ shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in chapter 3 ~~article 4~~, unless the carrier proves that neither its fault nor that of any person referred to in article 15(3) ~~6.3.2(a)~~ caused or contributed to the loss, damage or delay.[59]

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[52] As noted in paragraph 131 of A/CN.9/510, the Working Group confirmed its broad support for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage be retaining the words that were currently between square brackets “and during” and “and keep”. However, a concern was reiterated that the extension of the carrier’s obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights.

[53] The Working Group may wish to consider whether “where” should be changed to “when”, since the place in which the containers are supplied is not relevant.

[54] It was noted in paragraph 136 of A/CN.9/510 that the Working Group agreed that the current text of paragraph 5.4 (now paragraph (1)) constituted a workable basis for continuation of its deliberations. The Working Group took note of the various suggestions that had been expressed in respect of the draft provision. It was generally agreed that the draft provision would need to be further considered in light of similar or comparable provisions in other unimodal transport conventions.

[55] This phrase would become redundant if this paragraph were placed under the heading “Additional obligations applicable to the voyage by sea” as suggested in the text.

[56] It was noted in paragraph 143 of A/CN.9/510 that the Working Group was divided between those who favoured the elimination of the subparagraph, and those who preferred to retain it but to further consider its substance. The Working Group decided to place the draft article between square brackets.

[57] Once the Working Group decides upon the preferred variant for paragraphs 1 and 2, it may be advisable to split paragraphs 1, 2 and 3 into separate articles.

[58] Variant A of paragraphs 1 and 2 are based on the original text of the draft instrument.

[59] (a) It was noted in paragraph 34 of A/CN.9/525 that strong support was expressed for the substance of paragraph 6.1 (now article 14). It was also noted in paragraph 34 of A/CN.9/525 that the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made. Variants B and C to subparagraphs 6.1.1 and 6.1.3 (now paragraphs 1 and 2) are presented as possible solutions to the views and suggestions expressed, as noted in the remainder of this note, as well as in notes 61 to 66, *infra*.

[6.1.2[60]]

2. ~~6.1.3~~[61]. Notwithstanding ~~the provisions of~~ ~~article~~ paragraph 1~~6.1.1~~, if the carrier proves that it has complied with its obligations under chapter 4 ~~article 5~~[62] and that

(b) The suggestion was noted in paragraph 31 of A/CN.9/525 that subparagraph 6.1.1 (now article 14(1)) was closer in substance to the approach taken in article 4.2(q) of the Hague-Visby Rules than the approach taken in article 5.1 of the Hamburg Rules, which required that the carrier prove that it, its servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences. However, there was some criticism that the reference to the "period of the carrier's responsibility as defined in article 4 (now chapter 3)" would allow the carrier to restrict its liability to a considerable extent, since, as noted in paragraph 40 of A/CN.9/510, some reservations were expressed with the approach taken in article 7, according to which the precise moment of the receipt and delivery of goods was a matter of contractual arrangements between the parties of a matter to be decided upon by reference to customs or usages.

(c) As further noted in paragraph 31 of A/CN.9/525, some concern was expressed as to why it had been considered necessary to deviate from the language used in the Hamburg Rules. It was suggested that the reason for the difference in wording from both the Hague Rules and the Hamburg Rules was to improve and provide greater certainty (e.g. as to the fact that the liability of the carrier was based on presumed fault, a matter that had required clarification by way of the common understanding adopted by the drafters of the Hamburg Rules). A contrary view was that combining different languages from both the Hague and Hamburg Rules might increase uncertainty as it was not clear how the provision would be interpreted. Since the views differed, and there is no evidence that one of them prevailed over the other, it does not seem possible to reflect them in the text.

(d) A suggestion was made in paragraph 31 of A/CN.9/525 that the basis of liability should be simplified by abolishing the standard of due diligence and replacing it with liability stemming from use of the vessel as such. This suggestion would entail a very strict, if not objective, standard of liability. Since support was expressed in paragraph 31 of A/CN.9/525 for the requirement of fault-based liability on the carrier, the change that has been suggested would seem to clash with the majority view.

(e) Paragraph 32 of A/CN.9/525 suggested that, whilst a higher standard of liability had been adopted in instruments dealing with other modes of transport (such as COTIF), a higher standard would not be acceptable in the maritime context. In this regard, support was expressed for features in addition to paragraph 6.1 (now article 14), such as draft article 5 (now chapter 4), which set out the positive obligations of the carrier. This suggestion appeared to have the support of the Working Group, and should be taken into consideration.

(f) The original text as presented in Variant A has no clear linkage between article 5 (now chapter 4) and article 6 (now chapter 5) of the draft instrument, i.e. between the breach of the obligations set out in article 5 (now chapter 4) (as well as the allocation of the burden of proof) and the liability of the carrier in accordance with article 6 (now chapter 5). The suggestion that was made is to create such a linkage.

(g) It was noted in paragraph 31 of A/CN.9/525 that if the draft instrument were to apply on a door-to-door basis, conflict with unimodal land transport conventions (such as COTIF and CMR) would be inevitable given that both imposed a higher standard of liability on the carrier. However it was suggested that these conflicts could be reduced by adopting suitable wording in paragraph 6.4 (now article 16) as well as the language used in respect of the performing carrier. More generally, doubts were expressed as to whether default liability rules applicable in the context of door-to-door transport should be based on the lower maritime standard instead of relying on the stricter standard governing land transport.

[60] Moved to new chapter 6 (now chapter 5) under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

[61] Paragraph 45 of A/CN.9/525 notes that the Secretariat was requested to take the suggestions, views and concerns in paragraphs 38 to 44 of A/CN.9/525 into consideration when preparing a future draft of the provision. The prevailing view noted in paragraph 39 was that this provision should be maintained. An attempt has been made in this text to take into account the comments and suggestions made by the Working Group, as noted in paragraphs 40 to 43 of A/CN.9/525.

[62] Paragraph 42 of A/CN.9/525 made reference to concerns that the chapeau of subparagraph 6.1.3 (now paragraph (2)) insufficiently addressed cases where the carrier proved an event in the list

loss of or damage to the goods or delay in delivery has been caused [solely][63] by one of the following events [it ~~is~~ shall be presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused [or contributed to cause]][64] that loss, damage or delay][65] [the carrier shall not be liable, except where proof is given of its fault or of the fault of a performing party, for such loss, damage or delay].[66]

(a)~~(i)~~ [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b)~~(ii)~~ quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process];

(c)~~(iii)~~ act or omission of the shipper, the controlling party or the consignee;

(d)~~(iv)~~ strikes, lock-outs, stoppages or restraints of labour;

[(v) … [67];]

(e)~~(vi)~~ wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) ~~(vii)~~ insufficiency or defective condition of packing or marking;

(g)~~(viii)~~ latent defects not discoverable by due diligence.

(h) ~~(ix)~~ handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) ~~(x)~~ acts of the carrier or a performing party in pursuance of the powers conferred by article 12 ~~5.3~~ and 13(2) ~~5.5~~ when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) … [68];]

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under subparagraph 6.1.3 (now paragraph (2)), but there was an indication that the vessel might not have been seaworthy. See also the comments under paragraph 6.1 (now article 14), as noted in note 59, *supra*.

[63] It was suggested in paragraph 42 of A/CN.9/525 that the word "solely" be added to the subparagraph, particularly if the events listed were to be treated as exonerations.

[64] It was suggested in paragraph 42 of A/CN.9/525 Report that the words "or contributed to cause" be deleted, again, particularly if the events listed were to be treated as exonerations.

[65] This is the first alternative based on the "presumption regime" suggested in paragraphs 41 and 42 of A/CN.9/525.

[66] As noted in paragraph 41 of A/CN.9/525, this is the second alternative, based on the traditional exoneration regime, but subject to proof being given of the carrier's fault.

[67] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

[68] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

Variant B of paragraphs 1 and 2:

1. The carrier is relieved from liability if it proves that:

(i) it has complied with its obligations under article 13.1 [or that its failure to comply has not caused [or contributed to][69] the loss, damage or delay], and

(ii) neither its fault, nor the fault of its servants or agents has caused [or contributed to][70] the loss, damage or delay, or

that the loss, damage or delay has been caused by one of the following events:

(a)~~(i)~~ [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b)~~(ii)~~ quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];

(c)~~(iii)~~ act or omission of the shipper, the controlling party or the consignee;

(d)~~(iv)~~ strikes, lock-outs, stoppages or restraints of labour;

[(v) … [71];]

(e)~~(vi)~~ wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) ~~(vii)~~ insufficiency or defective condition of packing or marking;

(g)~~(viii)~~ latent defects not discoverable by due diligence.

(h) ~~(ix)~~ handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) ~~(x)~~ acts of the carrier or a performing party in pursuance of the powers conferred by article 12 ~~5.3~~ and 13(2) ~~5.5~~ when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) … [72];]

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[69] See note 64, *supra*.

[70] Ibid.

[71] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

[72] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

The carrier shall, however, be liable for the loss, damage or delay if the shipper proves that the fault of the carrier or the fault of its servants or agents has caused [or contributed to][73] the loss, damage or delay.

Variant C of paragraphs 1 and 2

1. The carrier ~~is~~ shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in chapter 3 ~~article 4.~~

2. The carrier is relieved of its liability under paragraph 1 if it proves that neither its fault nor that of any person referred to in article 15(3) ~~6.3.2(a)~~ caused [or contributed to][74] the loss, damage or delay.

2.bis It shall be presumed that neither its fault nor that of any person referred to in article 15(3) caused the loss, damage or delay if the carrier proves that loss of or damage to the goods or delay in delivery has been caused [solely][75] by one of the following events:

(a)~~(i)~~ [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b)~~(ii)~~ quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];

(c)~~(iii)~~ act or omission of the shipper, the controlling party or the consignee;

(d)~~(iv)~~ strikes, lock-outs, stoppages or restraints of labour;

[(v) … [76];]

(e)~~(vi)~~ wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) ~~(vii)~~ insufficiency or defective condition of packing or marking;

(g)~~(viii)~~ latent defects not discoverable by due diligence.

(h) ~~(ix)~~ handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) ~~(x)~~ acts of the carrier or a performing party in pursuance of the powers conferred by article 12 ~~5.3~~ and 13(2) ~~5.5~~ when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) … [77];]

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[73] See note 64, *supra*.

[74] See note 64, *supra*.

[75] See note 63, *supra*.

[76] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

[77] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

The presumption is rebutted if the claimant proves that the loss, damage or delay was caused by the fault of the carrier or any person referred to in article 15 (3). Furthermore the presumption is rebutted if the claimant proves that the loss, damage or delay was caused by one of the cases listed in article 13 (1)(a), (b) or (c). However, in such a case, the carrier is relieved of liability if it proves compliance with the duty under article 13.

3. ~~6.1.4~~ ~~[~~If loss, damage or delay in delivery is caused in part by an event[78] for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.~~]~~

~~[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is~~

~~(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and~~

~~(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.~~

~~If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]~~[79]

[6.2 Calculation of compensation[80]]

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[78] As noted in paragraph 55 of A/CN.9/525, one concern raised was the ambiguous nature of the "event", and whether it was intended to be limited to "cause", and whether it would be limited to the list of presumptions in subparagraph 6.1.3 (now paragraph 2).

[79] The text that has been deleted was included as a second alternative in the first draft of the draft instrument. As noted in paragraph 56 of A/CN.9/525, the first alternative received the strongest support in the Working Group and the decision was made to maintain only the first alternative in the draft instrument for the continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage:
[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is
(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and
(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.
If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]

[80] As suggested in paragraph 60 of A/CN.9/525, paragraph 6.2 (now article 17) has been moved after article 6.4 (now article 16) in order to ensure its closer connection with paragraph 6.7 (now article 18).

Article 15. ~~6.3~~ Liability of performing parties[81]

1. ~~6.3.1 (a)~~ Variant A of paragraph 1[82]

A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument (a) ~~(i)~~ during the period in which it has custody of the goods; and (b) ~~(ii)~~ at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

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[81] (a) As noted in paragraph 64 of A/CN.9/525, it was agreed that paragraph 6.3 (now article 15) should be retained, subject to a revision of the text taking account of the concerns expressed and to considering whether further changes were necessary if the draft instrument ultimately applied on a door-to-door basis.

An analysis of the "concerns" summarized in paragraph 64 follows in order to ascertain which may be taken into account in the preparation of a revised text.

(b) A concern was expressed that the coverage of performing parties was a novel rule which created a direct right of action as against a party with whom the cargo interests did not have a contractual relationship. It was strongly argued that this innovation should be avoided as it had the potential for serious practical problems. Disagreement was expressed with respect to the statement in paragraph 94 of document A/CN.9/WG.III/WP.21 that a performing party was not liable in tort. In this respect, it was argued that liability of the performing party in tort was a matter of national law to which the present instrument did not extend. Since the Working Group decided to retain this provision, the above concerns cannot be considered.

(c) Also it was submitted that it was not clear under which conditions liability could be imposed upon the performing party. It was said that even though it appeared that the loss or damage had to be "localized" with the performing party (i.e. the loss or damage had to have occurred when the goods were in the performing party's custody), it was less than clear how the burden of proof on this point was to be dealt with. It was suggested that one interpretation could require that the performing party prove that the loss or damage occurred at a time when the goods were not in that party's custody. The burden of proof should be on the claimant and this should be stated. An effort to remedy this concern was made in the suggested alternative text for subparagraph 6.3.1(a) (now article 15(1)).

(d) As well it was suggested that, whilst subparagraph 6.3.4 (now article 15(6)) created joint and several liabilities, it did not indicate how the recourse action as between the parties was to be determined. This was particularly ambiguous given that there was not necessarily a contractual relationship between the parties concerned. However, it is thought that it may be preferable to avoid regulating the recourse actions between parties who are jointly and severally liable. This has not been done in the Hague-Visby Rules (article 4 bis) nor in the Hamburg Rules (article 7).

(e) For these reasons, it was suggested in paragraph 64 of A/CN.9/525 that paragraph 6.3 (now article 15) and the definition of "performing party" in draft article 1 should be deleted or, in the alternative, that the definition should be clarified so as to ensure that it was limited to "physically" performing parties. Support was expressed for limiting the scope of paragraph 6.3 (now article 15) to "physically" performing parties. In this respect it was suggested that the words "or undertakes to perform" should be deleted from subparagraph 6.3.2(a)(ii) (now paragraph 3(b)). However, the existing definition of "performing party" in paragraph 1.17 (now paragraph 1(e)) of the draft instrument clearly states that such is a party that physically performs any of the carrier's responsibilities, so no changes to this provision would seem to be necessary.

(f) It should be noted that in paragraphs 251 to 255 of A/CN.9/526, when discussing the scope of application of the instrument, the Working Group also considered the issue of the treatment of performing parties. As noted in paragraph 256 of A/CN.9/526, it was agreed that the treatment of performing parties under the draft instrument was an important matter that would shape the entire instrument, and could help in the solution of other problems, such as the inclusion of mandatory national law in subparagraph 4.2.1 (now article 8). The anticipation of a more refined written proposal on this issue prevented a clear final or interim decision from being made at that stage. That proposal is now contained in A/CN.9/WG.III/WP.34. In light of this proposal, the Working Group may wish to consider the treatment of performing parties, as well as the other issues discussed therein.

[82] Variant A of paragraph 1 is based on the original text of the draft instrument.

Variant B of paragraph 1

A performing party is liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place:

(a) ~~(i)~~ during the period in which it has custody of the goods; or

(b) ~~(ii)~~ at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage provided the loss, damage or delay occurred during the performance of such activities.

The responsibilities and liabilities imposed on the carrier under this instrument and the carrier's rights and immunities provided by this instrument shall apply in respect of performing parties.

2. ~~(b)~~ If the carrier agrees to assume responsibilities other than those imposed on the carrier under this instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods ~~is~~ shall be higher than the limits imposed under articles 16(2) ~~6.4.2~~, 24(4) ~~6.6.4~~, and 18 ~~6.7~~, a performing party ~~is~~ shall not be bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.

3. ~~6.3.2 (a)~~ Subject to ~~article~~ paragraph 5 ~~6.3.3~~, the carrier ~~is~~ shall be responsible for the acts and omissions of

(a) ~~(i)~~ any performing party, and

(b) ~~(ii)~~ any other person, including a performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own. ~~A~~ The carrier is responsible under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

4. ~~(b)~~ Subject to ~~article~~ paragraph 5 ~~6.3.3~~, a performing party ~~is~~ shall be responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency.[83]

5. ~~6.3.3~~ If an action is brought against any person, other than the carrier, mentioned in ~~article~~ paragraphs 3 and 4 ~~6.3.2~~, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency.

6. ~~6.3.4~~ If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 16 ~~6.4~~, 24 ~~6.6~~ and 18 ~~6.7~~.

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[83] Language correction to reflect that used in 6.3.2(a) and 6.3.3 (now paragraphs 3, 4 and 5).

7. ~~6.3.5~~ Without prejudice to ~~the provisions of~~ article 19 ~~6.8~~, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument

Article 16. ~~6.4~~ Delay[84]

1. ~~6.4.1~~ Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon [or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage].

2. ~~6.4.2~~ If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 17 ~~6.2~~, the amount payable as compensation for such loss ~~is~~ shall be limited to an amount equivalent to [. . . times the freight payable on the goods delayed]. The total amount payable under this provision and article 18(1) ~~6.7.1~~ shall not exceed the limit that would be established under article 18(1) ~~6.7.1~~ in respect of the total loss of the goods concerned.

[6.5 Deviation[85]]

[6.6 Deck cargo[86]]

Article 17. ~~6.2~~ Calculation of compensation[87]

1. ~~6.2.1~~ ~~If the carrier is liable for loss of or damage to the goods~~ Subject to article 18 ~~6.7~~[88], the compensation payable by the carrier for loss of or damage to the goods shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

2. ~~6.2.2~~ The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. ~~6.2.3~~ In case of loss of or damage to the goods ~~and save as provided for in article 16 6.4~~[89], the carrier shall not be liable for payment of any compensation beyond what is provided for in ~~articles~~ paragraphs 1 and 2 ~~6.2.1 and 6.2.2~~ except where the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of article 88[90].

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[84] As noted in paragraph 70 of A/CN.9/525, the Working Group agreed that the text of paragraph 6.4 (now article 16) would remain as currently drafted for continuation of the discussion at a later stage.

[85] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

[86] Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

[87] See *supra* note 80.

[88] A linkage between the provisions relating to the calculation of compensation and the limits of liability was suggested in paragraph 60 of A/CN.9/525.

[89] The words that have been stricken out do not seem necessary, since paragraph 6.4 (now article 16) deals only with financial loss.

[90] Further to paragraphs 57 to 59 of A/CN.9/525, this phrase was intended to include a provision standardizing the calculation of the compensation, and that this calculation should take account

Article 18. ~~6.7~~ Limits of liability[91]

1 ~~6.7.1~~ Subject to article 16(2) ~~6.4.2~~ the carrier's liability for loss of or damage to or in connection with the goods is limited to […] units of account per package or other shipping unit, or […] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, ~~[~~or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.~~]~~[92]

[2. ~~6.7.1*bis*~~ Notwithstanding paragraph 1 ~~6.7.1~~, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.][93]

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of the intention of the parties as expressed in the contract of carriage. As noted in paragraph 58 of A/CN.9/525, it was suggested that whether or not consequential damages should be included in the compensation payable should depend on what was the intention of the parties.

[91] It was noted in paragraph 85 of A/CN.9/525 that the Working Group decided to retain the entire text of paragraph 6.7 (now article 18) in the draft instrument for continuation of the discussion at a later stage.

During the 11th session of the Working Group, the scope of application of the instrument was discussed, and in conjunction with that discussion, the subject of limits of liability was also discussed. As noted in paragraphs 257 to 263 of A/CN.9/526, several suggestions were made with respect to limits of liability, but at this stage no instructions were given to the Secretariat. As noted in paragraph 257 of A/CN.9/526, there was, however, wide support for the suggestions that no attempt should be made to reach an agreement on any specific amount for the limits of liability under this provision at the current stage of the discussion, and that a rapid amendment procedure for the limit on liability should be established by the draft instrument.

[92] As noted in paragraph 259 of A/CN.9/526, the Working Group recalled that the final phrase in subparagraph 6.7.1 (now paragraph 1) was bracketed pending a decision as to whether any mandatory provision should be one-sided or two-sided mandatory, and that the Working Group agreed provisionally that the square brackets should be removed.

The Working Group may also wish to consider the following alternative language for paragraph 1: "Subject to article 16(2) ~~6.4.2~~ the carrier's liability for loss of or damage to or in connection with the goods is limited to […] units of account per package or other shipping unit, or […] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, ~~except~~ However, where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, ~~[~~or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper~~]~~, the compensation payable is limited to such amount." The Working Group may wish to note that the final additional phrase of this alternative text should be reassessed in light of article 88, as it may be unnecessary if article 88 is adopted. The Working Group may wish to consider the method that should be used for determining an amount, possibly through the use of statistical data.

[93] Further, when discussing the issue relating to the treatment of non-localised damages, the proposal was made in paragraph 264 of A/CN.9/526, and adopted by the Working Group in paragraph 267, to insert this paragraph after subparagraph 6.7.1 (now paragraph 1) in square brackets. It now appears as paragraph 2.

The following presents several different alternatives for paragraph 2: "Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during [the carriage preceding or subsequent to the sea carriage][either of the periods referred to in article 8(1)(a) and (b)], the highest limit of liability [in the international

3. ~~6.7.2~~ When goods are carried in or on a container, the packages or shipping units enumerated in the contract particulars as packed in or on such container are deemed packages or shipping units. If not so enumerated, the goods in or on such container are deemed one shipping unit.

4. ~~6.7.3~~ The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Article 19 ~~6.8~~ Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 15(3) and (4) ~~6.3.2~~ ~~is~~ shall be entitled to limit their liability as provided in articles [16(2) ~~6.4.2~~,] 24(4) ~~6.6.4~~, and 18 ~~6.7~~ of this instrument, [or as provided in the contract of carriage,] if the claimant proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a [personal][94] act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

[and national] mandatory provisions that govern the different parts of the transport][provided for in any international convention [or national law] that may apply in accordance with article 8][that would have governed any contract which would have been concluded between the parties for each part of the carriage which involved one mode of transport][that would have been applicable had a specific contract been made for that mode of transport] shall apply."

[94] During the initial discussion of this provision, as noted in paragraph 92 of A/CN.9/525, the Working Group took note of the comments and suggestions made and decided to maintain the text of paragraph 6.8 (now article 19) in the draft instrument for continuation of the discussion at a later stage. As noted in paragraphs 260 and 261 of A/CN.9/526, however, after a discussion concerning the reference to the "personal act or omission" of the person claiming the right to the liability limit, the Working Group agreed to place the word "personal" between square brackets for continuation of the discussion at a later stage.

Article 20~~6.9~~ Notice of loss, damage, or delay

1. ~~6.9.1~~ The carrier ~~is~~ shall be presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice[95] of loss of or damage to [or in connection with][96] the goods, indicating the general nature of such loss or damage, ~~was~~ shall have been given [by or on behalf of the consignee][97] to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days][a reasonable time][__ working days at the place of delivery][__ consecutive days][98] after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection[99] of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

2. ~~6.9.2~~ No compensation ~~is~~ shall be payable under article 16 ~~6.4~~ unless notice of such loss[100] was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

3. ~~6.9.3~~ When the notice referred to in this chapter is given to the performing party that delivered the goods, it ~~has~~ shall have the same effect as if that notice was given to the carrier, and notice given to the carrier ~~has~~ shall have the same effect as a notice given to the performing party that delivered the goods.

4. ~~6.9.4~~ In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods and [for][must provide] access to records and documents relevant to the carriage of the goods[101].

Article 21~~6.10~~ Non-contractual claims

The defences and limits of liability provided for in this instrument and the responsibilities imposed by this instrument apply in any action against the carrier or a performing party for loss of, for damage to, or in connection with the goods

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[95] Paragraph 94 of A/CN.9/525 instructs the Secretariat to take account both the broad support for written notice and for the accommodation of electronic communications when preparing the revised draft of the text. Paragraph 2.3 (now article 5) of the draft instrument states that the notice in, *inter alia*, subparagraph 6.9.1 (now paragraph 1) may be made using electronic communication; otherwise, it must be made in writing.

[96] In accordance with the comments in paragraph 97 of A/CN.9/525, the words "or in connection with" have been placed in square brackets and the words "by or on behalf of the consignee" have been added. It is possible that such comments have not met with sufficient support.

[97] Ibid.

[98] Paragraph 95 of A/CN.9/525 instructed the Secretariat to place "three working" in square brackets, together with other possible alternatives.

[99] It was suggested in paragraph 95 of A/CN.9/525 that "concurrent inspection" or "*inspection contradictoire*" might be more appropriated phrases in a civil law context.

[100] The Working Group may wish to consider whether language should be added to indicate that this loss should be limited to the loss for delay.

[101] Paragraph 100 of A/CN.9/525 noted that the provision should also include reference to providing access to records and documents relevant to the carriage of goods. The words in square brackets indicate two alternatives: the first link the access to the obligation to give "reasonable facilities", the second is independent and the notion of reasonability is not applied to it.

covered by a contract of carriage and delay in delivery of such goods[102], whether the action is founded in contract, in tort, or otherwise.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO CARRIAGE BY SEA [OR BY OTHER NAVIGABLE WATERS][103]

Article 22. Liability of the carrier[104]

Variant A[105]

16.1.2 [Notwithstanding the provisions of article 14(1) 6.1.1 the carrier is shall not be liable responsible for loss, damage or delay arising or resulting from

(a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;

[(b) fire on the ship, unless caused by the fault or privity of the carrier.][106]

26.1.3 *bis* Article 14 shall also apply in the case of the following events:

(a) (v) saving or attempting to save life or property at sea; and

[(b) (xi) perils, dangers and accidents of the sea or other navigable waters;]

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[102] Paragraph 102 of A/CN.9/525 noted wide support for the inclusion of a reference to delay in delivery.

[103] As noted in note 50, *supra*, in light of the wide support expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port (see paragraph 239 of A/CN.9/526), it was thought that separating out provisions of the draft instrument that should apply only to the carriage by sea might assist the restructuring of the draft instrument. As a consequence, the following provisions in article 6 (now chapter 5) have been moved from their position in the original draft to be grouped together under this heading: subparagraph 6.1.2 (now article 22) and the relevant portions of subparagraph 6.1.3 (now also in article 22) on the basis of liability, paragraph 6.5 (now article 23) on deviation, and paragraph 6.6 (now article 24) on deck cargo.

[104] If Variant B or C for articles 14(1) and (2) is adopted, the Working Group may wish to re-examine this article with a view to adopting a consistent approach in terms of the shifting presumptions.

[105] Variant A of article 22 is based on the original text of the draft instrument.

[106] Subparagraph 6.1.2(a) has been deleted in view of the statements in paragraphs 36 and 37 of A/CN.9/525 that it was widely felt that the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was also emphasized that such a step might be essential in the context of establishing international rules for door-to-door transport. A related view was that, although it was probably inevitable to do away with the general exception based on error in navigation, subparagraph (a) should be maintained in square brackets pending a final decision to be made at a later stage on what was referred to as "the liability package" (i.e., the various aspects of the liability regime applicable to the various parties involved). After discussion, however, the Working Group decided that subparagraph (a) should be deleted. Subparagraph 6.1.2(b) (now article 22(1)) was kept in square brackets pursuant to the decision of the Working Group in paragraph 37 of A/CN.9/525.
In paragraph 43 of A/CN.9/525, it is noted that the suggestion was made that if the case of fire on the ship were to be maintained, it should be moved from subparagraph 6.1.2 to subparagraph 6.1.3 (now both contained in article 22). This has not been done in Variant A, but it has been done in Variant B.

Variant B

~~6.1.2 [Notwithstanding the provisions of article 14(1) 6.1.1 the carrier is shall not be responsible for loss, damage or delay arising or resulting from~~

~~(a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;~~

~~[(b) fire on the ship, unless caused by the fault or privity of the carrier.]~~[107]

~~6.1.3 *bis*~~ Article 14 shall also apply in the case of the following events:

(a) ~~(v)~~ saving or attempting to save life or property at sea;

[(b) ~~(xi)~~ perils, dangers and accidents of the sea or other navigable waters;] [and]

[(c) ~~(ix)~~ fire on the ship, unless caused by fault or privity of the carrier;][108]

Article 23. ~~6.5~~ Deviation

1. ~~(a)~~ The carrier is not liable for loss, damage, or delay in delivery caused by a deviation[109] to save or attempt to save life [or property][110] at sea[, or by any other [reasonable] deviation][111].

2. ~~(b)~~ Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with ~~the provisions of~~ this instrument.[112]

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[107] See *supra* note 106.

[108] In paragraph 43 of A/CN.9/525, it is noted that the suggestion was made that if the case of fire on the ship were to be maintained, it should be moved from subparagraph 6.1.2 to subparagraph 6.1.3 (now article 22).

[109] The Working Group may wish to consider whether, as noted in paragraph 73 of A/CN.9/525, the phrase "authorized by the shipper or a deviation" should be inserted after the phrase "… in delivery caused by a deviation" should be added.

[110] Further to paragraph 72 of A/CN.9/525, reference to salvage of property has been placed in square brackets because objections were raised to the inclusion of salvage of property..

[111] The reference to any other reasonable deviation has been placed in square brackets since concerns were raised with respect to its use in paragraph 73 of A/CN.9/525. It was also suggested in paragraph 72 of A/CN.9/525 that the draft article could include language to the effect that, when goods are salvaged as a result of the deviation, compensation received as a result of the salvage could be used as compensation for loss caused by the resulting delay.

[112] Alternative language for this paragraph could read as follows: "Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument." If such language is adopted, the Working Group may wish to consider whether paragraph 1 is necessary.

Article 24. ~~6.6~~ Deck cargo[113]

1. ~~6.6.1~~ Goods may be carried on or above deck only if

(a) ~~(i)~~ such carriage is required by applicable laws or administrative rules or regulations, or

(b) ~~(ii)~~ they are carried in or on containers on decks that are specially fitted to carry such containers, or

(c) ~~(iii)~~ in cases not covered by paragraphs (a) ~~(i)~~ or (b) ~~(ii)~~ of this article, the carriage on deck is in accordance with the contract of carriage, or complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.

2. ~~6.6.2~~ If the goods have been shipped in accordance with ~~article~~ paragraphs 1(a) and (c) ~~6.6.1(i) and (iii)~~, the carrier ~~is~~ shall not be liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to ~~article~~ paragraph 1(b) ~~6.6.1 (ii)~~, the carrier ~~is~~ shall be liable for loss of or damage to such goods, or for delay in delivery, under the terms of this instrument without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under ~~article~~ paragraph 1 ~~6.6.1~~, the carrier ~~is~~ shall be liable, irrespective of ~~the provisions of~~ article 14 ~~6.1~~, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

3. ~~6.6.3~~ If the goods have been shipped in accordance with ~~article~~ paragraph 1(c) ~~6.6.1(iii)~~, the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier ~~has~~ shall have the burden of proving that carriage on deck complies with ~~article~~ paragraph 1(c) ~~6.6.1(iii)~~ and, if a negotiable transport document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.

4. ~~6.6.4~~ If the carrier under this article 24 ~~6.6~~ is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in articles 16 ~~6.4~~ and 18 ~~6.7~~; however, if the carrier and shipper expressly have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods that exclusively resulted from their carriage on deck.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER

Article 25.

~~7.1~~ [Subject to the provisions of the contract of carriage,][114] the shipper shall deliver the goods ready for carriage ~~and~~[115] in such condition that they will

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[113] Further to paragraph 80 of A/CN.9/525, the Working Group decided to retain the structure and content of paragraph 6.6 (now article 24) for continuation of the discussion at a later stage. The Working Group may wish to note that this article depends heavily on the definition of "container" in article 1(s).

[114] As noted in paragraph 148 of A/CN.9/510, the Working Group agreed to place the phrase

withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.[116]

Article 26.

~~7.2~~ The carrier shall provide to the shipper, on its request, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 25 ~~7.1~~.[117]

Article 27.

~~7.3~~ The shipper shall provide to the carrier the information, instructions, and documents that are reasonably necessary for:

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

(b) compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;

(c) the compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 34(1) ~~8.2.1~~(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.[118]

"Subject to the provisions of the contract of carriage" in square brackets pending further consultations and discussions on the scope of the obligation of the carrier and the extent to which it was subject to freedom of contract.

[115] Paragraphs 145 and 148 of A/CN.9/510 noted the Working Group's agreement to remove the word "and".

[116] The suggestion in paragraph 148 of A/CN.9/510 to prepare alternative wording based on articles 12, 13 and 17 of the Hamburg Rules was noted by the Working Group.

[117] As noted in paragraph 151 of A/CN.9/510, some doubts were expressed as to whether the draft provision, which focused on the duties of the carrier, was properly placed in the chapter covering the obligations of the shipper. However, it was considered that, in view of the close link between draft article 7.2 (now, article 26) and the other provisions of draft chapter 7 (now, articles 25-32), the placing of the draft provision was not necessarily inappropriate. Subject to the other observations expressed in paragraphs 149 to 151 of A/CN.9/510, the Working Group decided to retain the draft provision with a view to considering its details at a future session (paragraph 152 of A/CN.9/510.

[118] As noted in paragraph 153 of A/CN.9/510,the Working Group approved the text of paragraph 7.3 (now article 27) as a sound basis for continuation of the discussion at a later stage.

Article 28.

~~7.4~~ The information, instructions, and documents that the shipper and the carrier provide to each other under articles 26 ~~7.2~~ and 27 ~~7.3~~ must be given in a timely manner, and be accurate and complete.[119]

Article 29.

Variant A[120]

[~~7.5~~ The shipper and the carrier are liable[121] to each other, the consignee, and the controlling party for any loss or damage caused by either party's failure to comply with its respective obligations under articles 26 ~~7.2~~, 27 ~~7.3~~, and 28 ~~7.4~~.][122]

Variant B

[1. The shipper is liable to the carrier, the consignee and the controlling party for any loss or damage [or injury] caused by its failure to comply with its obligations under articles 27 and 28.

2. The carrier is liable to the shipper, the consignee and the controlling party for any loss or damage [or injury] caused by its failure to comply with its obligations under articles 26 and 28.

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier shall be jointly liable to the consignee or the controlling party for any such loss or damage [or injury].]

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[119] As noted in paragraph 154 of A/CN.9/510, the Working Group agreed that the text should be retained for further consideration.

[120] Variant A of article 29 is based on the original text of the draft instrument.

[121] As noted in paragraph 156 of A/CN.9/510, a concern was raised that the type of liability established by paragraph 7.5 (now paragraph 1) was inappropriate given that the obligations set out in paragraphs 7.2, 7.3 and 7.4 (now, articles 26, 27 and 28) were not absolute and involved subjective judgements. Imposing strict liability for failure to comply with what were described as flexible and imprecise obligations seemed excessive to some delegations. It was also stated that as currently drafted, the provision was ambiguous and that it was not clear what its effect would be either as to liability to a consignee or a controlling party or as to whether a carrier would be liable to a consignee for the shipper's failure to provide adequate particulars and vice versa.

[122] Other concerns expressed in paragraph 157 A/CN.9/510 were that the provision did not accommodate the situation where both the shipper and the carrier were concurrently liable by allowing for shared liability, and that the provision was ambiguous in that it was not clear what was meant by "loss or damage", when, for example, compared to paragraph 7.6 (now, article 30) which referred to "loss damage or injury". Paragraph 158 of A/CN.9/510 noted that the Working Group concluded that paragraph 7.5 (now article 29) should be placed between square brackets, pending its re-examination in the light of the concerns and suggestions noted in paragraphs 156 and 157. The Secretariat was requested to prepare a revised draft, with possible alternative texts to take account of the suggestions made. At the close of the discussion, the Working Group generally agreed that in revising the draft provision, due consideration should be given to the fact that the information referred to in paragraph 7.5 (now article 29) might be communicated by way of electronic messages, i.e., fed into an electronic communication system and replicated with or without change in the transmission process. In view of the comments made, the alternative texts in Variant B have been prepared.

Article 30.

Variant A[123]

~~7.6~~ The shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 25 ~~7.1~~, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.

Variant B

A shipper is not [responsible][liable] for loss or damage sustained by the carrier or a ship from any cause without the act, fault or neglect of the shipper[, its agents or servants].[124]

Variant C

The shipper is liable to the carrier for any loss, damage or injury caused by the goods and for a breach of its obligations under article 25 unless the shipper proves it did not cause or contribute to the loss or damage.[125]

Article 31.

~~7.7~~ If a person identified as "shipper" in the contract particulars, although not the shipper as defined in article 1(d) ~~1.19~~, accepts the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 57 ~~11.5~~, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13.

Article 32.

~~7.8~~ The shipper ~~is~~ shall be responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency.[126]

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[123] Variant A of article 30 is based on the original text of the draft instrument.

[124] As noted in paragraphs 161 and 170 of A/CN.9/510, it was agreed that this alternative text appear along with the original text of paragraph 7.6 (now Variant A) so that both texts could be considered again at a future session of the Working Group. Paragraph 166 of A/CN.9/510 also noted that it might be necessary to delete the reference in this alternative text to "agents or servants" of the shipper, as the matter might be dealt with in paragraph 7.8 (now article 32).

[125] This alternative is intended to mirror the language used in Variant C for articles 14(1) and (2). The Working Group may wish to consider mirror language for this provision based on which alternative for articles 14(1) and (2) it adopts.

[126] As noted in paragraphs 169 and 170 of A/CN.9/510, the Working Group agreed that paragraph 7.8 (now article 32) was a basis on which to continue discussions whilst keeping in mind the various concerns that had been expressed as to its current wording. At the close of the discussion, it was suggested that paragraph 7.8 (now article 32) should be narrowed so as to apply only to shipper obligations that were delegable rather than those obligations that were non-delegable. It was agreed that the text in paragraph 7.8 (now article 32) should be retained

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC RECORDS

Article 33. ~~8.1~~ Issuance of the transport document or the electronic record

Upon delivery of the goods to ~~a~~ the carrier or performing party

(a) ~~(i)~~ the consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic record evidencing the carrier's or performing party's receipt of the goods;

(b) ~~(ii)~~ the shipper or, if the shipper so indicates to the carrier, the person referred to in article 31 ~~7.7~~, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If pursuant to article 3 ~~2.1~~ the carrier and the shipper have agreed to the use of an electronic record, the shipper is entitled to obtain from the carrier a negotiable electronic record unless they have agreed not to use a negotiable electronic record or it is the custom, usage or practice in the trade not to use one.[127]

Article 34. ~~8.2~~ Contract particulars

1. ~~8.2.1~~ The contract particulars in the document or electronic record referred to in article 33 ~~8.1~~ must include

(a) a description of the goods;

(b) the leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;

(c)

(i) the number of packages, the number of pieces, or the quantity, as furnished by the shipper before the carrier or a performing party receives the goods[128] and

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along with the proposal set out at paragraph 161 of A/CN.9/510 as an alternative for the current text of paragraph 7.6 (now article 30) so that both texts could be considered again at a future session of the Working Group.

[127] As noted in paragraph 25 of A/CN.9/526, the Working Group found the substance of paragraph 8.1 (now article 33) to be generally acceptable. In addition, with respect to subparagraph (i) (now paragraph (a)), a suggestion was made that the words "transport document" should be replaced by the word "receipt". While the term "transport document" was generally preferred for reasons of consistency in terminology, it was acknowledged that, since not all transport documents as defined under paragraph 1.20 (now article 1(k)) served the function of evidencing receipt of the goods by the carrier, it was important to make it abundantly clear that, under subparagraph 8.1(i) (now paragraph (a)), the transport document should serve the receipt function. Further, as noted in paragraph 26 of A/CN.9/526, a question was raised as to whether paragraph 8.1 (now article 33) might interfere with various existing practices regarding the use of specific types of transport documents such as "received for shipment" and "shipped on board" bills of lading. It was stated in response that paragraph 8.1 (now article 33) had been drafted broadly to encompass any type of transport document that might be used in practice, including any specific types of bill of lading or even certain types of non-negotiable waybills.

[128] As noted in paragraph 27 of A/CN.9/526 the Working Group agreed that these words be added. As noted in paragraph 28 of A/CN.9/526, a concern was expressed that the addition of this

(ii) the weight as[129] furnished by the shipper before the carrier or a performing party receives the goods;

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

(e) the name and address of the carrier; and

(f) the date

(i) on which the carrier or a performing party received the goods, or

(ii) on which the goods were loaded on board the vessel, or

(iii) on which the transport document or electronic record was issued.[130]

2. ~~8.2.2~~ The phrase "apparent order and condition of the goods" in ~~article~~ paragraph 1 ~~8.2.1~~ refers to the order and condition of the goods based on

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

(b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record.[131]

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phrase might be read as placing a heavy liability on the shipper, particularly if article 8 (now articles 33 to 40) was to be read in combination with paragraph 7.4 (now article 28). It was pointed out in response that subparagraph 8.2.1 (now paragraph 1) was not to be read as creating any liability for the shipper under draft article 7 (now chapter 7).

[129] The concern was expressed in paragraph 28 of A/CN.9/526 that the words "as furnished by the shipper before the carrier or a performing party receives the goods" might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase "as furnished by the shipper" with the phrase "if furnished by the shipper", and that care should be taken with respect to the use of those phrases in each of the relevant provisions.

[130] As noted in paragraph 75 of A/CN.9/526, it was suggested that the Working Group should consider redrafting subparagraph 8.2.1 (now paragraph 1) to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to subparagraph 10.3.1 (now article 48), *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory elements. The Working Group may also wish to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

[131] Paragraph 31 of A/CN.9/526 noted that the Working Group found the substance of subparagraph 8.2.2 (now paragraph 2) to be generally acceptable.

Article 35~~8.2.3~~ Signature[132]

(a) A transport document shall be signed by the carrier or a person having authority from the carrier.

(b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier's authorization of the electronic record.[133]

Article 36. ~~8.4~~ Deficiencies in the contract particulars[134]

1. ~~8.2.4~~ ~~Omission of required contents from the contract particulars~~

The absence of one or more of the contract particulars referred to in article 34(1) ~~8.2.1~~, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic record.[135]

2. ~~8.4.1~~ ~~Date~~

If the contract particulars include the date but fail to indicate the significance thereof, then the date is considered to be:

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

(b) if the contract particulars do not indicate that the goods have been loaded on board a vessel, the date on which the carrier or a performing party received the goods.[136]

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[132] The Working Group may wish to consider whether "signature" should be defined as, for example, in article 14(3) of the Hamburg Rules, particularly in light of modern practice.

[133] As noted in paragraph 32 of A/CN.9/526, the Working Group agreed that the substance of subparagraph 8.2.3 (now article 35) was generally acceptable, but that the provision might need to be further discussed at a later stage with a view to verifying its consistency with the UNCITRAL Model Law on Electronic Signatures 2001. In redrafting, it may be useful to bear in mind articles 14(2) and (3) of the Hamburg Rules.

[134] For improved consistency, this provision has been moved here from its original location.

[135] As noted in paragraph 34 of A/CN.9/526, the Working Group found the substance of subparagraph 8.2.4 (now paragraph 1) to be generally acceptable.

[136] As noted in paragraph 55 of A/CN.9/526, the Working Group found the substance of subparagraph 8.4.1 (now paragraph 2) to be generally acceptable, taking into account the issue raised with respect to electronic records that the terms "transport document or electronic record" are repeated throughout the provisions of chapter 8 of the draft instrument, and that the repetition of this phrase emphasized the distinction between transport documents and electronic records, rather than focusing on the content of the document, as intended in the mandate of the Working Group.

[3. 8.4.2 Failure to identify the carrier

If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage which transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]][137]

4. ~~8.4.3 Apparent order and condition~~

If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document or electronic record is either prima facie or conclusive evidence under article 39 ~~8.3.3~~, as the case may be, that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party.[138]

Article 37. ~~8.3~~ Qualifying the description of the goods in the contract particulars

~~8.3.1 Under the following circumstances, t~~The carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 34(1)(a) ~~8.2.1(a),~~[139] 34(1)(b) ~~8.2.1(b)~~ or 34(1)(c) ~~8.2.1(c)~~ ~~with an appropriate clause therein~~ in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non-containerized goods

(i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may ~~include an appropriate qualifying clause~~ so state in the contract particulars, indicating the information to which it refers, or

(ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.

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[137] As noted in paragraph 60 of A/CN.9/526, the prevailing view in the Working Group was the subparagraph 8.4.2 (now paragraph 3) identified a serious problem that must be treated in the draft instrument, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep subparagraph 8.4.2 (now paragraph 3) in square brackets in the draft instrument, and to discuss it in greater detail at a future date.

[138] As noted in paragraph 61 of A/CN.9/526, the Working Group found the substance of subparagraph 8.4.3 (now paragraph 4) to be generally acceptable.

[139] The addition of a reference to subparagraph 8.2.1(a) (now article 34(1)(a)) was suggested in paragraph 36 of A/CN.9/526.

(b) For goods delivered to the carrier or a performing party in a closed container, unless[140] the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate[141], the carrier may include a~~n appropriate~~ qualifying clause in the contract particulars with respect to

(i) the leading marks on the goods inside the container, or

(ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.

(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

(i) the carrier can show that neither the carrier nor a performing party weighed the container, and

the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or~~.~~

(ii) the carrier can show that there was no commercially reasonable means of checking the weight of the container.[142]

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[140] The phrase "unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate" has been moved to this position in the chapeau from its original position at the end of the paragraph in order to clarify that it is intended to apply to the entire paragraph.

[141] As noted in paragraph 36 of A/CN.9/526, another suggestion was that language along the lines of subparagraph 8.3.1(a)(ii) (now paragraph (a)(ii)) should be included also in subparagraph 8.3.1(b) (now paragraph b) to address the situation where the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in paragraph 37 of A/CN.9/526 that the carrier who decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft instrument should deal with the situation where the carrier accepted not to qualify the description of the goods, for example not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, where the carrier acting in bad faith had voluntarily avoided to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

[142] As noted in paragraph 36 of A/CN.9/526, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. The Working Group may wish to note that this subparagraph is intended to align with the provision on the reasonable means of checking, in article 38.

Article 38~~8.3.2~~ Reasonable means of checking and good faith

For purposes of article 37 ~~8.3.1~~:

(a) a "reasonable means of checking" must be not only physically practicable but also commercially reasonable;

(b) ~~a~~ the carrier acts in "good faith" when issuing a transport document or an electronic record if

(i) the carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and

(ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic record is materially false or misleading because it believes that the statement is likely to be false or misleading.

(c) The burden of proving whether ~~a~~ the carrier acted in good faith when issuing a transport document or an electronic record is on the party claiming that the carrier did not act in good faith.[143]

Article 39.~~8.3.3~~ Prima facie and conclusive evidence

Except as otherwise provided in article 40 ~~8.3.4~~, a transport document or an electronic record that evidences receipt of the goods is

(a) prima facie evidence of the carrier's receipt of the goods as described in the contract particulars; and

(b) conclusive evidence of the carrier's receipt of the goods as described in the contract particulars

[(i)] if a negotiable transport document or a negotiable electronic record has been transferred to a third party acting in good faith [or

(ii) Variant A of paragraph (b)(ii)[144]

if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars].

Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.][145]

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[143] As noted in paragraph 43 of A/CN.9/526, the Working Group found the substance of subparagraph 8.3.2 (now article 38) to be generally acceptable.

[144] Variant A of paragraph (b)(ii) is based on the original text of the draft instrument.

[145] As noted in paragraph 48 of A/CN.9/526, the prevailing view in the Working Group was to retain subparagraph 8.3.3(b)(ii) (now paragraph (b)(ii)) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paragraphs 45 to 47.

Article 40.~~8.3.4~~ Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 37 ~~8.3.1~~, then the transport document will not constitute prima facie or conclusive evidence under article 39 ~~8.3.3~~ to the extent that the description of the goods is qualified by the clause.[146]

CHAPTER 9. FREIGHT[147]

Article 41.

[1. ~~9.1 (a)~~ Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 7(3) ~~4.1.3~~, [and is payable when it is earned,]][148] unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.

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[146] As noted in paragraphs 50 to 52 of A/CN.9/526, while some support was expressed for redrafting subparagraph 8.3.4 (now article 40), the prevailing view was that it should be retained in substance for continuation of the discussion at a future session.
The Working Group may also wish to consider the alternative language for subparagraph 8.3.4 (now article 40) suggested in paragraphs 153 and 154 of A/CN.9/WG.III/WP.21:
40(1) "If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under article 39 ~~8.3.3~~, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under paragraph 2 ~~8.3.5~~."
It would then be necessary to add a new article 8.3.5 (perhaps as paragraph 2), which might provide:
2. "A qualifying clause in the contract particulars is effective for the purposes of paragraph 1 ~~8.3.4~~ under the following circumstances:
(a) For non-containerized goods, a qualifying clause that complies with the requirements of article 37 ~~8.3.1~~ will be effective according to its terms.
(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 37 ~~8.3.1~~ will be effective according to its terms if
(i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and
(ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that
(1) a container was opened for the purpose of inspection,
(2) the inspection was properly witnessed, and
(3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection."

[147] It was said by way of general comment in paragraph 172 of A/CN.9/510, that neither the Hague nor the Hamburg regimes contained provisions on freight and that it was questionable whether the draft instrument would benefit from dealing with this issue. Further reservations were noted in that paragraph as to the inclusion of freight provisions were based on the fact that practices varied widely between different trades. Paragraph 183 of A/CN.9/510 noted that the draft provision should be restructured, with paragraphs 9.1(a) (now article 41(1)) and 9.2(b) (now article 42(2)) being combined in a single provision, paragraph 9.l(b) (now article 41(2)) standing alone and paragraphs 9.2(b) and (c) (now articles 42(2) and (3)) also being combined. It was also provisionally agreed that appropriate clarification should be introduced to limit the application of paragraphs 9.2(b) and (c) (now articles 42(2) and (3)) to cases where specific agreement had been concluded between the parties.

[148] As noted in paragraph 174 of A/CN.9/510, there was general agreement that the principle of freedom of contract should apply to determining when the payment of freight was earned as well as when the payment of freight became due. See also *ibid*, paragraph 183 of A/CN.9/510.

2. ~~(b)~~ Unless otherwise agreed, no freight becomes due for any goods that are lost before the freight for those goods is earned.

Article 42.

Variant A[149]

1. ~~9.2 (a)~~ Freight is payable when it is earned, unless the parties have agreed that the freight is payable, wholly or partly, at an earlier or later point in time.

2. ~~(b)~~ If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight shall remain~~s~~ payable irrespective of the cause of such loss, damage or failure in delivery.

3. ~~(c)~~ Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not yet been agreed or established].

Variant B[150]

If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, unless otherwise agreed, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery, nor is payment of freight subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier ~~[~~the indebtedness of which has not yet been agreed or established~~]~~[151].

Article 43.

1. ~~9.3 (a)~~ Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods.

2. ~~(b)~~ If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:

(a) ~~(i)~~ with respect to any liability under chapter 7 of the shipper or a person mentioned in article 31 ~~7.7~~; or

(b) ~~(ii)~~ with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 45 ~~9.5~~ or otherwise for the payment of such amounts.

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149 Variant A of article 42 is based on the original text of the draft instrument.

150 See *supra* note 147, paragraph 183 of A/CN.9/510.

151 As noted in paragraph 182 of A/CN.9/510, wide support was expressed for including in the draft provision the words currently between square brackets, “the indebtedness or the amount of which has not yet been agreed or established”.

(c) ~~(iii)~~ to the extent that it conflicts with ~~the provisions of~~ article 62 ~~12.4~~.[152]

Article 44.

1. ~~9.4 (a)~~ If the contract particulars in a negotiable[153] transport document or a[n] negotiable[154] electronic record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee, ~~is~~ shall be liable for the payment of the freight. This provision ~~does~~ shall not apply if the holder or the consignee is also the shipper.

[If the contract particulars in a non-negotiable transport document or in a non-negotiable electronic record contain a statement "freight prepaid" or a statement of a similar nature, then it shall be presumed that the shipper is liable for the payment of the freight.][155]

2. ~~(b)~~ Variant A of paragraph 2[156]

If the contract particulars in a transport document or an electronic record contain the statement "freight collect" or a statement of similar nature, [such a statement puts the consignee on notice that it may be liable for the payment of the freight][the right of the consignee to obtain delivery of the goods is conditional on the payment of freight].[157]

Variant B of paragraph 2

If the contract particulars in a transport document or an electronic record contain the statement "freight collect", or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight.[158]

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[152] As noted in paragraph 189 of A/CN.9/510, the Working Group took note of the criticism of provision 9.3(b) (now paragraph 2) (noted in paragraphs 185 to 188 of A/CN.9/510) and decided to postpone its decision on the matter until the issue, including the practical context in which the provision was to operate, was further studied.

[153] Paragraph 110 of A/CN.9/525 noted the suggestion that the declaration in subparagraph 9.4(a) (now paragraph 1) was too radical in freeing the holder and consignee of any responsibility for the payment of freight, and instead that it would be better to create a presumption of the absence of a debt for freight. However, the alternative view was expressed that subparagraph 9.4(a) (now paragraph 1) should not create a presumption that the freight had been prepaid. A possible answer to this suggestion reported in paragraph 110 would be to draw a distinction between negotiable and non-negotiable transport documents or electronic records.

[154] Ibid.

[155] See *supra* note 153.

[156] Variant A of paragraph 2 is based on the original text of the draft instrument.

[157] See *supra* note 153.

[158] As noted in paragraph 111 of A/CN.9/525, it was said that draft articles 12.2.2 and 12.2.4 (now articles 60(2) and 62) were intimately linked with subparagraph 9.4(b) (now paragraph 2), and that consideration of these provisions should be undertaken at the same time. It was suggested that if the consignee took any responsibility for the delivery of the goods, it should also be responsible for the freight. At the same time, it was noted that subparagraph 9.4(b) (now paragraph 2) could serve to provide information or a warning that freight was still payable.

Article 45.

1. ~~9.5~~ ~~(a)~~ [Notwithstanding any agreement to the contrary,] if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payments referred to below, the carrier is entitled to retain the goods until payment of

(a) ~~(i)~~ freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,

(b) ~~(ii)~~ any damages due to the carrier under the contract of carriage,

(c) ~~(iii)~~ any contribution in general average due to the carrier relating to the goods

has been effected, or adequate security for such payment has been provided.

2. ~~(b)~~ If the payment as referred to in paragraph 1 ~~(a)~~ of this article is not, or is not fully, effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to it (including the costs of such recourse) from the proceeds of such sale. Any balance remaining from the proceeds of such sale shall be made available to the consignee.[159]

CHAPTER 10. DELIVERY TO THE CONSIGNEE

Article 46.

~~10.1~~ When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage][160] shall accept delivery of the goods at the time and location mentioned in article 7(3) ~~4.1.3~~. [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party will act in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier [or of the

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However, it was suggested that the payment of freight should be a condition for the consignee to obtain delivery of the goods, rather than an obligation. It was further noted that subparagraph 9.4(b) (now paragraph 2) should focus on the payment of freight in fact, rather than on who should bear the obligation for the unpaid freight. As noted in paragraph 112 of A/CN.9/525, one proposal to remedy the perceived problem was to replace the words "such a statement puts the consignee on notice that it may be liable for the payment of the freight" with the words, "the payment of freight is a condition for the exercise by the consignee of the right to obtain delivery of the goods." Paragraph 113 of A/CN.9/525 noted the alternative suggestion used in order to overcome the problems outlined in paragraphs 111 and 112.

[159] Although the text of paragraph 9.5 (now article 45) was heavily criticised in paragraphs 115 to 122 of A/CN.9/525, it does not appear that the Secretariat has been requested to prepare a new draft or an alternative draft. Paragraph 123 of A/CN.9/525 noted that the Working Group decided that paragraph 9.5 (now article 45) should be retained in the draft instrument for continuation of the discussion at a later stage.

[160] As noted in paragraph 67 of A/CN.9/526, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

performing party][161] done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.][162]

Article 47.

~~10.2~~ On request of the carrier or the performing party that delivers the goods, the consignee shall confirm delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.[163]

Article 48.

~~10.3.1~~ If no negotiable transport document or no negotiable electronic record has been issued:

(a) ~~(i)~~ If the name and address of the consignee is not mentioned in the contract particulars the controlling party shall advise the carrier therof, prior to or upon the arrival of the goods at the place of destination; ~~, of the name of the consignee~~.[164]

(b) ~~(ii)~~ Variant A of paragraph (b)[165]

The carrier shall deliver the goods at the time and location mentioned in article 7(3) ~~4.1.3~~ to the consignee upon the consignee's production of proper identification; ~~.~~[166]

Variant B of paragraph (b)

As a requisite for delivery, the consignee shall produce proper identification.

Variant C of paragraph (b)

The carrier may refuse delivery if the consignee does not produce proper identification.

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[161] As noted in paragraph 70 of A/CN.9/526, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of paragraph 10.1 (now article 46) could be clarified with the addition of the phrase "or of the performing party" after the phrase "personal act or omission of the carrier".

[162] As noted in paragraph 67 of A/CN.9/526, suggestions were made that paragraph 10.1 (now article 46) and 10.4 (now articles 50, 51 and 52) could be merged, or that to reduce the confusion caused by the interplay of paragraphs 10.1 (now article 46) and 10.4 (now articles 50, 51, and 52), the second sentence of paragraph 10.1 (now article 46) could be deleted, and paragraph 10.4 (now articles 50, 51, and 52) could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

[163] As noted in paragraph 73 of A/CN.9/526, the Working Group found the substance of paragraph 10.2 (now article 47) to be generally acceptable.

[164] As noted in paragraph 77 of A/CN.9/526, the Working Group found the principles embodied in subparagraph 10.3.1 (now article 48) to be generally acceptable. The Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.
The suggestion made in paragraph 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to subparagraph 8.2.1 (now article 34(1)), *supra*, note 130.

[165] Variant A of paragraph (b) is based on the original text of the draft instrument.

[166] The suggestion made in paragraph 76 of A/CN.9/526 that subparagraph 10.3.1(ii) (now paragraph (b)) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier has been incorporated in the text of both Variant B and C.

(c) ~~(iii)~~ If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise the controlling party or, if it, after reasonable effort, is unable to identify the controlling party, the shipper, accordingly. In such event such controlling party or shipper shall give instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 31 ~~7.7~~ shall be deemed to be the shipper for purposes of this paragraph.[167]

Article 49.

~~10.3.2~~ If a negotiable transport document or a negotiable electronic record has been issued, the following provisions shall apply:

(a) (i) Without prejudice to ~~the provisions of~~ article 46 ~~10.1~~ the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 7(3) ~~4.1.3~~ to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(ii) Without prejudice to ~~the provisions of~~ article 46 ~~10.1~~ the holder of a negotiable electronic record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 7(3) ~~4.1.3~~ to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 6 ~~2.4~~ that it is the holder of the electronic record. Upon such delivery, the electronic record ceases to have any effect or validity.[168]

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise accordingly the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 31 ~~7.7~~ ~~is~~ shall be deemed to be the shipper for purposes of this paragraph.[169]

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[167] As noted in paragraph 82 of A/CN.9/526, a suggestion was made during the consideration of subparagraph 10.3.2(b) (now article 49(b)) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as subparagraph 10.3.1(iii (now paragraph (c)).

[168] Subject to the note of caution raised in paragraph 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in paragraph 81 of A/CN.9/526, the Working Group found the substance of subparagraphs 10.3.2(a)(i) and (ii) (now paragraphs (a)(i) and (ii)) to be generally acceptable.

[169] The first suggestion made in paragraph 82 of A/CN.9/526, that the carrier should have the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery. These concerns appear to be already addressed by the text of subparagraph 10.3.2(b) (now paragraph (b)). The second suggestion in

(c) [Notwithstanding the provision of paragraph (d) of this article,][170] ~~a~~ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) of this article ~~is~~ shall be discharged from its obligation to deliver the goods under the contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in article 6 ~~2.4~~, that it is the holder.

(d) [Except as provided in paragraph (c) above][171] If the delivery of the goods by the carrier at the place of destination takes place without the negotiable transport document being surrendered to the carrier or without the demonstration referred to in paragraph (a) (ii) above, a holder who becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage will only acquire rights [against the carrier][172] under the contract of carriage if the passing of the negotiable transport document or negotiable electronic record was effected in pursuance of contractual or other arrangements made before such delivery of the goods, unless such holder at the time it became holder did not have or could not reasonably have had knowledge of such delivery. [This paragraph does not apply where the goods are delivered by the carrier pursuant to paragraph (c) above.][173]

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paragraph 82 of A/CN.9/526 that this subparagraph should set out the consequences for the carrier when it failed to notify the controlling party or the shipper or the deemed shipper has met with objections and, therefore, has not been included in the revised text.

[170] As noted in paragraph 83 of A/CN.9/526, it was suggested that it was unclear how subparagraphs 10.3.2(c) and (d) (now paragraphs (c) and(d)) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. It was requested that the drafting in this regard be clarified. It should be noted that a link between subparagraphs 10.3.2(c) and (d) (now paragraphs (c) and (d)) already exists, since subparagraph 10.3.2(c) (now paragraph (c)) starts with the words, "Notwithstanding the provision of paragraph (d) of this article". This is a technique used in other provisions of the draft instrument, such as paragraphs 5.3 (now article 12) and 6.1.3 (now article 14(2)). Other alternatives are possible, for example, to start subparagraph (d) with the words "Except as provided" or to add at the end of that paragraph a new sentence reading "The provisions of this paragraph (d) do not apply where the goods are delivered by the carrier pursuant to paragraph (c) of this article." The various alternatives are provisionally inserted in square brackets.

[171] As noted in paragraph 83 of A/CN.9/526. See *supra* note 170.

[172] Various comments and explanations with respect to subparagraph 10.3.2(d) (now paragraph (d)) are noted in paragraphs 83 to 88 of A/CN.9/526. The first concern expressed in paragraph 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. It is thought that a solution might be to indicate in subparagraph (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under paragraph 5.1 (now article 10), but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for paragraph 13.1 (now article 59), *infra*. The second concern expressed in paragraph 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase "could not reasonably have had knowledge of such delivery" has not specifically been addressed.

[173] As noted in paragraph 83 of A/CN.9/526. See *supra* note 170.

(e) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods [or in cases where the controlling party or the shipper cannot be found][174], the carrier is entitled, without prejudice to any other remedies that ~~a~~ the carrier may have against such controlling party or shipper, to exercise its rights under articles 50, 51 and 52 ~~10.4~~.

Article 50.

1. ~~10.4.1 (a)~~ If the goods have arrived at the place of destination and

(a) ~~(i)~~ the goods are not actually taken over by the consignee at the time and location mentioned in article 7(3) ~~4.1.3~~ [and no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage][175]; or

(b) ~~(ii)~~ the carrier is not allowed under applicable law or regulations to deliver the goods to the consignee,

then the carrier is entitled to exercise the rights and remedies mentioned in paragraph 2 ~~(b)~~.

2. ~~(b)~~ Under the circumstances specified in paragraph 1 ~~(a)~~, the carrier is entitled, at the risk and account and at the expense[176] of the person entitled to the goods, to exercise some or all of the following rights and remedies:

(a) ~~(i)~~ to store the goods at any suitable place;

(b) ~~(ii)~~ to unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or

(c) ~~(iii)~~ to cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time.

3. ~~(c)~~ If the goods are sold under paragraph 2(c) ~~(b)(iii)~~, the carrier may deduct from the proceeds of the sale the amount necessary to

(a) ~~(i)~~ pay or reimburse any costs incurred in respect of the goods; and

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[174] This addition has been made on the basis of the suggestion in paragraph 89 of A/CN.9/526 that subparagraph 10.3.2(e) (now paragraph (e)) should be aligned with subparagraph 10.3.2(b) (now paragraph (b)) through the insertion of this phrase.

[175] As noted in paragraph 92 of A/CN.9/526, concern was expressed with respect to the phrase "no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage" as confusing, since it could be seen to concern a contract for warehousing if it is one that "succeeds to the contract of carriage", and the notion of "express or implied" was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

[176] As noted in paragraph 97 of A/CN.9/526, concern was expressed that when the carrier exercised its rights under subparagraph 10.4.1 (now article 50) it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase "and at the expense" adding in subparagraph 10.4.1(b) (now paragraph 2) is intended to meet these concerns.

(b) ~~(ii)~~ pay or reimburse the carrier any other amounts that are referred to in article 45(1) ~~9.5(a)~~ and that are due to the carrier.

Subject to these deductions, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods.

Article 51.

~~10.4.2~~ The carrier is only allowed to exercise the right referred to in article 46 ~~10.4.1~~ after it has given a reasonable advance[177] notice to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper that the goods have arrived at the place of destination.

Article 52.

~~10.4.3~~ When exercising its rights referred to in article 50(2) ~~10.4.1(b)~~, the carrier or performing party ~~acts as an agent of the person entitled to the goods, but without any liability~~ shall be liable[178] for loss of or damage to these goods, ~~unless~~ only if the loss or damage results from [~~a personal~~ an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result][179].

CHAPTER 11. RIGHT OF CONTROL

Article 53.

~~11.1~~ [The right of control ~~of the goods~~ [means][includes][comprises] the right to agree with the carrier to a variation of the contract of carriage and the right[180] under

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[177] As noted in paragraph 93 of A/CN.9/526, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase “a reasonable advance” before the word “notice” in subparagraph 10.4.2 (now article 51) is intended to meet these concerns.

[178] The concern expressed in paragraph 94 of A/CN.9/526 that the wording of subparagraph 10.4.3 (now article 52) could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words “acts as an agent of the person entitled to the goods but without any liability” and the addition of the words “shall only be liable”, is intended to meet this concern.

[179] As noted in paragraph 94 of A/CN.9/526, it was suggested that the phrase “or of the performing party” be added after the phrase “personal act or omission of the carrier”, and that the word “personal” be deleted. Both of these suggestions have been adopted in the text. The suggestion in paragraph 96 of A/CN.9/526 that subparagraphs 10.4.3 (now article 52) and 10.4.1 (now article 50) had similarities in their content that should be reflected in their language was not thought to have received enough support for reflection in the text.

[180] The concerns raised in paragraph 103 of A/CN.9/526 that subparagraph (iv) (now paragraph (d)) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. These concerns could be met by placing subparagraph (iv) (now paragraph (d)) in square brackets, and by inserting a phrase such as that in subparagraph (iv) (now paragraph (d)) in the chapeau of paragraph 11.1 (now article 53). It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition

the contract of carriage to give the carrier instructions in respect of the~~se~~ goods during the period of its responsibility as stated in article 7(1) ~~4.1.1~~.][181] Such right to give the carrier instructions comprises rights to:

(a) ~~(i)~~ give or modify instructions in respect of the goods [that do not constitute a variation of the contract of carriage][182];

(b) ~~(ii)~~ demand delivery of the goods before their arrival at the place of destination;

(c) ~~(iii)~~ replace the consignee by any other person including the controlling party;

[(d) ~~(iv)~~ agree with the carrier to a variation of the contract of carriage.][183]

Article 54.

1. ~~11.2 (a)~~ When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:

(a) ~~(i)~~ The shipper is the controlling party unless the shipper [and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party][184].

(b) ~~(ii)~~ The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor [or the transferee][185] shall notify the carrier of such transfer.

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based upon it is included in article 1(g).

181 The Working Group may wish to consider whether this sentence should be somewhat altered and moved to the article 1(g) definition of "right of control". Should the Working Group decide to move the sentence, the suggested modifications to the chapeau and to subparagraph (d), *supra* note 180, should be readdressed.

182 The concern was raised in paragraph 102 of A/CN.9/526 that the phrase "give or modify instructions … that do not constitute a variation of the contract" might be read as contradicting themselves. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or "normal" modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. These concerns could be reflected by deleting the words placed in square brackets, since they would seem to be unnecessary in light of the limits within which the right can be exercised are set out in subparagraph 11.3(a) (now article 55(1)).

183 See *supra*, note 180.

184 The question was raised in paragraph 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) (now paragraph 1(b)) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words "unless the shipper" in square brackets for possible deletion and inserting instead, in square brackets, the text "designates the consignee or another person as the controlling party".

185 The concern mentioned in paragraph 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words "or the transferee" in subparagraph 11.2(a)(ii) (now paragraph 1(b)). This phrase placed in square brackets.

(c) ~~(iii)~~ When the controlling party exercises the right of control in accordance with article 53 ~~11.1~~, it shall produce proper identification.

[(d) ~~(iv)~~ The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.][186]

2. ~~(b)~~ When a negotiable transport document is issued, the following rules apply:

(a) ~~(i)~~ The holder[187] or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party.

(b) ~~(ii)~~ The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 59 ~~12.1~~, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(c) ~~(iii)~~ In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] shall be produced, failing which the right of control cannot be exercised[188].

(d) ~~(iv)~~ Any instructions as referred to in article 53(b), (c) and (d) ~~11.1(ii), (iii), and (iv)~~ given by the holder upon becoming effective in accordance with article 55 ~~11.3~~ shall be stated on the negotiable transport document.

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[186] As mentioned in paragraph 106 of A/CN.9/526 and in paragraph 188 of A/CN.9/WG.III/WP.21, the controlling party remained in control of the goods until their final delivery. However, nothing is said in paragraph 11.2 (now article 54) regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic record is issued. It is thought that something could be said to take care of the observation that has been made, and subparagraph 11.2(a)(iv) (now paragraph 1(d)) has been added. Note, however, that paragraph 106 of A/CN.9/526 also notes the concern that the common shipper's instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since article 53 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under article 7, it may be unnecessary to state when the right of control ends.

[187] As noted in paragraph 109 of A/CN.9/526, the concern raised in respect of the reference to the "holder" does not seem to be justified in consideration of the definition of "holder" in paragraph 1.12 (now article 1(f)).

[188] As noted in paragraph 110 of A/CN.9/526, the Working Group was in agreement that subparagraph 11.2(b)(iii) (now paragraph 2(c)) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added to subparagraph 11.2(b)(iii) (now paragraph 2(c)).

3. ~~(c)~~ When a negotiable electronic record is issued:

(a) ~~(i)~~ The holder is the sole controlling party and is entitled to transfer the right of control to another person by passing the negotiable electronic record in accordance with the rules of procedure referred to in article 6 ~~2.4~~, upon which transfer the transferor loses its right of control.

(b) ~~(ii)~~ In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the rules of procedure referred to in article 6 ~~2.4~~, that it is the holder.

(c) ~~(iii)~~ Any instructions as referred to in article 53(b), (c) and (d) ~~11.1, (ii), (iii), and (iv)~~ given by the holder upon becoming effective in accordance with article 55 ~~11.3~~ shall be stated in the electronic record.[189]

4. ~~(d)~~ Notwithstanding ~~the provisions of~~ article 62 ~~12.4~~, a person, not being the shipper or the person referred to in article 31 ~~7.7~~, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this instrument.[190]

Article 55.

1. ~~11.3 (a)~~ Variant A of paragraph 1[191]

Subject to ~~the provisions of~~ paragraphs 2 and 3 ~~(b) and (c)~~ of this article, if any instruction mentioned in article 53(a), (b) or (c) ~~11.1(i), (ii), or (iii)~~

(a) ~~(i)~~ can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;

(b) ~~(ii)~~ will not interfere with the normal operations of the carrier or a performing party; and

(c) ~~(iii)~~ would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage,

then the carrier shall execute the instruction. If it is reasonably expected that one or more of the conditions mentioned in sub-paragraphs (a), (b), (c) ~~(i), (ii), and (iii)~~ of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.[192]

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[189] As noted in paragraph 112 of A/CN.9/526, the Working Group deferred consideration of subparagraph 11.2(c) (now paragraph 3) until it had come to a more precise understanding of the manner in which the issues of electronic commerce would be addressed.

[190] As noted in paragraph 113 of A/CN.9/526, the Working Group found the substance of subparagraph 11.2(d) (now paragraph 4) to be generally acceptable.

[191] Variant A of paragraph 1 is based on the original text of the draft instrument.

[192] As noted in paragraph 117 of A/CN.9/526, the Working Group generally agreed that subparagraph 11.3(a) (now paragraph 1) should be recast to reflect the views and suggestions in paragraphs 114 to 116. It was agreed that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session.

Variant B of paragraph 1

Subject to paragraphs 2 and 3 of this article, the carrier shall be bound to execute the instructions mentioned in article 53(a), (b), and (c) ~~11.1(i), (ii) and (iii)~~ if:

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

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

(c) ~~(iii)~~ the instructions will not interfere with the normal operations of the carrier or a performing carrier.[193]

2. ~~(b)~~ In any event, the controlling party shall ~~indemnify~~ reimburse[194] the carrier, performing parties, and any persons interested in other goods carried on the same voyage ~~against~~ for any additional expense that they may incur and indemnify them against any~~,~~ loss, or damage that they may ~~occur~~ suffer as a result of executing any instruction under this article.[195]

3. ~~(c)~~ [If ~~a~~ the carrier

(a) ~~(i)~~ reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and

(b) ~~(ii)~~ is nevertheless willing to execute the instruction,

then the carrier is entitled to obtain security from the controlling party] If requested by the carrier, the controlling party shall provide security[196] for the amount of the reasonably expected additional expense, loss, or damage.

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[193] As noted in paragraph 114 of A/CN.9/526, to avoid a contradiction between subparagraphs 11.3(a)(iii) (now paragraph 1(c)) and subparagraph 11.1(ii) (now article 53(b)) with respect to the right of control and the possible generation of "additional expenses", it was suggested that either the carrier should be under no obligation to execute the instruction received under subparagraph 11.1(ii) (now article 53(b)) or that subparagraph 11.3(a)(iii) (now paragraph 1(c)) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses. Further, as noted in paragraph 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of subparagraph 11.3(a)(iii) (now paragraph 1(c)). In view of these suggestions, subparagraph 11.3(a) (now paragraph 1) could be reworded as indicated, and the right of the carrier under subparagraph 11.3(c) (now paragraph 3) could be made more stringent, as indicated *infra* note 196. In addition, subparagraph 11.3(a)(iii) (now paragraph 1(c)) has been deleted.

[194] As noted in paragraph 56 of A/CN.9/510 and in paragraph 118 of A/CN.9/526, the notion of "indemnity" inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of "remuneration", which was more in line with the rightful exercise of its right of control by the controlling party.

[195] The changes to subparagraph 11.3(b) (now paragraph 2) have been made in view of the suggestion in paragraph 117 of A/CN.9/526 that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

[196] Although subparagraph 11.3(c) (now paragraph 3) was found "generally acceptable", as noted in paragraph 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on subparagraph 11.3(a) (now article 51(1)). See note 193 *supra*.

4. ~~(d)~~ The carrier shall be liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in breach of its obligation under paragraph 1 of this article.[197]

Article 56.

~~11.4~~ Goods that are delivered pursuant to an instruction in accordance with article 53(b) ~~11.1(ii)~~ are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in chapter ~~article~~ 10, are applicable to such goods.[198]

Article 57.

~~11.5~~ If during the period that the carrier or a performing party holds the goods in its custody, the carrier or a performing party reasonably requires information, instructions, or documents in addition to those referred to in article 27(a) ~~7.3(a)~~, ~~it shall seek such information, instructions, or documents from the controlling party~~ the controlling party, on request of the carrier or such performing party, shall provide such information.[199] If the carrier, after reasonable effort, is unable to identify and find the controlling party, or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the obligation to do so shall be on the shipper or the person referred to in article 31 ~~7.7~~.

Article 58.

~~11.6 The provisions of a~~Articles 53(b) and (c) ~~11.1 (ii) and (iii)~~, and 55 ~~11.3~~ may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 54(1)(b) ~~11.2 (a)(ii)~~. If

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[197] As noted in paragraph 116 of A/CN.9/526 a question was raised regarding the nature of the obligation incurred by the carrier under paragraph 11.3 (now article 55), and whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft instrument should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new subparagraph 11.3(d) (now paragraph 4) has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

[198] As noted in paragraph 120 of A/CN.9/526, the Working Group found the substance of paragraph 11.4 (now article 56) to be generally acceptable.

[199] As noted in paragraph 121 of A/CN.9/526, the suggestion that paragraph 11.5 (now article 57) should allow the carrier the choice to seek instructions from "the shipper or the controlling party" was not supported. As noted in paragraph 122 of A/CN.9/526, the suggestion to add reference to the performing party in addition to the carrier, to the performing party was generally supported. In view also of the recommendation mentioned in paragraph 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of the subparagraph 11.5 (now article 57).

a negotiable transport document or ~~an~~ a negotiable electronic record is issued, any agreement referred to in this paragraph must be stated or incorporated[200] in the contract particulars.

CHAPTER 12. TRANSFER OF RIGHTS

Article 59.

1. ~~12.1.1~~ If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person,

(a) ~~(i)~~ if an order document, duly endorsed either to such other person or in blank, or,

(b) ~~(ii)~~ if a bearer document or a blank endorsed document, without endorsement, or,

(c) ~~(iii)~~ if a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement. [201]

2. ~~12.1.2~~ If a negotiable electronic record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by passing the electronic record in accordance with the rules of procedure referred to in article 6 ~~2.4~~.[202]

Article 60.

1. ~~12.2.1~~ Without prejudice to ~~the provisions of~~ article 57 ~~11.5~~, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder. [203]

2. ~~12.2.2~~ Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes [any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record] [the liabilities

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[200] As noted in paragraph 126 of A/CN.9/526, there was broad support in the Working Group that the revised draft of paragraph 11.6 (now article 58) should avoid suggesting any restriction to the freedom of parties to derogate from article 11 (now chapter 11). Further, it appears to be implied that the last sentence of subparagraph 11.6 (now article 58) should apply only if a negotiable document or electronic record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

[201] As noted in paragraph 133 of A/CN.9/526, there was strong support in the Working Group to maintain the text of subparagraph 12.1.1 (now article 59(1)) as drafted in order to promote harmonization and to accommodate negotiable electronic records. The concern raised in paragraph 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

[202] As noted in paragraph 134 of A/CN.9/526, the Working Group took note that subparagraph 12.1.2 (now paragraph 2) would be discussed at a later date in conjunction with the other provisions in the draft instrument regarding electronic records.

[203] As noted in paragraph 136 of A/CN.9/526, there was some support in the Working Group for the view that the concept in subparagraph 12.2.1 (now paragraph 1) was superfluous. However, it does not appear that there was enough support in the Working Group for this conclusion.

imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic record][204].

3. ~~12.2.3~~ Any holder that is not the shipper and that

(a) ~~(i)~~ under article 4 ~~2.2~~ agrees with the carrier to replace a negotiable transport document by a negotiable electronic record or to replace a negotiable electronic record by a negotiable transport document, or

(b) ~~(ii)~~ under article 59 ~~12.1~~ transfers its rights,

does not exercise any right under the contract of carriage for the purpose of ~~the articles~~ paragraphs 1 ~~12.2.1~~ and 2 ~~12.2.2~~. [205]

Article 61.

[~~12.3~~ The transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record is issued shall be effected in accordance with the provisions of the ~~national law applicable to the contract of carriage relating to transfer of rights~~ applicable law. Such transfer of rights may be effected by means of electronic communication. A transfer of the right of control cannot be completed without a notification of such transfer to the carrier [by the transferor or the transferee].][206]

Article 62.

[~~12.4~~ If the transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record has been issued includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor ~~and the transferee are jointly and severally liable in~~

[204] As noted in paragraph 140 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of subparagraph 12.2.2 (now paragraph 2) with due consideration being given to the views expressed. However, the views expressed in the preceding paragraphs 137 to 139 are not consistent. Those that favoured a revision of the text requested that the subparagraph stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract. Despite there being opposition to such an itemization, an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under paragraph 7.1 (now article 25)).

[205] As noted in paragraph 141 of A/CN.9/526, the Working Group found the substance of subparagraph 12.2.3 (now paragraph 3) to be generally acceptable.

[206] As noted in paragraph 142 of A/CN.9/526, concern was raised with respect to a conflict that could arise between paragraph 12.3 (now article 61) and national law in countries where notice of transfer of rights must be given by the transferor, and may not be given by the transferor or the transferee. Alternative suggestions were made in paragraph 142 of A/CN.9/526, but the first suggestion, consisting in the addition at the end of the final sentence of a reference to the national law applicable to the contract of carriage, might conflict with the subsequent suggestion in paragraph 143 of A/CN.9/526 to refer generally in the first sentence to the "applicable law" rather than to "the provisions of the national law applicable" in order to avoid potentially complex conflict of law issues. Thus, the alternative suggestion, to delete the final words "by the transferor or the transferee" was preferable, and these words have been placed in square brackets. Further,

~~respect of such liabilities~~shall not be discharged from liability unless with the consent of the carrier.][207]

CHAPTER 13. RIGHTS OF SUIT

Article 63.

Variant A[208]

~~13.1~~ Without prejudice to articles 64 ~~13.2~~ and 65 ~~13.3~~, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

(a) ~~(i)~~ the shipper,

(b) ~~(ii)~~ the consignee,

(c) ~~(iii)~~ any third party to which the shipper or the consignee has ~~assigned~~ transferred[209] its rights,

depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,

(d) ~~(iv)~~ any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer.

In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences

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the suggestion to insert a reference to the applicable law in the first sentence has been adopted, and the entire article has been placed in square brackets, as suggested.

207 As noted in paragraph 148 of A/CN.9/526, in light of the discussion with respect to draft article 12 (now chapter 12) and to paragraph 12.4 (now article 62) in particular, the Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.4 (now article 62), with due consideration being given to the views expressed. The relevant suggestion made in the paragraphs 147 of A/CN.9/526 is that the liability of the transferor and the transferee should not necessarily be joint and several. It has been suggested, as an alternative, that the transferor shall not be discharged from liability without the consent of the carrier.
In addition, the Working Group may wish to consider the following alternative text to replace articles 61 and 62:

"Article 61 bis.

1. If no negotiable transport document and no negotiable electronic record is issued, the transfer of rights under a contract of carriage is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer. [However, the transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage.]

2. Regardless of the law applicable pursuant to paragraph 1, the transfer may be made by electronic means, and it must, in order to be valid, be notified to the carrier [either by the transferor or by the transferee].

3. If the transfer includes liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities."

208 Variant A of article 63 is based on the original text of the draft instrument.

209 This change is suggested to make the language in this article consistent with those under this chapter.

and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.[210]

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, where that person suffered loss or damage.[211]

Article 64.

~~13.2~~ In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, ~~without having to prove that it itself has~~ irrespective of it itself having suffered loss or damage. ~~If such holder did not suffer the loss or damage itself, it is be deemed to act on behalf of the party that suffered such loss or damage.~~[212]

Article 65.

~~13.3~~ In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is ~~one of the persons referred to in article 13.1 without being~~ not the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer ~~such~~ the loss or damage in respect of which the claim is made.[213]

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[210] As noted in paragraph 157 of A/CN.9/526, while strong support was expressed for the deletion of paragraph 13.1 (now article 63), the Working Group decided to defer any decision regarding paragraph 13.1 (now article 63) until it had completed its review of the draft articles and further discussed the scope of application of the draft instrument.

[211] As noted in paragraph 157 of A/CN.9/526, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether this language adequately deals with the situation of the freight forwarder.

[212] Although no request appears to have been made to the Secretariat in respect of paragraph 13.2 (now article 64) (see articles 160 and 161 of A/CN.9/526), from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the last sentence is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft instrument.

[213] As noted from the discussion of this provision in paragraph 162 of A/CN.9/526, the Secretariat has not been requested to make a new draft. However, certain drafting changes are suggested as indicated.

CHAPTER 14. TIME FOR SUIT

Article 66.

~~14.1~~ Variant A[214]

The carrier ~~is~~ shall be discharged from all liability in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper ~~is~~ shall be discharged from all liability under chapter 7 of this instrument if judicial or arbitral proceedings have not been instituted within a period of [one] year.[215]

Variant B

All [rights] [actions] relating to the carriage of goods under this instrument shall be extinguished [time-barred] if judicial or arbitral proceedings have not been commenced within the period of [one] year.

Article 67.

~~14.2~~ The period mentioned in article 66 ~~14.1~~ commences on the day on which the carrier has completed delivery to the consignee of the goods concerned pursuant to article 7(3) or 7(4) ~~4.1.3 or 4.1.4~~ or, in cases where 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.[216]

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[214] Variant A of article 66 is based on the original text of the draft instrument.

[215] As noted in paragraph 169 of A/CN.9/526, the Working Group requested the Secretariat to place "one" in square brackets, and to prepare a revised draft of paragraph 14.1 (now article 66), with due consideration being given to the views expressed.
Concern was raised in paragraph 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to article 7 (now chapter 7) of the draft instrument, and why it did not also refer to shipper liability pursuant to other articles, such as article 9 (now chapter 9). A further suggestion was made that all persons subject to liability under the contract of carriage should be included in paragraph 14.1 (now article 66). It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft instrument, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that article 14 (now chapter 14) would apply to all liabilities regulated in the draft instrument.
The suggestion in paragraph 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft instrument is barred (or any right extinguished) might be a good solution.
Concern was also raised in paragraph 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (article 3(6)), COTIF-CIM (article 47), Warsaw (article 29) and probably CMR (article 32). It extinguishes the action under the Hamburg Rules (article 20), the 1980 Multimodal Convention (article 25), CMNI (article 24) and Montreal (article 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

[216] As noted in paragraph 174 of A/CN.9/526, the Working Group requested the Secretariat to retain the text of paragraph 14.2 (now article 67), with consideration being given to possible alternatives to reflect the views expressed.
Concern was raised in paragraph 170 of A/CN.9/526 that since the date of delivery "in the contract of carriage" might be much earlier than the date of actual delivery, the date of actual delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day "on which the carrier has completed delivery", which is the day of actual delivery. Considering the language in subparagraph 4.1.1 (now article 7(1)) the words "to the consignee" might be added for consistency.
Concern was also raised in paragraph 171 of A/CN.9/526 with respect to the "last day" on which the goods should have been delivered as the commencement of the time period for suit in the cases

Article 68.

~~14.3~~ The person against whom a claim is made at any time during the running of the period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.[217]

Article 69.

~~14.4~~ An action for indemnity by a person held liable under this instrument may be instituted even after the expiration of the period mentioned in article 66 ~~14.1~~ if the indemnity action is instituted within the later of

(a) the time allowed by the law of the State where proceedings are instituted; or

(b) Variant A[218]

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

90 days commencing from the day when either

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

(ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.[219]

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where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, since when goods have not been delivered the "last day" is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in paragraph 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under subparagraph 14.4(b)(ii) (now article 69(b)(ii)) as noted in paragraph 172, or in a separate paragraph of the draft instrument. See *infra* the alternative text for paragraph 14.5 (now article 71).

It was also suggested in paragraph 173 of A/CN.9/526 that different commencement dates should be fixed in respect of claims against the carrier and against the shipper. This would seem to be an unnecessary complication.

[217] As noted in paragraph 175 of A/CN.9/526, the Working Group found the substance of paragraph 14.3 (now article 68) to be generally acceptable.

[218] Variant A of article 69 is based on the original text of the draft instrument.

[219] As noted in paragraph 178 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4 (now article 69), with due consideration being given to the views expressed.

It was noted in paragraph 176 of A/CN.9/526 that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgment in the case had been rendered, and it was suggested that the 90-day period be adjusted to commence from the date the legal judgment is effective. Alternative language was offered that the 90-day period should run from the day the judgment against the recourse claimant became final and unreviewable. These suggestions are reflected in Variant B.

Article 70.

~~14.4 *bis*~~ A counterclaim by a person held liable under this instrument may be instituted even after the expiration of the limitation period mentioned in article 66 ~~14.1~~ 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.[220]

Article 71.

[~~14.5~~ If the registered owner of a vessel defeats the presumption that it is the carrier under article 36(3) ~~8.4.2~~, an action against the bareboat charterer may be instituted even after the expiration of the period mentioned in article 66 ~~14.1~~ if the action is instituted within the later of

(a) the time allowed by the law of the State 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.][221]

[220] It was reiterated in paragraph 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to subparagraph 14.4(b)(ii) (now article 69(b)(ii)) or in a separate subparagraph, but they should be treated in similar fashion to subparagraph 14.4(b)(ii) (now article 69(b)(ii)). Paragraph 14.4 bis (now article 70) sets out this provision as a separate article.

[221] As noted in paragraph 182 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of paragraph 14.5 (now article 71), with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain subparagraph 8.4.2 (now article 36(3)) in square brackets, and that it therefore requested the Secretariat to retain paragraph 14.5 (now article 71) in square brackets, bearing in mind that the fate of the latter article was linked to that of the former.
The link between paragraph 14.5 (now article 71) and subparagraph 8.4.2 (now article 36(3)) was noted in paragraph 179 of A/CN.9/526, and the square brackets around paragraph 14.5 (now article 71) have been retained.
Concern was raised in paragraph 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by the present subparagraph 14.5(b)(ii) (now paragraph (b)(ii)).
It was also suggested that subparagraphs (i) and (ii) of subparagraph 14.5(b) (now paragraph (b)) be combined into one, since subparagraph (ii) could be considered a sufficiently rigorous condition to subsume subparagraph (i). A revised text is proposed.

CHAPTER 15. JURISDICTION[222]

Variant A

Article 72.

In judicial proceedings relating to carriage of goods under this instrument the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or][223]

(c) The place of receipt or the place of delivery; or

(d) Any additional place designated for that purpose in the transport document or electronic record.

Article 73.

Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State Party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law.

Article 74.

No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73. This article does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.

Article 75.

1. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.

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222 As noted in paragraph 159 of A/CN.9/526, the Working Group requested the Secretariat to prepare draft provisions on issues of jurisdiction and arbitration, with possible variants reflecting the various views and suggestions expressed in the course of the discussion .
Two alternative versions of the provisions on jurisdiction and arbitration have been prepared, both based on articles 21 and 22 of the Hamburg Rules with the necessary language changes. Variant A of chapters 15 and 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 15 and 16 omits the paragraphs that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted (see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356).

223 See *supra* note 30.

2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.

Article 75 bis.

Notwithstanding the preceding articles of this chapter, an agreement made by the parties, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.

Variant B

Article 72.

In judicial proceedings relating to carriage of goods under this instrument the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or][224]

(c) The place of receipt or the place of delivery; or

(d) Any additional place designated for that purpose in the transport document or electronic record.

Article 73.

Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State Party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law.

Article 74.

No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73 of this article. This paragraph does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.

Article 75.

Notwithstanding the preceding articles of this chapter, an agreement made by the parties, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.

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224 See *supra* note 30.

CHAPTER 16. ARBITRATION[225]

Variant A

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.

Article 77.

If a negotiable transport document or a negotiable electronic record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.

Article 78.

The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

[(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or][226]

(iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or

(b) Any other place designated for that purpose in the arbitration clause or agreement.

Article 79.

The arbitrator or arbitration tribunal shall apply the rules of this instrument.

Article 80.

Article 77 and 78 shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

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[225] See *supra* note 222. Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paragraphs that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

Article 80 bis.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

Variant B

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this instrument applies shall be referred to arbitration.

Article 77.

If a negotiable transport document or a negotiable electronic record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith. [227]

Article 78.[228]

Article 79.

The arbitrator or arbitration tribunal shall apply the rules of this instrument.

Article 80.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

CHAPTER 17. ~~15.~~ GENERAL AVERAGE

Article 81.

~~15.1~~ Nothing in this instrument prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.[229]

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[226] See *supra* note 30.

[227] The amended text of article 73 of the provision on arbitration in Variant B is not a reproduction of Article 22.2 of the Hamburg Rules, since it was thought that Article 22.2 of the Hamburg Rules was too specific.

[228] In order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this paragraph has been omitted. No decision was reached by the CMI regarding a suitable replacement paragraph. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

[229] As noted in paragraph 186 of A/CN.9/526, there was broad support in the Working Group for the continued incorporation of the York-Antwerp Rules on general average into the contract of carriage. The substance of paragraph 15.1 (now article 81) was found to be generally acceptable.

Article 82.

1.~~15.2~~ [With the exception of the provision on time for suit,] the provisions of this instrument relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

2. All [actions for] [rights to] contribution in general average shall be [time-barred] [extinguished] if judicial or arbitral proceedings have not been instituted within a period of [one year] from the date of the issuance of the general average statement.[230]

CHAPTER 18. ~~16.~~ OTHER CONVENTIONS

Article 83.

~~16.1 *bis*~~Subject to article 86 ~~16.2~~, nothing contained in this instrument shall prevent a contracting state from applying any other international instrument which is already in force at the date of this instrument and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.[231]

Article 84.

~~16.2 *bis*~~ As between parties to this instrument its provisions prevail over those of an earlier treaty to which they may be parties [that are incompatible with those of this instrument].[232]

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[230] As noted in paragraph 188 of A/CN.9/526, it was suggested that the fact that the time for suit provisions of the draft instrument do not apply to general average should be expressed more clearly. Since paragraph 15.2 (now paragraph 1) states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.
As further suggested in paragraph 188 of A/CN.9/526, a separate provision could be established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of paragraph 15.2 (now paragraph 2). Such a provision should probably cover both claims for contribution and claims for indemnities.
In paragraph 189 of A/CN.9/526, the question was raised whether paragraph 15.2 (now paragraph 1) should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

[231] As previously mentioned in connection with subparagraph 4.2.1 (now article 8) and discussions relating to the relationship of the draft instrument with other transport conventions and with domestic legislation (see note 42 *supra*), the Secretariat was also instructed in paragraphs 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in article 16 (now chapter 18). It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new paragraph 16.1 bis (now article 83) is taken from article 25(5) of the Hamburg Rules.

[232] The suggestion in paragraph 196 of A/CN.9/526 that it would be helpful if paragraph 16.1 (now article 85) were amended to add language stating that the draft instrument would prevail over other transport conventions except in relation to States that are not member of the instrument is in line with the provisions of article 30(4) of the Vienna Convention. It is suggested, however,

Article 85.

~~16.1~~ This instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [~~seagoing~~][233] ships.

Article 86.

~~16.2~~ No liability arises under ~~the provisions of~~ this instrument for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage [by sea][234].

Article 87.

~~16.3~~ No liability arises under ~~the provisions of~~ this instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under ~~either~~ the Paris Convention ~~of 29 July 1960,~~ on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the a~~A~~dditional Protocol of 28 January 1964, ~~or~~ the Vienna Convention ~~of 21 May 1963,~~ on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.[235]

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that this new provision should be added in a separate paragraph, rather than to the present paragraph 16.1 (now article 85), that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as paragraph 16.2 bis (now article 84).

[233] The word "seagoing" in paragraph 16.1 (now article 85) has been deleted, as suggested in paragraph 197 of A/CN.9/526.

[234] As instructed in paragraph 199 of A/CN.9/526, square brackets have been placed around the words "by sea".

[235] As noted in paragraph 202 of A/CN.9/526, the Working Group requested the Secretariat to update the list of conventions and instruments in paragraph 16.3 (now article 87), and to prepare a revised draft of paragraph 16.3 (now article 87), with due consideration being given to the views expressed.

In paragraph 200 of A/CN.9/526, it is pointed out that the list of conventions in paragraph 16.3 (now article 83) is not complete and reference is made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in paragraph 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in paragraph 16.3 (now article 87), such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent paragraph 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

CHAPTER 19.~~17.~~ [LIMITS OF CONTRACTUAL FREEDOM] [CONTRACTUAL STIPULATIONS][236]

Article 88.

1. ~~17.1 (a)~~ Unless otherwise specified in this instrument, any contractual stipulation that derogates from ~~the provisions of~~ this instrument ~~are~~ 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, a performing party, the shipper, the controlling party, or the consignee under ~~the provisions of~~ this instrument.[237]

2. ~~(b)~~ ~~[~~Notwithstanding paragraph 1 ~~(a)~~, the carrier or a performing party may increase its responsibilities and its obligations under this instrument.~~]~~[238]

3. ~~(c)~~ Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.[239]

Article 89.

~~17.2~~ Notwithstanding ~~the provisions of~~ chapters 4 ~~5~~ and 5 ~~6~~ of this instrument, both the carrier and any performing party may by the terms of the contract of carriage: ~~exclude or limit their liability for loss of or damage to the goods if~~

(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

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[236] As noted in paragraph 204 of A/CN.9/526, it was suggested that the title of this draft article should be revised to reflect more accurately the contents of the provision, which did not deal with "limits of contractual freedom" in general, but dealt with clauses limiting or increasing the level of liability incurred by the various parties involved in the contract of carriage. A possible alternative is the title of article 23 of the Hamburg Rules, "Contractual stipulations". Otherwise the title might indicate the basic mandatory nature of the provisions of the Instrument.

[237] As noted in paragraph 213 of A/CN.9/526, the Working Group decided to maintain the text of subparagraph 17.1 (a) (now paragraph 1) in the draft instrument, including the words "or increase" in square brackets, for continuation of the discussion at a future session, possibly on the basis of one or more new proposals. It was indicated, as noted in paragraph 212 of A/CN.9/526 that a proposal for a draft provision excluding "competitively negotiated contracts between sophisticated parties" would be made available to the Secretariat before the next session of the Working Group, and that the concerns noted in paragraphs 205 to 211 of A/CN.9/526 would be borne in mind when drafting that proposal.

[238] As noted in paragraph 214 of A/CN.9/526, the Working Group found the substance of subparagraph 17.1 (b) (now paragraph 2) to be generally acceptable. It was decided that the square brackets around that provision should be removed.

[239] As noted in paragraph 215 of A/CN.9/526, the Working Group found the substance of subparagraph 17.1 (c) (now paragraph 3) to be generally acceptable.

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.[240]

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[240] As noted in paragraph 217 of A/CN.9/526, the Working Group decided that the substance of subparagraph 17.2 (a) (now paragraph (a)) should be maintained in the draft instrument for continuation of the discussion at a future session. The Secretariat was requested to prepare alternative wording to limit the ability of the carrier and the performing party carrying live animals to exonerate themselves from liability in case of serious fault of misconduct. Further, it was noted in paragraph 218 of A/CN.9/526 that the Working Group found the substance of subparagraph 17.2 (b) (now paragraph (b)) to be generally acceptable. The suggested different treatment of subparagraphs 17.2 (a) and (b) (now paragraphs (a) and (b)) requires a change in the chapeau. As regards live animals, it is suggested that language similar to that used in respect of the loss of the right to limit liability could be used, however, extending the reckless behaviour to servants or agents.