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

Comments of the European Shippers' Council regarding the draft convention on the carriage of goods [wholly or partly] [by sea]

Note by the Secretariat*

In preparation for the seventeenth session of Working Group III (Transport Law), the European Shippers' Council submitted to the Secretariat the document attached hereto as an annex containing its comments regarding the draft convention on the carriage of goods [wholly or partly] [by sea]. The text is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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

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Annex

1. The European Shippers' Council is the organization which represents the interests of European commercial and industrial companies as users of all modes of transport. "Shippers" are primarily producers or distributors of goods, which they market and distribute to their customers. Sea carriage is the main mode of transport which they use for international transactions.

2. In preparation for the session of Working Group III to be held in New York in April 2006, the Council will set out its position on the main agenda items for the session, with reference to document A/CN.9/WG.III/WP.56.

3. This document also contains an analysis of the articles that the Working Group was unable to study or on which it was unable to reach a conclusion during its previous session in Vienna.

Right of suit

4. The Council welcomes the fact that this issue is addressed in the draft instrument because, in practice, it is very often the case that an exporting shipper which has relinquished its transport document (for example, deposited it in a bank as a letter of credit) finds that its right of suit against the sea carrier is contested when it seeks compensation for damage to goods that have not been paid for by the consignee (bankrupt buyer, unpaid letter of credit, etc.). The current rule based on the holding of the transport document is too rigid and often leads to inequitable outcomes.

5. Article 67

From this point of view, the Council prefers the wording of variant B. The approach of formulating a general rule allows for greater simplicity and clarity and avoids the problem of an incomplete list, as in variant A. The concept of "legitimate interest" makes it possible to take into account the commercial contract (International Rules for the Interpretation of Trade Terms, Incoterms), as well as the factual circumstances.

6. Article 68

The Council is in favour of this article, which allows a shipper that has relinquished its bill of lading nonetheless to bring proceedings against the carrier or a performing party. However, the Council wishes to stress that the negative proof required in this case might be difficult to provide.

Chapter 15. Time for suit

7. Article 69

With respect to the limitation period for instituting proceedings, one year appears too short. While this period is derived from maritime tradition, that tradition dates back a long time and the periods provided for in more recent conventions such as the Hamburg Rules and the Montreal Convention are longer. In practice, disputes are increasingly being settled within the framework of insurance. It would be more sensible to allow the parties an additional year to resolve disputes amicably before having recourse to the courts or to arbitration.

Regarding the means of abatement of actions, the Council prefers the modern solution of limitation and the wording in variant B.

8. Article 70

This article is standard and meets with our approval if it avoids the idea of a "last day", which may give rise to too much controversy.

9. Article 71

It seems more logical for shippers, who form the majority of claimants, to have the right to request an extension of the limitation period. In any case, an extension should have to be accepted by both parties. The Council rejects the idea that the carrier may unilaterally extend the limitation period.

10. Article 72

Since this is the draft of an international convention intended to standardize the law, paragraph (a) is not needed and should be deleted. With regard to paragraph (b), we prefer variant A since the period it provides for is shorter than that provided for in variant B (ii).

Only variant A is needed in the article.*

11. (Article 73)

12. Article 74

The Council welcomes the principle that an action may be instituted against a bareboat charterer. However, it would be desirable to avoid referring to national law, in order to maintain legal certainty. The Council is therefore in favour of deleting paragraph (a). Only paragraph (b) is needed; subparagraphs (i) and (ii) could be combined.

Limitation of liability

13. In the Council's view, the issue of limitation of liability cannot be dissociated from that of defences of liability. The Council would like to point out that, when the Hamburg Rules were drafted, the fact that no exceptions were included was taken into account in setting low amounts for the calculation of the maximum limitation of liability. Since the draft convention reintroduces the concept of exceptions, the Working Group should, when considering this point, increase the amounts significantly, even though the average values of goods have probably increased over recent decades.

14. Article 64

Paragraph 1 presents no problems.

The Council favours variant B of paragraph 2 because of its clear formulation. Nevertheless, we would like to avoid referring to national law, in the interests of simplicity but also to achieve greater legal certainty. Regarding paragraphs 3 and 4, it would be desirable to retain the term "container" rather than to use the term "article of transport", which has no precise meaning in practice.

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* *Translator's note*: The amendments proposed here would entail a consequential amendment to the chapeau.

15. Article 65

Liability for loss caused by delay

16. The Council would like to draw the Working Group's attention to the fact that shippers are most often the victims of losses involving service deficiencies (goods being left on the quay, skipping of ports of call, delivery delays) rather than actual damage, which general containerization has helped to reduce considerably. The Council therefore calls upon the drafters to eschew ready-made solutions arising from a tradition that, though worthy of respect, is now completely out of step with the realities of sea carriage.

17. The Council requests that damage to or loss of goods caused by delay be compensated for in the same way as the damage mentioned in article 64.

18. As far as economic loss caused by delay is concerned, the methods for calculating limitation should not be based on the amount of freight but on the general rules for limitation of liability.

The reference to freight is no longer meaningful today, given the volatility and variability of freight rates (for example, the 2005-2006 rate for freight from Europe to Asia is less than US$ 200 per 20-foot container, whereas the rate for freight from Asia to Europe is US$ 1200 per 20-foot container).

Rather than [x] times the quantity of freight, the Council encourages the drafters to be more innovative and to propose a rule based on [x] per cent of the units of account used for damage in article 64.

We suggest that the drafters discard variants A and B and that they draft a specific article for material damage and another for non-material damage.

Article 66

19. The Council wishes to emphasize that timely delivery is one of the carrier's obligations under the draft convention. Paragraph 1 is therefore sufficient and paragraph 2 is redundant.

Chapter 9. Transport documents and electronic transport records

20. The Council takes due note of articles 37 to 43. It has no specific comments to make on these articles, which reflect current judicial practice.

21. Regarding the signature of the transport document or of the electronic transport record, the Council believes that, in the light of the identification requirements in article 38, the expression "as agent"* should be replaced by "as carrier". This would make the situation clear.

22. The wording of article 44, which relates to the scope of the qualifying clause set out by the carrier, should be more precise. The Council wishes to emphasize that a qualifying clause never releases the carrier from its obligations with respect to the goods.

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* *Translator's note*: The expression "as agent" appears in article 12.

It would be desirable for the draft convention to provide for a simpler formula and to stipulate that qualifying clauses must be "precise and well founded" in order to be effective.

Scope of application and contractual freedom

23. The Council favours a broad scope of application which guarantees predictable legal solutions—an essential condition for the stability of international trade flows.

The Council cannot agree with the general scope of application set out in article 8 because of the wording of article 9 (1)(d), which puts forwards the (new) principle that "volume contracts" fall outside the scope of application of the draft convention.

The new definition of "volume contract" in article 1 does not on its own justify an exclusion from the scope of application of the instrument, as was the case for the ocean liner service agreement (OLSA), a theoretical concept which seems to have been abandoned.

24. The Council believes that the great majority of transport operations should, on principle, be covered by the draft convention.

Apart from contracts under charterparties, which are excluded, other contracts covering many types of transport operation carried out at prices that are negotiated and fixed for a given period should, on principle, be included within the scope of the convention. There is nothing exceptional about these contracts; in fact, they are common and in everyday use.

25. This category of contract includes:

- The "service contract", as defined in the United States Ocean Shipping Reform Act (OSRA) of 1998. These contracts, use of which is limited in practice to carriage to or from the United States of America, contain only provisions relating to the technical conditions for execution of the contract (volume commitment, guaranteed freight rates, penalty for breach of commitment, minimum validity of commitment, etc.). In practice, service contracts are commonly signed for a volume commitment of 10 containers per year, or even fewer;
- Ocean liner service agreements (OLSA). This type of contract is still unknown in international trade practice but seems to have the same characteristics as the service contract;
- Any other contract simply defined by validity for a given period, quantities for carriage (with or without a volume commitment), specific operational conditions, where appropriate, and, in all cases, freely negotiated prices.

26. The Council nevertheless envisages a framework in which derogation from some of the rules in the future instrument is possible, but must be specifically negotiated between the two parties and subject to strict limits.

27. The possibility of derogation should be dependent not on a circumstance-specific type of contract (volume contract or OSRA*) but on a particular type of

* *Translator's note*: The French text says "OSRA" here, but "OLSA" may have been meant.

transport. In fact, the possibility of derogating from the instrument should be related to the need to organize a specific legal structure to cover:

- Carriage of a large quantity of goods (e.g. a quantity that may justify a "part cargo");
- Carriage under specific operational conditions (e.g. use of a private dock where a free in and out (FIO) clause is appropriate, or mandatory delivery periods with penalties for delay);
- Carriage that has been the subject of valid negotiations between the parties.

28. This particular situation occurs almost exclusively in cases of carriage involving "conventional" ships. Within this specific framework, it is desirable, for example, to allow the parties to derogate from the usual rules for the organization of handling under FIO clauses and free in and out, stowed (FIOS) clauses. This is the basis for article 14 (2). That article and article 11 (6) should be clearly limited to this type of situation.

29. The Council wishes to stress that under no circumstances should the parties be authorized to derogate from the material elements of the contract of carriage, particularly through provisions that result in the liability of the carrier being reduced or even eliminated (see articles 14 (2) and 95). The Council therefore requests that the scope for derogation be clearly defined and limited to cases provided for in the draft convention itself.

30. The "volume contract", as defined in chapter 1, is far from meeting these criteria, as is the "service contract". The criteria used to define them cover almost all business relationships between a shipper and a carrier and thus are not of an exceptional nature justifying derogation from the instrument. A large quantity and specific operational conditions, rather than the concept of a specified quantity in a large number of shipments during an agreed period, give grounds for derogation from the draft convention under a specially negotiated contract.*

Contractual freedom

31. The Council notes that the spirit of the new convention gives primacy to the contract and to contractual freedom. The Council, as a matter of policy, favours the contractual approach and the freedom to enter into contracts on a bilateral basis. However, the it wishes to qualify this policy in view of the economic ties that usually exist between parties to a contract for liner carriage.

32. It should be noted that there is a kind of structural imbalance between the parties in the maritime industry, to the detriment of shippers.

33. Despite the fact that liner owners enjoy an advantage that goes beyond the rights conferred by general law in terms of antitrust immunity, they generally have a much more advantageous negotiating position than shippers. Only a very small minority of very large shippers can actually negotiate with shipowners on equal terms. In practice, the vast majority have no real negotiating power with regard to the material elements of the contract of carriage. The Council therefore feels that

* *Translator's note*: This sentence is unclear in the original French. The translation gives what is assumed to be the intended meaning.

there are no grounds for calling into question the protection afforded to shippers under previous conventions.

34. This situation can be illustrated by the new article 14 (2), which provides that the carrier may ask the shipper to perform operations for which, under current law, the carrier is expressly liable. This possibility, combined with the provisions of article 95, could allow a carrier to be released from liability during loading or discharging simply because it had secured the shipper's signature of a "contract" on the basis of a "low freight rate". We are certain that this possibility will be of great benefit to non-vessel operating cargo carriers (NVOCCs) and other large "freight forwarders" pushing for the maximum extension of contractual freedom.

35. In the Council's views loading and discharging are part of the carrier's substantive obligations, and there can be derogation from them only in exceptional circumstances such as those referred to above. The same is true for the times of take-over and delivery, which are too sensitive to be left entirely to the (free?) choice of the parties.

36. The possibility of unrestricted derogation from the instrument will also disrupt international trade because in cases involving, for example, cost and freight (CFR) contracts, cost, insurance and freight (CIF) contracts or carriage and insurance paid to (CIP) contracts, consignees may be at risk of "inheriting" a contract of carriage governed by substandard provisions.

37. In fact, the terms under which the consignee consents to a contract that derogates from the draft convention, which are mentioned in article 95 (6)(b), provide no guarantees at all. To what extent can a consignee that is urgently awaiting goods (which it has probably already paid for) really refuse to apply substandard clauses, assuming it is sufficiently well informed to understand those clauses and their significance? Contrary to what the members of the Working Group may think, shippers generally have only a poor knowledge of maritime law and by no means have the legal analysis skills ascribed to them.

Comments on FIO/FIOS clauses

38. In response to the concerns of certain members of the Working Group regarding the legal consequences of "FIO(S)" clauses, which might explain the retention of article 14 (2), the Council would first like to point out that these clauses do not exist in the container transport sector, which today represents more than 90 per cent of total liner carriage. Second, in practice, these clauses pertain only to the distribution of the handling cost in the freight rate and do not affect the fact that it is the carrier who organizes the handling and thus should be liable for it. (N.B. Most freight rates for transport by containers are equivalent to such clauses. This results in the carrier billing the shipper for terminal handling charges (THC) to cover the terminal and loading expenses. Nonetheless, the carrier, which is the handler's only contracting partner, must remain liable for damages that occur during the container handling.)

39. FIO(S) clauses can actually exist in "conventional" transport, for the transport of very large batches of goods. In such cases, the party organizing the loading or discharging operations should be liable for those operations (conclusion of the contract with the handler).

40. This situation is thus governed either by a contract of carriage (bill of lading including a reference to FIO(S)) or by a "volume contract" negotiated for a series of operations.

This type of operation is sufficiently marginal to be provided for by specifying the scope of application of article 14 (2).

Obligations of the shipper

41. The use of specific provisions to underline shippers' obligations is consistent with the trend towards holding all transport actors accountable. The Council fully subscribes to this approach and even considers that the possibility of minimizing liability under a contrary agreement, as permitted by the contractual freedom provided for in article 95, would be unacceptable. However, the Council believes that the liabilities of each party should be limited to that party's sphere of activity and competence, and that the liabilities under the draft convention should be strictly limited to the contractual framework, as is the case for the obligations of the carrier.

42. Thus, under article 28, the shipper is responsible for packing the goods in such a way that they will withstand the intended carriage. Similarly, in the case of containerization, the shipper is responsible for loading the goods into the container. These obligations are entirely justified.

43. The Council is concerned not about shippers being held liable in the areas referred to above, but about the fact that the shipper's liability appears to be governed by general law and, therefore, to be unlimited. In this situation, unilateralism accentuates the lack of balance in a draft convention that is already unfavourable to shippers. To achieve a better balance, it would be desirable for shippers to be subject, under the convention, to a liability regime equivalent to that envisaged for carriers, with a limitation of liability, since the obligations of the shipper are determined in the contractual framework.

The grounds for treating the shipper and the carrier differently are questionable and can be explained only by the existence of a long tradition of imbalance between shipowners and maritime transport users, in both economic and legal terms. This imbalance can be seen, for example, with respect to the obligation set out in article 30.

44. With reference to the obligation set out in subparagraph (b), there is a real possibility of a shipper making, in good faith, an erroneous statement about its goods or trade information and subsequently being found in breach of risk assessment provisions that are now linked to anti-terrorist security laws and being ordered to provide unlimited compensation to the sea carrier because, for example, its ship is detained for several days in port by the customs authorities of the country of destination.

45. Some small and medium enterprises may be unable to pay the financial penalty imposed. In the context of the obligation set out in article 30 (b), the draft convention should provide that, in cases where loss is caused to the carrier because of an inaccurate declaration with regard to its goods, the shipper's liability may be limited (to [x] times the amount of freight, for example).

46. Another question is whether the shipper's liability for breach of its obligations is fault-based liability or strict liability.

The draft convention also says nothing about limitation periods and the competence of the courts that will hear actions against shippers.

The principle of equity requires that, in matters of liability, the situation of the shipper should not be more unfavourable than that of the carrier.

47. Note: the proposed wording of the new article 33 is "biased" and is therefore unbalanced.

Article 33 (1) uses pejorative terms such as "illegal" and "unacceptable [danger] to the environment"—which emotionally charged language—to refer to failures by a shipper, which are always possible. The same comment applies to article 15. At no time is such language used in defining the obligations of the carrier in chapter 5.

48. Furthermore, article 33 (2), which sets out the obligations to label goods to identify the type of danger they pose, does not specify whether compliance with this obligation is verified at the time the goods are handed over to the carrier or whether the shipper is supposed (how?) to maintain the labelling until delivery, which would be an unacceptable obligation. Penalties for failure to comply with this obligation may arise only from the shipper's contractual responsibility and should therefore be limited.

49. The current wording, which stipulates that the shipper's liability is unlimited, shows once again that the draft convention in its current form is systematically biased against shippers.

Right of control

Article 54 et seq.

50. The Council would like to see recognition of the principle whereby the shipper retains the right of control of the goods until they are delivered. In practice, the organization of long and complex door-to-door transport operations increasingly often places shippers in the position of having to modify their instructions during carriage in order to adapt to any risks, including commercial risks.

Requests for modifications are currently solely dependent on commercial negotiation and, in fact, are entirely subject to the carrier's goodwill, owing to the imbalance in the relationship between the carrier and the shipper.

Article 54 et seq. should therefore provide for this type of situation to be organized and managed within a legal framework and should state that the contract of carriage does not deprive the shipper of the right to dispose of its goods.

51. To enable the indisputable implementation of this principle, the Council would favour amending article 54 so that, instead of referring to the right to give the carrier instructions in respect of the goods, it clearly asserts the principle whereby the shipper (or the controlling party, as well as the lawful holder of the bill of lading) retains an automatic and unilateral right in respect of the goods until they are delivered or the bill of lading is transferred (as opposed to amendment of the contract itself, which is in essence bilateral) and may give instructions in respect of the transport operation.

52. Article 54 could be amended to read as follows:

> "The right of control means the right of the shipper to vary the contract of carriage and the right, under the contract, to give the carrier instructions in respect of the arrangements for carriage of the goods during the period of its responsibility (…)".

53. Regarding article 55 and the exercise of the right of control, the Council regrets that the amended text now limits this right to the controlling party and no longer to the shipper, regarded a priori as the controlling party.

54. The former wording on this point (article 54 in document A/CN.9/WG.III/WP.32) was preferable, as it was based on business practice. In addition, the obligation to mention any variation in the transport document (article 55 (2)) indicates a lack of awareness of practical realities. It is actually once the shipper has relinquished the transport document that the problem of control of the goods arises and that the shipper needs a precise legal framework for giving swift instructions that modify the transport operation.

55. In practice, when a bank is the holder of the transport document because the document functions as a payment instrument, it may be necessary to give the carrier swift instructions in respect of the goods. In such cases, the solutions mentioned in article 55 (2), based on the transfer of the transport document, are inappropriate where swift action is needed. The lawful third party holder of the transport document (for example, the bank), which is often not concerned about the transport arrangements, should be distinguished from the controlling party, while preserving the rights of the third party holder.

56. The Council therefore suggests that the drafters provide for mechanisms for the swift exercise of the right to modify instructions to the carrier, not limited to the standard transfer of the transport document.

57. It would also be desirable to include an additional paragraph specifying that the holder of the transport document (which is no longer the shipper) may instruct the carrier, by any secure written means, to execute instructions which shall be given to it by a specifically designated party and which the carrier shall execute when it has received confirmation from the shipper or from the last controlling party of whose designation it was officially notified.

58. The Council believes that article 55* is a key element of this new mechanism. For this reason it rejects variant A, subparagraph (c) of which makes it very difficult in practice to implement article 54 (a), (b) and (c).

It is quite possible—and this is taken into account in the decision of the shipper or the controlling party—that a modification of the instructions could entail additional costs. However, provided these costs are reasonable, they need not be an impediment.

The Council is of the view that the wording of variant B is more effective.

59. This wording establishes the principle of the carrier's obligation to act (subparagraph (a)), but also places limits on the right conferred by article 54.

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* *Translator's note*: The French text says "article 55" here but the comment appears to refer to article 57.

The Council recognizes that any request must be reasonable and compatible with the constraints of shipping. It therefore suggests that the word "interfere" in subparagraph (c) of variant B be qualified by the addition of a word such as "significantly".

The Council considers that additional expenses resulting from a change of instructions, should not constitute grounds for the carrier to refuse to execute the new instructions. The corollary to this principle is the obligation, set out in paragraph 2, to reimburse additional expenses (see also paragraph 3 (a) and (b)), which is needed to enable a shipper to request a carrier to take an operational and/or financial "risk", with the shipper providing security for the consequences of taking the risk.

60. Similarly, it is logical for the carrier to be liable for the consequences of refusing to comply with the instructions referred to in article 54 (article 57, variant B, paragraph (4*). Likewise, it is logical for a carrier which complies with new instructions nevertheless to remain responsible for complying with the usual obligations of the carrier under a contract of carriage.

The possibility of (reasonable) changes should be incorporated in the carrier's obligations.

The current wording resembles a sort of inverse deviation clause in reverse. In order to articulate clearly this dual liability (liability for damage caused by a refusal to accept new instructions, as well as the ordinary liability of the carrier once it has accepted the modification of the instructions), the wording of article 57 needs to be more precise.

The Council wishes to underline once again that this new legal instrument, which is needed in business practice, should not be weakened by the simultaneous offer of the possibility of derogation from it, which amounts to an amendment to the contract.

In this respect, article 60 is counterproductive.

Transfer of rights

61. The Council welcomes the recognition of electronic transport records as a means of transferring rights that is equivalent to the traditional transfer of the transport document.

However, we consider article 62 (2) to be particularly dangerous because the current position of the Working Group is that it tends to give contractual freedom precedence over the function of protecting shippers that has to date been fulfilled by international maritime conventions.

This article may result in the consignee having to take on the derogating contractual commitments undertaken by the consignor.

Thus, a shipper that has negotiated an economical freight rate and has accepted the obligations set out in article 14, which are ordinarily the responsibility of the carrier, will transfer this obligation to the consignee (holder of the transport

* *Translator's note*: The French text refers to "variant B, paragraph 4", but paragraph 4 is not part of variant B.

document) if the transport document contains an ad hoc clause, even if the clause (i.e. a FIO clause) is added merely in the form of a watermark.

62. The article in question illustrates perfectly the reasons why the Council opposes the position of certain members of the Working Group that derogation from all the fundamental rules of international maritime law should be allowed when there is a "contract" between the shipper and the carrier.

63. If article 62 (2) is retained in its present form, it should be clarified or even reconsidered, since it seems to impose on a holder that is not the shipper more obligations than rights, even if such holder has not participated in the negotiation of the contract. The controlling party is thus at risk of having to assume the liabilities imposed on the shipper (payment of dead freight, demurrage, etc.) as well as those that are ordinarily imposed on the carrier but which have been assumed by the shipper (article 14).

Period of responsibility

64. The Council considers that the wording of article 11 constitutes a significant step backwards compared with the advances reflected in article 4 of the Hamburg Rules and the provisions of the most recent international transport conventions.

First of all, the Council notes a weakening of the principle governing the responsibility of the carrier, namely custody of the goods, a concept which made it possible to define accurately the period between the start and the end of custody of the goods.

The weakening of this rule, which has a direct impact on the responsibility of the carrier, again proceeds from the desire to provide systematically for the possibility of derogation from all the material elements of international maritime law.

The Council opposes this position all the more strongly because article 11 (2) and (3) allows the time and location to be determined not only by the contract of carriage—which in practice is never open to question—but also by the customs or usages in the trade. Custody would then become a residual concept.

65. Article 11 (6) again raises the issue of the validity of contractual freedom. It is comprehensible if it is intended to take adequate account of the statistically infrequent but nonetheless real practice of concluding contracts of carriage that are not especially repetitive to cover operations that are unusual because of the large quantity of goods being transported at one time (carriage almost exclusively by conventional ship) and that give grounds for the negotiation of a FIO(S) clause. This is a situation similar to tramping, where loading is often carried out by the shipper, and it is therefore logical to take this into account in determining the time at which the carrier's period of responsibility begins (the same applies to arrival).

However, the Council is totally opposed to any attempt to allow the carrier, in the context of liner carriage (by container ship in 99 per cent of cases), to delay taking over the goods by invoking the combined effects of articles14 (2) and 11 (6) and reiterates its opposition to contractual freedom that is specifically intended to benefit the sea carrier.

66. Last, but by no means least, the provision allowing the carrier to evade its responsibility as intermodal carrier—the possibility under article 12 of hiding behind the legal status of "freight forwarder"—de facto destroys any possibility of ensuring that a carrier performing door-to-door transport assumes overall responsibility. The Council knows from experience about preprinted clauses in bills of lading (adhesion contracts) whereby carriers attempt to limit the period of their responsibility.

If we accept this provision, "contractual freedom" will in future allow even a carrier performing door-to-door transport to assume no responsibility at all for it. The Council cannot accept this return to practices that pre-date the Hague Rules and the uncertainty that arise from them, and requests that the wording of article 12 be modelled on article 4 of the Hamburg Rules.

Delivery to the consignee. Articles 46 to 52

67. The Council is pleased to note that the Working Group has undertaken to find legal solutions to specific situations that were previously subject to little or no regulation. The affirmation of the consignee's obligation to accept delivery is logical and indisputable, and the provisions of article 46 et seq. which govern this area are welcome, subject to certain important reservations concerning the points set out below.

It should be noted that the consignee may, in certain cases, be unable to accept delivery of the goods at the agreed time for reasons relating to the law of the country of destination, such as customs law.

It would therefore be desirable—in so far as the consignee or the controlling party is identified and is unable to accept delivery—for the liability of the carrier or of the performing party (the square brackets should be deleted) to continue to apply until the delivery can be effected.

68. As concerns article 48, the use of which should be minimal, we prefer variant A of paragraph (b).

69. Article 49 has a wider scope and has been given full consideration by the Council.

The Council favours provisions that are likely to solve practical problems relating to the delivery of goods. In that context, it supports the wording of the article, especially subparagraphs (a)(i) and (ii) and (b).

70. With a view to resolving two recurrent operational problems, the Council requests the Working Group to take into account cases where the actual consignee does not hold the transport document (for example, a blank order bill of lading) and where the transfer of the document is delayed either because of the means of paying for the goods (letters of credit, payment against documents) or because of a late transfer.

71. It may be in the interests of such a consignee to take delivery to avoid demurrage charges or simply because of an urgent need for the goods.

The carrier should be allowed to deliver the goods to the consignee—which is likely to appear under "notify"—without producing a transport document, subject to the agreement of the holder (for example, the bank) and of the shipper (or of the

controlling party when it is not the shipper). It would be desirable to amend article 49 (a)(i) to this effect.

It would also be desirable to add a clause aimed at preventing the possibility of the carrier incorporating into its transport documents a provision authorizing it to deliver goods upon surrender of what it reasonably believes to be an authentic bill of lading. In such a case, it would be logical to make the carrier liable for the erroneous delivery by placing upon it the obligation to carry out checks that are more than merely "reasonable" with respect to its own transport documents, which may be counterfeit.