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Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003)

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I. 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 by sea 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.[1] 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.[2]

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.[3] 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.[4]

5. Working Group III on Transport Law which was composed of all States members of the Commission held its twelfth session in Vienna from 6-17 October 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, India, Italy, Japan, Lithuania, Mexico, Morocco, Russian Federation, Singapore, Spain, Sweden, Thailand, United States of America and Uruguay.

6. The session was also attended by observers from the following States: Algeria, Antigua and Barbuda, Argentina, Bolivia, Bulgaria, Costa Rica, Cuba, Czech Republic, Denmark, Finland, Greece, Kuwait, Lebanon, Netherlands, New Zealand, Norway, Republic of Korea, Senegal, Sri Lanka, Switzerland, Tunisia, Turkey, Venezuela and Yemen.

7. The session was also attended by observers from the following international organizations:

(a) **United Nations system**: the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Europe (UNECE);

(b) **Intergovernmental organizations invited by the Commission**: Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) **International non-governmental organizations invited by the Commission**: Association of American Railroads (AAR), Center for International Legal Studies (CILS), *Comité Maritime International* (CMI), *Instituto Iberoamericano de Derecho Marítimo*, International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), International Union of Marine Insurance (IUMI) and The Baltic and International Maritime Council (BIMCO).

8. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

9. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.III/WP.31);

(b) Draft instrument on the carriage of goods [wholly or partly] [by sea]: Note by the Secretariat (A/CN.9/WG.III/WP.32);

(c) Proposal by the Netherlands on the application door-to-door of the instrument (A/CN.9/WG.III/WP.33), and proposal by the United States regarding 10 aspects of the draft instrument (A/CN.9/WG.III/WP.34);

(d) Addendum to compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument (A/CN.9/WG.III/WP.28/Add.1).

10. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea].
4. Other business.
5. Adoption of the report.

II. Deliberations and decisions

11. The Working Group began its review of the draft instrument on the carriage of goods [wholly or partly] [by sea] contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.32) and discussed various proposals, including the proposal of the United States (A/CN.9/WG.III/WP.34) regarding 10 aspects of the draft instrument. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section III below.

III. Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]

A. Methodology for continuation of work

12. The Working Group heard that a group of Scandinavian countries had held informal discussions regarding the best way for the Working Group to proceed with its second reading of the draft instrument. It was proposed that, in light of the number of articles in the revised draft instrument (A/CN.9/WG.III/WP.32) and in light of the proposal made by the United States (A/CN.9/WG.III/WP.34), it might be best to proceed with discussions by grouping matters into core issues. It was suggested that the first major heading of issues could be "Scope of application" and that the first sub-set of issues under that heading could be "Conflicts with international and national legislation", pursuant to which the following three groups of issues could be discussed: (1) contract of carriage; (2) performing parties and network liability and (3) localized and non-localized damage. It was proposed that the second sub-set of issues under the heading "Scope of application" could be "Geographical scope of the maritime leg" (article 2 of the draft instrument).

13. It was further proposed that a second major group of issues could be discussed under the heading "Freedom of contract", and could consist of the following topics: the charter party exemption (article 2(3) of the draft instrument); treatment of ocean liner service agreements (OLSAs); mixed contracts of carriage and forwarding (article 9 of the draft instrument); the functional approach (e.g. article 11(2), free in and out, stowed, or FIOS, clauses); one-way or two-way mandatory provisions (article 88 of the draft instrument); and period of responsibility (article 7). It was stated that the topics in this group were based on the assumption that the instrument would otherwise be mandatory.

14. It was suggested that a third major group of issues could be discussed under the heading "Carrier obligations and liability". This group of topics could include exemptions; limits and tacit amendment procedure; delay; and seaworthiness (as a continuing obligation). It was proposed that a discussion of these three major groups of issues could be followed by a discussion of the following four topics: shippers' obligations; forum selection and arbitration; delivery of goods; and right of control.

15. Support was expressed for the methodology that the Working Group consider the core issues in the draft instrument. It was generally agreed that this examination could begin with a discussion of the issue of the scope of application of the convention and the issue of performing parties.

B. Preliminary matter: title of the draft instrument

16. The title of the draft instrument as considered by the Working Group was as follows: "Draft instrument on the carriage of goods [wholly or partly] [by sea]".

17. It was observed that the Working Group might want to consider the extent to which the title should reflect the "maritime plus" (also referred to as "trans-maritime") approach that had emerged at previous sessions of the Working Group as most likely to rally consensus in the preparation of the draft instrument.

18. A suggestion was made that consideration of the title of the draft instrument was premature in light of the future discussions to be held by the Working Group with respect to article 2 "Scope of application" and to the definition of "contract of carriage" in article 1(a). However, support was expressed for the proposal that the Working Group had achieved a level of consensus with respect to the approach to be taken in the draft instrument that was sufficient for the square brackets to be simply removed from the existing title so that the draft instrument would be called the "Convention on the carriage of goods wholly or partly by sea". Further refinements were suggested. One suggestion was that the word "international" should be added before the word "carriage", so as to more accurately describe the contents of the instrument and to ensure consistency with existing conventions for the carriage of goods. Another suggestion was that, since the contract of carriage was the essence of the draft instrument, a reference to contracts should be made in the title, which would read "Convention on contracts for the international carriage of goods wholly or partly by sea". In response to that suggestion, it was pointed out that inclusion of the word "contracts" could be misleading, in that it has been used in the past to describe conventions that, unlike the draft instrument, were more focused on the substantive requirements of the contract itself, such as its formation. Yet another suggestion was that, since UNCITRAL conventions often use the phrase "in international trade", this phrase should be added to the end of the title. An additional proposal was made to delete the phrase "wholly or partly" currently in square brackets so as to avoid confusion with respect to multimodal instruments. Support was voiced for the contrary view that the inclusion of language indicating both the sea carriage aspect and other possible modes of transport was necessary in order to provide an accurate description of the subject matter of the convention.

19. The Working Group heard support for a number of different variations on the above proposals. While consensus on a specific title was not reached, support was expressed for the view that the title of the draft instrument should reflect its focus

on maritime transport, as well as the possible coverage of other modes of transport. The Working Group decided to retain the current title unchanged for the purposes of future discussion.

C. Consideration of core issues in the draft instrument

1. Scope of application and performing parties

(a) General discussion

20. The Working Group heard statements by the delegation of Italy (made also on behalf of the Netherlands) that, in order to promote a pragmatic approach to the draft instrument and to facilitate the work of the Working Group, its earlier proposal (contained in document A/CN.9/WG.III/WP.25) would be withdrawn to favour the adoption of a limited network system in article 8 of the draft instrument. Italy and the Netherlands remained convinced that a uniform liability regime applicable throughout the door-to-door period of the carriage of goods would be the clearest and simplest solution, but had realized, based upon the debate at the eleventh session of the Working Group, that such a solution would not obtain sufficient support.

21. The Working Group heard that Italy and the Netherlands would support the proposal of the United States with respect to scope of application and performing parties (as it appeared in section I of document A/CN.9/WG.III/WP.34), subject to some minor changes. It was proposed that the first change should be that the provisions of the draft instrument apply from the time the goods are taken over by the carrier to the time of their delivery to the consignee, subject to the limited network exception contained in article 8 of the draft instrument, and that the reference to national law that appeared in square brackets in that draft provision should be deleted. It was suggested that such deletion was necessary to avoid the danger that international law could be superseded by national law. The second change suggested was that in addition to the carrier, the provisions of the draft instrument should also apply to those performing parties that operate in the port areas, which were referred to as “maritime performing parties”, for which a definition would be required. The third suggestion was that the provisions of the draft instrument should not apply to performing parties that are not maritime performing parties. The fourth suggestion was that all of the provisions of the draft instrument that make reference to performing parties should be reviewed so that in those provisions relating to the liability of the carrier for acts or negligence of performing parties (e.g. draft articles 14(2) and 15(3)) reference should continue to be made to performing parties generally, whether maritime or not, while in those provisions that relate to the obligations and the liability of performing parties, reference should only be made to maritime performing parties. Amongst others, it was suggested that draft articles 15(1) and 15(4) should be revised to create a direct cause of action against maritime performing parties only. Similarly, it was suggested that the “Himalaya” protection of article 15(5) should be extended to maritime performing parties only.

22. By way of general presentation of working paper A/CN.9/WG.III/WP.34, the Working Group heard that the intention of the proposal was to begin shaping the basic structure of the draft instrument now that the Working Group had completed

an initial review of possible provisions. It was stated that the working paper was intended to address the likelihood that creating a uniform liability regime would not be possible, and to present an overall package of compromises reached amongst competing interests in the industry. It was felt that the package represented both the highest level of uniformity that was achievable and a significant improvement over the current system.

23. With specific reference to section I of document A/CN.9/WG.III/WP.34 ("Scope of application and performing parties"), the Working Group heard that, in keeping with the overall proposal (which was referred to by its proponents as a "compromise position"), support was given to door-to-door coverage of the draft instrument on a limited network basis as currently set out in the draft instrument. However, it was recommended that the treatment of performing parties be altered so that only maritime performing parties, generally those who would have been covered in a port-to-port instrument, such as stevedores and terminal operators, and ocean carriers would be covered by the draft instrument. Non-maritime performing parties, such as inland truck and railroad carriers or warehouses outside of the port area, would be specifically excluded from the liability regime of the draft instrument. However, non-maritime performing parties would still be considered performing parties under the draft instrument because the contracting carrier would be responsible for their acts or negligence. It was further explained that it was felt that under this proposed regime, reference to "national law" in article 8 of the draft instrument would be inappropriate and unnecessary to protect the current liability regime applicable to inland carriers, and that the liability of inland performing parties would be based on existing law, whether that be a regional unimodal convention or mandatory or non-mandatory domestic law, which may include tort. Automatic "Himalaya clause" protection would extend only to those performing parties who assumed liability under the draft instrument (i.e. to maritime performing parties only), and the ability of inland performing parties to rely on a "Himalaya clause" would be subject to their existing rights to do so under applicable national law. In response to a question, it was acknowledged that this proposal did not solve any existing problems for inland performing parties under current applicable national law, but that inland performing parties would be left in exactly the same position with respect to liability in which they were currently.

24. Strong support was expressed for the general principles and "compromise position" set out in section I of document A/CN.9/WG.III/WP.34. While some potential adjustments were suggested as, for example, with respect to the treatment of maritime performing parties in a non-Contracting State, it was strongly felt that the approach was the best one possible in the circumstances. Minority views were also expressed that the draft instrument should cover inland carriers and that a uniform liability system should still be considered.

25. While there was general support for the creation of different regimes for maritime and non-maritime performing parties, it was proposed that a reference to national law be kept in article 8(b), and it was suggested that this reference could be qualified by referring to national mandatory law that is similar to or based upon existing conventions. It was stated that the proposal in section I of document A/CN.9/WG.III/WP.34 did not solve all problems that a specific reference to national law would solve, since, for example, without a reference to national law in article 8(b), it would not be possible for the owner of goods to sue a contracting

carrier on the basis of the national law governing the carriage of goods by road. It was also stated that if inland carriers were left out of the scope of the draft instrument, it could not be assured that claims against inland carriers would be available under the applicable national law, and that this would be detrimental to shippers. It was suggested that shippers could potentially enjoy greater recovery for claims under national law given the generally lower liability limits under maritime conventions, but it was pointed out that this was not necessarily the case, particularly with respect to the "per package" limitation rules contained in maritime conventions, coupled with the amount of container traffic and the incidence of high value/low weight goods. As a further qualification to the reference to national law, it was suggested that only mandatory national regimes that created better protection for owners of goods would prevail over the draft instrument. Some support was expressed for the position that a reference to national law should be maintained in article 8(b), although concern was raised with respect to this proposal in light of the Working Group's intent to create as uniform a regime as possible under the draft instrument. Further, with respect to the proposed qualifications of the reference to national law, concern was expressed regarding what criteria would be used to decide whether national laws would meet the proposed qualification requirements under article 8(b), and whether this would increase the level of uncertainty in the scope of application.

26. It was suggested that the treatment of performing parties under the draft instrument and the possible reference to national law in article 8(b) were two separate matters that were not necessarily linked. It was suggested that the liability of the contracting carrier was the key aspect of article 8, which in turn had two aspects, that of recourse action under article 8 and that of conflicts with other international conventions. In response, it was suggested that there was a substantial or pragmatic link between article 8 and the treatment of performing parties. It was explained that the proposal in section I of document A/CN.9/WG.III/WP.34 was very clearly dependent on the acceptance of both the exclusion of non-maritime performing parties from the liability regime under the draft instrument, and the deletion of the reference to national law in article 8(b), since the exclusion of inland carriers was intended to render the reference to national law unnecessary.

27. The Working Group was almost unanimous in support of the exclusion of non-maritime performing parties from the liability regime of the draft instrument as set out in section I of A/CN.9/WG.III/WP.34. In addition, there was strong support in favour of the second aspect of that proposal in deleting the reference to national law in article 8(b). One delegation expressed the view that there was no reason to exclude land carriers from the draft instrument. While a provisional decision was made to retain the reference to national law in article 8(b) in square brackets pending a final decision to be made at a future session, it was strongly felt that deletion of the reference to national law was a necessary component to the overall proposal. The Working Group took note of the fact that the proposal in section I of document A/CN.9/WG.III/WP.34 should be regarded as a single package, including both the exclusion of non-maritime performing parties from the liability regime and the deletion of the reference to national law in article 8(b).

(b) Definitions of "maritime performing party" and "non-maritime performing party"

28. The Working Group proceeded with a consideration of the definition of maritime and non-maritime performing parties. The Working Group heard proposals

for possible definitions of "maritime performing party" and "non-maritime performing party", and for adjustments to the existing definition of "performing party" set out in article 1(e) of the draft instrument.

29. The definitions proposed were as follows:

> "(e) 'Performing party' means a person other than the carrier that physically 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 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' includes maritime performing parties and non-maritime performing parties as defined in subparagraphs (f) and (g) of this paragraph but 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) 'Maritime performing party' means a performing party who performs any of the carrier's responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] and their departure from the port of discharge [or final port of discharge as the case may be]. The performing parties that perform any of the carrier's responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading shall be deemed not to be maritime performing parties."
>
> "(g) 'Non-maritime performing party' means a performing party who performs any of the carrier's responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge."

30. By way of presentation, the Working Group heard that two approaches had been envisaged in creating the definitions, namely, a functional approach and a geographical approach. The geographical approach had been chosen as the simpler of the two. It was proposed that the geographical area for the definition could be the "port", although it was conceded that a definition of "port" could pose considerable difficulties, and would likely be defined with reference to national law. A further caveat added by the proponents of the definitions was that the final sentence of the proposed definition of "maritime performing party" was intended to deal with the situation where a maritime leg of the carriage was followed by a land leg, which was in turn followed by another maritime leg, but that this phrase would require refinement.

31. There was general agreement in the Working Group that these definitions were a good basis for continuing the discussion on how to define maritime and non-maritime performing parties. There was general agreement that a geographical approach to the definition was appropriate, and there was support for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, as, for example, in the case of a movement by truck from one dock to the next. However, a widely shared view was that movement between two physically distinct ports should be considered as part of a non-

maritime performing party's functions. It was suggested that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. A caveat was raised that experience under national law in some States indicated that the application of the geographical approach (while generally appropriate), was likely to generate substantial litigation. It was suggested that the draft definition could clarify the situation where non-maritime performing parties carried out some of their activities in a port area, as, for example, in the loading of a truck for movement of the goods outside of the port. It was proposed that this clarification could be achieved by indicating that performing parties were those who carried out the carrier's obligations in connection with the sea carriage. In response, it was noted that "performing parties" under the definition contained in draft article 1(e) were already qualified as those parties who carried out core functions pertaining to the carrier. It was suggested that it was slightly unclear whether the definition of a maritime performing party also concentrated on these core functions.

32. A second area of discussion concerned whether the phrase "or undertakes to perform" should be included in the draft definition. Support was expressed for the inclusion of this phrase and the deletion of the square brackets around it, since it was suggested that inclusion of the phrase would appropriately take the interests of claimants into account by recognizing a direct cause of action against each party in what could be a very long chain of subcontracts. An opposing view suggested that the inclusion of the phrase "or undertakes to perform" could cause problems in practice, since the performing party who simply undertook to perform would be responsible to the carrier, but that it would be difficult for the shipper to ascertain the facts and determine against whom the action should be taken. The Working Group decided that the inclusion or exclusion of the phrase "or undertakes to perform" could be decided at a later stage, in conjunction with an analysis of the existing definition of "performing party" in article 1(e) of the draft instrument (see paras. 34 to 42 below) and in view of the overall balance for cargo liability in the draft instrument.

33. Another concern raised was whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole. As a matter of drafting, it was suggested that the phrase "first port of loading" be changed to "next port of loading" in the proposed paragraph (f).

(c) Definition of "performing party" in article 1(e)

34. In addition to the definition proposed in paragraph 29 above, the Working Group considered the text of draft article 1(e), which read as follows:

> "(e) 'Performing party' means a person other than the carrier that physically 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 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."

35. By way of introduction, the Working Group heard that article 1(e) had not changed significantly in the redraft of the draft instrument, and that the historical aspect of the discussion could be found in the footnotes to article 1(e). It was also stated that the footnotes contained alternative language to that presented in the text of article 1(e) (see A/CN.9/WG.III/WP.32, footnotes 8-10).

36. With a view to broadening the definition of "performing party", it was suggested that the square brackets around the phrase "undertakes to perform" should be removed. The Working Group was reminded that the relevance of the definition was to establish that the contracting carrier would be liable for the errors, faults, and omissions of performing parties in general. It was stated that the narrower definition resulting from deleting the phrase in square brackets would allow performing parties who undertake to perform and then who either do not perform or delegate that performance to another party to escape liability. Further, it was suggested that it would be inappropriate to subject those who undertake to perform and do not perform at all to a lower standard than those who undertake to perform and fail in their attempted performance. In response to concerns that so-called "paper carriers", or those who do not actually perform the carriage, should not be held responsible based on their undertaking to carry, it was suggested that the language of the definition would simply allow a direct action against the performing party who was at fault, and that it would avoid a multiplicity of actions in working through the chain of contracts to get to the same party. It was also suggested that failure to include the phrase in the definition could allow for the linkages in the chain of contracts to be broken. For these reasons, strong support was expressed for the inclusion of the phrase "or undertakes to perform". It was suggested that this proposal should be further clarified to exclude remote defendants by inserting into the phrase the word "physically", so that the performing party would have to "undertake to perform physically". While it was suggested that it was implicit that those who undertook to perform with respect to the contract of carriage undertook to do so physically, there was also strong support expressed for this refinement of the original proposal.

37. Concern was expressed by some delegations that the draft instrument should not cover performing parties at all. In addition, the concern was again raised that the phrase "or undertakes to perform" would make it difficult for the shipper to identify all of those parties whom the contracting carrier had engaged to perform some aspect of the carriage, and that the contract would be between the performing party and the contracting carrier. It was suggested that inclusion of the phrase might create a multiplicity of actions against performing parties that would not necessarily be the proper defendants, which would result in no improvement over the situation where the shipper would simply bring action against the performing carrier and the contracting carrier. In addition, it was felt that inclusion of the phrase in the definition would violate the concept of privity of contract between the shipper and the contracting carrier.

38. Concern was also expressed regarding the limitation of the definition to those persons other than the carrier that perform "any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods", since it was felt that the definition should include all of the functions of the

carrier rather than only those listed. It was also suggested that there was a potential anomaly in the definition, since in some cases the carrier could be performing the loading or discharging of the goods on behalf of the shipper, yet the definition referred to persons performing "at the carrier's request or under the carrier's supervision or control".

39. Further concern was expressed that the inclusion of the phrase "undertakes to perform" made the definition too broad. In response to this and to a question whether the interaction of this definition and the period of responsibility in article 7 could mean that the performing party who failed to pick up the goods would be liable when the contracting carrier would not be liable, the Working Group heard that the period of responsibility of the performing party and of the carrier was intended to be the same, and that the liability of the performing party in his role as performing party would never be wider than the contracting carrier's responsibility as contracting carrier. In addition, it was stated that the notion of undertaking physical performance would clarify the intended narrower scope of the definition. Another potential difficulty with the definition was raised in the situation where certain ports require that port operations are undertaken by administrative authorities.

40. The Working Group was urged to bear in mind the two separate aspects of the issue of performing parties: that of liability for the performing party, and that of liability of the performing party. It was suggested that these issues might be better dealt with in a substantive provision such as draft article 15 on the liability of performing parties, rather than in a definition. It was felt by some delegations that this definition of "performing party", while adequate in general terms for the moment, might have to be revisited in the context of a discussion of draft article 15.

41. Two matters with respect to the definition were clarified. First, it was emphasized that the definition should not include an employee or agent as a performing party. In addition, it was observed that if the Working Group decided to exclude non-maritime performing parties from the application of the draft instrument, language along the lines of the proposed definition in paragraph 29 above including both maritime performing parties and non-maritime performing parties would have to be included in this general definition in article 1(e).

42. The Working Group made a provisional decision that the phrase "undertakes physically to perform" should be included in the definition without square brackets in order to both broaden the definition and clarify its limits in terms of physical performance pursuant to the contract of carriage. The Working Group asked the Secretariat to consider adding an inclusive phrase, such as "among others", "inter alia" or a reference to "similar functions", to the list of the carrier's functions, and to consider shortening the definition, among other possibilities by deleting the phrase "regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage" as noted in footnote 8 of the revised draft instrument (A/CN.9/WG.III//WP.32).

2. Scope of application and localized or non-localized damage (draft article 18(2))

43. The text of draft article 18(2) as considered by the Working Group was as follows:

"[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, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.]"

44. By way of introduction, the Working Group was reminded that article 18(2) was a new provision in the draft instrument, and that further alternative texts had been proposed (see A/CN.9/WG.III/WP.32, footnote 93).

45. It was stated that a key question with respect to article 18(2) was whether it was advisable to use the same limits of liability in the case of non-localized damage as in the case of localized damage, or whether regard should be had to the other possible limits that might apply with a view to choosing the highest one. It was also stated that a key question was whether it was appropriate to have a specific liability limit for non-localized damage. It was suggested that those issues would be difficult to decide until the limits of liability in article 18(1) had been chosen, and that if the "per kilogram" limit decided upon for article 18(1) by the Working Group was at the same level as that in the Hague-Visby Rules, it might be appropriate to look to unimodal transport conventions in order to select a higher limit for non-localized damage. In addition, it was suggested that regard to national mandatory provisions could also be had, particularly if the scope of application of the draft instrument was very broad and potentially encompassed long inland transport legs. Caution was expressed, however, that certain mandatory national provisions might have no liability limit at all, and that consequently, it might not be appropriate to look to national law in this regard. It was also pointed out that different liability limits for localized damage and non-localized damage had been used in other instruments, for example in the 1980 Convention on International Multimodal Transport of Goods which contained a similar provision on localized damage, as did the UNCTAD/ICC Rules. For these reasons, it was proposed that article 18(2) should be maintained in the draft instrument.

46. A series of alternative proposals were presented with respect to maintaining article 18(2) in the draft instrument. It was suggested that article 18(2) should be maintained in the draft instrument but kept in square brackets, and that as a matter of drafting, the phrase "international and national mandatory provisions" should be changed to "international or national mandatory provisions". A further refinement suggested was to keep article 18(2) in square brackets pending the insertion of liability limits in article 18(1), but to insert square brackets around the phrase "and national mandatory provisions" in order to mirror the current text in article 8. Another alternative suggested was that article 18(1) could establish the specific liability limit for localized damage, while article 18(2) could establish a second specific liability limit for non-localized damage without any reference to other liability limits in international and national mandatory provisions. There was some support for each of these alternative proposals.

47. There was strong support for the deletion of article 18(2). The Working Group was reminded that the greater the number of exceptions that were created to the broad application of the draft instrument, the more it could undermine the goals of predictability and uniformity. It was suggested that in order to achieve the maximum degree of uniformity possible, the limited network exception in article 8 should be kept as narrow as possible, and the application of article 8 would

adequately cover the concerns expressed with respect to non-localized damage. It was further stated that article 18(2) was a repetition of the principle set out in article 8 with respect to localized damage but with a different allocation of the burden of proof. However, it was also suggested that article 8 and article 18(2) were not incompatible. In addition, it was reiterated that the liability limits in the Hague-Visby Rules were often much higher in practice than might appear at first sight, and that given the volume of container traffic and the "per package" liability limit set out therein, they were often much higher than those in the unimodal transport regimes where the liability limits for recovery were based only on weight. The Working Group was also reminded that it had decided that the emphasis in the draft instrument was appropriately placed on the maritime leg, and it was suggested that it was in keeping with this approach that the liability limit for non-localized damage should be that set out for the maritime leg of the transport.

48. With respect to the burden of proof in the case of non-localized damage, it was stated that if the liability limit was low, a carrier might not even attempt to prove where the damage occurred so as to limit a claimant's recovery to a lower liability limit. In response, it was stated that carriers would be very interested in establishing where the damage occurred so that they could bring recourse action against the subcontractor who was responsible for the damage.

49. In support of the deletion of article 18(2), the Working Group was warned against drawing an artificial distinction between localized and non-localized damage, since the cargo in issue was intended to be maritime cargo, regardless of which leg of the transport it was on, and that the risks would thus be the same, the values of the cargo would be the same, the parties involved would be the same, and the essence of which party insured the goods for what amount would also be the same. It was pointed out that the purpose of liability limits was closely connected to the liability system itself, and that they were part of the overall balance of the liability regime. It was suggested that it might not be appropriate to upset this regime simply because damage might occur outside of the sea leg. However, the importance of draft article 18(2) was emphasized, based on the view that damage to cargo was usually non-localized and that the apparent exception set out in article 18(2) risked becoming the rule, particularly since damage was often discovered only when the container was opened by the consignee, notwithstanding that some ports were capable of photographing containers to ascertain external damage.

50. The Working Group took note that opinions were fairly evenly divided between those who favoured the deletion of draft article 18(2) in its entirety, and those who favoured retaining it. Those in favour of deletion held that position firmly. However, some of those who favoured maintaining the provision for the moment did so with a number of nuances. Having noted the positions expressed during the discussion with respect to draft article 18(2), the Working Group decided that it would be appropriate to maintain the draft article in square brackets pending the decision of the Working Group on the liability limit set forth in draft article 18(1).

3. Scope of application: definition of the contract of carriage and treatment of the maritime leg (draft articles 1(a) and 2)

51. The text as of draft article 1(a) as considered by the Working Group was as follows (see A/CN.9/WG.III/WP.32):

> "(a) 'Contract of carriage' means a contract under which a carrier, against payment of freight, undertakes to carry goods **wholly or partly** by sea from one place to another".

52. The text of draft article 2 as considered by the Working Group was as follows (see A/CN.9/WG.III/WP.32):

> "1. *Variant A of paragraph 1*
>
> Subject to paragraph 3, this instrument applies 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 specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or
>
> (b) the place of delivery 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]
>
> (e) the contract of carriage provides that this instrument, or the law of any State giving effect to it, is to govern the contract.
>
> *Variant B of paragraph 1*
>
> Subject to paragraph 3, this instrument applies to all contracts of carriage of goods by sea 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]

(e) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, 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.

Variant C of paragraph 1

Subject to paragraph 3, this instrument applies to all contracts of carriage in which the port of loading and the port of discharge are in different States if

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

(b) the 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]

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

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

"3. This instrument does not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

"4. Notwithstanding paragraph 3, 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. If a contract provides for the future carriage of goods in a series of shipments, this instrument applies to each shipment to the extent that paragraphs 1, 2, 3 and 4 so specify."

(a) General discussion regarding the three variants of draft article 2(1)

53. It was recalled that Variant A was based on the original text of the draft instrument, which did not distinguish between the various modes of transport that might be used for carrying the goods to determine the sphere of application of the

draft instrument. Variant B was meant to emphasize that the scope of the draft instrument should be defined by reference to maritime transport, with possible extensions inland, provided that the goods, during the sea voyage, were unloaded from the means of transport with which the land segment of the carriage was performed. The effect of Variant B was to exclude the application of the draft instrument, for example where goods were carried by road and the trailer in which they were contained had been loaded onto a ship during a maritime segment of the overall carriage. Variant C was intended to emphasize the maritime nature of the draft instrument by establishing that it should only apply to those carriages where the maritime leg involved cross-border transport (see A/CN.9/WG.III/WP.32, footnotes 27, 31 and 35).

54. Limited support was expressed for Variant B. It was stated that a distinction based on whether or not the goods had been unloaded from their original means of transport appeared somewhat outdated. For example, in the context of containerized transport, goods would often be downloaded or uploaded without such operations requiring or justifying a change in the legal regime applicable to the cargo. It was observed that the purpose of Variant B was mainly to raise the issue of possible conflicts between international conventions covering different modes of transport. The Working Group decided that such possible conflicts should be dealt with not in the context of the provision establishing the sphere of application of the draft instrument but in the provisions of chapter 18, in particular draft articles 83 and 84, which were directly intended to deal with the relationship between the draft instrument and other conventions. In the context of that discussion, doubts were expressed as to whether draft articles 83 and 84 adequately covered the issue of potential conflicts of conventions. It was also pointed out that the relationship between the draft instrument and other transport conventions would largely depend on the liability limits that would be established in draft article 18. The continuation of that discussion was postponed until the Working Group had reached a common understanding regarding the scope of the draft instrument.

55. Considerable support was expressed in favour of Variant A. Among the reasons given for avoiding to focus on any specific mode of transport in the definition of the sphere of application of the draft instrument, it was stated that the scope of the draft instrument should be as broad as possible and avoid relying on technical notions such as “port”, the definition of which might be difficult to agree upon. In that context, it was generally agreed that the draft instrument should cover carriage of goods not only from “ports” traditionally located on the coast of a State but also from offshore terminals in the high sea and even from oil rigs located in the exclusive economic zone of a State, outside its territorial waters.

56. The prevailing view, however, was that the focus of the draft instrument on maritime transport should be reflected in the provision establishing its sphere of application. It was pointed out that the acceptability of the draft instrument might be greater if its scope made it clearly distinguishable from a purely multimodal transport convention. The initial draft of the instrument had attempted to establish such a distinction simply by stating that the draft instrument was intended to cover door-to-door transport involving a sea leg. However, it was agreed by most delegations that a further restriction to the scope should be introduced by establishing that the draft instrument would apply to door-to-door carriage of goods,

whether unimodal or multimodal, provided that such carriage involved a sea leg and that such sea leg involved cross-border transport.

(b) Draft articles 1(a) and 2(1)

57. Having decided on the general policy that the draft instrument should cover door-to-door carriage of goods, whether unimodal or multimodal, provided that such carriage involved a sea leg and that such sea leg involved cross-border transport, the Working Group proceeded with the implementation of that policy, which could be envisaged either in the "Scope" provision or in the definition of "contract of carriage" (or possibly in both provisions).

58. With respect to subparagraphs (a) to (e) of paragraph 1 of draft article 2, general support was expressed for the deletion of subparagraph (d). As noted during the ninth session of the Working Group, it was widely held 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 (see A/CN.9/510, para. 34).

59. No final decision was made on the text of subparagraph (c), currently between square brackets. It was decided that the text should be maintained between square brackets for continuation of the discussion at a future session.

60. A suggestion was made to improve on the text of subparagraph (e) to extend the benefit of the "paramount clause" by replacing at the beginning of the draft provision the words "the contract of carriage" by the words "the contract of carriage or any related contract" or the words "the contract of carriage or any contract related to the execution of the contract of carriage". The Working Group took note of that suggestion.

61. The Working Group requested a small drafting group composed of several delegations to prepare wording based on a combination of Variants A and C, and designed to implement the policy regarding the sphere of application of the draft instrument. A first proposal made by the small drafting group was as follows:

"Article 1(a)

"Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place in one State to a place in another State and may include carriage by other [mode] [means] of carriage preceding or subsequent to the carriage by sea.

"Article 2

"Subject to paragraph 3, this instrument applies to all contracts of carriage 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 provides that this instrument, or the law of any State giving effect to it, is to govern the contract."

62. While the proposal by the small drafting group was generally regarded as an improvement and a step towards achieving consensus over the sphere of application of the draft instrument, several concerns were expressed. One concern was that the proposed text might inappropriately exclude from the scope of the draft instrument those contracts that did not specify or imply that the carriage would be undertaken by sea but left it open whether part of the carriage would be undertaken by sea, or which part of the carriage would be carried out by sea. For example, carriage from Vancouver to Portland would be outside the scope of the draft instrument unless it had been specified in the contract that the goods would initially travel from Vancouver to Seattle by sea. In addition, under the proposed wording, carriage from Vancouver to Hawaii through Seattle would also be outside the scope of the draft instrument unless it had been specified in the contract that the goods would initially travel from Vancouver to Seattle by sea. The sea leg from Seattle to Hawaii alone would not meet the requirement that the sea leg should involve cross-border transport. A more general concern was raised that, since the draft instrument was intended not only to cover certain aspects of multimodal carriage but also to replace the existing unimodal regime governing the international carriage of goods by sea, there should be no ambiguity regarding the applicability of the draft instrument to maritime transport.

63. Various drafting suggestions were made to alleviate the above concerns. One suggestion was to add the words "expressly or impliedly" after the word "undertakes" in the proposed definition of "contract of carriage". That suggestion was intended to achieve a purely legal definition of the contract of carriage that would require no investigation regarding the actual routing of the goods to determine the applicability of the draft instrument. However, it was generally found that such drafting would be insufficient to address the concerns expressed regarding the scope of the draft instrument. It was also found that such wording might increase the risk for conflicts between unimodal transport conventions.

64. Another suggestion was that wording should be added to the proposed definition of the contract of carriage to the effect that, where the contract did not expressly or impliedly refer to a mode of transport and the voyage for which a given mode would be used, a contract of carriage would be covered by the draft instrument where it could be shown that the goods had actually been carried by sea.

65. Yet another suggestion was that the placement of the words "by sea" in the definition of "contract of carriage" might need to be reconsidered.

66. A further concern was expressed that the proposed definition of "contract of carriage" might be too broad in that it might include certain types of contracts (such as contracts for "slots" on-board vessels under charter parties) that should not be covered by the draft instrument. Based on that concern, a suggestion was made that, in order to be regarded as a "contract of carriage" under the draft instrument, a contract should be evidenced "by a transport document or an electronic record". That suggestion was not adopted by the Working Group. It was generally felt that

certain contracts of carriage not evidenced by a transport document (for example, in the context of short sea traffic) might need to be covered by the draft instrument and that the issue of the exclusion of charter parties from the scope of the draft instrument should be dealt with separately.

67. After discussion, the Working Group decided to continue its deliberations based on the proposal by the small drafting group. Although some support was expressed for maintaining Variant A as a possible alternative, the prevailing view was that all three variants should be deleted from the future revised version of the draft instrument. The small drafting group was requested to prepare a revised proposal, reflecting the views and concerns expressed in respect of its first proposal.

68. The second proposal prepared by the small drafting group was as follows:

"Article 1. Definitions

"For the purpose of this instrument:

(a)[(i)] Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place [port] in one state to a place [port] in another state; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.

[(ii) A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage under paragraph (i), provided that the goods are actually carried by sea.]"

"Article 2. Scope of application

Subject to paragraph 3, this instrument applies to all contracts of carriage 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 provides that this instrument, or the law of any State giving effect to it, is to govern the contract."

69. The discussion focused on the definition of "contract of carriage". Regarding the use of the word "place" or "port" in subparagraph (i), preference was expressed for the word "port" in view of its maritime connotation. However, in view of the difficulties anticipated in the definition of "port", the prevailing view was that the more neutral word "place" could be used, in view of the focus on the sea carriage being expressed throughout the draft provision. As a matter of drafting, it was suggested that the second phrase in subparagraph (i) might read as follows: "In

addition, such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after such international carriage by sea."

70. A more fundamental concern was raised with respect to the drafting of both the definition of "contract of carriage" and the provision establishing the sphere of application of the draft instrument. It was stated that the definition of the contract of carriage should be limited to describing the substantive obligations under a contract of carriage (a contract under which a carrier against payment of freight undertakes to carry goods from a place in one State to a place in another State) and providing an indication that such carriage should comprise a maritime leg. It was also stated that the test of internationality established to trigger the application of the draft instrument should be dealt with not in the definition of "contract of carriage" but exclusively in the provision dealing with the scope of the draft instrument. Therefore, it was suggested that the notion that the sea leg should take place between two different States should be expressed in draft article 2, together with the remainder of the test of internationality set forth by the draft instrument. The Working Group took note of that concern.

71. With respect to subparagraph (ii), divergent views were expressed. One view was that the draft provision was necessary and should be further improved, possibly through the addition of an indication that the option to carry the goods by sea could be either expressly stated or implied in the contract. It was also suggested that the words "shall be deemed" should be replaced by "may be deemed".

72. Another view was that subparagraph (ii) should be deleted, as a possible cause for conflict with other conventions. For example, if the contract stipulated that the carriage should be "by air" and the goods were actually shipped by sea, both the draft instrument and the Warsaw Convention could apply. It was pointed out that the draft instrument should not be open to misuse by a carrier who might have shipped goods by sea in breach of its contractual obligations. As to the situation where the mode of transport was not specified in the contract, it was stated that it could be addressed by courts and that commercial parties should be encouraged to avoid such uncertainty in the contracts they entered into. As another objection to the text of subparagraph (ii), it was stated that the text was likely to introduce a confusion between contracts of carriage and freight forwarding contracts.

73. Yet another view was that the substance of subparagraph (ii) could be further discussed in the context of the provisions dealing with liability under the draft instrument. While it was generally felt that the text of subparagraph (ii) might need considerable redrafting, it was also felt that the draft instrument should provide for the situation where no specific mode of transport had been stipulated in the contract. Among various possibilities for redrafting subparagraph (ii), it was suggested that article 18(4) of the Montreal Convention might provide a useful model.

74. After discussion, the Working Group decided that the second proposal by the small drafting group should be kept for continuation of the discussion at a future session, subject to the relocation of subparagraph (ii) in square brackets outside of the definition of "contract of carriage" in article 1(a). The Secretariat was requested to prepare a revised draft, with possible variants, to reflect the various views and concerns expressed.

75. After the closure of discussion, another proposal for alternative wording for article 1(a) was made.*

(c) Draft article 2(2)

76. The Working Group found the substance of paragraph (2) to be generally acceptable.

(d) Draft article 2(3)

77. There was broad agreement in the Working Group that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. Such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law.

78. Diverging views were expressed as to the best legislative technique to be used in excluding those contracts that should not be covered on a mandatory basis by the draft instrument. One view was that the traditional exception regarding charter parties should be maintained in the provision dealing with the scope of the draft instrument. It was suggested that such a traditional exception should be complemented by a treatment of specifically identified types of contracts in respect of which the provisions of the draft instrument should not be mandatory. However, it was also suggested that such contracts should not be dealt with in draft article 2 but in chapter 19 dealing with freedom of contract. Pursuant to that view, it was suggested that the references to "contracts of affreightment, volume contracts, or similar agreements" currently between square brackets should be moved to chapter 19, with the possible addition of a reference to "ocean liner service agreements (OLSAs)". It was recalled that document A/CN.9/WG.III/WP.34 contained detailed explanations regarding the practice of OLSAs and the reasons for which they should be excluded from the scope of the draft instrument. As to the possible inclusion of a definition of OLSAs, the following was proposed:

> "(a) An "Ocean Liner Service Agreement" is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or a performing party receives the goods, between one or more shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels

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* "Article 1(a)

"Contract of carriage means a contract under which a carrier against the payment of freight undertakes to carry goods from a place in one state to a place in another state if:

(i) the contract includes an undertaking to carry the goods by sea from a place in one state to a place in another state; or

(ii) the carrier may perform the contract at least in part by carrying the goods by sea from a place in one state to a place in another state, and the goods are in fact so carried.

In addition, a contract of carriage may also include an undertaking to carry goods by other modes prior to or after the international carriage by sea."

used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo.

"(b) For purposes of paragraph (a), a "meaningful service commitment" is a service commitment or obligation not otherwise mandatorily required of a carrier under this Instrument.

"(c) For purposes of paragraph (a), a "liner service" is an advertised maritime freight transport service using vessels for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports.

"(d) An Ocean Liner Service Agreement does not include the charter of a vessel or the charter of vessel space or capacity on a liner vessel."

79. Another view was that paragraph (3) should be deleted and that the issue should be dealt with in the provisions of the draft instrument dealing with freedom of contract. In favour of avoiding a list of individual contracts to be excluded from the scope of the draft instrument, it was explained that such a list might be extremely difficult to agree upon. For example, in respect of charter parties, which were traditionally excluded from the scope of international conventions governing the carriage of goods by sea, it was stated that it might prove impossible to reach a common understanding as to the legal nature of a charter party and the manner in which such a document might be incorporated in subsequent contracts of carriage. It was stated that the dilution of the notion of "charter party" since 1924 (and the legal uncertainty in that regard) had only increased with the modernization of trade practices, a reason for which that notion should no longer be used in efforts to harmonize the law of international trade. Related notions such as "contracts of affreightment, volume contracts, or similar agreements" were described as even more imprecise and difficult to define than charter parties. Pursuant to that view, it was suggested that no attempt should be made to define such contracts in the draft instrument. Instead, it was suggested that the Working Group should focus on the preparation of a general standard establishing the conditions under which a contract might be regarded as "freely negotiated", in which case the provisions of the draft instrument should apply only as suppletive rules.

80. The Working Group expressed broad support for the idea that further attempts should be made to defining sets of criteria to be applied when determining the mandatory application of the draft instrument. Instead of defining types of contracts to be excluded from the application of the draft instrument, it might be easier to define situations where it would be inappropriate for the draft instrument to apply mandatorily. The following were described as situations where freedom of contract should prevail: the situation where a contract is freely negotiated; the situation where the focus of the contract is on the use of the vessel and not on the carriage of goods; the situation of non-liner trade; and the situation where the object of the chartering is the whole or a large part of the vessel. It was acknowledged that, even if such criteria could be devised, a margin of uncertainty to be decided upon by courts was unavoidable.

81. Yet another view was that, while the freedom of contract might need to receive broad recognition under the draft instrument, the mandatory nature of the instrument should be made clear in respect of third parties, where such third parties held rights under the draft instrument.

82. After discussion, the Working Group requested the Secretariat to prepare a revised draft, with possible variants, to reflect the above views and suggestions to the extent possible.

(e) Draft article 2(4)

83. Subject to possible reconsideration of the placement of paragraph (4) after discussion of chapter 19, the Working Group found the substance of the draft provision to be generally acceptable. It was decided that the words "[contract of affreightment, volume contract, or similar agreement]" should be retained in square brackets for further discussion. The Working Group took note of suggestions for possible improvement of the text. One suggestion was to add the words "or the consignee" at the end of the paragraph. Another suggestion was to delete the reference to "negotiable" transport document or electronic record to cover also the case where a non-negotiable document or electronic record had been issued.

(f) Draft article 2(5)

84. Subject to possible reconsideration of the placement of paragraph (4) after discussion of chapter 19, the Working Group found the substance of the draft provision to be generally acceptable.

4. Exemptions from liability, navigational fault, and burdens of proof (draft article 14)

(a) Paragraphs 1 and 2 of draft article 14

85. The text of draft article 14(1) and (2) as considered by the Working Group was as follows:

"Article 14. Basis of liability

"*Variant A of paragraphs 1 and 2*

"1. The carrier 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, unless the carrier proves that neither its fault nor that of any person referred to in article 15(3) caused or contributed to the loss, damage or delay.

"2. Notwithstanding paragraph 1, if the carrier proves that it has complied with its obligations under chapter 4 and that loss of or damage to the goods or delay in delivery has been caused [solely] by one of the following events [it 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] that loss, damage or delay] [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].

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

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

"(c) Act or omission of the shipper, the controlling party or the consignee;

"(d) Strikes, lockouts, stoppages or restraints of labour;

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

"(f) Insufficiency or defective condition of packing or marking;

"(g) Latent defects not discoverable by due diligence;

"(h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

"(i) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13(2) when the goods have become a danger to persons, property or the environment or have been sacrificed;

"*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] the loss, damage or delay], and

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

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

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

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

"(c) Act or omission of the shipper, the controlling party or the consignee;

"(d) Strikes, lockouts, stoppages or restraints of labour;

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

"(f) Insufficiency or defective condition of packing or marking;

"(g) Latent defects not discoverable by due diligence;

"(h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

"(i) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13(2) when the goods have become a danger to persons, property or the environment or have been sacrificed;

"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] the loss, damage or delay.

"*Variant C of paragraphs 1 and 2*

"1. The carrier 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.

"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) caused [or contributed to] 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] by one of the following events:

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

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

"(c) Act or omission of the shipper, the controlling party or the consignee;

"(d) Strikes, lockouts, stoppages or restraints of labour;

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

"(f) Insufficiency or defective condition of packing or marking;

"(g) Latent defects not discoverable by due diligence;

"(h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

"(i) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13(2) when the goods have become a danger to persons, property or the environment or have been sacrificed;

"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."

86. Information was provided to the Working Group that empirical data were being gathered with respect to the proposal in paragraphs 10 to 12 in A/CN.9/WG.III/WP.34 that the Hague-Visby liability limits should be maintained. It was suggested that the preliminary results of the analysis of containerized imports and exports to the United States, thought to be representative of the kind of goods that would be covered by the draft instrument, indicated that the average value of most cargo shipped was below the Hague-Visby per-package and weight limitations. Further analysis of this information was continuing with a view to presenting more refined results to the Working Group at its thirteenth session, and other delegations were encouraged to obtain relevant data from their domestic trade statistics for the information of the Working Group.

87. By way of general presentation of section III of A/CN.9/WG.III/WP.34 on exemptions from liability, navigational fault and the burdens of proof, the Working Group heard an explanation of the general approach taken. Paragraph 14 of A/CN.9/WG.III/WP.34 discussed whether the defences in draft article 14 of the draft instrument should be treated as exonerations or presumptions. It was suggested that in practice, there was no real difference between the two approaches since under the exoneration system, a carrier's right to rely on an exemption could still be lost if the cargo interests could prove the carrier's fault. It was proposed that the list of "excepted perils" in draft article 14 of the draft instrument should continue to be treated as exonerations in order to achieve greater predictability and uniformity in the application of the defences, given the substantial body of case law that had developed under the existing Hague and Hague-Visby approach. It was further suggested that with respect to the "excepted perils" themselves, the navigational fault defence should be eliminated and that the fire defence should be modified so as to accommodate the door-to-door nature of the draft instrument by limiting its operation to that of a maritime defence (see A/CN.9/WG.III/WP.34, paragraphs 13 and 16-17).

88. By way of further presentation, the Working Group heard the suggestion that a case for cargo damage was, in practice, a four-step process. In the first step, the cargo claimant was required to establish its prima facie case by showing that the cargo was damaged during the carrier's period of responsibility. In that first step, the cargo claimant was not required to prove the cause of the damage, and if no further proof was received, the carrier would be liable for unexplained losses suffered during its period of responsibility. In the second step, the carrier could rebut the claimant's prima facie case by proving an "excepted peril" under article IV.2 of the Hague and Hague-Visby rules, and that that peril was the cause of the damage to the cargo. In step three, the cargo claimant had the opportunity to prove that the "excepted peril" was not the sole cause of the damage, and that the carrier caused some of the damage by a breach of its duty to care for the cargo. Once the claimant had shown that there were multiple causes for the damage, the analysis proceeded to step four, in which liability for the damage was apportioned between the different causes. It was suggested that the first three steps of this approach had worked well since their inception in the Hague Rules, and that this general approach should be preserved in the draft instrument.

89. Finally, the Working Group was cautioned that the elimination of the exception based on navigational error could have unintended consequences. It was suggested that in most cases where goods were lost or damaged at sea, the claimant

would generally have a plausible argument that the carrier might have been able to reduce the loss by having made a different navigational decision, and that thus a navigational error had been made. Under the current law, that argument would not succeed because navigational error was listed as an "excepted peril". However, it was suggested that if navigational error was deleted from the list of "excepted perils", as the Working Group had decided it should be, and if the burden of proof was not accordingly adjusted, the carrier would have to prove the apportionment of the cause of the loss, which was considered to be virtually an "insuperable burden". The view was expressed that the practical result would be that the carrier would be fully liable in most cases for all of the damage when there was any navigational fault, and that it could render irrelevant the "excepted peril" provisions in most cases where the damage occurred at sea. (This issue is discussed further in paragraphs 127 and 129 below, regarding the burden of proof.)

90. The Working Group agreed to proceed with its examination of variants A, B and C of draft article 14 as set out in A/CN.9/WG.III/WP.32, first with a discussion on the general approach, next with a discussion of the "excepted perils", followed by a discussion on the burden of proof, and concluding with a discussion on concurrent causes of loss. Support was expressed for the general approach to draft article 14 outlined in paragraph 88 above. It was also suggested that the Working Group should, in its general discussion, decide on the preferred approach to the issue of the nature of the liability, be it strict or presumed fault or perhaps of another nature. Strong support was expressed for the view that the nature of the liability in draft article 14 should be based on presumed fault. In this regard, strong support was also expressed for the approach taken in the opening paragraph of variant A of draft article 14. In addition, the view was expressed that draft article 14 should not be examined in isolation, but that the balance of the allocation of risk between the parties should be looked at as a whole, and that draft article 13, with respect to the carrier's obligation of due diligence, should also be examined in this context. The Working Group was in general agreement with the approach that the carrier should be responsible for unexplained losses occurring during its period of responsibility, but that the carrier should then have an opportunity to prove the cause of the damage. In light of this general agreement, it was suggested that it was unnecessary to use potentially charged words such as "fault", "presumption" and "exoneration" in draft article 14, since they might be misinterpreted. A contrary view was expressed that the word "fault" need not be avoided, since it had been a part of the liability regime from the inception of the Hague Rules, and its meaning was unambiguous and not likely to cause confusion.

91. With respect to the discussion of variants A, B and C of draft article 14, strong support was expressed for variant A. The view was expressed that variant A was more in keeping with the classical approach to the liability of the carrier, and that it more clearly expressed that unexplained losses would remain the responsibility of the carrier. Certain refinements were suggested to the wording of variant A. One suggestion made was that paragraph 1 could be ended after the phrase "chapter 3", and the rest of the paragraph deleted. The view was also expressed that the reference to article 15(3) in variants A and C was misleading and redundant, and that it should be deleted. There was some support for this suggestion. Another suggestion in this regard was to replace the phrase "person referred to in article 15(3)" with the phrase "performing party". A further general suggestion was made that draft article 14 could follow the approach taken in

existing unimodal transport conventions and start with a basic liability rule, for example, along the lines of "the carrier is liable for loss or damage to the goods occurring during the custody of the goods", without a specific mention of fault, followed by a paragraph that set out the situations in which the carrier would be relieved from responsibility for the loss or damage.

92. Some support was expressed for variant B of draft article 14, particularly with respect to its treatment of the list of "excepted perils" as exonerations rather than presumptions. The suggestion was made that the overall approach of variant B was most like that in the Hague and Hague-Visby Rules, in that the carrier was not liable at all until the cargo claimant had proved that the loss occurred during the carrier's period of responsibility, and that the list of "excepted perils" would then be applied, after which the cargo claimant would have an opportunity to rebut those exceptions, and prove that the loss resulted from another cause for which the carrier was liable, such as unseaworthiness. However, concern was expressed that variant B did not clearly express the carrier's liability at all, and that paragraph 1 thereof stated that "the carrier is relieved from liability" without first having set out the carrier's liability. The view was expressed in response that variant B did not need a paragraph comparable to paragraph 1 of variants A and C due to the closing paragraph of variant B.

93. No support was expressed for variant C.

94. As a matter of drafting, concern was expressed with respect to the addition of the phrase "or contributed to" in variants A, B and C in regard to the parties who had "caused or contributed to the loss, damage or delay". The view was expressed that this phrase suggested that if the carrier was in any way responsible for any portion of the loss, even only 5 per cent of it, then the carrier would be liable for the entire loss. It was proposed that this phrase should be deleted, or that it should be clarified that the carrier was liable only to the extent it had contributed to the loss or damage.

95. The Working Group expressed a preference, on the whole, for the approach taken in variant A of draft article 14.

96. An informal drafting group composed of a number of delegations prepared a redraft of draft article 14, based upon the discussion in the Working Group on variants A, B and C. The text of the first redraft of draft article 14 that was proposed to the Working Group for its consideration was as follows:

"Proposed revision of draft article 14

"1. Subject to paragraph 2, the carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the [shipper] proves that

"(a) The loss, damage, or delay; or

"(b) The occurrence that caused the loss, damage, or delay took place during the period of the carrier's responsibility as defined in chapter 3.

"2. Subject to paragraph 3, the carrier is relieved of its liability under paragraph 1 if it proves:

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

"(ii) That neither its fault, nor the fault of its servants or agents, [nor the fault of a performing party] has caused [or contributed to] the loss, damage, or delay; or

"that the loss, damage, or delay was caused by one of the following events:

"(a) [Fire defence]; or

"(b) ... ; or

"... [*Insert all of the remaining items to be included on the list here*.]

"3. If the [shipper] proves that the fault of the carrier, or the fault of its servants or agents, [or the fault of a performing party] also contributed to the loss, damage, or delay, then liability shall be apportioned in accordance with paragraph 4. [To the extent that the [shipper] proves that the loss, damage, or delay was caused by a failure of the carrier

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

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

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

"then the carrier is relieved of liability if it proves that it complied with its obligation to exercise due diligence as required under draft article 13.1.]

"4. [*Insert provision for apportionment of liability in cases of multiple causation; see draft article 14.3 & footnote 79 in WP.32*.]"

97. By way of presentation, the Working Group heard that the proposed redraft of article 14 was not specifically intended to embrace either the exoneration or the presumption approach, but it was observed it was probably closer to a presumption approach. The Working Group also heard that, as redrafted, article 14(1) was substantially the same as paragraph 1 in variants A and C. One minor change was that the word "shipper" had been placed in square brackets in paragraphs 1 and 3 of the redrafted article 14 in order to signal that the term used should be brought into conformity with article 63 of the draft instrument regarding who had a right to sue under the contract of carriage. In contrast to variant A, B or C of the draft instrument, the redrafted article 14(1) clarified which party was required to establish the prima facie case that the loss or damage occurred during the carrier's period of responsibility. It was further suggested that the redrafted version of article 14(1) was intended to reflect the Working Group's consensus that the carrier should be held responsible for unexplained losses, and thus included subparagraph (a), for the situation when the cause of the loss was unknown, and subparagraph (b) for the situation where the cause of the loss was known.

98. By way of further presentation, the Working Group heard that redrafted article 14(2) was intended to allow the carrier to prove why it should not be liable, and that subparagraph (ii) included the list of "excepted perils", while the opening

phrase of subparagraph (ii) corresponded to article IV.2.q of the Hague and Hague-Visby Rules. It was stated that, since it was unclear where the obligation with respect to seaworthiness should be placed in the scheme, two alternative approaches were presented: one in subparagraph (i) of redrafted article 14(2), and the other in square brackets in redrafted article 14(3). The treatment of the seaworthiness obligation in redrafted article 14(2) was intended to present it as an overriding obligation, while the treatment of the seaworthiness obligation in redrafted article 14(3) was intended to reflect the alternative that it be treated as another issue to be proved by the cargo claimant, subject to the carrier's ability to prove its due diligence. Redrafted article 14(3) was intended to cover the step where the cargo claimant could show that the carrier contributed to the loss by proving an additional cause. It was pointed out that, if the cargo claimant was successful in this regard, resort would then be had to redrafted article 14(4) which would deal with the apportionment of the liability for the loss based either upon draft article 14(3) of the draft instrument or on the language in footnote 79 of A/CN.9/WG.III/WP.32.

99. The Working Group welcomed the redrafted version of article 14 as a positive step that might represent a possible way forward. There was general agreement that the text would have to be digested and considered over the next few months prior to the thirteenth session of the Working Group. A view was expressed that a careful assessment of the redrafted provision should be made so as to avoid the imposition of new burdens on the cargo claimant. Another concern raised was that the traditional way for the cargo claimant to prove that damage had occurred was for the claimant to present a clean bill of lading. However, it was explained that redrafted article 14(1) was intended to provide the cargo claimant with an option, in that subparagraph (a) covered the traditional method of presenting a clean bill of lading, while subparagraph (b) allowed the claimant to prove the occurrence where the damage to the cargo only manifested itself later. It was stated that, although there was a possibility that subparagraph (b) might be redundant, both possibilities (a) and (b) had been included in order to enhance the clarity of the provision.

100. Some requests were made for clarifications to the redraft. Concern was raised that redrafted article 14(1)(b) might not be broad enough to include damage that would take place over a continued period of time, such as damage caused by sea water. It was suggested that the phrase "the occurrence that caused the loss, damage or delay" should be changed to "the loss, damage or delay took place" in redrafted article 14(1)(b) in order to accommodate continuing damage to goods, and so as to make the claimant's burden of proof more manageable in that the claimant would not have to prove the actual cause of the loss or damage, but only that it occurred during the period of the carrier's responsibility. There was some support for this view. However, there was also support for the view that the current language in redrafted article 14(3) appropriately and adequately covered the situation of continuing damage. It was also suggested that redrafted article 14(1) did not make it clear whether the presumption of fault of the carrier was the basis for liability. In response, it was clarified that the principles in variant A of draft article 14 were reflected throughout the paragraphs of the redrafted provision, but not in one single paragraph.

101. With a view to maximizing the benefit of consultations that were expected to take place before the thirteenth session of the Working Group, the informal drafting

group prepared a second redraft of draft article 14, based upon the discussion in the Working Group on variants A, B and C of article 14 and the first redraft of article 14. The text of the second proposed redraft of draft article 14 submitted to the Working Group for its consideration was as follows:

"Proposed revision of article 14

"1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the [shipper] proves that

"(a) The loss, damage, or delay; or

"(b) The occurrence that caused [or contributed to] the loss, damage, or delay

"took place during the period of the carrier's responsibility as defined in chapter 3, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person mentioned in article [15(3)] caused [or contributed to] the loss, damage, or delay.

"2. [The carrier is not liable under paragraph 1 if [and to the extent] it proves that the loss, damage, or delay was caused by] [It is presumed that neither the carrier's fault nor that of any person mentioned in article [15(3)] has caused the loss, damage, or delay, if [and to the extent] the carrier proves that the loss, damage, or delay was caused by] one of the following events:

"(a) [Fire]; or

"(b) …; or

"... [*Insert all the remaining items to be included on the lists here*.]

"unless [and to the extent] the [shipper] proves that

"(i) The fault of the carrier or a person mentioned in article [15(3)] caused [or contributed to] the event on which the carrier relies under this subparagraph; or

"(ii) Any event other than those listed in this subparagraph contributed to the loss, damage or delay.

"3. To the extent that the [shipper] proves [that there was] [that the loss, damage, or delay was caused by],

"(i) The unseaworthiness of the ship;

"(ii) The improper manning, equipping, and supplying of the ship; or

"(iii) The fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods,

"then the carrier is liable under paragraph 1 unless it proves that,

"(a) It complied with its obligation to exercise due diligence as required under article 13(1). [; or

"(b) The loss, damage or delay was not caused by any of the facts mentioned in (i), (ii) and (iii) above.]

"[4. In case of concurring causes that each have caused part of the loss, damage or delay, then the court shall determine the amount for which the carrier is liable in proportion to the extent to which the cause attributable to its fault has contributed to the loss, damage or delay.] [The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.]"

102. By way of presentation of the second redraft of article 14, the Working Group heard that paragraph 1 was an attempt to set out the basic rules with respect to the allocation of the burden of proof between the claimant and the carrier. It was explained that, as with the previous redraft of article 14, the claimant was required to prove that there had been a loss and that the loss could be attributed to the period of the carrier's responsibility. The underlying approach was that the carrier should be held responsible for unexplained losses. It was observed that paragraph 2 of the second redraft contained two alternatives in square brackets in its chapeau, which reflected the continuing difference of views with respect to whether the "excepted perils" should be treated as exonerations from liability or presumptions of non-liability. The first of these alternatives was intended to reflect the exoneration approach, while the second was intended to reflect the presumption approach. It was further explained that the chapeau of paragraph 3 contained alternative language in square brackets that was intended to reflect a difference of views with respect to whether the claimant was required simply to prove the occurrence of the events in subparagraphs (i), (ii) and (iii), or whether it was necessary to prove that those events caused the loss, damage or delay. It was observed that paragraph 3(b) was in square brackets to indicate that this language was necessary only if the first alternative in the chapeau of paragraph three was chosen by the Working Group. The Working Group also heard that the informal drafting group had not had sufficient time to consider appropriate language for paragraph 4 and that the text proposed simply represented an attempt to illustrate the alternative views of the Working Group.

103. There was general agreement in the Working Group that, like the first redraft of article 14, no firm decision could be made with respect to this second redraft before further consideration and consultations had taken place. However, a widely shared view was that this second redraft represented an improvement on previous drafts, and that it would be appropriate for the Working Group to use it as a basis for future work on article 14. One drafting observation made with respect to the redrafted article as a whole was that the phrase "shall be liable" and "is liable" were both used, and that consistency should be sought in this regard.

104. In reviewing paragraph 1 of the second redraft of article 14, the view was expressed that the paragraph substantially reflected the approach in variant A of article 14 that was favoured by most delegations. Strong support was expressed in the Working Group for the overall approach taken and the principles reflected in paragraph 1. A concern was raised that the provision was not clear enough with respect to the carrier's ability to show that it was only partly at fault. There was support for the view that this should be clarified. In response to a suggestion, it was thought that the addition to paragraph 1 of the phrase "to the extent" similar to that

in paragraph 2 would not be sufficient to alleviate this concern. In response to a concern with respect to how the claimant would meet its burden of proof in paragraph 1, it was reiterated that the claimant was in the best position to prove the damage and that it occurred during the carrier's period of responsibility, since the claimant need only prove that the goods were delivered to the carrier in good condition and that the consignee received them in a damaged condition.

105. A few additional drafting changes were suggested with respect to paragraph 1. One proposed change was that the phrase "the carrier proves that neither its fault nor the fault of any person" required proof in negative terms, and that the drafting could be adjusted to require positive proof. It was noted in response that the Hague and Hague-Visby Rules used virtually identical wording in article IV.2.q, and that this was not a novel approach. A second change proposed was that the phrase immediately before subparagraph (a), "if the [shipper] proves that" should be deleted, but there was support for the proposal that the language should remain in the text so as to provide guidance with respect to which party had the burden of proof. A third change suggested was the word "shipper" that still appeared in square brackets could be replaced with the word "claimant", which could then be defined with reference to article 63 of the draft instrument.

106. The Working Group next considered article 14(2) of the second redraft prepared by the informal drafting group. As with previous iterations of this paragraph, discussion in the Working Group again focused on whether the preferred approach to the list of "excepted perils" should be one of exoneration from liability or one based on presumption of non-liability. Similar views were presented to those expressed in paragraphs 87, 90, 97 and 102 above (see also para. 119 below). Again, there was support for the view that the presumption approach was preferable, while a minority view expressed a preference for the exoneration approach. The question was raised whether substituting a phrase such as "It is considered" for the phrase "It is presumed" in the second of the alternatives would alleviate the concerns of those who had expressed views against a presumption approach. However, a widely held view was that there was no specific preference for one approach over the other, particularly if, as expected, the legal outcome would be the same with either approach.

107. A few drafting concerns were expressed with respect to paragraph 2. One view was that the language in paragraph 2(ii) was superfluous, while other views were expressed that this subparagraph was necessary since it encompassed different circumstances, where a shipper or claimant proved not only the fault of the carrier with respect to one of the "excepted perils", but an additional event attributable to the carrier that did not appear on the list and that contributed to the loss or damage. A more widely shared concern was that the construction of the first alternative in paragraph 2 could cause confusion by inadvertently suggesting that the carrier had to prove that it was not liable for the loss, damage or delay under both paragraphs 1 and 2. There was support for the proposal that, if the first alternative in paragraph 2 was chosen by the Working Group, it should be clarified that paragraph 2 was intended to function as an alternative means to paragraph 1 by which the carrier could demonstrate its innocence. It was suggested that this intention should be made clear through the insertion of a phrase in paragraph 2 illustrating its relationship with paragraph 1.

108. The Working Group heard that in an attempt to bridge the gap between those delegations that favoured an exoneration approach to the "excepted perils", and those that preferred a presumption approach, and based upon the discussion on variants A, B and C of draft article 14 and of the previous informal texts submitted for the consideration of the Working Group, one delegation had prepared a further redraft of paragraphs 2 and 4 of draft article 14. The text of the third redraft of paragraphs 1 and 2 of draft article 14 submitted to the Working Group for its consideration was as follows:

> "2. If the carrier [, alternatively to proving the absence of fault as provided in paragraph 1] proves that the loss, damage or delay was caused by one of the following events:
>
> "(i)……
>
> Then its liability for such loss, damage or delay will arise only in the event the claimant proves that:
>
> "(i) The fault of the carrier or of a person mentioned in article 14bis caused [or contributed to] the event on which the carrier relies under this paragraph; or
>
> "(ii) An event other than those listed in this paragraph contributed to the loss, damage or delay.
>
> "4. In case the fault of the carrier or of a person mentioned in article 14bis has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to its fault."

109. It was explained that the phrase in square brackets in the first line of this third redraft of paragraph 2 was intended to alleviate the concerns expressed above (see para. 107) with respect to making explicit the relationship between paragraphs 1 and 2. It was also indicated that the proposal was intended to include the full list of "excepted perils", and that the second alternative in the second redraft of article 14(4) (see para. 101 above) referring to the so-called "50-50" apportionment rule should be added after the first sentence in paragraph 4 of this third proposal (see below, paras. 140 to 144).

110. As with the previous drafts of article 14, there was general agreement in the Working Group that, while no firm decision could be made before further consideration and consultations had taken place, the third proposal represented a strong basis for bridging the gap between the preferred approaches to take with respect to the list of "excepted perils". Unanimous support was expressed that the third redraft (in respect of paras. 2 and 4) and the second redraft (in respect of the remainder of draft article 14) should form the basis for future work on article 14(2), subject to those drafting suggestions indicated below. One view was expressed that, in addition to the redrafts, Variant A of article 14(1) and (2) as set forth in the note by the Secretariat (A/CN.9/WG.III/WP.32) should be maintained in the draft instrument for continuation of the discussion. While that view was not accepted by

the Working Group, it was pointed out that the text of all variants, including Variant A in favour of which considerable support had been expressed, was reproduced in this report for further reference. In the context of that discussion, a suggestion was made that, as a general statement of policy, the draft instrument should contain a provision on compulsory insurance for carriers. Strong opposition was expressed to this suggestion.

111. A number of drafting improvements were suggested to paragraph 2 of the third proposed redraft. The Working Group heard that the text of paragraph 2(ii) could have the unintended consequence of suggesting that it was necessary for the shipper or claimant to prove both the additional cause for the loss and that it was outside the list of "excepted perils" in paragraph 2(i). There was support for the suggestion that a remedy for this inadvertent result could be to insert in paragraph 2(ii) after the phrase "an event other than those listed in this paragraph" the additional phrase "on which the carrier relies".

112. Further drafting refinements that reflected previous discussions on the various article 14 redrafts were supported in the Working Group. It was agreed that the phrase "[and to the extent]" should be added after the opening "If" of paragraph 2, and that the phrase "only in the event" should be deleted in the text immediately following the list of "excepted perils", and the phrase "if [and to the extent]" should be substituted in its place. A further refinement agreed upon was to clarify the relationship of paragraphs 2 and 3, and so as to avoid blocking recourse to paragraph 3. It was decided that the opening phrase "Without prejudice to paragraph 3", should be added at the beginning of paragraph 2.

113. The Working Group further agreed that the square brackets surrounding the phrase in the opening line of paragraph 2 should be removed, to accommodate the concern expressed regarding possible misinterpretation of the relationship between paragraphs 1 and 2. An additional drafting suggestion was made that, instead of the phrase "then its liability … will arise" in the text immediately following the list of excepted perils, a different phrase such as "then the carrier's liability is maintained or continued", or "then the carrier shall be liable for such loss, damage or delay" could be substituted. The Working Group requested the Secretariat to consider whether an appropriate text should be substituted in this regard, bearing in mind the caveat expressed that replacing the existing phrase with alternative language should not result in disregarding the intention that paragraph 2 was an alternative to paragraph 1.

114. It was also suggested that the relationship between paragraph 2 and paragraph 1 could be left unclear if the text in the third redraft remained as it was. In order to express the general agreement that in the situation where the shipper or claimant proved a cause for the damage attributable to the carrier but outside the list of "excepted perils" under subparagraph (ii) resort should be had back to paragraph 1, the Working Group agreed to add to subparagraph (ii) after its final period the sentence "In this case, liability is to be assessed in accordance with paragraph 1."

115. One final drafting suggestion was made with respect to paragraph 2 of the third redraft. It was observed that the various drafting refinements outlined in the paragraphs above had clarified the relationship between paragraphs 1 and 2, and between paragraphs 2 and 3 of draft article 14, but that the counterproof provisions

in subparagraphs (i) and (ii) of paragraph 2 might have become unclear. The suggestion was made to separate paragraph 2 into two separate sentences in order to clarify this potential problem. The Working Group requested the Secretariat to consider this potential problem and to suggest possible drafting improvements if it was deemed advisable.

116. After discussion, the Working Group approved the substance of the third redraft of article 14(2), subject to the drafting refinements agreed to in the paragraphs above, as the basis upon which to continue future work.

(b) Article 14 list of "excepted perils"

117. The Working Group next considered the list of "excepted perils" in draft article 14. There was support for the general view that the list of perils from draft article IV.2.c through article IV.2.q in the Hague and Hague-Visby Rules should be followed closely in order to preserve the certainty and predictability that had come with the development of a significant body of law on these issues. Two exceptions to this general approach were suggested, that of the deletion of article IV.2.a (error in navigation), and of a redrafting of article IV.2.b (fire exception) to reflect its limited application to the maritime leg of the transport. Support was also expressed for these proposals. A further suggestion was made to amend the notion of the overriding obligation of the carrier to provide a seaworthy ship in the Hague and Hague-Visby Rules so that the issue of the seaworthiness of the ship would become relevant only during the third step in an actual claim for cargo damage, i.e. when the cargo claimant could prove unseaworthiness as a cause of damage to rebut the carrier's invocation of one of the "excepted perils".

118. With respect to the use of the list of "excepted perils" from the Hague and Hague-Visby Rules generally, it was explained that the original rule was the result of a compromise position taken at the time in order to accommodate both the civil law and common law systems. Several views were expressed that the list of "excepted perils" was not necessary in many States, but that there was no objection to their continued inclusion in the draft instrument in order to accommodate all legal systems and to preserve the general body of law that had developed with the widespread use of the Hague and Hague-Visby Rules.

119. With respect to the issue of whether the list of "excepted perils" in draft article 14 should continue to be treated as exonerations or whether they should be treated as presumptions, support was expressed for both positions. A concern was expressed that treating the listed perils as exonerations might result in confusion, since such treatment could lead to an interpretation that once one of the listed perils had been proved by the carrier, the claimant would have no right to rebut that exonerating evidence and prove that the event causing some or all of the damage was a result of the carrier's fault. One view expressed was the possibility that, for example, in the case of the subparagraph (d) exception for strikes, if the provision was treated as an exoneration rather than a presumption, a carrier could be exonerated for strikes that were a result of the carrier's own actions. It was widely felt that, irrespective of whether the exceptions to the general liability of the carrier were expressed by reference to the legal theory of exonerations or on the basis of a set of presumptions, it would be essential to preserve a rebuttal mechanism in the draft instrument.

120. The Working Group next considered the specific content of each of the listed perils. The view was expressed that the "act of God" exception in subparagraph (a) of all variants of draft article 14 was unnecessary due to the general force majeure provision set out in article IV.2.q of the Hague and Hague-Visby Rules and incorporated in the draft instrument. However, the view was expressed that if the "act of God" exception were deleted from the list of "excepted perils" it could risk erroneous judicial interpretation as a result of speculation regarding the reasons for its deletion from the list of "excepted peril" in the draft instrument. There was broad support for the proposal that the "act of God" exception should be maintained.

121. Support was expressed for the inclusion of piracy and terrorism in subparagraph (a) of the list of "excepted perils" in the draft instrument. While some doubts were expressed with respect to the precise definition of terrorism, it was observed that terrorism had been defined in a number of States. It was suggested that a precise definition of terrorism was unnecessary in any event, since it expressed a certain intention, and the important issue was whether the event was the fault of the carrier. The general view was that piracy and terrorism should be included in the list.

122. With respect to subparagraph (b) of the list of perils in the draft instrument, it was suggested that the square brackets be removed and the text be maintained, but that the language used should be the same as that used in the Hague and Hague-Visby Rules. There was support for this position, but the question was raised whether the phrase "including interference by or pursuant to legal process" could also include the situation where a cargo claimant arrested a ship. The suggestion was made to clarify the meaning of the phrase "interference by or pursuant to legal process".

123. With a view to broadening the scope of subparagraph (d) of the list of "excepted perils", the suggestion was made to add at the end of the subparagraph "for any cause whatsoever". However, doubts were raised as to this addition, since some strikes could be caused or contributed to by the acts of the carrier or the ship owner, such as where the owner refused the reasonable requests of the crew. It was suggested that the subparagraph might need to establish a distinction between general strikes and strikes that might occur in the carrier's business, and for which the carrier might bear some fault.

124. With respect to subparagraph (i) of the list of "excepted perils", it was suggested that although this subparagraph did not appear in the Hague or Hague-Visby Rules, it was appropriate to include it in the draft instrument.

125. Some specific issues were raised with respect to the formulation of the list. Uncertainty was expressed with respect to the precise meaning of the phrase "restraints of labour" in subparagraph (d) of the list. In a similar vein, the word "rulers" in subparagraph (b) was questioned as meaningless in light of modern political realities. It was proposed that subparagraph (f) should clarify that the packing or marking should have been done "by the shipper". In addition, there was support for the view that subparagraph (g) of the list in the draft instrument should make it clear that the latent defects referred to were those in the ship. Another suggested clarification of subparagraph (g) was that the phrase "not discoverable by due diligence" should be replaced by "not discoverable by vigilant examination", although it was observed that the phrase "due diligence" came about as a result of

the English translation of the words “diligence raisonnable” in the French text of the Hague Rules. Further, it was noted that if the phrase “due diligence” was used elsewhere, for example in draft article 13, it should also be repeated in subparagraph (g) in the interest of consistency. It was suggested that the phrase “or on behalf of the shipper” in subparagraph (h) should be deleted as confusing, since if the carrier handles the goods, it should be liable for any damage. It was also suggested that subparagraphs (a) and (b) should be broadened by adding the phrase “and all other events that are not the fault of the carrier”.

126. With regard to the fire exception currently in chapter 6 of the draft instrument, the view was expressed that the wording was unclear in that it seemed to lead to the conclusion that the fault of the carrier must be a personal fault. The question was raised whether this exception was necessary at all in light of other provisions making the carrier responsible for the acts of its servants or agents. However, it was suggested that if the fire exception was maintained for traditional reasons, the provision should be adjusted to clarify that the carrier is also responsible for the acts of its servants or agents. In addition, the view was expressed that the existence of the fire exception unfairly placed the burden of proof on the consignee. There was some support for these views, but another view was expressed that the fire exception should be the same as it was in the Hague and Hague-Visby Rules.

127. With respect to the elimination of the exception based on error in navigation, a number of delegations agreed with the position that there was a danger that the elimination of this exception could have the unintended effect outlined in paragraph 89 above. In response to this possibility, some delegations favoured the reinstatement of the exception for error in navigation, while others preferred to bear the potential problem in mind when considering the issue of burden of proof. Additional views were expressed in support of reinstating error in navigation as an exception, for example, that an error might be easy to characterize in hindsight, but that it was often the error of the master, forced to make rapid decisions in bad weather, and that no ship owner would generally interfere with his masters’ decisions in these circumstances. However, the prevailing view was that the deletion of the navigational error exception should be maintained, but also that the impact of that decision should be considered with respect to burdens of proof in discussions to come.

128. The Working Group was reminded that certain of the perils listed in the Hague and Hague-Visby Rules had been placed in a separate chapter 6 in the draft instrument, entitled “Addition provisions relating to carriage by sea [or by other navigable waters]”. The Working Group agreed to leave those exceptions in chapter 6 separate from draft article 14 for future consideration of where best to place them in the draft instrument.

129. The Working Group agreed that the list of “excepted perils” should be included in the draft instrument, and that the substance and content of the exceptions on the list should be inspired from the Hague and Hague-Visby Rules, including article IV.2.q. There appeared to be a slight preference in the Working Group for the list to be characterized as one of presumptions rather than exonerations. Several specific recommendations were made to refine the exceptions listed, as noted in paragraphs 120 to 126 above, and there was agreement that navigational fault should not be reinstated in the list as an “excepted peril”.

(c) New paragraph 3 of draft article 14

130. Discussion ensued in the Working Group with respect to draft article 14(3) as set out in the second redraft of article 14 (see para. 101 above). Views in the Working Group were divided between the two alternatives presented by the language in square brackets in the opening line of paragraph 3. There was support for the view that the shipper or claimant should only be required to prove the existence of the circumstances in subparagraphs (i), (ii) and (iii), since, it was suggested, it would be difficult enough to prove the events in (i), (ii) or (iii) without having to prove the causal link. A related view was that requiring the shipper to prove the circumstances in subparagraphs (i), (ii) and (iii) was excessively burdensome. Under that view, the mere allegation by the shipper that any of the events in subparagraphs (i), (ii) and (iii) had taken place should be sufficient to establish or restore the liability of the carrier. It was suggested that the word "alleges" should be introduced in square brackets as an alternative to "proves" in the opening words of paragraph 3. The opposing view was also expressed that the shipper or claimant should be required to prove that the circumstances in subparagraphs (i), (ii) and (iii) had caused the loss, damage or delay, since it was suggested that it would not be appreciably more difficult to prove the causal connection in addition to the event itself. It was observed that the new paragraph 3 should be considered in the context of the entire draft article 14. Paragraph 1 of article 14 permitted the claimant to prove the existence of loss, damage or delay without proving its cause. The carrier could explain that it should not be liable by proving a lack of fault or an exception under paragraph 2. If the carrier proved such a lack of fault or an exception, the claimant would have the burden to prove unseaworthiness and causation.

131. Between these two poles, a third view emerged that suggested that it was inappropriate for the loss, damage or delay to be wholly dissociated from the circumstances alleged in the subparagraphs to paragraph 3, and that the shipper or claimant should be required to prove that there was at least some sort of nexus between the alleged unseaworthiness and the damage. It was observed that the differences in opinion on this matter could be rendered less relevant in light of the actual conduct of a claim, since a carrier would often present evidence with respect to seaworthiness and the other matters in subparagraphs (i), (ii) and (iii) early in the conduct of the case in an effort to prove that it was not at fault with respect to the damage. In addition, it was observed that, while the draft instrument might require the claimant to prove the unseaworthiness of the ship, it would not establish a standard of proof. Such a standard of proof would be governed by domestic law and would generally be easy to meet. It was further observed that causation of the damage was a relatively unimportant issue in the conduct of a claim, since even if there were circumstances that might suggest unseaworthiness, the carrier need not guarantee the seaworthiness of the ship, but needed only to prove that it had exercised due diligence in trying to maintain it.

132. Discussion ensued in the Working Group with respect to draft article 14(3) as set out in the second proposed redraft of article 14. The Working Group was of the view that paragraph 3 represented a good basis for the continuation of future work, and that the text should remain with its two alternative approaches for further consideration and consultation prior to making a decision on this matter. The Working Group requested the Secretariat to consider whether a third alternative

could be proposed representing the approach that was part way between full proof of causation for the damage and mere allegation of the circumstances in subparagraphs (i), (ii) or (iii). It was suggested that the notion of "likelihood of causation" by one of the events in subparagraphs (i), (ii) or (iii) might need to be further explored. Wording along the lines of "[that the loss, damage, or delay could have been caused by]" was also suggested in that respect as a possible formulation for the third alternative.

133. As a matter of drafting, it was widely felt that, in the preparation of a revised draft of article 14 for continuation of the discussion at a future session, serious consideration should be given to replacing the word "shipper" by "claimant". It was suggested that "claimant" could be defined as any person given the right of suit under article 63.

134. The Working Group also took note of a suggestion for restructuring paragraph 3 along the following lines:

> "3. The carrier is not liable for loss, damage, or delay resulting from the unseaworthiness of the ship as [alleged] [proved] by the claimant, to the extent that the carrier proves that
>
> "(a) It complied with its obligation to exercise due diligence as required under Article 13(1). [; or
>
> "(b) The loss, damage or delay was not caused by any of the facts mentioned in (i), (ii) and (iii) above.]".

(d) Provision in draft article 14 dealing with the apportionment of liability in case of concurring causes for the damages

135. The text of draft article 14(3) set forth in the note by the Secretariat was as follows:

> "3. 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, 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."**

** 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 (see A/CN.9/WG.III/WP.32, footnote 79):

[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.]

136. The text of the corresponding provision in the second proposal for a redraft of article 14 was as follows:

> "[4. In case of concurring causes that each have caused part of the loss, damage or delay, then the court shall determine the amount for which the carrier is liable in proportion to the extent to which the cause attributable to its fault has contributed to the loss, damage or delay.] [The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.]"

137. The text of the corresponding provision in the third proposal for a redraft of article 14 was as follows:

> "4. In case the fault of the carrier or of a person mentioned in article 14bis has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to its fault."

138. A further draft proposal was submitted by one delegation in relation to paragraph 3 of article 14 as follows:

> "3. When the carrier establishes that in the circumstances of the case, the loss of or damage to the goods or delay in delivery could be attributed to one or more of the events referred to in paragraph 2, it shall be presumed that it was so caused. The presumption is rebutted if and to the extent that the claimant proves that such loss or damage or delay is caused or contributed to by the fault of a carrier [or of a performing party]."

139. By way of explanation, the Working Group heard that the draft proposal had been taken from article 18(2) of the Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol ("CMR") with slight modifications. Under the first sentence, if the carrier could establish that one or more of the listed events occurred during the carriage that *could*, in the ordinary case, have caused the loss, damage or delay, then the causation between the listed event and the loss would be presumed. It was further explained that the draft provision was intended to decrease the carrier's burden of proof of causation since, it was suggested, it was often difficult for the carrier to identify the cause of the damage and to establish the causation between the damage and the exonerative events, especially when the cargo was carried by container. It was further explained that, under the second sentence of proposed paragraph 3, the claimant was entitled to rebut the presumption by proving if and to what extent the fault of the carrier caused or contributed to the loss, damage or delay. Although it was proposed that this paragraph would apply even where the carrier's fault was the only cause of the damage to the goods, it was suggested the proposed paragraph could play a more important role where both the carrier's fault and the event listed in paragraph 2 jointly contributed to the loss. By way of further explanation, the Working Group heard that the proposed paragraph 3 was intended to be an alternative solution to the concern raised that the elimination of the navigational

fault defence may have unintended effects (see A/CN.9/WG.III/WP.34, paragraph 15).

140. The view was expressed that the apportionment of liabilities in situations of concurring causes of the damage should not be dealt with under the draft instrument. Instead, it should be left to courts and arbitral tribunal to be decided upon according to applicable law. The prevailing view, however, was that an attempt should be made to cover the issue of apportionment of liabilities in the draft instrument. It was pointed out that, in cases of concurring causes, it was important to establish as a general rule that each party should prove the extent of causation, in particular in view of the exclusion of the nautical fault from the list of "excepted perils", it was stated that, where the goods had been damaged at sea, claimants could easily argue that navigational decisions had contributed to the damage (see A/CN.9/WG.III/XII/CRP.1/Add.4, paras. 5-10). The draft instrument should not place the carrier in a situation where the carrier would be liable for the entire loss where its fault had only contributed to a minor proportion of the damage. Accordingly, it was proposed that the issue of apportionment of liability should be discussed on the basis of footnote 79 to the text of draft article 14(3) set forth in the note by the Secretariat (A/CN.9/WG.III/WP.32).

141. That proposal was objected to on the grounds that it had not been favoured by the Working Group at its tenth session (see A/CN.9/525, para. 56). It was observed that a result of the proposed approach might be to transfer on the shipper the insuperable burden of proving the extent of causation in situations where the carrier's fault had clearly contributed to the damage. In the absence of such proof, the proposed approach offered a 50 per cent liability of the carrier, which was described as unfair to shipping interests. Support was expressed for the text of paragraph (3) of draft article 14 as set forth in the note by the Secretariat.

142. With a view to reconciling the various views that had been expressed, it was suggested that the draft instrument should avoid placing on any party the burden or proving the exact extent of causation. It was also suggested that the draft instrument should provide guidance to courts and arbitral tribunals to avoid certain causes of the damage being neglected, for example through excessive reliance on the doctrine of overriding obligations. The discussion focused on paragraph 4 of the third proposed redraft of article 14. It was suggested that, in discussing the issue of apportionment of liability, it might be useful to bear in mind a distinction between concurring causes and competing causes for the damage. In the case of concurring causes, each event caused part of the damage but none of these events alone was sufficient to cause the entire damage (for example, where the damage was attributable to both weak packaging by the shipper and improper storage by the carrier). In the case of competing damages, the court might have to identify an event or the fault of one party as having caused the entire damage, irrespective of the fault of the other party (for example, where the goods were damaged as a result of artillery fire hitting the vessel, a decision might need to be made as to whether the artillery fire was to be regarded as the only cause of the damage, irrespective of the fault the master of the vessel might have committed by bringing the ship into a war zone). It was pointed out that, in this second situation, the doctrine of "overriding obligations" would often apply. It was suggested that draft article 14 dealt only with the situation where concurring faults were at stake and not with the second situation described as "competing faults".

143. Various proposals were made for improving the text of the third redraft. A widely accepted proposal was to add in square brackets the last sentence proposed in the second redraft along the lines of "[The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis]." It was widely felt that further discussion could be based on that text. Another proposal, intended to take into account the situation addressed in paragraph 2(ii) where the damage was not caused by actual fault was to rephrase the paragraph as follows:

> "4. In case the fault of the carrier or of a person mentioned in article 14bis [or an event other than the one on which the carrier relied] has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to such fault [or event]."

The Working Group took note of that suggestion.

144. After discussion, the Secretariat was requested to prepare a revised draft of the provision regarding concurring liabilities under draft article 14, taking into account the above views and suggestions.

5. Obligations of the carrier in respect of the voyage by sea (draft article 13)

145. The text of draft article 13 as considered by the Working Group was as follows:

> "Article 13. Additional obligations applicable to the voyage by sea
>
> "1. The carrier shall be bound, before, at the beginning of, [and during] the voyage by sea, to exercise due diligence to:
>
> "(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 supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.
>
> "[2. Notwithstanding articles 10, 11, and 13(1), the carrier 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.]"

146. By way of introduction, the Working Group was reminded that draft article 13 had undergone only editorial changes in A/CN.9/WG.III/WP.32. The Working Group commenced its examination of draft article 13 with paragraph 1. It was noted that three sets of square brackets remained in the text of this paragraph, and that removing the square brackets and retaining the text would make the carrier's duty of due diligence for seaworthiness a continuing obligation.

147. Strong support was expressed in the Working Group that the square brackets be removed and the text be retained in order to make the carrier's obligation of due diligence for seaworthiness a continuing obligation. The view was expressed that

making this obligation a continuous one was in keeping with the modernization of the law governing the carriage of goods by sea, and with the International Safety Management code and safe shipping requirements.

148. Several drafting suggestions were made with respect to draft article 13(1). It was observed that different language had been used with respect to the duties expressed in subparagraphs (a), (b) and (c), such that (a) and (c) used the phrase "make [and keep]", while (b) did not contain such a phrase. The concern was expressed that this could be erroneously interpreted to suggest that the obligation in subparagraph (b) to "properly man, equip and supply the ship" was not a continuing obligation. In response, it was stated that, in any event, the phrase "before, at the beginning of, [and during] the voyage" in the chapeau of draft article 13(1) was sufficient to ensure that this mistake was not made. While it was conceded that this phrase in the chapeau assisted in the interpretation of subparagraph (b) as a continuing obligation, it was suggested that the lack of the phrase "and keep" in that subparagraph could still result in an improper interpretation. Support was expressed for this view. Another drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man … the ship" used in subparagraph (b).

149. Some support was expressed for the view that the text in square brackets should be deleted so as to ensure that the carrier's obligation to keep the ship seaworthy existed only prior to and at the beginning of the voyage. It was observed that this would continue the approach taken in article III.1 of the Hague and Hague-Visby Rules, and it was suggested that this approach had worked well to date. It was suggested that making the obligation to provide a seaworthy vessel a continuing obligation would place too great a burden on the carrier, and that it would considerably alter the overall allocation of risk between the carrier and cargo interests in the draft instrument. The view was also expressed that there were practical problems associated with making the seaworthiness obligation a continuing one, since a ship could experience problems in the middle of the ocean, and it might not be possible to make it seaworthy until it put into a port of call. While it was acknowledged that practical problems could arise for the carrier if seaworthiness was made a continuing obligation, it was observed that the duty of seaworthiness was one of due diligence rather than an absolute duty of the carrier, and the view was expressed that this would only amount to an obligation to take reasonable steps during the voyage. A preference was expressed that the standard that should apply to the carrier during the course of the voyage should be one of negligence, rather than the higher standard of due diligence.

150. It was proposed that instead of a continuing obligation, the Working Group could adopt the charter party "doctrine of stages" where a vessel must be seaworthy at the beginning of each stage of a voyage. There was some support for this proposal. However, the view was expressed that such "doctrine of stages" was already reflected in the draft instrument, since the carrier was under an obligation to provide a seaworthy ship at the beginning of each voyage of the goods, not of the vessel. The view was that, since the draft instrument applied to the contract of carriage of the goods, the carrier was under an obligation to exercise due diligence with respect to each contract of carriage. An additional suggestion made was that the carrier's duty to "properly and carefully load, handle, stow, carry, keep, care for

and discharge the goods" in draft article 11 would provide for sufficient continuing responsibility of the carrier.

151. Although there was strong support in favour of making the obligation of seaworthiness a continuing obligation, it was acknowledged that making the obligation a continuing one might be interpreted as significantly changing the allocation of risk in the draft instrument. There was general agreement that, if seaworthiness was to be a continuing obligation, an attempt should be made to rectify that balance with respect to the carrier in the Working Group's consideration of other articles concerning the rights and interests of the carrier. One suggestion made was that this change in the carrier's allocation of risk could be borne in mind during the Working Group's discussion of draft article 14(3) on apportionment of liability in cases of multiple causation of damage. Concern was expressed that continuing the obligation of seaworthiness after the vessel sailed might be interpreted to continue the high degree of care appropriate when shore experts were available. It was suggested that the appropriate at-sea degree of care would be achieved by removing the error of nagivation and management defence.

152. A question was raised with respect to the carrier's obligation regarding containers, as mentioned in draft article 13(1)(c), and whether the contracts pursuant to which a carrier leased or provided containers were intended to be covered by the draft instrument. A view was expressed that the draft instrument was intended only to apply to contracts of carriage, and not to separate contracts for the lease or rental of containers. The contrary view was that the draft instrument should apply not only to the contract of carriage but also to related contracts, particularly those contracts that might be entered into for the execution of the contract of carriage. It was suggested that, without taking a stand as to whether such contracts related to the contract of carriage were covered by the draft instrument, the approach in draft article 13(1)(c) was in keeping with the position adopted in most courts that when the container was provided by the carrier, it should be qualified as part of the ship's hold, and that the same obligation that the carrier had for the ship and the care of the holds should apply to those containers once the containers were loaded on board a ship. It was also noted that this approach was in keeping with draft article 1(j) definition of "goods" to include any "container not supplied by or on behalf of the carrier or a performing party".

153. After discussion, the Working Group agreed that the carrier's obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft article 13(1) should thus be removed, and the text in them retained. The Working Group also requested the Secretariat to make the necessary changes to subparagraph (b) to ensure that this obligation was understood to be of a continuing nature. It was also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft instrument, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the instrument.

154. The Working Group next turned its attention to draft article 13(2) of the draft instrument with respect to the carrier's sacrifice of goods for the common safety or for the preservation of other property. Support was expressed for the view that this provision should be retained in its current form and location in the draft instrument, and that the square brackets surrounding it should be removed. It was suggested that this provision set out a necessary exception to the carrier's general duty of care that

had long been recognized and accepted. It was further suggested that the provision contained adequate safeguards for cargo interests, since any decision to sacrifice goods had to be reasonably made for the common safety or for the preservation of property. Another view was expressed that the inclusion of this provision could assist in redressing the shift in the allocation of risk that resulted from the continuing seaworthiness obligation in draft article 13(1). One refinement proposed to the wording of draft article 13(2) was that it should also refer to the protection of human life, while another refinement proposed was to make explicit a reference to imminent peril.

155. Support was also expressed for the view that draft article 13(2) should be deleted in its entirety. It was observed that that provision differed markedly from article IV.6 of the Hague and Hague-Visby Rules with respect to the disposal of dangerous goods and should not be retained. It was also suggested that the sacrifice of goods was already adequately covered by the general average provisions in chapter 17 of the draft instrument, and by the general duty of care of the carrier.

156. Concerns were expressed with respect to the interaction of draft article 13(2) with the general average provisions in chapter 17 of the draft instrument, particularly since draft article 13(2) did not refer to the preservation of the vessel or the cargo from imminent peril, which was an essential element of general average. Support was expressed for the proposal that if draft article 13(2) was retained, it should be moved to the chapter on general average, but that care should be taken not to prejudice or alter the rules on general average. Additional support was expressed for the view that the square brackets around draft article 13(2) should be maintained.

157. Given the level of support expressed for the rule, the Working Group decided to maintain draft article 13(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 17 on general average. The Secretariat was also requested to consider drafting suggestions to include in the provision references to the preservation of human life and to the presence of imminent danger.

6. Liability of performing parties (draft article 15)

158. The text of draft article 15 as considered by the Working Group was as follows:

> "1. [*Variant A of paragraph 1*]
>
> 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) during the period in which it has custody of the goods; and (b) 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.

[*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) during the period in which it has custody of the goods; or

(b) 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. 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 shall be higher than the limits imposed under articles 16(2), 24(4) and 18, a performing party shall not be bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.

"3. Subject to paragraph 5, the carrier shall be responsible for the acts and omissions of

(a) any performing party, and

(b) any other person, including a performing party's subcontractors 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. 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. Subject to paragraph 5, a performing party 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 subcontractors, 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.

"5. If an action is brought against any person, other than the carrier, mentioned in paragraphs 3 and 4, 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. 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, 24 and 18.

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

(a) General discussion

159. The Working Group was reminded of its discussion with respect to the definition of a "maritime performing party" (see above, paras. 23 to 33). The Working Group was generally in agreement with a suggestion that was made to the effect of limiting the scope of draft article 15 to such "maritime performing parties". The consequences of such a limitation would be that the liability of non-maritime performing parties would be covered by domestic and international law applicable outside the draft instrument. In that context, it was also agreed that adjustment should be made to the title of the draft article to reflect that decision. However, the Working Group generally felt that the general policy regarding the scope of draft article 15 might need to be reviewed in respect of each of the individual paragraphs of the draft article. It was felt that the scope of paragraph (3), in particular, should extend to all performing parties, without limitation to "maritime performing parties" (for continuation of that discussion, see below, para. 166).

160. A concern was expressed that, where the contracting carrier was liable under the draft instrument and a non-maritime performing party would be subject to liabilities under another legal regime, the claimant could seek compensation under the two regimes in addition to one another. It was suggested that a rule on aggregation of claims should also apply to all performing parties. It was stated in response that applicable law outside the draft instrument would typically provide mechanisms through which double compensation could be avoided.

(b) Paragraph (1)

161. The Working Group reaffirmed its understanding that the draft instrument should, in principle, avoid dealing with non-maritime performing parties and that the scope of paragraph (1) should be restricted to maritime performing parties.

162. Broad support was expressed in favour of Variant A. It was suggested that an improvement to the text would result from inserting the words: "if the occurrence that caused the loss, damage or delay took place" before the text of subparagraph (a) in Variant A. That suggestion was found acceptable by the Working Group. A second suggestion was made to add words along the lines of "to the extent that it is established by the claimant" before the other phrase suggested for insertion. It was stated in response that the purpose of paragraph (1) was not to deal specifically with burdens of proof but to place the maritime performing party on an equal footing with the contracting carrier, including the rules applicable to such contracting carrier in respect of burdens of proof. The second suggestion was not adopted by the Working Group.

(c) Paragraph (2)

163. The Working Group generally agreed with the substance of the paragraph. It was also agreed that the scope of paragraph (2) should be restricted to maritime performing parties. In response to a proposal that the word "higher" should be replaced by the word "different" to allow the parties to agree to a lower limit of liability, it was pointed out that the contracting carrier should not be allowed to

contract with the shipper to the detriment of the performing party (or of any other third party). It was acknowledged that the liability of the performing party could be reduced by agreement but not as a result of a contract to which it was not a party. The proposal was withdrawn by its proponents.

164. Another proposal was made to replace the words "unless the performing party expressly agrees to accept such responsibilities or such limits" by wording along the lines of "unless the performing party has knowledge of such responsibilities or such limits". That proposal was objected to on the grounds that a contract should not bind a third party unless that third party had at least accepted to be bound. Simple knowledge of a contract by a third party should not result in that third party being bound.

165. Yet another proposal was made to limit the reference to draft article 18. It was stated that, while the reference to paragraphs (1), (3) and (4) of draft article 18 was acceptable, paragraph (2) of draft article 18 should not be referred to since the performing party was not liable in case of non-localized damage. The Working Group took note of the suggestion and decided that it might need to be further discussed after a decision had been made regarding the inclusion of paragraph (2) of draft article 18 in the draft instrument.

(d) Paragraph (3)

166. There was general agreement that, in view of the decision that the contracting carrier should be liable under the draft instrument for all its subcontractors, agents or employees, paragraph (3) should apply to both maritime and non-maritime performing parties, and possibly also to persons that would not fall under the definition of "performing party". The attention of the Working Group was drawn to the fact that the definition of "performing party" (see above, paras. 34 to 42) already encompassed all subcontractors of the performing party.

167. The question of the placement of paragraph (3) was raised. Although support was expressed in favour of maintaining paragraph (3) within draft article 15 in view of the close relationship between the various paragraphs in that draft article, the prevailing view was that a provision dealing with the liability of the carrier did not fit well in an article dealing with the liability of maritime performing parties. It was agreed that paragraph (3) should become a separate article, provisionally numbered draft article 14 bis.

168. Various suggestions were made regarding the substance of paragraph (3). One suggestion was that the contents of paragraph (3) should mirror that of paragraph (4). In that respect, it was pointed out that an express reference to the "employees" of the contracting carrier should be added in subparagraph (b), since the reference to "any other person" was insufficiently clear and a reference to the scope of that person's "employment" was already included in the second sentence of the subparagraph. That suggestion was accepted by the Working Group. As a matter of drafting, it was pointed out that further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

169. Another suggestion was that the words "who performs or undertakes to perform" should be replaced by the words "who physically performs or undertakes to perform". That suggestion was objected to on the grounds that the contracting

carrier should never be allowed to delegate liability, whether he delegated physical or other type of performance.

170. It was stated that the words "Subject to paragraph 5" might be inaccurate since paragraph (3) dealt with actions brought against the carrier, while paragraph (5) dealt with actions brought against any person, other than the carrier. Accordingly, it was suggested that the words "Subject to paragraph 5" should be replaced by "Subject to the liability and limitations of liability available to the carrier". While support was expressed for that suggestion, the Working Group decided to maintain the reference to paragraph 5, subject to further discussion at a later stage.

(e) Paragraph (4)

171. Consistent with a suggestion made in the context of the discussion of paragraph (3), it was suggested that the situation of employees under paragraph (4) might be differentiated from that of subcontractors. For example, it was stated that the notion that performance was "delegated" might be appropriate for a subcontractor but seemed too narrow to address the situation of an employee, which might be better covered by wording along the lines of "a performing party shall be responsible for the acts and omissions of its employees, provided they acted within the scope of their employment". Another example given was that the text of paragraph (4) should avoid suggesting that a subcontractor could delegate "any" of the obligations of the carrier, since the subcontractor could only delegate those obligations of the carrier the subcontractor had undertaken.

172. The Working Group reaffirmed its earlier decision that the structure of paragraph (4) should mirror that of paragraph (3). In that connection, a question was raised as to whether the scope of paragraph (4) should be extended to cover both maritime and non-maritime performing parties. After discussion, it was recalled that the provision that would replace paragraph (3) as a separate article should establish the liability of the contracting carrier also in respect of subcontractors and employees of its subcontractors. That provision was intended to establish a general liability of the contracting carrier for all conceivable agents or subcontractors the contracting carrier might rely upon. However, since paragraph (4) dealt with employees and subcontractors from the perspective of the maritime performing party and not from that of the contracting carrier, there was no need to extend the scope of paragraph (4) to non-maritime performing parties. While the Working Group was generally in agreement with the difference in scope between paragraphs (3) and (4), the recurring view was expressed that the maritime subcontractor dealt with under paragraph (4) should still be responsible for all of its subcontractors, whether maritime or non-maritime. The view was also reiterated that paragraph (4) should mirror the general rule in paragraph (3) since in both provisions, the contracting carrier and the maritime performing party were placed in parallel situations vis-à-vis their maritime and non-maritime subcontractors. It was pointed out that those views were not in conflict with the general policy that the non-maritime performing party, as such, should not be regulated under the draft instrument. The Working Group took note of those views for continuation of the discussion at a future session.

(f) Paragraph (5)

173. It was suggested that the reference to paragraph (3) should be deleted to avoid any interpretation extending the protection of "Himalaya clauses" to non-maritime performing parties. While the Working Group generally approved the intended result of that suggestion, it was observed that the deletion of the reference to the persons mentioned in paragraph (3) would deprive employees and agents of the carrier of the benefit of "Himalaya clauses". A revised suggestion was that paragraph (5) might need to list expressly those persons mentioned in paragraph (3) to which the benefit of such clauses should extend. In the context of that discussion, the view was expressed that since, historically, "Himalaya clauses" had been introduced for the protection of employees, the scope of paragraph (5) should be restricted to such employees of the carrier, to the exclusion of subcontractors of the carrier. The view was also expressed that the benefit of "Himalaya clauses" should only extend to those parties who were liable under the draft instrument. An alternative suggestion was made for a restriction of the scope of paragraph (5) to employees of the contracting carrier or of a maritime performing party, if they proved that they had acted within the scope of their employment.

174. In response to those suggestions, it was pointed out that a clear departure from the interpretation of the Hague and Hague-Visby Rules might adversely affect the acceptability of the draft instrument. It was also pointed out that the definition of "performing party" covered only those persons that "physically" handled the goods. Therefore, pilots, cargo inspectors and other persons that might assist the carrier would not be protected by "Himalaya clauses". As to the formulation of the draft instrument, it was suggested that the protection created by paragraph (5) should be extended at least to "employees or agents of the contracting carrier or of a maritime performing party". An alternative suggestion was that wording should be introduced to extend such protection to all the parties involved in the maritime operations, including independent subcontractors.

175. After discussion, the Working Group agreed that, as an alternative to the existing text of paragraph (5), the words "employees or agents of the contracting carrier or of a maritime performing party" should be inserted in square brackets for continuation of the discussion at a future session. The Secretariat was requested to examine the possibility of introducing a further variant limiting the scope of paragraph (5) to the maritime sphere.

176. As a matter of drafting, it was suggested that the words "Any action" might lend themselves to misinterpretation and should be replaced by the words "Any action under this instrument". The Working Group took note of that suggestion.

(g) Paragraph (6)

177. Concerns were expressed with respect to the translation of the legal notion of "joint and several liability" in a number of official languages. It was pointed out that, for example, in French and Spanish, the phrases "*responsabilité solidaire*" and "*responsabilidad solidaria*" respectively, should be used. The Working Group requested the Secretariat to ensure that the notion was used consistently in all official languages. A suggestion was made to introduce a definition of "joint and several liability" in the draft instrument. However, it was generally felt that such a definition might be superfluous to the extent that corresponding concepts existed in

the various legal systems. It was further suggested that the provisions of paragraph 6 should not prevent parties that are liable from resorting to recourse actions.

178. Regarding the substance of paragraph (6), a question was raised as to how the reference to "the limits provided for in articles 16, 24 and 18" would interplay with the operation of the international conventions referred to in draft article 8 that might be applicable before or after the sea leg of the carriage. In response, it was pointed out that, in relation to maritime performing parties, draft article 8 would not apply. Furthermore, while draft article 8 might apply in relation to non-maritime performing parties, there seemed to be no example of a single situation where a claimant would have an option to sue a contracting carrier or a non-maritime performing party to whom article 8 might be applicable. It was stated that concurring actions were only conceivable in actions against the contracting carrier or against a maritime performing party, both of whom would be covered by maritime limitations.

179. A concern was expressed with respect to the operation of limits of liability. In a situation where two parties were liable but the limit of liability did not apply in respect of only one of those parties, the theory of joint and several liability would apply up to the limit in respect of one party but the other party should be liable beyond the limit. In order to clarify that paragraph 6 should only deal with maritime performing parties and in response to that concern, a suggestion was made to simplify the text of paragraph (6) along the following lines: "The contracting carrier and the maritime performing party are jointly and severally liable." It was suggested that the issue should be further discussed in the context of paragraph (7).

180. After discussion, the Working Group agreed that the scope of paragraph (6) should be limited to maritime performing parties.

181. Due to the absence of sufficient time, the Working Group did not discuss paragraph (7) of draft article 15.

IV. Other business

182. The Working Group noted that its thirteenth session was scheduled to be held in New York from 3 to 14 May 2004. The Working Group took note with appreciation of the decision made by the Commission at its thirty-sixth session that two-week sessions would be allocated to the Working Group for continuation of its work (see A/58/17, para. 275).

183. The Working Group took note of an initiative by some delegations to organize a seminar on issues of freedom of contract in door-to-door international carriage of goods wholly or partly by sea before the thirteenth session of the Working Group. The Secretariat was requested to examine the possibility of co-sponsoring the seminar.

Notes

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

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

[3] For the general discussion regarding the allocation of conference time to the various working groups, see ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 270-275 and 277-278.

[4] Ibid., paras. 205-208.