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Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006)

Contents

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.71.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its eighteenth session in Vienna from 6 to 17 November 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Benin, Brazil, Canada, Chile, China, Colombia, Croatia, Czech Republic, France, Gabon, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Bulgaria, Burkina Faso, Congo, Democratic Republic of the Congo, Denmark, Dominican Republic, Finland, Greece, Indonesia, Iraq, Latvia, Libyan Arab Jamahiriya, Malaysia, Netherlands, New Zealand, Norway, Peru, Philippines, Romania, Senegal, Slovakia, Ukraine and Yemen.

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

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

(b) **Intergovernmental organizations**: Council of the European Union, European Commission (EC), and Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) **International non-governmental organizations invited by the Working Group**: Association of American Railroads (AAR), BIMCO, Center for International Legal Studies (CILS), Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Commerce (ICC), 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 Road Transport Union (IRU), International Union of Marine Insurance (IUMI), and The European Law Students' Association International (ELSA).

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter de Sá Leitão (Brazil)

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

(a) Annotated provisional agenda and corrigendum (A/CN.9/WG.III/WP.71 and A/CN.9/WG.III/WP.71/Corr.1);

(b) A document on transport documents and electronic transport records presented for information by the Government of the United States of America at its seventeenth session, but consideration of which was not completed at that session (A/CN.9/WG.III/WP.62);

(c) A document on the limitation of the carrier's liability in the draft convention presented for information by the Government of China (A/CN.9/WG.III/WP.72);

(d) A document annexing comments and proposals of the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs on topics on the agenda for the 18th session of the Working Group (A/CN.9/WG.III/WP.73);

(e) A document on the shipper's liability for delay presented by the Government of Sweden (A/CN.9/WG.III/WP.74);

(f) A note by the secretariat containing the revised text of chapter 16 of the draft convention on jurisdiction (A/CN.9/WG.III/WP.75);

(g) A document on rights of suit and time for suit in the draft convention on the carriage of goods [wholly or partly] [by sea] presented for information by the Government of Japan (A/CN.9/WG.III/WP.76);

(h) A proposal of the Government of the United States of America with respect to the procedure for the amendment of the limitation amounts in the draft convention (A/CN.9/WG.III/WP.77);

(i) A note by the secretariat on the relation of the draft convention on the carriage of goods [wholly or partly] [by sea] with other conventions (A/CN.9/WG.III/WP.78); and

(j) A document containing a drafting proposal by the Governments of Italy and the Netherlands with respect to the identity of carrier provision in the draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.79).

7. The Working Group adopted the following agenda:

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

I. Deliberations and decisions

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in the annexes to a note by the Secretariat (A/CN.9/WG.III/WP.56), and discussed various proposals and revised texts, including the proposal by the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs on topics on the agenda for the 18th session of the Working Group (A/CN.9/WG.III/WP.73); the revised text of chapter 16 of the draft convention on jurisdiction (A/CN.9/WG.III/WP.75); the proposal of the Government of the United States of America with respect to the procedure for the amendment of the limitation amounts in the draft convention (A/CN.9/WG.III/WP.77); the proposal of the Governments of Italy and the Netherlands with respect to the identity of carrier provision in the draft convention (A/CN.9/WG.III/WP.79). 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 II below.

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

Transport documents and electronic transport records — Chapter 9 (*continued*)

9. The Working Group was reminded that its most recent consideration of draft chapter 9 on transport documents and electronic transport records had commenced at its seventeenth session (see A/CN.9/594, paras. 216 to 233), but that it had been interrupted due to time constraints until the current session. It was also recalled that the most recent complete consideration of the topic by the Working Group took place during its eleventh session (see A/CN.9/526, paras. 24-61), and that a written proposal regarding the identity of the carrier in draft article 40 (3) had been submitted for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.79). The consideration by the Working Group of the provisions of chapter 9 was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56, and that the text of the provisions set out in A/CN.9/WG.III/WP.62 was the current text of the draft convention as found in A/CN.9/WG.III/WP.56, without modification.

Draft article 39. Signature

10. The Working Group considered the text of draft article 39 as contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 19 of A/CN.9/WG.III/WP.62. It was recalled that draft article 39 had been accepted in substance at its eleventh session (see A/CN.9/526, para. 32) and that the only modification to the draft article since then had been to paragraph 2 to ensure that the text conformed with changes made to the text of the draft convention with respect to electronic communication (see A/CN.9/576, paras. 201-205).

11. The Working Group was informed that, in connection with informal consultations that took place in connection with draft article 39, it was suggested that the Working Group may wish to consider whether the draft convention should contain a definition of signature such as, for example, along the lines of that contained in article 14 (3) of the Hamburg Rules or article 5 (k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (see A/CN.9/WG.III/WP.62, para. 22). No support was expressed in the Working Group for the inclusion of such a definition. It was suggested that such a definition was unnecessary and that what constituted a signature could be determined according to practical commercial needs.

12. Support was expressed for the drafting proposal (see A/CN.9/WG.III/WP.62, para. 24) that the references to "authority" should be deleted from draft paragraphs (1) and (2). It was agreed that the consequences of unauthorized signature should be left to national law.

Conclusions reached by the Working Group regarding draft article 39:

13. After discussion, the Working Group decided that:

- The text of draft article 39 contained in A/CN.9/WG.III/WP.56 should be retained;
- The expression "by the carrier or a person having authority from the carrier" in draft paragraph (1) be replaced by a phrase such as "by or on behalf of the carrier"; and
- The expression "of the carrier or a person having authority from the carrier" in draft paragraph (2) be replaced by a phrase such as "of the carrier or a person acting on behalf of the carrier".

Draft article 40. Deficiencies in the contract particulars

14. The Working Group proceeded to consider draft article 40 as contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 25 of A/CN.9/WG.III/WP.62.

Paragraph (1)

15. It was noted that paragraph (1) provided a general rule that the absence of one or more contract particulars referred to in article 38 (1) or inaccuracy of those particulars did not of itself affect the legal character or validity of the transport document or the electronic transport record. The Working Group approved the substance of paragraph (1).

Paragraph (2) "shall be deemed to be"

16. It was recalled that paragraph (2) provided a rule to overcome ambiguity with respect to the significance of a date specified in the contract particulars. Clarification was sought as to whether the phrase "is considered to be" raised a rebuttable presumption or was conclusive in respect of interpreting a date included in the contract particulars. Support was expressed for the view that the phrase "is considered to be" should be taken as conclusive and that the paragraph could be revised to clarify that point, possibly by using a phrase such as "shall be deemed to be" in its stead.

Paragraph (3) and the identity of the carrier

17. The Working Group considered the text of paragraph 3 of draft article 40 as contained in A/CN.9/WG.III/WP.56 relating to transport documents and electronic transport records that were unclear with respect to the identity of the carrier. In connection with the discussion of draft paragraph 3, the drafting proposal set out in A/CN.9/WG.III/WP.79 was considered by the Working Group.

18. By way of introduction, it was explained that the various aspects of the drafting proposal contained in A/CN.9/WG.III/WP.79 were intended to deal principally with three perceived problems in connection with the identification of the carrier in transport documents and electronic transport records. The first problem was said to be when the face of the transport document or electronic transport record was unclear and contained, for example, only the trade names of the carrier or the name of the carrier's booking agents, rather than identifying the carrier (see A/CN.9/WG.III/WP.79, para. 3). It was proposed that, in keeping with the identification of the carrier requirements of articles 23 (a)(i) and 26 (a)(i) of the Uniform Customs and Practices for Documentary Credits 500 (UCP 500), draft paragraph 38 (1) (e) regarding the necessary contract particulars should be modified to read: "the name and address of a person identified as the carrier". General support was expressed in the Working Group for this proposal, however it was recalled that the UCP 600 would soon be made public and should be reviewed to ensure the consistency of the draft convention in this regard.

19. The second practical problem intended to be addressed by the drafting proposal in A/CN.9/WG.III/WP.79 (see para. 4 thereof) was said to be the situation where the information in small print on the reverse side of a transport document in the so-called "identity of carrier" clause conflicted with the information identifying the carrier on the face of the document. In order to solve this ambiguity, it was proposed that a provision be inserted into the draft instrument (see A/CN.9/WG.III/WP.79, para. 4) ensuring that the information regarding the identification of the carrier on the face of the transport document or electronic transport record would prevail over contradictory information on the reverse side. Support was expressed for this proposal in the Working Group, with the caveat that care should be taken in the drafting of the provision to ensure that appropriate text was inserted to find an equivalent for the "reverse side" of an electronic transport record.

20. The third practical problem with which the drafting proposal in A/CN.9/WG.III/WP.79 was intended to deal was the situation when, despite existing requirements, the identity of the carrier remained unclear in the transport document or electronic transport record such as, for example, in the case where the document or record was signed by or on behalf of the master, without stating the basis of the master's authority. In such cases, it was proposed that the fallback position for the identification of the carrier should be the text as set out in paragraph 5 of A/CN.9/WG.III/WP.79 whereby the registered owner was presumed to be the carrier, unless the owner identified the bareboat charterer, or unless the owner or the bareboat charterer defeated the presumption by identifying the carrier. A corollary of the acceptance of this aspect of the proposal was set out in paragraph 6 of A/CN.9/WG.III/WP.79, which provided for an extension of the limitation period for the commencement of actions by the claimant in such cases. It was stated that national law had in some cases provided a solution for this situation, but that the

response in this regard was not uniform. Further, it was said that while presuming the registered owner to be the carrier might be inappropriate in cases where, for example, the owner was a financial institution, it was thought that the owner was nonetheless in the best position to identify the carrier, and thus to rebut the presumption.

21. General support was expressed in the Working Group for this effort to find a compromise solution to the persistent problem of the identification of the carrier. Further, support was expressed in principle for the particular approach to the problem that had been taken in the proposal.

22. However, concerns were expressed regarding the presumption that the registered owner of the ship was the carrier. It was thought that such an approach to the identification of the carrier could be particularly troublesome in the context of multimodal transport, where the registered owner of the ship might not have any knowledge regarding the other legs of the transport. Further, it was noted that the probability of the registered owner being the carrier was small, and that there was likely to be a series of charters from the registered owner, such that the owner may have very little knowledge regarding the identity of the carrier. It was also said to be erroneous to assume that the registered owner could easily have access to the necessary information to rebut the presumption that it was the carrier.

23. It was said that there were additional complications related to the compromise approach to the identification of the carrier set out in paragraph 5 of A/CN.9/WG.III/WP.79. It was suggested that the presumption created in the proposal could reduce the flexibility of courts as they decided on the identity of the carrier responsible on a case-by-case basis by weighing all of the facts at hand, including the various indicators regarding the identity of the carrier on the transport document or electronic transport record, even though such indicators could conflict. Further, the concern was expressed that a provision such as the one proposed could prevent cargo interests from advancing their claims against the party they believed to be most responsible, and support was expressed for the suggestion that while deletion of the provision on the identity of the carrier was preferred, if it were retained, it was suggested that text along the following lines should also be adopted: “Nothing in this article prevents the claimant from proving that any person other than the registered owner is the carrier.”

24. It was also indicated in the Working Group that the discussion had revealed a number of issues on which there was general agreement. The first of these was said to be agreement that the contracting carrier should be responsible for any breach of the contract of carriage. Further, it had already been agreed by the Working Group that draft article 38 should require the carrier to identify itself in the transport document or electronic transport record. It was noted that a presumption regarding the identity of the carrier was necessary only in situations where the carrier had failed to identify itself and left the consignee in the position of not knowing against whom to pursue its claim. Support was expressed for the view that while it was clear that the registered owner may not always have the best information regarding the identity of the carrier, it was likely to have some information regarding its ship, and the approach proposed to that problem was simply a device to allocate the burden of identifying the carrier and to give the consignee an effective remedy. It was also suggested that in order to deal with cases where there was a succession of

charters of a vessel, the provision could be modified so as to allow each person in the chain of contracts to rebut the presumption that it was the carrier.

25. In further support of the proposed approach to the identification of the carrier set out in paragraph 5 of A/CN.9/WG.III/WP.79, it was indicated that a number of remedies relating to maritime law adopted a similar approach with respect to the responsibility of the registered owner of the ship, such as in the case of maritime liens or the arrest of a ship.

Paragraph (4)

26. The Working Group approved the substance of paragraph (4).

Possible additional paragraph: Number of originals

27. It was recalled that the Working Group had decided at its seventeenth session to include in draft article 38 regarding the required contract particulars the number of originals of a negotiable transport document issued (see A/CN.9/594, paras. 230 and 232-233). In that regard, the question was raised whether reference should be made in draft article 40 regarding the consequences of failure to include such information in the contract particulars. The Working Group agreed to leave this matter as a drafting issue to be decided by the Secretariat.

Conclusions reached by the Working Group regarding draft article 40:

28. After discussion, the Working Group decided that:

- The text of draft paragraph (1) be adopted;
- The reference in draft paragraph (2) “is considered to be” is adjusted to render it conclusive;
- The drafting proposals contained in paragraphs 3 and 4 of A/CN.9/WG.III/WP.79 should be adopted into the text of the draft convention;
- The existing text of draft paragraph (3) should be maintained for the time being in square brackets;
- In addition, the Secretariat should prepare revised text of the approach to the identity of the carrier issue in draft paragraph (3) based on principles as enunciated in paragraph 5 of A/CN.9/WG.III/WP.79 and the concerns raised by the Working Group during its consideration of that text;
- Consideration of the proposal regarding the extension of the limitation period in which to take actions was deferred until the Working Group’s consideration of the revised text to be prepared regarding the identity of carrier problem;
- The text of draft paragraph (4) be adopted; and
- The Secretariat should prepare a new version of draft article 40 taking into account the above deliberations and conclusions.

Draft article 41. Qualifying the description of the goods in the contract particulars

29. The Working Group proceeded to consider draft article 41 as contained in A/CN.9/WG.III/WP.56 and reproduced in paragraph 35 of A/CN.9/WG.II/WP.62.

30. It was recalled that draft article 41 was based on the assumption that the shipper was always entitled to obtain a transport document or electronic transport record reflecting the information that it provided to the carrier but that in certain circumstances, a carrier should be entitled to qualify that information. The Working Group was informed that informal consultations had to some extent supported some of the drafting suggestions that had been made at its eleventh session (see A/CN.9/526, para. 37) but which had not been addressed in the text of the draft convention.

Distinction between containerized and non-containerized goods

31. One suggestion made was to either delete draft paragraph (b) and apply draft paragraph (a) to containerized goods, or to include text along the lines of draft article 41 (a)(ii) in draft paragraph (b) to address the situation in which the carrier reasonably considered the information furnished by the shipper regarding the contents of the container to be inaccurate (see A/CN.9/526, para. 37 and A/CN.9/WG.III/WP.62, para. 38).

32. In that respect, a question was raised as to the validity of distinguishing between containerized and non-containerized goods in draft article 41. Some doubt was expressed as to whether that distinction adequately reflected the current state of the industry, given that other means of transport, such as trailers, were sometimes used for goods as well. It was also suggested that paragraph (b) added a new element to the discussion, namely the term “closed”, and that it was not clear what was meant by the term “closed container”, nor whether for example, a sealed door on a trailer could be considered a “closed container”.

33. In support of the current structure of the article, it was said that the distinction was valid for the reason that, in practice, containerized and non-containerized goods were treated differently, and that there was a presumption that a carrier would not open containerized cargo for inspection. The provision, it was further said, accommodated a wide range of practices, and the broad definition of the term “container” defined in article 1 (y) was sufficient to cover other types of unit loads, such as trailers. However, some support was expressed for combining draft paragraphs (b) and (c), as both paragraphs dealt with closed containers, although draft paragraph (b) dealt with quantity and description of the goods within a container, while draft paragraph (c) referred to the weight of the goods. In addition, a suggestion was made to include a reference to a description of the goods in paragraph (b) along the lines of that contained in article 38 (1) (a).

Requiring carrier to give reasons for qualification

34. Another suggestion made at the eleventh session was to require a carrier that decided to qualify the information mentioned on the transport document to give reasons for that qualification. That suggestion did not receive support.

Agreement by carrier not to include qualification in exchange for guarantee from shipper and the notion of "good faith"

35. A further suggestion was made to deal with the situation where a carrier agreed not to qualify the description of the goods in exchange for a letter of indemnity from the shipper, by providing sanctions and the loss of the right to invoke the limits of liability set forth in the draft convention when the carrier acting in bad faith voluntarily agreed not to qualify the information in the contract particulars. It was agreed, however, that questions of sanctions should be dealt with in provisions relating to the loss of the limitation on liability.

36. There was an extensive exchange of views on the notion of "good faith" in connection with the draft article. The use of the term "good faith" generally in the chapeau of article 41 was questioned not only because the concept of "good faith" had various meanings in different legal systems, but also because the explanation of what constituted "good faith" for the purposes of draft article 41, as set out in draft article 42, was felt to be too narrow. It was said, in that connection, that in legal systems that acknowledged a general obligation for parties to commercial contracts to act in good faith, a breach of such general obligation might also occur in a variety of situations not specifically mentioned in draft article 42.

37. Support was expressed for including examples of what "good faith" was, given that in circumstances where the carrier colluded with the seller it would be the consignee who would suffer as a result. However, strong support was expressed for the deletion of the term "good faith". It was said that the term was susceptible to differing interpretations in different legal systems and that the term was not merely relative to a contract but applied to the behaviour of all the parties. It was also noted that its inclusion could be misinterpreted as implying that good faith was not required elsewhere in the instrument. It was suggested that one option might be delete the term "good faith" but include the elements in subparagraphs (b)(i) and (ii) of draft article 42 in a rule setting out the conditions for validity of qualifications made by the carrier under draft article 41.

"if the carrier can show"

38. Clarification was sought as to what was intended by the phrase "if the carrier can show" as used in draft paragraphs (a)(i) and (c)(i). It was suggested that if what was intended was that carrier could show to the seller or consignee then that should be expressly stated, but the view was also expressed that evidentiary matters should be left to national law, and that the references in these provisions to "can show" could simply be deleted.

Conclusions reached by the Working Group regarding draft article 41:

39. After discussion, the Working Group decided that:

- The term "good faith" in the chapeau in article 41 and the corresponding term in article 42 should be deleted with elements of the description contained in article 42 possibly being included at an appropriate place in article 41;
- The distinction between containerized and non-containerized goods should be maintained. However, consideration should be given to clarifying what was meant by a "closed container" to indicate that it referred to the situation where

there was difficulty in inspecting the goods on the part of the carrier and streamlining paragraphs (b) and (c); and

- The Secretariat should prepare a new version of draft article taking into account the above deliberations and conclusions.

Draft article 42. Reasonable means of checking and good faith

40. It was recalled that at its eleventh session, the substance of draft article 42 was found to be generally acceptable (see A/CN.9/526, para. 43) and that in informal consultations since its seventeenth session, all of the delegates addressing the issue supported draft article 42 in substance as currently drafted (see para. 41 of A/CN.9/WG.III/WP.62).

41. It was agreed that issues addressed under draft article 41 should also be considered in relation to article 42 where relevant, for example, the decision to delete the reference to "good faith".

42. A proposal was made to add the following wording at the end of paragraph (a): "and not require technical expertise or costs other than what follows from a customary examination of the goods". It was suggested that if that proposal were accepted, then a consequential amendment would be to reword draft article 38 (1) (a) as follows: "The carrier is required to include in the transport document a description of the goods as provided by the shipper. However, the carrier is not obliged to include lengthy descriptions irrelevant to the contract of carriage or detailed technical descriptions of the goods which, even if controllable by the carrier, are not necessary in order to reasonably identify the goods or may impose an undue burden of control upon the carrier." Whilst there was some sympathy expressed for the potential problem of increased burden on the carrier or of burdensome inclusions in the contract of carriage, the proposed additional text did not receive support. It was agreed that the matter sought to be covered therein was already encompassed by the phrase "commercially reasonable". Possible concerns that the term "commercially reasonable" was too imprecise to encompass the intention of the proposal could be addressed, for instance, in a commentary on the draft convention that the Secretariat might wish to prepare.

43. It was noted that the decision to delete references to good faith in draft article 41 would entail deletion of paragraphs (b) and (c) of draft article 42. For that reason, it was suggested that the remainder of draft article 42 (paragraph (a)) could be inserted at the appropriate juncture in draft article 41.

Conclusions reached by Working Group regarding draft article 42:

44. After discussion the Working Group decided that:

- Paragraph (a) be included in a revised version of draft article 41; and

- In accordance with the decision to delete references to "good faith" in article 42, paragraphs (b) and (c) be deleted and the elements that characterized a carrier's action in good faith to be possibly included in a revised draft article 41.

Draft article 43. Prima facie and conclusive evidence

General discussion

45. The Working Group considered the text of draft article 43 as contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 42 of A/CN.9/WG.III/WP.62. It was recalled that draft article 43 had been accepted in substance at its eleventh session (see A/CN.9/526, paras. 44-48).

46. By way of introduction, the Working Group was reminded that draft article 43 set out the conditions, subject to draft article 44, under which transport documents or electronic transport records that evidenced receipt of the goods would constitute conclusive evidence of the carrier's receipt of the goods as described in the contract particulars, and when they should be regarded as being only prima facie evidence of such receipt. The Working Group was in agreement with the text as set out in draft subparagraph 43 (a).

47. The Working Group agreed that the most controversial aspect of the provision was draft subparagraph 43 (b)(ii) with respect to the evidentiary effect of non-negotiable transport documents or non-negotiable electronic transport records. It was recalled that Variant A of draft subparagraph 43 (b)(ii) was slightly broader than Variant B, in that it did not restrict the protection it offered to third parties to those that had purchased and paid for the goods in reliance on the description of the goods in the contract particulars, and thus would include, for example, a bank that had relied on the contract particulars to advance money to the consignee.

48. The Working Group was reminded that a third variant of this subparagraph had been proposed as Variant C in A/CN.9/WG.III/WP.68, in order to take into account bills of lading consigned to a named person, which were approved by the Working Group for inclusion in the draft convention (see A/CN.9/594, paras. 208-211). The text of Variant C of subparagraph 43 (b)(ii), which was intended to replace Variants A and B, was proposed as follows (see A/CN.9/WG.III/WP.68, para. 21): "If a non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods has been issued, if such document or record has been transferred to the consignee acting in good faith."

Negotiable versus non-negotiable

49. By way of explanation of Variant C, the Working Group was reminded that the basic rule with respect to evidentiary value was that negotiable documents and records were considered conclusive evidence, while non-negotiable documents and records were considered prima facie evidence. The sole exception to this general approach was said to be sea waybills, to which the Comité Maritime International (CMI) Uniform Rules for Sea Waybills had been agreed to apply. In an effort to elevate the status and use of sea waybills, such documents were deemed conclusive evidence as between the carrier and the consignee. It was said that the primary objection to extending conclusive evidence status to non-negotiable documents and records in the terms set out in Variant A or B was that it was thought to be improper to confer such evidentiary status on the basis of a unilateral act by the consignee, i.e. the act of having relied on the description of the goods. It was suggested that bills of lading to named persons that included a presentation rule were deserving of the status of providing conclusive evidence, but that other non-negotiable

documents and records were not. Some support was expressed for the approach set out in Variant C.

50. By way of further clarification, it was observed that the Hague Rules had originally conferred only prima facie evidentiary status on bills of lading or similar documents of title, and that the 1968 Visby Protocol had amended the Hague Rules to provide for conclusive evidentiary status. It was suggested that this amendment had been effected in order to address problems that had arisen because of the lack of uniformity in the application of the prima facie evidentiary rule in regard to bills of lading that had been transferred to third parties acting in good faith. In addition, it was noted that the 1968 amendment had referred only to bills of lading and had not extended to non-negotiable transport documents, because the scope of application of the Hague-Visby Rules was limited to bills of lading and similar documents of title.

51. Some doubts were raised as to whether the appropriate evidentiary weight of a document or record should depend on its negotiable status. It was suggested that there were four categories of documents which should be considered in this regard: negotiable documents and records, which should constitute conclusive evidence; documents and records which were mere receipts and which should not be conclusive evidence; bills of lading to named persons which were non-negotiable but which should nonetheless have the effect of conclusive evidence; and finally, non-negotiable documents and records that evidenced a contract of carriage, such as sea waybills. Of these categories, the evidentiary treatment of the first three was thought to be essentially non-controversial, but it was proposed that the final category could be treated in one of two ways: one option was to provide that unless otherwise stated on its face, the document or record constituted conclusive evidence, while the other option was to provide that unless otherwise stated on its face, the document or record constituted prima facie evidence only. Some support was expressed for a rule holding this fourth category of documents to be conclusive evidence unless otherwise stated on its face. In further support of this proposition, views were expressed that such a rule could also be appropriate in terms of promoting increased recourse to the use of sea waybills in circumstances in which a bill of lading was not necessary. However, some concerns were raised that this approach could cause legal uncertainty by allowing parties to change the legal nature of a document by including a certain statement in it.

52. An additional alternative approach to the problem of how to decide which documents and records should represent prima facie evidence, and which should represent conclusive evidence, was also proposed. It was suggested that the distinction between documents and records based on their negotiable character should be abandoned in favour of an approach where the document or record would be considered prima facie evidence in all cases except those where three requirements were met: the relationship was between the carrier and a third party other than the shipper, and where the third party was acting both in good faith and in reliance on the description of the goods in the transport document or electronic transport record. Where those three requirements were met, the document or record would be considered conclusive evidence.

53. A strongly-held view remained that, with the sole exception of non-negotiable transport documents or electronic transport records that indicated that they had to be surrendered in order to obtain delivery of the goods, the prima facie evidence rule should be the general rule for non-negotiable documents or records such as sea

waybills, while the conclusive evidence rule should apply only to negotiable transport documents and electronic transport records. It was said that any other approach risked causing significant confusion regarding the legal nature of the documents or records. Support for this view was said to arise from the basic rule that the transferor of a document or a record was not able to transfer to others greater rights than possessed by the transferor, and from the exception to that rule in the case of negotiable instruments, such as promissory notes or bills of lading, whose rights could be invoked from the face of the document or record itself. However, questions were raised whether this rationale unnecessarily intermingled concepts of the law of assignment with the evidentiary effect that the document or record, when functioning as a receipt, should have in respect of the protection of the rights of third parties acting in good faith.

54. A further observation was made that the question in issue should be less one of the law of assignment or of the strict consequences of negotiability, and more one of allocating the risk of relying on inaccurate information in the contract particulars as between the carrier, who possessed specialized knowledge and entered the information, and the innocent consignee. In this vein, the Working Group was urged to depart from the confines of strict domestic legal principle and to make a policy decision to allow non-negotiable documents or records to be considered conclusive evidence in certain situations in order to facilitate trade.

55. In urging the search for a compromise, it was noted that the contents of the contract particulars were dictated by the requirements set out in draft article 38, and that subparagraphs (1) (a), (b) and (c) thereof referred to information to be furnished by the shipper, which the carrier was under no explicit obligation to check. Further, it was observed that, since the carrier never checked the contents of containers in practice, the issue of whether a document or record was to be considered prima facie or conclusive evidence was of limited operation, since it did not apply to the container trade at all, and the two types of evidentiary value had similar practical effect.

Notion of "reliance" and "good faith" in relation to third party

56. In addition, concerns were raised regarding the requirement in draft subparagraph 43 (b)(ii) that the evidentiary value of a transport document or electronic transport record would depend on whether a third party had in fact relied on the description of goods in the contract particulars to its own detriment. This approach was said to be relatively unknown in civil law countries, and a preference was expressed for a more general solution linking the evidentiary value of the transport document or electronic transport record to the function it fulfilled, possibly coupled with a general rule protecting the holder in good faith, in a manner similar to the law that governed negotiable instruments, such as bills of exchange and promissory notes, in many jurisdictions.

Conclusions reached by the Working Group regarding draft article 43:

57. After discussion, the Working Group decided that:

- While in agreement with respect to the text of draft paragraph 43 (a), the discussion of draft paragraph (b) indicated that the differences of approach with respect to the evidentiary treatment that should be conferred on certain

transport documents or electronic transport records, be they negotiable or non-negotiable, had not yet sufficiently narrowed to allow for a consensus view to emerge in the Working Group; and

- Several different proposals had been made during the course of discussion, further to which the Secretariat was requested to prepare alternative draft text for consideration at a future discussion, taking into account the various views expressed in the Working Group.

Revised text of draft article 43

58. The Working Group recalled its earlier discussion of draft article 43 on prima facie and conclusive evidence, and its discussion of draft paragraph (b) which indicated differences in approach in the Working Group with respect to the evidentiary treatment that should be conferred on the information in certain transport documents or electronic transport records, be they negotiable or non-negotiable (see paras. 45-57 above). To resolve conflicting views expressed on paragraph 43 (b), a proposal was made to revise the text of draft article 43 as follows:

"Article 43. Evidentiary effect of the description of the goods in the contract

"Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is prima facie evidence of the carrier's receipt of the goods as described in the contract particulars; and

"(a) Proof to the contrary by the carrier in respect of any contract particulars relating to the goods shall not be permissible, when such contract particulars are included in:

"(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith, or

"(ii) A non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith.

"(b) Proof to the contrary by the carrier vis-à-vis the consignee, acting in good faith, shall equally not be permissible in respect of contract particulars relating to the goods included in a non-negotiable transport document or a non-negotiable electronic transport record, when such contract particulars are furnished by the carrier. For the purpose of this paragraph the number and type of containers is deemed to be information furnished by the carrier."

Amendments in the proposal

59. It was clarified that the reference to "contract particulars furnished by the carrier" in the proposal included all information listed in subparagraphs 38 (1) (d) to (f) (inclusive), as well as the new subparagraph to be added to draft article 38 (1) regarding the inclusion of the number of original documents issued. It was noted that, in relation to the final sentence of subparagraph 43 (b), some additional drafting might be necessary, such that information with respect to the number and

type of containers would be deemed to have been provided by the carrier, whereas information as to the seals on the containers would be deemed to be provided by the shipper. To address those concerns it was proposed to add after the word "containers" in subparagraph (b), the words ", their identifying numbers and the information referred to in article 38, subparagraphs (1) (d) to (f) (inclusive)," as well as the number of original documents issued. Additionally a further sentence along the following lines was proposed to be added at the end of subparagraph (b): "The number of container seals is deemed to be information furnished by the shipper". Those amendments received strong support.

60. It was noted that the chapeau of paragraph (a) had been modified to the simpler formulation of "proof to the contrary" from the "conclusive evidence" approach, which had been found to be problematic. Further, subparagraph (a)(ii) had been added to the text as representing what was thought to be a consensus in the Working Group regarding the appropriateness of including bills of lading consigned to a named person in draft paragraph (a) (see paras. 48, 49, 51 and 53 above).

61. It was explained that the intention of the proposal had been to preserve the status quo with respect to negotiable transport documents, and to provide a compromise approach for the evidentiary treatment of non-negotiable transport documents in order to bridge the differing views expressed in this regard earlier (see paras. 49-55 above). On this aspect, the main innovation was in draft paragraph (b), which set out the nature of the compromise by drawing a clear demarcation line distinguishing the evidentiary value of information in the contract particulars of non-negotiable transport documents based upon whether that information was provided by the carrier or by the shipper. It was said that in respect of information it furnished in such documents, the carrier should not be permitted to provide proof to the contrary with respect to the consignee, but that such proof should be permitted when such information was furnished by the shipper.

General discussion

62. While some lingering concerns were expressed regarding the replacement of the requirement of reliance on the information with a "good faith" rule, and some doubts were expressed regarding granting any sort of non-negotiable transport documents status in terms of the evidentiary rule, it was generally recognized that the proposal represented a positive development in terms of a compromise approach. Strong overall support was expressed in the Working Group for the approach taken in the revised text of draft article 43 as representing a sound compromise on which to continue discussion.

Subparagraph (b)

63. It was suggested that the practical operation of paragraph (b) of the proposed provision might be unclear in terms of what evidentiary effect the information in the contract particulars in a non-negotiable transport document would have if a carrier chose to make a reservation under article 41 (a)(ii) to shipper-provided information. In response, it was explained that if the carrier inserted a qualifying clause to the shipper information, such as "contents unknown" or "as provided by shipper", the description of the goods would still be shipper-furnished, but if the carrier (believing that the shipper's description was incorrect) inserted its own description

clause based on article 41 (a)(ii), it would do so at its own peril, and that clause would be considered to be carrier-furnished information.

Inclusion of a "mere receipt"

64. A concern was raised that the definition of a transport document or electronic transport record in draft article 1 (n) was very broad and could include a mere receipt. The question was raised as to whether it was appropriate that a non-negotiable transport document that merely evidenced receipt should be covered in draft paragraph (b), given that a mere receipt was issued only as evidence of receipt as between the shipper and carrier and nothing more. A sea waybill, on the other hand, was a different type of non-negotiable document in that it evidenced the contract of carriage, and which identified the consignee. However, the view was expressed that mere receipts should sometimes be properly included in draft paragraph (b), depending on their nature. Further, it was noted that most domestic legal regimes contained a general principle preventing parties from presenting evidence contrary to statements made by them. Finally, it was observed that, under its terms, this draft paragraph was unlikely to operate frequently, since mere receipts would not often have a function in the relationship between the carrier and the consignee. However, some concerns remained regarding the inclusion of a mere receipt in draft paragraph (b), such that it would have an estoppel effect, in particular in respect of legal regimes that did not have a general rule preventing reliance by a party on its own statement, and a suggestion was made that an effort could be made to investigate whether it was possible to exclude mere receipts from inclusion in draft paragraph (b).

"furnished by"

65. An additional question raised was whether the term "furnished by the carrier" was sufficiently clear, and concerns were raised that it might raise difficulties of proof, since the carrier most often entered the information in the contract particulars. In response, it was said that being required to prove from whom the information came would not be too onerous under modern transport conditions. It was noted that, in the past, carriers often had shipper instruction forms which required the shipper to provide certain specific information, but that nowadays there were established patterns within the industry regarding who had to furnish certain information.

"by the carrier vis-à-vis the consignee"

66. A question was also raised as to why the operation of draft paragraph (b) was limited to "the carrier vis-à-vis the consignee". In that respect, it was noted that a transport document only had to be signed by the carrier and that article 39 did not require the shipper to sign the transport document, yet the shipper would not under the current provision be protected in the same way as the consignee. In response, it was noted that the position of the consignee was particular, since the consignee was involved in the transaction without having participated in the contract of carriage, but that the shipper did not require the same protection since it was involved in the contract of carriage and the provision of information in the transport documents.

Freedom of parties to increase evidentiary value of a document

67. In response to a question, it was suggested that pursuant to the draft convention, including draft article 94, parties would not be prevented from agreeing to upgrade the evidentiary value of a non-negotiable transport document by making a statement in that non-negotiable transport document that it was conclusive evidence. It was noted, however, that the parties could not downgrade the evidentiary status of a document, and that although such a statement on the face of a document could change its evidentiary value, it could not change the negotiable or non-negotiable status of the document itself.

Conclusions reached by the Working Group regarding revised text of draft article 43:

68. After discussion, the Working Group decided that

- The compromise proposal, as amended with respect to the closing line of paragraph (b), was acceptable in substance; and
- The Secretariat prepare a text taking account of the comments made for consideration at a future session.

Draft article 44. Evidentiary effect of qualifying clauses

69. The Working Group considered the text of draft article 44 as currently drafted and contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 47 of A/CN.9/WG.III/WP.62, and an alternative text contained in paragraph 49 of A/CN.9/WG.III/WP.62. The Working Group was reminded that draft article 44 set out the practical effect of qualifying clauses that fulfilled the requirements of draft article 41, thus permitting the carrier's qualification to supersede the prima facie or conclusive evidence that would otherwise exist under draft article 43. It was further recalled that a view had been expressed at its eleventh session that draft article 44, in its current form, favoured the carrier because it allowed the carrier to rely on its qualifying clauses regardless of its treatment of the goods (A/CN.9/526, para. 50, see also paras. 49-52). The alternative text offered a narrower approach, permitting the carrier to rely on qualifying clauses only when it could demonstrate a chain of custody by delivering a container in substantially the same condition in which it had been received.

70. Some support was expressed in the Working Group for the alternative text reproduced in paragraph 49 of A/CN.9/WG.III/WP.62, as it was said to represent a commercial compromise that preserved a balance between the interests of shippers and carriers. It was further explained that the alternative text had been carefully crafted to permit qualifying clauses where they had previously seldom been allowed, but that care had been taken to ensure that the text did not broadly allow such qualifications without regard to the care that the carrier had taken with respect to the goods.

71. Strong support was expressed in the Working Group for the text of draft article 44 as currently set out in A/CN.9/WG.III/WP.56. In response to the concerns expressed regarding the need to ensure that care had been taken by the carrier with respect to the goods, the view was expressed that the fact that qualifying clauses must fulfil the requirements of draft article 41 should be sufficient for that purpose,

in addition to the fact that draft article 44 only allowed their operation to the extent that they qualified the description of the goods.

72. Clarification was sought as to the relationship between draft articles 41 and 44, and particularly whether draft article 44 was necessary in light of the phrase in draft article 41 that "the carrier does not assume responsibility for the accuracy of the information furnished by the shipper". In response, it was explained that, whereas draft article 41 provided for the inclusion of a specific qualifying clause that met certain requirements, article 44 was thought to be necessary since it set out the legal effect of such a clause. It was also clarified that prima facie or conclusive evidentiary effect of the document or record was not completely superseded by the qualifying clause, since there was certain information in the document or record on which no reservations were allowed. However, a drafting suggestion was made that, given the Working Group's preference for the text as it appeared in A/CN.9/WG.III/WP.56, consideration could be given to simplifying the text by merging article 44 into article 41.

Conclusions reached by the Working Group regarding draft article 44:

73. After discussion, the Working Group decided that:

- The text of draft article 44 be retained but that its drafting be revisited once the text of draft article 41 had been finalized, with consideration being given to merging draft article 44 into draft article 41.

Draft article 45. "Freight prepaid"

74. It was recalled that, notwithstanding the deletion of the proposed chapter on freight at its thirteenth session, draft article 45 from that chapter had been retained in the text of the draft convention in square brackets. The Working Group was reminded that the provision preserved the carrier's right to collect freight from the consignee unless an affirmative statement, such as "freight prepaid", appeared in the negotiable transport document or negotiable electronic transport record. It was further recalled that proponents of the draft article said its inclusion was primarily intended to protect and provide clarity for third party holders of transport documents, such as banks (A/CN.9/552, paras. 163-164).

75. The Working Group considered three options in relation to the treatment of draft article 45: to delete it entirely; to revise the article so as to conform in substance with article 16 (4) of the Hamburg Rules, or to retain the draft article in its current form.

Deletion of the draft article

76. Some support was expressed for the deletion of draft article 45. In that respect, it was suggested that given that the general conditions in which freight should be paid had been left to national law, it was not appropriate to address the circumstances when freight would not have to be paid in the draft convention. As well, it was suggested that the payment of freight was a commercial matter that should be left to be resolved by the parties.

Revision in conformity with article 16 (4) of the Hamburg Rules

77. There was some support for revision of draft article 45 in conformity with article 16 (4) of the Hamburg Rules. However, concern was expressed regarding that provision of the Hamburg Rules, since it contained a reverse presumption regarding payment of freight from that of draft article 45, such that the carrier's right to collect freight from the consignee under the Hamburg Rules was defeated unless an affirmative statement, such as "freight payable by the consignee", appeared on the transport document.

Retention of draft article

78. While it was generally thought that this provision addressed a practical problem but was not a core provision of the draft convention, support was expressed in favour of retaining the provision as currently drafted. It was said that the provision merely represented what was uncontroversial international practice, namely that if freight had been stated to be prepaid the carrier could not claim it from the consignee.

79. In additional support of retention of the draft provision, it was recalled that the draft provision was intended to solve two practical problems. First, if a transport document or electronic transport record contained the statement "freight prepaid" then it would clarify that banks (and third parties generally) would never become liable for freight; and it would defeat a shipper's unjustified defence to a carrier seeking to collect freight therefrom on the basis that a "freight prepaid" document was a receipt issued by the carrier evidencing that the freight had in fact been paid (see A/CN.9/WG.III/WP.62, para. 57). Support was expressed for the retention of the draft article on the basis that it addressed these practical problems.

Carrier's right of retention and other drafting proposals

80. It was noted that, whilst the draft article, as currently drafted, confirmed that a consignee or other third party did not have an obligation to pay the freight, it did not explicitly exclude the possibility of a carrier asserting a lien or right of retention so as to force the consignee or other third party to pay the freight in order to take delivery. Although some concern was raised regarding inclusion of the right to retention in this provision given the agreement of the Working Group to include it elsewhere in the draft convention (see A/CN.9/594, paras. 114-117), support was expressed for inclusion of text along the lines contained in paragraph 59 of A/CN.9/WG.III/WP.62 to address that situation.

81. It was explained that this provision had been historically limited to negotiable transport documents because it was with respect to them that problems had arisen. However, there was support for the proposal that the draft provision should be extended to cover both negotiable and non-negotiable transport documents and electronic transport records, but that this decision could require reconsideration following a decision by the Working Group on the text of draft article 43 on prima facie or conclusive evidence (in this regard, see the revised text and discussion thereon at paras. 58-68 above). In addition, it was suggested that draft article 45 could include a requirement that parties act in good faith along the lines contained in article 43.

Conclusions reached by the Working Group regarding draft article 45:

82. After discussion, the Working Group decided that:

- The text of draft article 45 should be revised:
  - o By incorporating text along the lines of that contained in paragraph 59 of A/CN.9/WG.III/WP.62;
  - o By broadening the language to cover both negotiable and non-negotiable transport documents; and
  - o By considering the inclusion of a requirement that parties must act in good faith in conformity with article 43.

Shipper's obligations — Chapter 8

Draft article 31. Shipper's liability for delay

General discussion of the problem of liability for delay

83. The Working Group was reminded that it had most recently considered the topic of the shipper's liability for delay at its seventeenth session (see A/CN.9/594, paras. 199-207), and that it had previously considered the topic at its sixteenth session (see A/CN.9/591, paras. 133 and 143-147). It was also recalled that a document containing information relating to delay had been presented by the Government of Sweden (A/CN.9/WG.III/WP.74), and that written proposals on this topic had been submitted for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.73, paras. 24-27), and at its seventeenth session (see A/CN.9/WG.III/WP.67, para. 22 and A/CN.9/WG.III/WP.69, paras. 8 to 14). The consideration by the Working Group of the provisions on the shipper's liability for delay was based on the text as found draft article 31 in annexes I and II of A/CN.9/WG.III/WP.56.

84. The Working Group recalled that, under draft articles 28 and 30, the shipper was obliged to deliver the goods ready for carriage and to provide the carrier with certain information, instructions and documents. It was further recalled that the shipper's liability for delay, due to breach of those obligations, was regulated in draft article 31, while the carrier's liability for delay was regulated in draft article 22, which had last been considered by the Working Group at its thirteenth session (see A/CN.9/552, paras. 18-31). The Working Group was also reminded that, during its sixteenth session, it had decided that the liability for breach of the shipper's obligations should be generally based on fault with an ordinary burden of proof (see A/CN.9/591, para. 138). Two exceptions to this general rule were that the shipper would be held strictly liable for failure to inform the carrier of the dangerous nature of goods being transported or for failure to mark or label such goods accordingly (see draft article 33), or for loss or damage due to the inaccuracy of information and instructions actually provided to the carrier (see A/CN.9/591, paras. 148 to 150). It was also noted that the liability of the shipper in the present text of the draft convention was not limited, such that the shipper, if found liable, could be exposed to enormous and potentially uninsurable liability for any consequential damage as well as any physical loss that resulted from a breach of the shipper's obligations (see A/CN.9/WG.III/WP.69 generally, and para. 8, and

A/CN.9/591, paras. 143-147). The Working Group recalled that, as a consequence of that concern, a proposal had been made at its seventeenth session that, in the absence of an acceptable limitation on the shipper's liability for economic loss or consequential damages arising from delay, liability for economic loss or consequential damages arising from delay on the part of the shipper and of the carrier should be deleted from the draft convention (A/CN.9/WG.III/WP.69, paras. 8 to 14).

Treatment of delay in other conventions and jurisdictions

85. By way of introduction of A/CN.9/WG.III/WP.74, the Working Group heard that the Hague-Visby Rules did not contain provisions on the carrier's liability for delay, but that the Hamburg Rules did contain such a provision based on fault, and limited to an amount equal to two and one-half times the freight payable for the goods delayed (article 6 (1) (b)), but not exceeding the total freight payable under the contract of carriage of the goods by sea. Further, pursuant to the Hague-Visby and Hamburg Rules, the shipper may be liable on a fault basis for damage caused by delay (see articles 4 (3) and 12, respectively) or on a strict liability basis for loss, including that arising from delay, as a result of providing inaccurate information (see articles 3 (5) and 17 (1), respectively), or from failure to mark, label, or inform regarding dangerous goods (see Hamburg Rules, article 13 (2) (a)). It was further recalled that the liability of the shipper under these provisions was unlimited.

86. The Working Group was also reminded that, while liability for physical loss arising from delay was well known and already included in the draft convention, liability for pure economic loss or consequential damages arising from delay on the part of the shipper or the carrier was not a part of transport law in some legal systems. In those jurisdictions, pure economic loss or consequential damages could only be recovered when they were foreseeable, and when such recovery was referred to in the contract of carriage. It was suggested that inclusion of liability for such damages in the draft convention would constitute a major change to the status quo, and would thus have to be one of the issues in the draft convention that needed to be particularly carefully balanced in its treatment. In response to a question, it was clarified that the main concern of shippers with respect to their potential liability for delay was that their failure to provide timely and accurate information and documentation to the carrier, or that damage to the ship by the goods, could result in delaying the departure of the ship, and that the shipper responsible for the delay would be held liable on an unlimited basis for indemnifying the carrier for any amounts for which the carrier was found liable for delay to all of the other shippers with goods on board that ship.

Three possible options for dealing with delay

87. It was suggested that there were three possible approaches that could be taken in the text of the draft convention with respect to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier.

Option one: no liability for delay on the part of the shipper or the carrier

88. The first option was said to be to leave liability for delay completely outside of the scope of the draft convention, except for the liability for delay as a result of

the submission by the shipper of inaccurate information. That approach would entail the deletion of all references to delay, which would mean that the question of liability for delay on the part of the shipper and of the carrier would be left to national law, and there would be no uniformity.

89. Some support was expressed for that approach. However, a disadvantage of this approach was said to be that some of the unimodal regional transport conventions, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (CMR) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (COTIF/CIM), contained provisions on liability for delay in delivery, which could create discrepancies in States that were parties to those conventions. An additional concern raised with respect to this approach was that in the modern transportation era, a key element was "just-in-time" delivery, which would not be taken into account by the draft convention if it were to remove all liability for delay. In addition, it was observed that simple deletion of all references to liability for delay on the part of the shipper in the draft convention would not necessarily absolve the shipper of liability for delay, given the shipper's obligations set out in chapter 8, including the shipper's liability for any loss caused by the goods or by breach of its obligations under draft article 31. If the shipper's liability for economic loss should be left to national law, the entire chapter on shipper's obligations, or at least draft article 31, should be deleted.

Option two: retain carrier liability for delay but delete shipper liability for delay

90. A second option was said to be to retain carrier liability for delay in the draft convention, but to delete shipper's liability for delay and leave it to national law. This approach would leave the carrier with uniform limited liability, which was said to be of greater importance than uniform liability of the shipper for delay, since the primary obligation of the shipper under the contract of carriage was to pay the freight, while the primary obligation of the carrier was to deliver the goods. However, option two was still said to create an imbalance in the treatment of shippers and carriers.

91. In support of option two, it was said that liability of the shipper for delay had not been a great problem in practice. In response, however, it was observed that time was becoming increasingly important in modern transport, and as such, it could become a greater problem in the future. Further, it was noted that while, in theory, the carrier should not be responsible to all of the other shippers for one shipper's delay, in practice, there was still a risk that the carrier would be held responsible to the other shippers, and would then look to the shipper at fault for compensation. Option two was thus said to be unacceptable because it would be unfair to impose broad liability on the carrier without providing the carrier with recourse against the party responsible for the delay. Additional concerns were raised regarding the importance of weighing the perceived benefits of including shipper liability for delay against the difficulty of proceeding with and proving such a claim, whether or not a limitation on liability was in place.

Option three: retain carrier and shipper liability for delay and find an appropriate limitation level for shipper liability

92. A third option was said to be to have the draft convention cover delay on the part of the carrier as well as on the part of the shipper. Some concern was expressed regarding the inclusion of shipper's liability for delay, since it was thought that this could affect the non-liner trade where there were often damages for delay, and where it could further affect well-established contractual matters such as responsibility for demurrage and detention. Further, general concerns were expressed regarding the possibility of creating burdens on the shipper that could be said to exceed those in the Hague-Visby or Hamburg Rules.

93. Some of the advantages of option three were thought to be that the approach would be a uniform one that would provide predictability, certainty and balance to the draft convention. The support expressed for variant three was largely premised on finding an acceptable limitation level for shipper liability. It was suggested, however, to clarify the notion of the words "loss" and "delay" used in draft article 31.

Possible methods to limit shipper's liability for delay

94. A number of suggestions were made in the Working Group regarding how best to establish an appropriate limitation level for the liability of shippers. In general, it was thought that an appropriate limitation level could be fairly low, since it was not the goal of the draft convention to provide full compensation for the economic loss in issue. Further, it was thought that the basis of the limitation level should be high enough to provide an incentive for a shipper to do its utmost to meet its obligations under the draft convention.

95. One approach that was suggested was to hold the shipper fully liable for physical loss, such as loss and damage to the ship and other equipment, but limiting the shipper's liability for pure economic loss to an amount equal to the value of the goods shipped. Disadvantages of this approach were thought to be that it could create a certain disparity, since cargo of low value could cause as much damage as cargo of high value, and that it could be difficult to establish the value of the goods. But an advantage was thought to be that it would be equitable that shippers of large volumes of more expensive goods would have to take on greater risk. A further advantage was said to be that the value of most commodities in the liner trade was quite stable over time, and a Special Drawing Rights (SDR) approach could be avoided.

96. Another possible approach to establishing a limitation level for shipper's liability was thought possible by linking it to the amount of the freight payable on the goods shipped, similar to the approach to limit the carrier's liability for delay in draft article 65. One problem with this approach was thought to be that freight rates varied considerably over time, and that this limitation amount was in any event likely to be too low.

97. It was proposed that a further possibility for establishing an appropriate limitation level for shipper's liability would be to use the same limitation of liability as for the carrier in the case of loss or damage to the goods as set out in draft article 64. While the situation of the liability of the shipper for delay could not be said to be the same as that of the carrier for loss or damage to the goods, the

advantage of this approach was said to be that it would be fair, and that it was well known and predictable. It was observed that this approach had been taken in one domestic system, and that the results there had not been entirely successful.

98. An additional approach suggested for the establishment of a limitation amount was to simply take a fixed sum at a reasonably insurable rate. Again, the advantages of such an approach were thought to be certainty and predictability.

99. A suggestion was made that the limitation level established for the liability of the shipper should extend to all of its potential liabilities, including those for physical loss. That suggestion received some support. Another suggestion was to include a provision outlining the circumstances in which that limit could be exceeded. This suggestion was not taken up by the Working Group, nor was a suggestion that demurrage should be linked to delay, and thus subject to a limitation level.

Conclusions reached by the Working Group regarding the treatment of liability for economic or consequential loss occasioned by delay:

100. After discussion, the Working Group decided that:

- The approach to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier set out as "option three" should be pursued as the optimal approach for the draft convention, subject to the Working Group's ability to identify an appropriate method to limit the liability of the shipper for pure economic loss or consequential damages caused by delay.

Proposals regarding the identification of an appropriate limitation level for shipper liability for delay

101. The Working Group recalled its earlier decision that the approach to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier set out in "option three" (as described in A/CN.9/WG.III/WP.74 and discussed in paras. 92-93 above) should be pursued as the optimal approach for the draft convention, subject to the Working Group's ability to identify an appropriate method to limit the liability of the shipper for pure economic loss or consequential damages caused by delay.

102. The Working Group was reminded that the proposal to retain shipper liability for delay was to accommodate those jurisdictions where liability for pure economic loss arising from delay on the part of the shipper or the carrier was not recognized unless foreseeable, and such recovery was referred to in the contract of carriage. In such jurisdictions carriers were concerned that, where a shipper was responsible for a delay, the carrier could nevertheless be found liable under the draft convention in respect of that delay to all of the other shippers with goods on board that vessel. Shippers in those jurisdictions were equally concerned about a potentially very high exposure to liability in a recourse action brought by the carrier.

103. It was proposed that any provision on carrier liability for delay should include clarification that the carrier would not be liable for loss or damage to the extent that it was attributable to an act or omission of another shipper. That proposal received support although a concern was expressed that such clarification was unnecessary

and might be confusing, given that such an exclusion was already encompassed within the general principle contained in draft article 17 (1), which relieved the carrier of all or part of its liability if it proved that "the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any person referred to in article 19". However, it was suggested that as draft article 17 could be subject to differing judicial interpretation which nevertheless found a carrier liable, perhaps for an overall failure to put into place systems to prevent such a delay, the clarification would still be helpful.

104. It was noted that the intention behind such a provision was only to create a limit in respect of economic loss due to delay but that that limit would not apply to physical or consequential losses due to breach of other contractual obligations such as failure to inform the carrier of the dangerous nature of goods being transported or failure to mark or label such goods accordingly (see draft article 33) for which the shipper should be subject to strict unlimited liability (see para. 95 above). Further, the shipper would still be liable for consequential loss resulting from physical damage to the vessel, other cargo or personal injury, in respect of any breach of its obligations under articles 28, 30 and 32.

Possible limitation on shipper's liability for delay

105. Recalling the Working Group's earlier discussion on possible methods to limit the shipper's liability for delay (see paras. 94-100 above), it was suggested that a fixed sum of 500,000 SDRs could be considered. It was explained that the reason for proposing a fixed sum was that it had proven difficult to tie the limitation level to the weight or value of the goods or to the freight, as neither of these factors necessarily corresponded with the risk in question. For example, a shipper who shipped waste might cause the same amount of damage as a shipper who shipped electronic equipment. It was noted that, whilst this figure was somewhat arbitrary, the amount chosen was based on the average freight rates for a container of between 1,500 and 3,000 US dollars, and that the total amount of the limitation was thought to be sufficient to ensure shippers were fully liable for ordinary delay cases, but to protect them from excessive exposure in extraordinary cases.

106. It was suggested that insurers be consulted for their views on whether that figure suggested for the limitation was appropriate, or on whether a general limitation on all of the shipper's liability for pure economic loss would be more appropriate. It was suggested that it might be necessary to undertake a cost-benefit analysis of the proposal to determine whether the proposed limitation amount represented an insurable risk and whether or not it would affect freight rates and impact negatively on international trade. In response to a proposal that a general limitation for all liability of the shipper arising from delay might be more appropriate, it was said that such an approach might necessitate a higher limitation to accommodate the relatively remote chance of extraordinary losses.

Proposal regarding recoverability of damages

107. It was noted that the draft convention did not expressly refer to the issue, but that, as in various domestic jurisdictions, foreseeability and causality should be necessary elements for a successful claim for damages. It was said that the draft convention should contain a provision to clarify that the issue of recoverability of pure economic loss was not dealt with in the draft convention and was therefore

referred to national law. To clarify such issues, a proposal was made to add an additional provision to the draft convention along the following lines: "Without prejudice to article 23, nothing in this Convention prevents the application of the rules regarding the scope of recoverable damages under the applicable law". It was suggested that that principle should be applicable to both carriers and shippers and that the Secretariat should examine how that principle would apply to the liability regimes covered under the draft convention.

108. A question was raised as to what was meant by the term "applicable law" under the proposal and whether it referred to the contractual law or the law of the forum. In that respect, it was suggested that, as the assessment related to economic loss, reference should be made to law of the forum. A suggestion was made that that question be left to interpretation by the courts. As well, a concern was raised that the proposal could have the effect that there would be no liability in respect of delay at all where, under the applicable law, there was no liability for economic loss.

Proposal on freedom of contract

109. A question was raised whether the limitation on the shipper's liability should be subject to freedom of contract. As noted below (see paras. 190-194 below), the Working Group decided during its consideration of draft article 65 (which dealt with limitation of liability for loss caused by delay of the carrier) to retain the phrase "unless otherwise agreed" in square brackets until the Working Group had decided whether or not liability for delay on the part of the shipper was to be included in the draft convention. It was proposed that, if draft article 65 permitted a carrier to include a clause in its bill of lading that excluded or reduced its liability for delay, that exclusion or limitation should automatically benefit the shipper by a proportionate reduction in its liability for delay. It was suggested that creating a two-way benefit in such a provision would enhance the acceptability of the phrase "unless otherwise agreed" in the text in terms of draft article 65.

The "package" of three proposals

110. It was said that the proposals to render the liability limit subject to freedom of contract and to limit unduly remote damages pursuant to applicable law were complementary. It was noted that article 23 set out a calculation for determining the compensation payable by the carrier in respect of loss or damage to the goods. It was noted that the carrier might also be liable for other losses, and that the proposed provision with respect to the preservation of national rules regarding the causality and foreseeability of damages made explicit what had been implicit under the draft convention.

111. While the Working Group expressed generally positive views about the entire package of three proposals regarding the establishment of a limitation on the shipper's liability for pure economic loss arising from delay, some concerns were raised regarding the proposal on freedom of contract. Some doubts were expressed about how the principle of proportionality would work in practice, particularly in situations where, for example, the contractual freedom was used to choose another measurement for the loss entirely. There was also some concern whether this approach would be appropriate in general, and it was said that it would be necessary to examine the proposed new text carefully.

112. There was support for the view that any text should make clear that the limitation on the shipper's liability did not extend to contractual obligations, such as demurrage or damages for the detention of a vessel arising out of a charterparty. It was also agreed that no final decision on the proposals could be taken until a written text was available.

Conclusions reached by the Working Group regarding the three proposals pertaining to the limitation of the shipper's liability for delay:

113. After discussion, the Working Group decided that:

- On the basis of the above discussions, a written proposal on the issue of a limitation on the shipper's liability for delay should be prepared for consideration at a future session;
- In addition, text should be prepared both regarding the preservation of national rules with respect to the recoverability of pure economic loss, and with respect to the possibility of freedom of contract for the adjustment of the limitation on both the shipper's and the carrier's liability, as linked with the term "unless otherwise agreed" in draft article 65.

Rights of suit — Chapter 14

114. The Working Group had before it chapter 14 comprising draft articles 67 and 68 as currently drafted and contained in A/CN.9/WG.III/WP.56 and an information document concerning this issue in A/CN.9/WG.III/WP.76. The Working Group recalled that it had exchanged preliminary views on the issue of right of suit at its ninth session (A/CN.9/510, paras. 58 to 59) and undertaken a detailed discussion on the issue at its eleventh session (A/CN.9/526, paras. 149 to 162).

115. Before turning to consider the draft chapter substantively, the Working Group considered the question whether its provisions should be retained at all. In that respect, it was recalled that at previous sessions of the Working Group there had been support for deleting the draft chapter altogether (see A/CN.9/WG.III/WP.56, footnote 237; and A/CN.9/526, paras. 152 and 157).

116. It was pointed out that the draft chapter attempted to offer uniform solutions for important practical issues for which various legal systems offered different solutions. It had, however, become apparent that the purpose of the chapter, however laudable, was overly ambitious and that it was unlikely that the Working Group could reach a consensus on the substance dealt with therein.

117. Although certain aspects of draft article 67 could be incorporated into the provisions set forth in chapter 6 regarding liability of the carrier, there was strong support for the deletion of chapter 14 from the draft convention. There were, however, expressions of regret that, by deleting the draft chapter, the draft convention would leave a number of problems relating to the right of suit for possibly diverging domestic laws. For example, often it might be wrongly assumed that the holder of a bill of lading had an exclusive right of suit. Also, in respect of a non-negotiable document, uncertainty would remain as to whether a person that was not party to a contract of carriage but had suffered damage, had a right of suit.

Conclusions reached by the Working Group regarding draft chapter 14:

118. After discussion, the Working Group decided that:

- Chapter 14 be deleted in its entirety;
- Certain aspects of article 67 could be considered for incorporation into chapter 6 (liability of the carrier).

Time for suit — Chapter 15

119. The Working Group had before it chapter 15 comprising draft articles 69 to 71 as currently drafted and contained in A/CN.9/WG.III/WP.56 and an information document concerning this issue in A/CN.9/WG.III/WP.76. The Working Group recalled that it had exchanged preliminary views on the issue of time for suit at its ninth session (A/CN.9/510, para. 60) and undertaken a detailed discussion on the issue at its eleventh session (A/CN.9/526, paras. 163 to 182). It was recalled that the need for the draft chapter had not been questioned in previous sessions of the Working Group.

Types of claims to be covered

120. The Working Group began its deliberations by considering the proper scope of the chapter, in particular what types of claims should be covered.

121. There was general agreement within the Working Group that the draft chapter should apply to claims relating to a contract of carriage arising under the draft convention. Other types of claims between the shipper, the carrier and the maritime performing party (for example, for unpaid freight) should remain unaffected by the draft chapter.

122. The Working Group proceeded to consider whether the limitation period should apply only to claims against the carrier or the maritime performing party, or should also extend to claims made against shippers. The Working Group was reminded that that issue had been considered at its eleventh session (see A/CN.9/526, para. 166).

123. Some support was expressed for restricting the scope of the chapter to claims made against the carrier and the maritime performing party, with the time for suit for all other claims being left to national law. In support of that approach, it was suggested that whilst claims against carriers, which in most cases related to cargo loss or damage, were largely standardized, potential claims against shippers, for instance, as a result of delay attributable to inaccurate information or of damage caused by dangerous goods to a vessel, might cover a much broader spectrum of situations. Such claims might therefore require extensive investigation on the part of the carrier, needing longer than ordinary cargo claims to be properly prepared. They should not, therefore, be subject to a limitation period under the draft convention.

124. Against such restriction it was suggested that the scope should, in the interests of predictability and equal treatment of all parties to a contract of carriage, cover claims against both carriers and shippers. It was said that differences in the nature of the claims that could be brought against shippers as compared to those that could be brought against carriers was not relevant given that the chapter did not require a

case to be fully argued within the limitation period, but merely introduced a time period within which judicial or arbitral proceedings should be commenced.

125. The Working Group considered the arguments advanced in favour of both propositions. It eventually agreed that the draft convention should cover claims against both the carrier and the performing party as well as claims against the shipper.

Duration of limitation period

126. The Working Group then turned to the question of the appropriate time during which a suit might be brought. There was some support for the suggestion that different time limits should be provided depending on the nature of the claim. It was said that a longer period of time (possibly two years) would be appropriate with respect to claims against shippers given their likely more complex nature, while a shorter time period of one year could be adopted in respect of claims against carriers. The prevailing view within the Working Group, however, favoured the inclusion of one time period that applied to all parties. Support was expressed for the proposal to apply a limit of one year to all claims, since this was the period currently used in many jurisdictions. A longer period it was said, might impact negatively on settlement of claims, given the tendency observed in practice of delaying the submission of claims for settlement until shortly before the limitation period expired. The prevailing view within the Working Group, however, was that the potential complexities arising in relation to claims against the shipper might be better taken into account by a limitation period of two years for all claims.

Draft article 69. Limitation of actions

127. The Working Group proceeded to examine the two variants of article 69 as contained in A/CN.9/WG.III/WP.56 and reproduced in paragraph 19 of A/CN.9/WG.III/WP.76. Several issues were considered in relation to article 69. It was noted that Variant A referred to the carrier or shipper being "discharged from liability" if judicial or arbitral proceedings were not instituted within one year. By contrast Variant B referred to "rights" (or "actions") being "extinguished" (or "time-barred") if judicial or arbitral proceedings were not commenced within one year.

128. The Working Group recalled that several substantive questions arose in choosing between the variants. It was recalled that the distinction between a "limitation period" and the extinguishment of a right had been discussed at a previous session of the Working Group and that the difference might affect the applicability of the time period or the choice of applicable law (A/CN.9/526, para. 167).

129. The Working Group heard differing views as to the manner in which the principle of a limitation period should be formulated. It was pointed out that there was no uniformity among legal systems as to the nature and effect of a limitation period. While in some legal systems the expiry of a limitation period typically extinguished the right to which the limitation period related, in other legal systems a limitation period only deprived the entitled party of the possibility to enforce its right through court action. Some legal systems applied both rules, depending on the nature of the claim, some being extinguished, while others became unenforceable. It was further pointed out that such a distinction had a number of practical

consequences, such as whether a party to a contract whose claim was affected by the limitation period still retained the possibility of invoking its claim, even though time-barred, as a defence in order to obtain a set-off in a claim asserted by the other party to the contract. That possibility existed for claims that were only rendered unenforceable by a limitation period, but was not available when the underlying right was extinguished.

130. There was some support for adopting a rule to the effect that the claimant's rights under the draft convention would be extinguished by the limitation period, and that, accordingly, the approach taken in Variant A should be adopted. This would mean, in practice, that the party whose right had been extinguished could not use that "time-barred" claim by means of a set-off. Prohibition of the use of "time-barred" claims by means of set-off was said to be supported by the precedent of other international instruments on carriage of goods, in particular the CMR and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (CMNI), which expressly precluded set-off of time-barred claims.

131. However, the prevailing view was that draft article 69 should only affect the enforceability of the claimant's right and that, accordingly, the approach taken in Variant B, subject to retaining only reference to "action" rather than "right" was preferable. That approach, which would preserve the claimant's right to set-off, was said to be consistent with the solution adopted in the Convention on the Limitation Period in the International Sale of Goods. It also had the advantage of not preserving the parties' right to choose whether or not to file a claim on the basis of the party's assessment of the expected benefit, as compared to the costs of the claim. Without the possibility of set-off, parties might be enticed to file even uneconomical claims in order to protect themselves against the possibility of a claim by the other party to the contract.

132. The question was raised as to whether the limitation period provided in the draft convention would be capable of being suspended or interrupted and, if so, under what circumstances. It was said that various legal systems provided a number of possibilities for suspending or interrupting a limitation period, or even making the period start to run again from zero. Given the variety of solutions found under domestic law, there was support for the suggestion that that matter should be left to domestic law. In that connection, it was suggested that the draft convention could include a provision indicating which law should govern that question, in which case a choice should be made between the law applicable to the contract rather than the law of the forum. The Working Group was mindful of the diversity of domestic laws on the question of suspension or interruption of limitation periods, but was generally of the view that the draft convention should offer a uniform rule on the matter, rather than leave it to domestic law. The general agreement within the Working Group was that the draft convention should expressly exclude any form of suspension or interruption of the limitation period, except where such suspension or interruption had been agreed by the parties under draft article 71.

Conclusions reached by the Working Group regarding draft article 69:

133. After discussion, the Working Group decided that:

- Draft article 69 should extend to claims both against the carrier and the shipper;

- The time period be fixed at two years for both types of claims;
- Variant B, without references to extinguishment of "rights" should be used as a basis for expressing the principle of limitation period;
- No suspensions or interruptions of the limitation period should be allowed, except as agreed by the parties under draft article 71;
- The party whose claim was time-barred under draft article 69 should nevertheless retain the possibility of set-off; and
- The Secretariat should prepare a revised version of the draft article, taking into account the above considerations.

Draft article 70. Commencement of limitation period

134. The Working Group noted that draft article 70 which provided for the commencement date of the limitation period had been discussed at its seventeenth session (A/CN.9/526, para. 170). At that time, preference had emerged for a commencement date that was linked to the date of actual delivery rather than the date of delivery stipulated in the contract of carriage, supplemented by a rule that referred to the contractual date of delivery in cases where there was total loss of the goods. An outstanding question in this regard was thought to be whether the same commencement date should be used for claims against the carrier, the maritime performing party and the shipper.

Claims against the carrier and maritime performing party

135. It was generally agreed that the purpose of the provision was to provide certainty by way of an easily determinable commencement date on which a person wishing to bring a claim could bring such a claim, and a person against whom a claim might be made would know whether or not that claim was to be made, so that the expiration of the period would be equally certain and predictable.

136. The question was asked, however, as to whether it was sufficiently clear that the draft article intended to refer to the date of actual delivery. It was said that the cross-reference to draft article 11, paragraphs 4 or 5, on the period of responsibility, obscured that intention, to the extent that such cross-reference might link the notion of "delivery" for the purposes of draft article 70, to the provisions in the contract of carriage that defined the date of delivery. In that respect, it was noted that a court, in determining the question of what constitutes delivery, might refer back to draft article 11 in any event. The Working Group agreed that the draft article should only refer to "delivery", without reference to draft article 11, paragraphs (4) or (5), since the notion of "delivery", which was also used in a similar context in article 3 (6) of the Hague-Visby Rules and article 20 (3) of the Hamburg Rules, was well understood and had been amply clarified in case law.

137. A proposal was made that in the case of total loss of the goods, reference could be had to the date on which the carrier took over the goods as the commencement date instead of "completed delivery". A further proposal was made to use the date on which the carrier took over the goods for the commencement date for both regular claims and cases of total loss. It was said that a reference to the date on which the carrier took over the goods, which should be stated in the contract particulars pursuant to draft article 38, subparagraph (1) (f)(i), would provide an

objectively verifiable element for determining when the limitation period would commence and would better promote legal certainty than a reference to "delivery", which might require a finding of fact. Further, it was thought that the decision of the Working Group to set the limitation period at two years would provide sufficient time to cover the earlier commencement date in this case. That proposal received some support, but a potential problem was thought to be that the limitation period would start running prior to the right to claim arising. Overall, the Working Group preferred to retain the well-known approach of the date of actual delivery as taken in the Hague-Visby Rules and in the Hamburg Rules on the basis that these represented well-tested formulations. However, there was support for future consideration of using the date that the carrier took over the goods as the commencement date in the case of total loss.

138. Some support was expressed for the text used in the Hamburg Rules in that it contained a reference to partial delivery not expressly dealt with in draft article 70 as currently drafted.

139. It was recalled that as currently drafted, article 70 contained a specific rule for situations of total loss of the goods, since in such cases there would obviously be no "delivery". The default rule in the draft article tied the limitation period to the "[last] day on which the goods should have been delivered". The view was expressed that the phrase "should have been delivered" might be ambiguous. In response, it was pointed out that the reference to the date when the goods "should have been delivered" was an accepted default provision for situations of total loss, as it made the contractual date of delivery, which should be verifiable from the contract particulars, the starting point for the limitation period. The reference to the "last" day on which goods should have been delivered, it was further explained, had been included so as to accommodate situations where goods were not required to be delivered at a specific date, but within a certain time, such as in a particular week or month.

140. Some doubts were expressed as to whether the same commencement date should also apply for claims against a maritime performing party. The advantage of one uniform commencement period was that it was said to meet the practical concern of providing predictability and certainty. However some doubts were raised about a uniform commencement period starting before the maritime performing party had received or taken custody of the goods. Some considered that the limitation period should only commence as against maritime performing parties on the date on which damages could be sought. It was noted that whilst that might be true, given that the Working Group had decided on a two-year period and that the date referred only to the commencement of the limitation period, applying the same date would not be too onerous.

Claim against shipper

141. It was recalled that doubts had been raised as to whether the time of delivery was relevant for the limitation period for claims against the shipper (A/CN.9/526, para. 173). It was suggested that, given the different nature of claims that could be made against shippers compared to those that could be made as against carriers, a different commencement period should apply relating to the date on which damages occurred. Generally, it was said that in accordance with well-established principles of law, a limitation period only started to run when the relevant party against which

the limitation period operated had accrued a claim against the other party. Given the greater diversity of possible claims by carriers against shippers, as compared to the more standard nature of cargo claims, the Working Group should attempt to devise specific rules. A general rule that referred to the time when the carrier's claim against the shipper accrued could also be used, if the formulation of more specific rules was not deemed to be feasible. There was some support for that proposal.

142. The countervailing view, however, was that, in the interest of enhancing legal certainty and predictability it would be preferable to provide for the same commencement date for claims against the shipper as for those against the carrier. It was pointed out that in most cases acts by the shipper that might cause damage to the carrier, such as failure to provide information on the dangerous nature of the goods, or appropriate instructions for handling them, would typically occur well before the delivery of the goods, so that, in practice, the carrier already benefited from the fact that the limitation period would not commence before delivery of the goods. Furthermore, it was said that the date of delivery, which was a material event easily ascertainable, better promoted legal certainty than a reference to the time when the shipper breached its obligations or caused damage to the carrier, which would inevitably vary from case to case. The Working Group concurred with the latter view and agreed that the same commencement date should apply to both claims against the shipper and claims against the carrier.

Conclusions reached by the Working Group regarding draft article 70:

143. After discussion, the Working Group decided to:

- Retain the text in draft article 70 but revise it to remove references to article 11 and to take account of the wording in article 20 (2) of the Hamburg Rules; and
- Retain the term "last" and remove the square brackets.

Draft article 71. Extension of limitation period

144. It was observed that a provision that enabled parties to extend the limitation period existed under the Hague-Visby Rules (article 3 (6)) and the Hamburg Rules (article 20 (4)). It was noted that draft article 71 was largely based on the Hamburg Rules in that it permitted a person against which a claim was made to extend the limitation period by declaration any time during the running of the limitation period. It was noted that draft article 71 differed from the Hague-Visby Rules which required an agreement and might permit an extension even after the lapse of the limitation period.

145. In response to a question as to the form requirement for the declaration in article 71, it was pointed out that draft article 3 required the declaration to be in writing but also admitted electronic communications.

146. The Working Group considered the form requirement appropriate.

Conclusions reached by the Working Group regarding draft article 71:

147. After discussion, the Working Group decided that the existing text of draft article 71 should be maintained.

Draft article 72. Action for indemnity

148. The Working Group recalled that draft article 72 provided for a special extension of the time period with respect to recourse action so that, for example, the carrier had sufficient time to bring an action against a sub-carrier when the action against the carrier was brought immediately before the lapse of a limitation period. It was recalled that a similar rule existed in both the Hague-Visby Rules (article 3 (6 bis)) and the Hamburg Rules (article 20 (5)).

149. The Working Group had before it two variants (as contained in A/CN.9/WG.III/WP.56 and reproduced in A/CN.9/WGIII/WP.76, para. 47). It was noted that the variants provided for a different commencement date for the additional 90 days after the expiration of the period contained in article 69.

150. It was recalled that Variant B had been drafted to meet the concern of certain civil law countries where an indemnity action could not be commenced until after the final judgment was rendered. However, paragraph (a) of draft article 72 was said to adequately address that situation by referring to the time allowed by the applicable law in the jurisdiction where proceedings were instituted.

151. To enhance certainty, a proposal was made that a requirement for early notification to the person against whom a claim for indemnity might be sought should be included to allow that person to preserve evidence that might otherwise be lost during the period. It was suggested that that notice be provided within 90 days after the end of the limitation period and that that period not be subject to extension. That proposal received some support.

Conclusions reached by the Working Group regarding draft article 72:

152. After discussion, the Working Group decided that:

- Variant B be deleted; and
- Variant A be retained and revised to include possible variants relating to providing notice of the original action.

Draft article 73. Counterclaims

153. It was recalled that draft article 73 was based on the suggestion made at the eleventh session of the Working Group that the draft convention should address counterclaims and that these types of claims should be treated in a similar fashion to recourse actions (see A/CN.9/526, para. 177).

154. Concerns were expressed that, as drafted, draft article 73 was unclear and too broad. It was suggested that draft article 73 should be revised to limit it to counterclaims that were instituted for set-off. It was recalled that the Working Group had already decided in draft article 69 to retain a reference to “action” rather than “right” which would preserve the claimant’s right to set-off and thus that draft article 73, in its present form, was now otiose. It was agreed that the placement of such a provision on set-off would need to be considered by the Working Group at an appropriate stage.

Conclusions reached by the Working Group regarding draft article 73:

155. After discussion, the Working Group decided that:

- A revised version of draft article 73 dealing with a rule on set-off be prepared and that that version either be located in draft article 73 or at another appropriate place in the draft convention.

Article 74. Actions against the bareboat charterer

156. It was recalled that article 74 addressed the concern that the limitation period might expire before a claimant had identified the bareboat charterer that was the responsible "carrier" under draft article 40 (3). It was agreed that the text in article 74 be modified to take account of the Working Group's decision to reformulate paragraph 40 (3) (see paras. 17-25 and 28 above) and that the revised version of draft article 74 be retained in square brackets for consideration at a future session.

Conclusions reached by the Working Group regarding draft article 74:

157. After discussion, the Working Group decided that the text in draft article 74 be retained in square brackets and be revised in accordance with its decision taken in relation to draft article 40 (3).

Possible additional article with regard to the removal of actions pursuant to draft article 80 (2)

158. The Working Group recalled that at its sixteenth session, a proposal had been made that the draft convention should provide for the treatment of the time limitation for suit in connection with the removal of actions pursuant to draft article 80 (2) (see A/CN.9/591, para. 57).

159. It was suggested that, in general, any action which could be removed under draft article 80 (2) would be a declaratory action to deny the carrier's liability and would not include legitimate actions against the shipper such as a claim for liability under chapter 8 (see A/CN.9/591, paras. 57-59). The Working Group agreed that it was not necessary to have a special rule in connection with the removal of actions pursuant to draft article 80 (2).

Conclusions reached by the Working Group regarding possible additional article:

160. After discussion, the Working Group decided no additional article was required in relation to removal of action.

Limitation of carrier's liability — Chapter 13

161. The Working Group was reminded that it had most recently considered the topic of the limitation of the carrier's liability at its thirteenth session (see A/CN.9/552, paras. 25-31 and 38-62), and that it had previously considered the topic at its tenth session (see A/CN.9/525, paras. 65-70 and 81-92). It was also recalled that a document containing information relating to delay had been presented by the Government of China (A/CN.9/WG.III/WP.72), and that written

proposals on this topic had been submitted for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.73, paras. 29-36, and A/CN.9/WG.III/WP.77). The consideration by the Working Group of the provisions on the limitation of the carrier's liability was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

Draft article 64. Basis of limitation of liability

Paragraph (1)

162. It was noted that paragraph (1) of draft article 64 provided a method for calculating the limitation level of the liability of the carrier. As in the Hague-Visby and the Hamburg Rules, the approach contemplated that calculation on the basis of both a per kilogram and a per package basis of the goods lost or damage, allowing for limitation of liability based on the higher of the two amounts as calculated. It was further recalled that paragraph (1) provided for an exception when the "nature and value" of the goods lost or damaged had been declared by the shipper before shipment and included in the contract particulars, or when a higher amount had been agreed upon by the parties to the contract of carriage. The Working Group agreed that the final amount of the limitation on liability to be inserted into paragraph (1) should be considered as an element of the overall balance in the liability regime provided in the draft convention, and thus agreed to proceed with its consideration of paragraph (1) without making specific reference to numbers or amounts at this stage of the discussions. In addition, factors that were said to be worthy of consideration in this regard were the tacit amendment procedure for the level of the limitation on the carrier's liability as found in draft article 104 of the draft convention, which offered additional flexibility for future adjustments of the liability limits, and the rule for non-localized loss or damage found in paragraph (2) of draft article 64.

General comments

163. The Working Group was reminded of the general principle for which a limitation on the carrier's liability was included in the draft convention and in other transport conventions. It was said the primary purpose of such provisions on limitation of liability was to regulate the relationship between two commercial parties in order to entitle each of them to obtain a benefit. It was recalled that, without the benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and that where such goods were in containers, the carrier would have no knowledge regarding their contents, thus potentially exposing the carrier to very high and unexpected risks. Rather than pay expensive insurance costs, and in order to share the burden of that potentially very high risk, the carrier would have to apportion it to every shipper through an increase in freight rates. By allowing for a limitation of the carrier's liability, this allocation of risk allowed the costs of both shippers and carriers to be reduced, with the trade-off that full compensation for high-level losses would not be possible. It was further observed that the aim of an appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but that it would not so limit too many claims. It was also noted that the optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off

excessive claims, yet to provide for a proper allocation of risk between the commercial parties.

164. The view was expressed that the limits of liability provided in the Hague or Hague-Visby Rules have proven to be satisfactory. It was observed that the limitation on the carrier's liability that appeared in paragraph (1) allowed for a limitation level on a per package or a per kilogram basis, whichever was higher. It was recalled that the Hague Rules contained only a per package limitation, while the Hague-Visby and Hamburg Rules contained both per package and per kilo limitation provisions, but that each of those conventions predated the advent of modern container transport. The importance of this was said to be that prior to widespread containerization, most goods were shipped in a crate or a large wooden box that counted as one package, while with the widespread use of containers, the per package limitation level was instead based on the number of packages inside the container. This development in practice increased the amounts recoverable from the carrier, as compared with the per kilogram limitation level or pre-container per package limitation would have allowed.

165. In further support of the view that the limits of liability provided in the Hague or Hague-Visby Rules were satisfactory, it was said that the limitation levels of other transport conventions, such as the CMR or the COTIF/CIM conventions, were not directly comparable to those in the maritime transport conventions, since several of the unimodal transport conventions included only per kilogram limitation levels. Thus, it was said, while the per kilogram limitation level was much higher than the Hague-Visby level, in fact, the level of recovery was much greater under those conventions that allowed for a per package calculation of the limitation level. It was also said that certain other conventions, such as the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (Montreal Convention), at 17 SDRs, set a high limitation level in comparison with other transport conventions, but that it also contained provisions rendering its limitation on liability incapable of being exceeded, even in the case of intentional acts or theft, and that the freight payable for the mode of transport covered by those other transport conventions was much higher than under the maritime transport conventions. Further, it was observed that it could be misleading to compare the regimes from unimodal transport conventions, since each convention contained provisions that were particularly geared to the conditions of that type of transport. In this regard, it was noted that it would be helpful to obtain actual figures with respect to recovery in cases of loss or damage to the goods, and to what extent the per package and per kilogram limits had been involved in those recoveries, but that such information had been sought from various sources and was difficult to obtain. The view was also expressed that, since the transport covered during the door-to-door carriage of the goods could be multimodal, that it might be useful to consider the limitation amounts of other unimodal transport conventions, particularly in reference to cases of non-localized loss or damage to the goods.

166. It was further observed that, through the method in which the goods were packed for shipment, the shipper could essentially unilaterally choose whether any claim for loss or damage would be on the basis of a per package or a per kilogram calculation. In addition, it was noted that while it was not an opportunity of which shippers often availed themselves; a shipper always had the option to declare the value of the cargo it was shipping, or to agree with the carrier on a different

limitation level, and thus to avoid falling within the rules for the limitation of the carrier's liability set out in paragraph (1).

167. In further support of the adequacy of the liability limits of the Hague-Visby Rules, it was suggested that, in the bulk trade, the average value of cargo had not increased dramatically since the time of earlier maritime conventions, and that, in the liner trade, the average value of the cargo inside containers had not increased dramatically either.

168. Another strongly supported view, however, was that an increase in the liability limits under the Hague-Visby Rules would be appropriate. It was noted that since broad containerization had meant that cheaper goods could be transported in containers more economically than in the past, examination of figures such as the average value of goods over time could be misleading in attempting to decide upon an equitable limit for the liability of the carrier. It was also pointed out that the value of high-value cargo had increased over the past number of years, and that inflation had also clearly affected the value of goods and depreciated the limitation amounts since the adoption of existing maritime transport conventions, which had been negotiated decades ago. There was support for the view that those factors should be taken into account when considering at what level the limitation in paragraph (1) should be set, and that an increase in the limitation level in traditional maritime conventions should be considered by the Working Group. There were, however, diverging views as to the parameters for such an increase. While there were suggestions that only a moderate increase might be conceivable, there were also views that the liability limits should be based on the amounts set forth in the Hamburg Rules, or above them.

169. In addition to the historical and commercial issues discussed by the Working Group in its consideration of the factors involved in choosing an appropriate level for the limitation of the carrier's liability, the Working Group was encouraged to take into account certain additional factors. In particular, it was said that regard should be had to the need to ensure broad acceptability of the draft convention, such as through careful consideration of the level of the limitation on the carrier's liability in relation to earlier maritime transport conventions. There was support for the view that it was preferable to strike a middle ground in choosing an appropriate limitation level, which might require an increase from levels in historical maritime conventions.

170. A note of caution was voiced that setting the limitation level for the carrier's liability at the level set forth in the Hamburg Rules, which currently governed only a relatively small fraction of the world's shipping, would represent a significant increase for the largest share of the cargo in world trade, which was currently governed by the lower limits of the Hague-Visby Rules, or even lower limits, as was the case in some of the world's largest economies. However, concern was expressed that anything other than increasing the level of the limitation from previous maritime conventions might be perceived as a move backwards rather than forwards.

171. Having heard those views, the Working Group concluded its discussions by emphasizing their merely indicative nature, at the present stage of the deliberations, and reiterating its understanding that any decision on the limit of liability was to be

treated as an element of the overall balance in the liability regime provided in the draft convention.

"nature and value of the goods"

172. A question was raised about the use of the phrase "nature and value of the goods" in paragraph (1), and how that phrase differed from that of "a description of the goods" as found in draft article 38 (1) (a) regarding contract particulars. It was suggested that the term used in draft article 64 (1) should mirror that of draft article 38 (1) (a), since, it was suggested, use of a different term could cause confusion regarding the intention of the shipper with respect to the declared value of the goods. Some reservations were expressed regarding this analysis, as it was thought that since draft article 38 concerned what had been taken into the carrier's custody and what was being transported, rather than a specific declaration of value, a clear difference in the terms used should be retained. However, a suggestion to clarify the drafting and the terms used, possibly by simply deleting the reference to "nature", received support in the Working Group.

Per package and per kilogram

173. Although the suggestion was made that a final decision on the liability limit might be facilitated by retaining only the weight of the goods as an element to calculate the carrier's liability, the Working Group generally agreed that both package and weight should be retained for the Working Group's further consideration.

Conclusions reached by the Working Group regarding draft article 64 (1):

174. After discussion, the Working Group decided that:

- The mechanism set out in draft article 64 (1) for calculating the limitation level for the carrier's liability was approved;
- The phrase "nature and value of the goods" should be adjusted in keeping with the text set out in draft article 38 (1) (a); and
- A final decision on the limitation level for the carrier's liability would be made on the basis of the entire package of rights and obligations contained in the draft convention.

Paragraph (2)

175. The Working Group next considered paragraph (2) of draft article 64, which contained two variants, both of which set out a special regime for the limitation level with respect to non-localized loss of or damage to the goods. The Working Group agreed to defer its consideration of that provision until it had concluded its discussion at this session on the relationship of the draft convention with other conventions.

Conclusions reached by the Working Group regarding draft article 64 (2):

176. The Working Group agreed to defer its consideration of draft article 64 (2) until after its discussion of the relationship of the draft convention with other conventions (see paras. 236-238 below).

Paragraph (3)

177. It was pointed out that the origin of this paragraph could be traced back to the Hague-Visby Rules. The Working Group noted that paragraph (3) regulated the limitation of liability in terms of the number of packages or shipping units when using containers, pallets or other means of transport. It was noted that when originally drafted for the Hague-Visby Rules, packages were often quite large but that with containerization the size of packages were now typically much smaller. That meant that carriers, by virtue of the definition of packages, now faced a greater exposure to cargo liability in respect of a single container than at the time the Visby Protocol was adopted.

Conclusions reached by the Working Group regarding draft article 64 (3):

178. After discussion, the Working Group agreed that the existing text of draft article 64 (3) should be maintained.

Paragraph (4)

179. The Working Group noted that paragraph (4) provided that the SDR as defined by the International Monetary Fund should be used as the unit of account for the purpose of calculating the carrier's liability.

Conclusions reached by the Working Group regarding draft article 64 (4):

180. The Working Group approved the paragraph 64 (4) in substance.

Draft article 65: Liability for loss caused by delay

Variant A or B

181. The Working Group had before it two variants and proceeded to consider which was preferable. It was noted that there was little substantive difference between Variant A or Variant B. However, Variant A received greater support on the ground that it provided greater clarity.

182. The Working Group was reminded of the objections that had been raised in connection with the treatment of liability for delay in the draft convention and that, for countries that had raised such objections, either variant of draft article 65 was only acceptable if the draft convention would also contain an equivalent provision for the shipper's liability for delay.

Nature of loss covered by the draft article

183. With a view to facilitating its consideration of the draft article, the Working Group was invited to consider the various types of loss that might be caused by delay in delivery of goods and how each category would be dealt with under the draft convention. Loss caused by delay was said to fall under essentially three categories. The first category was physical damage or loss of goods (for example, of perishable goods, such as fruits or vegetables). The second category was economic loss sustained by the consignee due to a decrease in the market value of the goods between the time of their expected delivery and the time of their actual delivery. The third category was pure economic loss sustained by the consignee, for example

where an industrial plant could not operate because components and parts of an essential machine were delivered late.

184. It was noted that the first category of damage caused by delay was clearly outside the scope of draft article 65, as it was covered by the provisions on the calculation of compensation for physical loss of the goods in draft article 23. The third category of loss (pure economic loss) was said to fall clearly under draft article 65. However, as regards the second category (i.e. loss of market value), the situation was said to be unclear. The Working Group concurred with that analysis and with the need for making it clear that draft article 65 was only concerned with pure economic (consequential) loss and that decline in the good's market value was a type of loss that should be covered by draft article 23.

Limitation level for loss caused by delay

185. There was some support for the suggestion that the main parameter for establishing the carrier's liability for delay should be the same as the calculation of compensation for physical damage to the goods in accordance with draft article 23, paragraph (1), namely the market value of the goods at the place of destination. Moving away from the value of freight as a factor for calculating compensation was said to be justified by the fact that freight rates were subject to large fluctuations, with current rates being much lower than, for example, at the time the Hamburg Rules were adopted, in 1978. Maintaining freight as a factor would therefore mean affording the shipper and the consignee much lower protection than in the past.

186. Yet another proposal was to link the limit of liability to whichever was the lesser of the actual amount of the loss or two and one-half times the freight payable for the goods delayed or the total amount payable as freight for all the goods shipped. That proposal received some support and a suggestion was made that further research be undertaken on the utility of referring to the value of goods in determining liability for loss caused by delay.

187. The prevailing view, however, was that, in keeping with other existing instruments, the amount of freight payable on the goods delayed was a more suitable factor for calculating the carrier's liability for economic loss caused by delay, which might be entirely unrelated to the value of the goods. The freight, in turn, had a direct relationship to the obligation that a carrier failed to perform in the manner agreed. It was said that as market value was often completely unforeseeable, such a limit would impose an unreasonable risk on carriers which in turn would have a negative impact on shippers in terms of higher freight rates. It was noted that compensation for loss due to decline in market value was already dealt with in draft article 23, and if that provision was unclear it ought to be clarified.

188. There were various expressions of support for retaining the liability limit set forth in article 6 (1) (b) of the Hamburg Rules, namely two and one-half times the freight payable for the goods delayed. It was also pointed out that the limitation of liability should provide an incentive for carriers to meet their obligation to deliver in due time, and should not, therefore, be too low.

189. The countervailing and strongly supported view was that liability limit of one times the freight for economic loss caused by delay would be adequate. It was explained that a casual comparison of the liability limits set forth in the Hamburg Rules was misleading, as in practice, they would seldom lead to a recovery of two

and one-half times the freight paid. In that respect it was pointed out that whilst the Hamburg Rules included a limit of two and one-half times the freight payable, the overall limit of liability, in accordance with article 6 (1) (b), was the total amount in freight paid for the shipment. In practice, that meant that in most cases the limit was often one times the freight. For example, a shipper might ship ten containers with a rate of 1,000 SDRs each and a delay on one container would impose liability of 2,500 SDRs but, in what was said to be the more common situation where all the containers were delayed, the limit would be one times the total freight amounting to 10,000 SDRs, and not 25,000 SDRs. Furthermore, it was suggested that the liability limits for delay in the Hamburg Rules applied to all types of liability for delay, whereas draft article 65 was limited to economic (consequential) loss. It was suggested that one times the freight was already a substantial exposure given that the carrier could be liable to a large number of shippers in respect of delay and therefore using freight as the liability limit provided sufficient incentive for a carrier to meet its obligation of timely delivery.

"unless otherwise agreed"

190. The Working Group proceeded to consider whether to retain the phrase "unless otherwise agreed", which appeared in both variants A and B. It was recalled that the intention behind inclusion of that phrase was to permit contractual freedom in relation to the limits of liability in respect of economic loss caused by delay. Opinion was divided on whether or not to retain that phrase.

191. It was said that retaining that phrase would render one of the basic obligations of the carrier, namely to deliver in time, non-mandatory and would undermine the incentive of carriers to meet that fundamental contractual obligation. In favour of deletion, it was noted that the phrase was unnecessary given that if the parties agreed on a higher limit, that possibility was already recognized in chapter 20 and any agreement on a lower limit would be contrary to the provision regarding contractual freedom. There was strong support for the view that the phrase in question would, in practice, mean that shippers and consignees would be deprived of any compensation for delay, as carriers would routinely include in pre-printed transport documents standard clauses reducing liability for delay to a possibly insignificant amount. While this level of freedom of contract might be acceptable for volume contracts where both parties negotiated on equal footing, it would not be appropriate in other situations in liner transportation, where contracts of carriage were contracts of adhesion, and shippers had no fair opportunity to negotiate their terms.

192. There was also strong support for retaining the phrase in question, it was suggested that the qualification was based on mutual agreement between the parties rather than a unilateral declaration by the carrier and that shippers today often had sufficient bargaining power to negotiate better conditions. It was further suggested that commercial flexibility was important to permit parties to impose different limits on consequential loss appropriate to their needs and that that approach met with commercial practices. Moreover, eliminating party autonomy on the matter would amount to making the carriers into insurers of the timeliness of the arrival of goods shipped. That result would impact negatively in a highly competitive industry where very low freights had been experienced in recent time. Shippers for whom timely

arrival was so essential always had the alternative of shipping their cargo by faster means, such as by air, and paying an accordingly higher rate of freight.

193. Having noted the conflicting opinions on the matter, the Working Group agreed that a final decision on whether or not to retain the phrase should be postponed until the Working Group had decided whether or not liability for delay on the part of the shipper would be included in the draft convention. If retained, then that would tend in favour of deletion of the words so as to make that paragraph apply on a mandatory basis.

Conclusions reached by the Working Group regarding draft article 65

194. After discussion, the Working Group decided that:

- The text contained in Variant A was preferred and should be used as the basis for further discussions;
- That the term "unless otherwise agreed" be retained in square brackets for consideration at a future session;
- That any necessary clarification be made to draft articles 23 and 65 with respect to what types of damage were being covered by each provision; and
- That a decision on the appropriate limit of liability for the carrier in respect of consequential loss caused by delay be deferred pending the identification of a consensus regarding any limitation on the liability of the shipper for delay.

Draft article 66. Loss of the right to limit liability

Paragraph (1)

195. The Working Group was reminded that paragraph (1) of draft article 66 set out the conditions which would cause the carrier to lose the benefit of the right to limit its liability. Those conditions were fulfilled if the claimant proved that the loss of, or damage to the goods, or breach of the carrier's obligation under the draft convention, resulted from a personal act or omission of the person claiming the right to limit liability, done either intentionally or recklessly and with knowledge that the loss or damage would probably occur.

196. It was observed that a provision of this type that allowed for the limitation level to be exceeded in certain circumstances was a common feature in transport conventions. General approval was expressed in the Working Group for the structure and approach of the text in paragraph (1).

"personal"

197. A number of delegations expressed great dissatisfaction with the inclusion of the word "personal" before the phrase "act or omission" in paragraph (1), believing that it made it too difficult for the cargo claimant to prove that the conditions for the provision had been fulfilled and thus for the carrier's limitation on liability to be exceeded. The Working Group recalled that the issue of whether or not to include this term in the paragraph had been discussed at length during its thirteenth session, and it decided against overturning the decision that it made at that time (see A/CN.9/552, paras. 59-60 and 62).

"[or as provided in the contract of carriage]"

198. The Working Group considered whether to include the phrase "[or as provided in the contract of carriage]" in the text of paragraph (1). The view was expressed that the text could be deleted, since it was thought that the proper conclusion would be reached by those applying the provision regardless of the inclusion of that phrase. In particular, it was thought if the conditions of the paragraph were fulfilled, it would result in a decision that any limitation on liability could be exceeded, regardless of where that limitation was found, and whether or not that particular phrase appeared in the provision. However, concerns were raised that since the draft convention only allowed the parties to agree to increase their level of limitation of liability and not to decrease it, if the phrase were not included, confusion could be caused in some jurisdictions regarding whether or not a higher limitation on liability that was agreed upon should be allowed to stand, even when the conditions of paragraph (1) had been met. After discussion, the Working Group agreed that the square brackets around the text should be deleted, and the phrase should be retained in paragraph (1).

Drafting concerns

199. Concerns were raised regarding the interaction of draft article 64 and the drafting of draft paragraph 66 (1). In particular, since the phrase in the text of draft article 64 "in connection with" had been deleted in favour of the insertion of the phrase "the carrier's liability for breaches of its obligations under this Convention", the question was raised whether the revised text included cases of misdelivery of goods or delivery without presentation of the negotiable transport document or for misrepresentation in the transport document. Further, if those situations were not included in draft article 64, the additional question was raised whether these situations could ever result in a case where the carrier's limitation amount could be exceeded pursuant to draft article 66, since there might never be any intent or knowledge on the part of the carrier.

Conclusions reached by the Working Group regarding draft article 66 (1):

200. After discussion, the Working Group decided that:

- The square brackets around the phrase "or as provided in the contract of carriage" should be deleted and the phrase retained; and
- The text of draft paragraph (1) was approved by the Working Group, subject to any drafting adjustments considered necessary by the Secretariat for clarification.

Paragraph (2)

201. The Working Group was reminded that paragraph (2) of draft article 66 set out the conditions which would result in the carrier losing the benefit of the right to limit its liability in case of delay in delivery. Those conditions were fulfilled if the claimant proved that the delay in delivery resulted from the personal act or omission of the person claiming the right to limit liability, done either intentionally or recklessly and with knowledge that the delay would probably result.

202. The Working Group approved the text of draft paragraph (2), with the understanding that a proposal had been made that if an appropriate limitation level were found for the shipper's liability for delay, the Working Group should consider a similar provision to draft paragraph (2) setting out the conditions pursuant to which that limitation level could be exceeded.

203. A drafting concern was raised regarding the phrase "if the claimant proves" in draft article 66 (2) in comparison with the phrase "if it is proved" found in the corresponding provision of the Hamburg Rules at article 8 (1) and of the Hague-Visby Rules at article 4.5 (e), since it was felt that this would place an extra burden on the cargo claimant.

Conclusions reached by the Working Group regarding draft article 66 (2):

204. The Working Group approved draft paragraph (2), bearing in mind that a parallel provision could be needed for the limitation level for the shipper's liability, should such a level be identified.

Draft article 104: Amendment of limitation amounts

205. In light of the provision's close relationship with the provisions in chapter 13 on the limitation of liability, the Working Group next considered draft article 104 on the amendment of the limitation amounts in the draft convention. The Working Group recalled that it had requested the Secretariat at its thirteenth session to prepare a specific amendment procedure for the rapid amendment of limitation amounts in the draft convention (see A/CN.9/552, para. 40). The Working Group had before it two texts of draft article 104: that prepared by the Secretariat and inserted into the text of the draft convention in A/CN.9/WG.III/WP.56, and that proposed as a revised version set out in paragraph 9 of A/CN.9/WG.III/WP.77.

206. The view was expressed that a provision such as that in draft article 104, whether it was the proposed revised text or the version set out in A/CN.9/WG.III/WP.56, was directly linked to the level of the limitation of the carrier's liability. In particular, it was thought that if the amount of the limitation were set at a very high level, the procedure for its amendment should be very strict, but if the amount were set at a relatively low level, the procedure for its amendment should be less strict.

Introduction of the text in paragraph 9 of A/CN.9/WG.III/WP.77

207. By way of introduction of the changes suggested in the proposed revised text, the Working Group heard that, as set out in paragraph (1) thereof, draft article 104 was intended to be a specific amendment procedure to be followed only with respect to the amendment of the limitation on liability of the carrier set out in draft article 64 (1). Any other amendments to the draft convention would be undertaken in the normal course under general treaty law.

208. In paragraph (2) of the proposed revised text, it was proposed that the number of Contracting States required to request the amendment of the limitation amount should be one-half of the number of Contracting States rather than one-quarter. The view was expressed that this change would ensure that there was sufficient consensus and that there was a need for material change of the provision among the parties most affected, in particular, those representing a sufficient percentage of

cargo volume or cargo value in transport covered by the draft convention. It was further suggested that paragraph (2) of the proposed revised text should provide for the amendment to be made at a meeting of all Contracting States and Members of the United Nations Commission on International Trade Law (UNCITRAL), since it was thought that, under existing international private law, significant changes to concluded texts were often produced by the same multilateral bodies that had formulated the original text.

209. A further innovation of the proposed revised text was said to be found in paragraph (4), which avoided the strict and potentially politicizing mechanism of a vote in favour of the normal consensus-based procedures of UNCITRAL. In addition to greater flexibility, resort to a consensus-based approval mechanism was proposed as appropriate for the amendment procedure, given that that was the mechanism that was used for the adoption of the draft convention itself.

210. Draft paragraph (5) of draft article 104 as set out in A/CN.9/WG.III/WP.56 was thought to be unnecessary, and it had been deleted in the proposed revised text of the provision.

211. By way of further introduction, draft paragraph (5) of the proposed revised text was said to be important in order to lend some stability to the draft convention by limiting the frequency with which, and the amount by which, the limitation level could be amended. The proposed text suggested that the appropriate time period for requesting any amendment was seven years after the entry of the draft convention into force, and seven years after any prior amendment procedure. Further, the proposed text suggested that any single increase or decrease in the limitation level should be limited to twenty-one per cent, and that any limit could not be increased or decreased by more than two times the original amount, cumulatively.

212. Draft paragraph (6) of the proposed revised text set out a time period for the amendment's entry into force of twelve months after the date of its adoption by a sufficient number of Contracting States, which was suggested should be the same number as that ultimately agreed upon in draft article 101 as required for entry into force of the draft convention as a whole. Paragraphs (7) and (8) of draft article 104 as set out in A/CN.9/WG.III/WP.56 were said to have established an unnecessarily lengthy period for the coming into force of the amendment.

213. Draft paragraph (7) of the proposed revised text provided that Contracting States would have to denounce the amendment or be bound by it, rather than having adopted the approach in the text in A/CN.9/WG.III/WP.56 whereby Contracting States would have to denounce the entire convention. The approach in the proposed revised text was thought to be a more flexible one, that would allow States that, for example, had difficulties with approving the amendment internally in time for its entry into force, to nonetheless remain parties to the convention itself.

Preliminary reaction to the proposed revised text in paragraph 9 of A/CN.9/WG.III/WP.77

214. It was observed that paragraph (2) of the proposal envisioned three different groups of States attending any UNCITRAL session convened to consider a proposed amendment: Contracting States that were members of UNCITRAL; non-Contracting States that were members of UNCITRAL; and Contracting States that were non-members of UNCITRAL. The question was raised whether there was any

precedent for such a mixed body to amend a convention. In response, it was said that the three types of States were included in the text because they constituted the usual members and observers that participated in consensus UNCITRAL deliberations, and that all Contracting States to the convention should also be included in any discussions regarding its amendment. Examples mentioned in this regard were the adoption of the Visby Protocol, which was not limited to a conference of Contracting Parties, and the negotiation of the 1974 Convention on the Limitation Period in the International Sale of Goods. In response to an additional question on this point with respect to any precedent that could be identified for the adoption of a simplified amendment procedure by a group including non-Contracting States, mention was made of various conventions of the International Maritime Organization that contain specific amendment procedures that are agreed to by consensus.

Conclusions reached by the Working Group regarding draft article 104:

215. After a preliminary discussion, the Working Group decided that:

- More time was required to reflect upon the procedure outlined in draft article 104 in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.77; and
- Further discussion of the provision would be deferred until a later date.

Relation with Other Conventions: draft articles 27, 89 and 90

General discussion and draft article 27

216. It was recalled that the Working Group had previously considered the issue of the relationship of the draft convention with other conventions at its eleventh session (see A/CN.9/526, paras. 191-202), and that the Working Group had instructed the Secretariat to prepare conflict of convention provisions for possible insertion into draft chapter 19 during its discussion of draft article 27, also at its 11th session (see A/CN.9/526, paras. 245-250, particularly paras. 247 and 250). Those provisions were currently found in the text at articles 89 and 90. It was also recalled that a note by the Secretariat had been prepared on the relationship of the draft convention with other conventions (A/CN.9/WG.III/WP.78), and that it was intended to be read along with a previous note on the sphere of application of the draft convention that had been prepared by the Secretariat (A/CN.9/WG.III/WP.29). The consideration by the Working Group of draft articles 27, 89 and 90 was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

217. The Working Group heard a presentation from the International Road Union (IRU) that highlighted certain concerns of the IRU regarding the interaction of the draft convention with the CMR. According to the IRU, the draft convention created a competing legal regime to the CMR for the carriage of goods by road. While recognizing that draft article 27 of the draft convention attempted to harmonize the operation of the two conventions, the IRU contended that the combined operation of draft articles 27, 89 and 90 of the draft convention would require a Contracting Party of the CMR that wanted to accede to the draft convention to be in conflict with the provisions of the CMR. The view of the IRU was that the draft convention would operate contrary to the terms of article 41 (1) (b) of the Vienna Convention

on the Law of Treaties, with respect to the modification of a treaty, and of article 1 (5) of the CMR, which prohibited Contracting Parties of the CMR from making any special agreements amongst themselves to vary the provisions of the CMR. It was argued by the IRU that any Contracting Party of the CMR would be in conflict with those provisions by ratifying the draft convention, since it was alleged that the door-to-door sphere of application of the draft convention necessarily entailed that the obligations of those Contracting Parties under the CMR would be varied or violated. Of further concern to the IRU was the operation of draft article 27 of the draft convention, that, in the case of localized loss or damage to the goods, allowed for the operation of mandatory provisions of other conventions that specifically provided for the carrier's liability, limitation of liability or time for suit, which was said to be contrary to the mandatory nature of the whole of the CMR, pursuant to its own provisions (see CMR, article 41).

218. In response to those remarks, it was pointed out that some of the comments of the IRU were based on tentative provisions in the draft convention that were still subject to consideration by the Working Group. It was also observed that the membership of the Contracting Parties of the CMR did not coincide with the membership of the United Nations, and that it was for the Contracting Parties of the CMR to assess the extent of their treaty obligations under public international law. Finally, it was also emphasized that the type of contract of carriage contemplated for coverage by the draft convention was clearly of a different type than that covered by the CMR.

219. The Working Group proceeded to consider the alleged conflicts between the draft convention and other international conventions on the carriage of goods. As a preliminary matter intended to alleviate any perceived concerns with the relationship of the draft convention with other conventions, it was proposed that the text of draft article 89 be modified by replacing the phrase, "and that applies mandatorily to contract of carriage of goods primarily by a mode of transport other than carriage by sea" with the phrase, "to the extent that it applies mandatorily to the contract of carriage in question and cannot be overridden by this Convention." It was explained that this proposed change was intended to ensure that other transport conventions were applied only and to the extent that such application was truly necessary and when the draft convention could not be said to apply. The Working Group took note of that suggestion.

220. It was observed that the draft convention and the CMR each had its particular and discrete sphere of application, based on the type of contract of carriage contemplated for inclusion. It was indicated that the draft convention concerned the "maritime plus" contract of carriage with additional inland carriage, while the CMR concerned contracts for the carriage of goods exclusively by road. It was further observed that the operation of draft article 27 intended to respect and preserve the provisions of the existing conventions for inland carriage of goods relating to liability matters, and that the performing inland carrier would always be subject to its own unimodal inland liability regime, while the overall contracting carrier would be subject to the regime under the draft convention. The Working Group was encouraged to avoid placing too much emphasis on the possible conflict of conventions.

221. The focus of the problem of conflict of conventions was said to be the definition of the contract of carriage in various conventions. For example, it was

said that the definition of "contract of carriage" in the draft convention was quite broad, and could include a fairly short sea leg and very long inland carriage. Further, the combined transport provisions of other conventions, such as article 2 of the CMR and article 38 of the Montreal Convention, apply those conventions to the entire carriage in certain cases, regardless of the fact that other modes of transport were involved. This appeared to set up a direct conflict of conventions with the draft convention, but the view was expressed that draft article 27 was the most appropriate mechanism through which to deal with such conflicts, subject to any necessary drafting adjustments.

222. It was suggested that a conflict of conventions arose in the case of transport conventions primarily when the provisions on scope allowed for an overlap in the types of contracts of carriage covered by the convention. In particular, the concern was said to be particularly problematic only when the scope provisions of unimodal transport conventions were read very generously. The view was expressed that the scope provisions of the draft convention were quite modest and precise compared with those of other conventions, and that further precision of the scope of the draft convention had been achieved by allowing for actions against only the contracting carrier and the maritime performing party, leaving inland carriers subject to their unimodal inland regimes. It was acknowledged that, in spite of these mechanisms, there could still exist cases where there was a conflict between the regimes applicable to the overarching umbrella contract of carriage and the unimodal contract of carriage, and that draft article 27 was intended to allow for coordination in those cases by having the draft convention give way to mandatory provisions in present or future conventions but only regarding carrier's liability, limitation of liability or time for suit. The reason for maintaining the priority of the draft convention with respect to all other issues was said to be a matter of utmost concern to the certainty of trade, in that treatment of the documentary aspects of the multimodal shipment had to stay constant and subject to the rules of the draft convention. Otherwise, it was suggested that instability would be created by, for example, having a negotiable transport document suddenly being transformed into a non-negotiable one under the CMR for the land leg of the transport. Similar arguments were said to exist for the preservation of the right to instruct with respect to the goods, and the right of control, in that, unlike under certain unimodal conventions, the shipper could under the provisions of the draft convention prevent a consignee that had not paid for the goods from nonetheless collecting them at the end of the transport.

223. Although there was general satisfaction with the approach to other conventions taken in draft article 27, and although there was general agreement that the Working Group had agreed on adopting a limited network approach in the draft convention (see A/CN.9/526, paras. 219-239), some concerns were raised regarding whether the scope of draft article 27 was broad enough to provide a complete remedy for the conflict of conventions. In particular, since draft article 27 referred only to mandatory provisions, the view was expressed that conflicts could also arise in the case of non-mandatory provisions, such as with respect to notice of damage provisions, and that draft article 27 did not provide a sufficient answer for those situations. As such, it was said that the provisions of the draft convention could be said to overlap with the unimodal transport conventions. A possible solution for the problem regarding non-mandatory provisions was said to be the addition of a provision that parties were deemed to opt out of non-mandatory provisions of other

conventions to the extent that they were in conflict with provisions of the draft convention.

224. Another, related problem was said to exist in the wording of draft article 27 (1) (b)(i) itself, which referred to conventions which according to their terms "appl[ied] to all or any of the carrier's activities" under the contract of carriage. It was pointed out that, given the differing scopes of application of the various unimodal transport conventions, their provisions might never apply "according to their terms" and draft article 27 might never operate, thus establishing a uniform system rather than a limited network system. It was suggested that the phrase "according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period" should be deleted and replaced with text along the following lines: "would have applied if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of transport where the loss or damage occurred". It was said in further support of a limited network system that it would operate in order to create the preferable situation in which the contracting carrier would be sued by the cargo claimant rather than the performing carrier.

225. The view was expressed by some that draft article 27, perhaps with some drafting adjustments to take into account the specific problems of overlap with conventions such as the Montreal Convention, was sufficient to ensure a solution to any potential conflict of conventions. In light of this, it was said by some that the additional provisions in draft article 89 and 90 were unnecessary, and in fact complicated the clear and predictable approach to the problem provided for in draft article 27. In support of this view, it was said that draft article 89 allowed too much discretion for a decision regarding which convention to apply to be made, and preference was expressed for the more certain approach presented in draft article 27. Further, it was said that using draft article 89 as a solution to the conflict of conventions problem would not provide for as precise and uniform an interpretation as could be found by relying on draft article 27. However, others that supported draft article 27 saw a possible continuing role for draft articles 89 and 90, in order to deal with situations such as the direct and unavoidable conflict between the provisions of the draft convention and the operation of the provisions of other conventions, such as articles 18 (4) and 38 of the Montreal Convention. Further, it was thought that the position of draft articles 89 and 90 in the chapter on "Other conventions" was more appropriate for a conflict of conventions provision, and that inclusion of such provisions could provide added security of interpretation should such conflicts arise.

"[national law]"

226. Several delegations expressed the view that the phrase "national law" should be deleted from the chapeau of draft article 27 (1) (b). In support of this view, it was said the deletion of the terms would promote uniformity of interpretation and legal certainty. It was further suggested that the added complexity and expense in a cargo claim of having to determine the applicable provisions of national law argued against retention of that phrase. However, a considerable number of delegations also expressed a desire to retain the text in square brackets, pending further consideration of that phrase. In support of that proposal, the view was expressed that in some situations where the last leg of the carriage was by road and was purely

domestic, leaving out the phrase could result in a markedly different regime being applied to that road leg than might be applied under domestic law. It was thought that further consideration should be given to such a possible scenario, or whether such concerns could be accommodated by means of another approach in the draft text.

An additional drafting concern

227. Questions were raised whether it was necessary in draft article 27 (1) (b)(iii) to make reference to "private contracts", or whether the word "private" could be deleted from the text.

Conclusions reached by the Working Group regarding draft article 27:

228. After discussion, the Working Group decided that:

- The scheme of draft article 27 should be maintained with some possible drafting improvements;
- The brackets around the text of paragraph 1 should be removed and the text retained;
- The Secretariat was requested to consider alternative drafting for aspects such as the phrase "according to their terms apply";
- To maintain the square brackets around paragraphs 2 and 3; and
- The phrase "[or national law]" in the chapeau of draft article 27 (1) (b) should be retained pending further consideration.

Article 89. International instruments governing other modes of transport and Article 90. Prevalence over earlier conventions

229. The Working Group continued its discussion of the relationship between the draft convention and other conventions on the basis of draft articles 89 and 90, which, it was recalled, had been included in the draft convention at the request of the Working Group during its eleventh session (see A/CN.9/526, paras. 245-250, particularly paras. 247 and 250), but had not yet been considered by the Working Group.

230. Concern was expressed that draft articles 89 and 90 seemed to contradict each other, such that draft article 89 would allow for the prevalence of other conventions over the draft convention in cases of conflict, while draft article 90 provided for the prevalence of the draft convention over all other conflicting earlier conventions. In light of this, two possible solutions were suggested: the deletion of one or the other of draft articles 89 or 90, or the deletion of both provisions. In this regard, it was suggested that draft article 27 presented a satisfactory solution to the problem of any potential conflict between other unimodal transport conventions and the draft convention, and that no additional provision in this regard was necessary or desirable.

231. Other views were expressed in support of the proposal to delete draft articles 89 and 90 and to allow draft article 27 to stand, along with specific conflict of convention provisions in the draft convention at draft articles 79, 91, 92, 93 and the denunciation provision in draft article 102, as the sole provisions intended to

resolve any potential conflict of conventions. In support of this proposal, the view was reiterated that, in terms of other unimodal transport conventions, such as the CMR, there was no conflict with the draft convention because the scope of application of those conventions was tied to contracts of carriage that were different from the "maritime plus" contract of carriage covered by the draft convention (see para. 225 above). Thus, it was said, the subject matter of those conventions and the draft convention was not identical. Secondly, it was said that draft article 27 had been drafted at the outset as a limited network approach to fulfil the role of a conflict of conventions provision, and that separating it from that conflict of conventions role could result in the broad application of draft article 27 to all inland carriage contemplated under the draft convention. It was said that such an interpretation could result in a significant decrease in the recoverability of damages by the shipper, who, in the case of road carriage, would be thus limited to the 8.33 SDR per kilogram limitation amount of the CMR, rather than to a limitation level comparable to, for example, that of the Hague-Visby Rules of 666.67 SDRs per package. In terms of this example, it was said that recovery under the per kilogram limitation of the CMR would be more favourable than under the per package limitation of a provision like that of the Hague-Visby Rules only when an individual package weighed greater than 83 kilograms which, it was said, was a rare occurrence. Finally, it was said that draft articles 89 and 90 were superfluous anyway, since if there was any conflict with another convention with respect to subject matter, in light of article 30 of the Vienna Convention of the Law on Treaties, any later convention dealing with the same subject matter would prevail over the provisions of the earlier convention.

232. While there was general agreement that draft article 90 could be deleted as potentially causing confusion with respect to the application of article 30 of the Vienna Convention on the Law of Treaties, there remained substantial support in the Working Group for the retention of draft article 89, at least for the moment. In this regard, concerns were reiterated from the earlier discussion (see para. 225 above) concerning the adequacy of draft article 27 in dealing with general conflict of conventions issues as they may arise with respect to certain unimodal transport conventions and with regard to some regional unimodal transport instruments other than the CMR, such as the uniform rules on road carriage that had been formulated by the Organization for the Harmonization of Business Law in Africa (OHADA). In particular, it was thought that draft article 89 could provide addition protection against such residual risk of conflict of conventions, to the extent that such protection was necessary in addition to the operation of draft article 27. Further, in supporting the retention of draft article 89, a specific request was made to ensure certainty regarding the intention of that provision by retaining the word "primarily" as found therein and in article 25 (5) of the Hamburg Rules.

233. It was suggested in response that such concerns regarding additional protection were unnecessary and that draft article 27 presented a clear and complete solution to the problem, and that, in fact, adding draft article 89 to the draft convention could result in confusion and could obscure the intended operation of draft article 27. In this regard, the view was also expressed that draft article 89 was too general a provision as currently drafted to fulfil the role envisioned for it of filling any potential gaps left by the application of draft article 27. However, it was suggested that in order to assuage remaining concerns regarding the clarity of the application of draft article 27 as a conflict of convention provision, the Secretariat

could propose additional clarifying provisions such as those set out in paragraphs 29 and 36 of A/CN.9/WG.III/WP.78, to the effect that actions under the draft convention were available against only the contracting carrier and the maritime performing party, and that claims against other performing inland carriers were not so included. Additional suggestions were made that, in light of its role as a conflict of conventions provision, the optimal placement of draft article 27 within the draft convention might be reconsidered, and that the Secretariat could also consider clarifications to the text of the draft convention based on the Bimco COMBICONBILL referred to in paragraph 26 of A/CN.9/WG.III/WP.78.

234. Since concerns had been raised regarding a possible conflict of conventions with the Montreal Convention (see para. 225 above), it was suggested that, although the combination of air and sea transport in the same carriage was thought to be rare, additional clarification of the draft convention could be undertaken to ensure that there was no lingering conflict with the Montreal Convention. In this regard, additional concerns were raised that a direct conflict of convention could also arise between the draft convention and the instruments under certain regional agreements affecting trade and transport, such as OHADA.

Conclusions reached by the Working Group regarding draft articles 89 and 90:

235. After discussion, the Working Group decided that:

- Draft article 89 should be deleted;
- Draft article 90 should be deleted;
- The Secretariat was requested to consider the optimal placement of draft article 27; and
- Possible drafting clarifications to ensure the proper application of the limited network system should be considered to the draft instrument in light of paragraphs 26, 29 and 36 of A/CN.9/WG.III/WP.78, and in order to ensure that there is no conflict between the draft convention and the Montreal Convention.

Draft article 64. Basis of limitation of liability (*continued from paras. 175-176 above*)

Paragraph (2) (continued)

236. The Working Group recalled that draft article 64 (2) contained two variants, both of which set out a special regime for the limitation level with respect to non-localized loss or damage of goods. It further recalled that it had agreed to defer its consideration of that paragraph until after its discussion of the relationship of the draft convention with other conventions (see paras. 175-176 above).

237. The view was expressed that, given the large number of packages that might be placed in a single container, the per package limitation in container trade might in practice lead to a higher compensation in maritime transport as compared to inland transport (see the example in para. 231 above). Therefore, a proposal was made to delete paragraph (2), since it was thought that shippers would obtain higher recovery amounts for damage under the liability regime of the draft convention, and that recovery for non-localized damage should also therefore be subject to the general liability regime under the draft convention. That proposal received some

support, with some delegations suggesting that the limitation could be dealt with in draft article 27, and that, in any event, paragraph (2) introduced lack of certainty into the regime. However, it was said that it was premature to delete paragraph (2) and that the Working Group should reconsider the issue once the limitation levels in draft article 64 (1) had been determined. It was also suggested that both variants in paragraph (2) were unclear and, if either were to be retained, they would require substantial redrafting.

Conclusions reached by the Working Group regarding draft article 64 (2):

238. As this was the final issue discussed at its eighteenth session, due to a lack of time, the Working Group suspended its discussion and agreed to continue discussions on draft article 64 (2) at a future session.

General average — Chapter 18

239. The Working Group considered the text of Chapter 18 (comprising articles 87 and 88) as contained in A/CN.9/WG.III/WP.56 and recalled its earlier discussions on that chapter (see A/CN.9/510, paras. 137-143 and A/CN.9/526, paras. 183-190).

Draft article 87

240. It was recalled that draft article 87 largely reproduced the provisions regarding general average as contained in the Hague, Hague-Visby and Hamburg Rules and expressed the agreed policy that the draft convention should not affect the application of provisions in the contract of carriage or national law regarding the adjustment of general average. It was agreed that the principle contained in draft article 87 was useful and should be retained. A suggestion was made that any necessary clarification be made that the operation of article 16 (2) was not intended to have any effect on the existing general average regime.

Draft article 88

241. It was noted that paragraph (1) was intended to reflect the principle that the general average award adjustment must first be made, and the general average award established, and that liability matters would thereafter be determined on the same basis as liability for a claim brought by the cargo owner for loss of or damage to the goods.

242. It was noted that paragraph (2) dealt with the limitation period for claims in general average. It was noted that, when drafted, some doubt existed as to what the applicable time period should be, but that subsequently in 2004 the CMI had issued a revision of the York-Antwerp Rules 1994, which contained a limitation period of one year after the date of the general average adjustment or six years after the date of termination of the common maritime adventure, whichever came first. It was noted that given that it was unclear whether a limitation period in a private contract could override a limitation period in international law, and that the revised York-Antwerp Rules 2004 had not yet achieved general acceptance, it might be helpful to retain paragraph (2) for the sake of clarity, but to adjust its text to reflect the York-Antwerp Rules regarding claims “under general average bonds or guarantees”. Some support was expressed for that proposal.

243. However, opposition was expressed to the retention of article 88. It was said that incorporating the revised time limitation of the York-Antwerp Rules 2004 could create confusion given that the revised rules had not been taken up by all ship-owners. It was suggested that the question of a time bar should be left to the existing legal regime for the adjustment of general average.

Conclusions reached by the Working Group regarding Chapter 18:

244. After discussion, the Working Group decided to:

- Retain article 87 in substance; and
- Delete article 88.

Jurisdiction — Chapter 16

General discussion

245. The Working Group was reminded that it had most recently considered the topic of jurisdiction at its sixteenth session (see A/CN.9/591, paras. 9-84), and that it had previously considered the topic at its fourteenth (see A/CN.9/572, paras. 110-150) and fifteenth sessions (see A/CN.9/576, paras. 110-175). It was also recalled that a revised text of the chapter on jurisdiction was prepared for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.75), which was based upon the text considered at its sixteenth session (see A/CN.9/591, para. 73), as well as consideration of that text (see A/CN.9/591, paras. 74-84). Certain suggestions by the Secretariat for drafting improvements had been included in the text in A/CN.9/WG.III/WP.75, as set out in the footnotes thereto. Discussion in the Working Group of the provisions on jurisdiction was based on the text as found in A/CN.9/WG.III/WP.75.

Proposal for reservation or clause to "opt in" to the chapter

246. It was proposed in the Working Group that, given the range of divergent views that were expressed during its sixteenth session with respect to the treatment and enforcement of choice of court clauses in the jurisdiction chapter of the draft convention, the Working Group should consider the adoption of a clause either allowing for a reservation to be taken by Contracting States to the entire chapter, or that a clause be adopted in the draft convention allowing Contracting States to specifically agree, or "opt in", to be bound by the chapter on jurisdiction. The view was expressed that this approach would make it more likely that the draft convention would be widely accepted by Contracting States, and that a broader consensus on the chapter on jurisdiction could be reached.

247. In terms of specific drafting, it was suggested that a new provision could be drafted with a Variant A along the lines of: "Any state may make a reservation with respect to this chapter," and a Variant B with text such as: "The provisions of this chapter will only apply to a Contracting State if that State makes a declaration to that effect." Further, it was explained that by allowing for a reservation or an "opt in" clause to be taken to the chapter on jurisdiction, the existing provisions in paragraphs 4 and 5 of draft article 76, which allowed for Contracting States to allow

choice of court agreements that met different conditions than the rest of the draft provision, could be deleted.

Partial "opt in" approach

248. The view was expressed that allowing for a reservation or "opt in" clause to the entire chapter on jurisdiction could be too extreme, and that a more flexible approach should be considered by the Working Group. It was said that certain States that might choose to become Contracting States of the draft convention might wish to retain draft article 76 in the text of the draft convention in order to give effect to choice of court clauses under conditions different from those set out elsewhere in draft article 76. It was suggested that this would be possible if the Working Group decided to include provisions allowing Contracting States to either "opt in" to the whole chapter excluding draft article 76, or to "opt in" to the entire chapter on jurisdiction, including draft article 76.

Views expressed on the two proposals

249. The Working Group proceeded to consider the two proposals as expressed above. There was strong support for allowing for a reservation or "opt in" clause to be provided for Contracting States in the draft convention with respect to the entire chapter on jurisdiction. A number of delegations that had originally expressed an interest during the sixteenth session in deleting the entire chapter on jurisdiction expressed their satisfaction with respect to this proposal and for the flexibility that it would grant to Contracting States.

250. Interest was also expressed in the partial "opt in" approach with respect to draft article 76. Delegations expressed their desire to see draft text setting out how this approach would operate prior to expressing their views on whether to adopt it or not. In particular, it was said to be important that the draft convention continue to allow for the recognition of choice of court agreements pursuant to draft article 76 (4). In considering the partial reservation or "opt in" approach, the view was expressed that care would have to be taken with respect to consequential amendments that might be necessary to ensure the appropriate operation of draft article 81 bis on recognition and enforcement. This view was echoed with respect to consequential amendments that might be required to draft article 81 bis if the Working Group adopted the approach of providing for a reservation or "opt in" clause with respect to the entire chapter on jurisdiction, as well.

Reservation versus "opt in" approach

251. While no strong view was expressed in favour of or against the reservation or the "opt in" approach, it was suggested that the "opt in" approach might be easier for Contracting States to adopt, as it simply allowed States passively to allow the relevant provisions to remain inoperable rather than to take the positive act of making a reservation with respect to those provisions. The general view in the Working Group was that delegations preferred to review draft text outlining the complete and partial reservation and "opt in" approaches prior to expressing definitive views on those proposed approaches.

Conclusions reached by the Working Group regarding the whole and partial reservation or "opt in" approaches:

252. After discussion, the Working Group decided that:

- There was support in the Working Group for the inclusion in the draft convention of a reservation or an "opt in" clause for the whole of chapter 16;
- Interest was expressed in the reservation or partial "opt in" approach proposed with respect to draft article 76 and the recognition of choice of court agreements pursuant to draft article 76 (4); and
- Draft text setting out in more detail the various approaches proposed should be prepared for the consideration of the Working Group, along with any necessary text on consequential adjustments to other provisions, such as draft article 81 bis.

Discussion of specific provisions in chapter 16

253. The Working Group proceeded to examine the provisions in the chapter on jurisdiction with a view to considering whether a decision could be reached regarding any alternative text presented in A/CN.9/WG.III/WP.75, and whether resolution could be reached regarding other questions raised.

Draft article 75. Actions against the carrier

254. Several delegations expressed the view that the opening phrase of draft article 75, "unless the contract of carriage contains an exclusive choice of court agreement that is valid under articles 76 or 81" should be deleted as allowing for too much freedom of contract in terms of establishing which places should be considered appropriate for the establishment of jurisdiction. In addition, questions were raised regarding whether there should be a provision in the draft convention establishing the rules for designating the appropriate jurisdiction for actions against the shipper and the consignee, in addition to those provisions in draft article 75 and 77, providing such rules for actions against the carrier and the maritime performing party, respectively. In regard to both issues, a preference was expressed for the approach taken in article 21 of the Hamburg Rules. In response, it was said that while there was some sympathy for these suggestions, it was thought that, in light of the delicate compromise struck on these issues during its sixteenth session, the Working Group should at the moment retain its views, as expressed in the text under consideration, and that concerns about the freedom of contract were perhaps best left to the consideration of draft article 76 on choice of court agreements. In response to a concern raised regarding the use of the word "plaintiff" in draft article 75 and that it could allow an opening for carriers seeking to circumvent the provision by seeking a declaration of non-liability in an anti-suit injunction, it was explained that that problem might be best dealt with in terms of possible drafting adjustments to draft article 80 (2), which was aimed primarily at that problem.

Draft article 76. Choice of court agreements

255. Despite a view expressed to the contrary, there was general agreement in the Working Group to delete the square brackets surrounding the phrase "claims against

the carrier" and retain the text therein, and to delete the alternative "[disputes]" in draft article 76 (1).

256. With regard to the alternative text set out in square brackets in draft article 76 (2) (b), there was general agreement to retain the text "designates the courts of one Contracting State or one or more specific courts of one Contracting State" as allowing parties to be more precise in choosing the court in a choice of court agreement. It was further agreed to add the word "clearly" at the beginning of the chosen phrase, and to delete the alternative text set out in square brackets in the draft provision.

257. It was agreed that draft paragraph 76 (2) (c) could be deleted, since sufficient protection was thought to have been provided as between the parties to a volume agreement in draft paragraph 76 (2) (a).

258. It was proposed that the text in draft paragraph 76 (3) (b) be retained without square brackets. However, it was suggested that since the term "transport document" had a very broad meaning under the draft convention, the provision should be narrowed slightly to provide for proper notice to be provided to the third party to the volume contract, by deleting the phrase "issued in relation to" and substituting the phrase, "that evidences the contract of carriage for". There was general support for that proposal.

259. With regard to draft article 76 (3) (d) regarding the requirement for binding a third party to a volume contract to a choice of court agreement concluded therein, a concern was expressed that the conditions set out in the provision were not sufficiently clear with respect to how such parties would be bound. In response to this concern, it was proposed that subparagraph (d) be amended to refer to the law of the agreed place of destination of the goods, rather than to the "rules of private international law of the court seized". While this suggestion was welcomed as a possible solution, concerns were expressed regarding what law was being chosen under this formulation, and it was suggested that "the place of receipt of the goods" might be better wording, but that that connecting factor was unusual, and it was thought to be preferable to refer to the law of the forum or the law governing the contract. Further, the view was expressed that the draft convention had avoided elsewhere making specific reference to the law chosen, and that the current text as found in A/CN.9/WG.III/WP.75 might be preferable. Support was expressed for the view that the provision should be left as it was currently found, or failing that, that the law of the forum should be used so as to avoid a potentially uncertain and confusing rule like the "law of the place of receipt of the goods". It was agreed that alternative text could be proposed for draft article 76 (3) (d) as follows: "[the law of the place of destination of the goods][the law of the place of receipt of the goods] [the applicable law pursuant to the rules of private international law of the law of the forum]", and that the Secretariat should have regard to the use of the word "court" in this draft article, and specifically, to proper usage of the term "competent court".

260. The Working Group agreed that under the proposal to include a reservation or "opt in" clause regarding the entire chapter on jurisdiction, paragraphs 4 and 5 of draft article 76 would be deleted.

Draft article 77. Actions against the maritime performing party

261. After discussion, the Working Group agreed that the text in square brackets in draft article 77 (b) should be retained as necessary to further define the maritime performing party and the brackets around them deleted, but that the words "single" and "all of" could be deleted as redundant.

Draft article 79. Arrest and provisional or protective measures

262. Although the view was expressed that retaining the text in square brackets in draft article 79 might effectively provide an extra ground of jurisdiction under the draft convention by including the place of arrest, the Working Group agreed to retain the text in square brackets and to delete the brackets.

Draft article 80. Consolidation and removal of actions

263. With respect to the square brackets appearing in draft article 80 (2), there was support for the proposal that, of the texts presented, the best text was the following compromise between the three alternative texts: "seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum under articles 75 or 77." Two other issues mentioned for consideration by the Secretariat in future drafting were the possibility that the reference in draft article 80 to articles 76 or 81 might need to be adjusted if the option with respect to the partial "opt in" approach was taken, and that with respect to draft article 80 (2), the Secretariat could consider clarifying that the cargo claimant must designate a forum to which the action must be removed, or there would be no removal. The Working Group approved both suggestions.

Draft article 81. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

264. There was approval for the suggestion to add the word "competent" before the word "court" in draft article 81 (2).

Draft article 81 bis. Recognition and enforcement

265. The Working Group reiterated its view that the text of draft articles 81 bis (2) and (3) might need to be adjusted depending on what decision was made regarding the whole or partial reservation or "opt in" with respect to chapter 16. It was submitted that draft article 81 bis did not place an obligation on Contracting States to recognize and enforce judgments from other States but offered the possibility to do so subject to their national laws. The submission was accepted by the Working Group. Further, the Secretariat was requested to review the use of the terms "may" and "shall" in draft article 81 bis (1).

Conclusions reached by the Working Group regarding the provisions in chapter 16:

266. After discussion, the Working Group decided that:

- The Secretariat should make the adjustments to the provisions of chapter 16 as approved above in paragraphs 245 to 265.

Arbitration — Chapter 17

267. The Working Group was reminded that it had most recently considered the topic of arbitration at its sixteenth session (see A/CN.9/591, paras. 85-103), and that it had previously considered the topic at its fourteenth (see A/CN.9/572, paras. 151-157) and fifteenth sessions (see A/CN.9/576, paras. 176-179).

268. The Working Group was reminded that, following the consideration of the topic of arbitration during its sixteenth session, a revised text for a new chapter on arbitration had been proposed (see A/CN.9/591, para. 95). Discussion on that proposal ensued in the Working Group at that same session, and it was decided that the general approach taken in those provisions was acceptable and should be retained for future consideration by the Working Group (see A/CN.9/591, paras. 96 to 103). It was further recalled that draft article 83 of that revised text provided for a claimant to commence either arbitral proceedings according to the terms of the arbitration agreement in the contract of carriage, or to institute court proceedings in any place, provided that such place was specified by draft article 75 of the draft convention. It was further recalled that the purpose of that approach was to ensure that, with respect to the liner trade, the right of the cargo claimant to choose the place of jurisdiction for a claim pursuant to draft article 75 was not circumvented by way of enforcement of an arbitration clause. In addition, the Working Group was reminded that it had attempted in that approach to limit interference with the right to arbitrate in the liner trade while protecting the cargo claimant, but that the intended approach in the non-liner trade was to allow for complete freedom to arbitrate, thus preserving the status quo in both trades.

269. At that time, it was noted that the approach of that revised text in paragraph 95 of A/CN.9/591, would in practice mean that an otherwise valid arbitration agreement might not be considered binding if the claimant chose to institute court proceedings elsewhere. This particular aspect of that revised text was felt to be possibly inconsistent with article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which generally recognized the binding nature of arbitration agreements and mandated courts to decline jurisdiction in respect of disputes which the parties had agreed to submit to arbitration. Therefore, it was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (Arbitration) on the provisions of the draft convention relating to arbitration (see A/CN.9/591, para. 101).

270. The Working Group was informed that the Secretariat had since facilitated consultations between experts that participated in the activities of both Working Groups with a view to devising ways to implement the approach taken by Working Group III at its sixteenth session in a manner that did not conflict with the New York Convention and the policies advocated by UNCITRAL in the field of arbitration. As a result of those consultations, the following text was proposed for consideration by the Working Group:

“CHAPTER 17. ARBITRATION

“Article 83. Arbitration agreements

“1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

“2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at one of the following locations:

“(a) Any place designated for that purpose in the arbitration agreement; or

“(b) Any other place situated in a State where any of the places specified in article 75, paragraph (a), (b) or (c), is located.

“3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and either

“(a) is individually negotiated; or

“(b) contains a prominent statement that there is an arbitration agreement and specifies the location within the volume contract of that agreement.

“4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

“(a) The place of arbitration designated in the agreement is situated in one of the places referred to in article 75, paragraphs (a), (b) or (c);

“[(b) The agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;]

“(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

“(d) Applicable law [for the arbitration agreement] permits that person to be bound by the arbitration agreement.

“5. The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is null and void.

“Article 84. Arbitration agreement in non-liner transportation

“1. If this Convention has been incorporated by reference into a charterparty or other contract of carriage that is excluded from the application of this Convention pursuant to article 9, then the incorporation does not include this chapter unless it explicitly expresses the intent to incorporate this chapter.

"2. Nothing in this Convention affects the enforceability of an arbitration agreement in a charterparty or other contract of carriage that is excluded from the application of this Convention pursuant to article 9 if that agreement has been incorporated by reference into a transport document or electronic transport record issued under that charterparty or other contract of carriage and the provision in the transport document or electronic transport record that incorporates the agreement (i) identifies the parties to and date of the charterparty; and (ii) specifically refers to the arbitration clause.

"Article 85. Agreements for arbitration after the dispute has arisen

"Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.

"Article 85 bis. Application of Chapter 17

"Variant A

"The provisions of this chapter will apply only to a Contracting State if that State makes a declaration to this effect in accordance with Article XX [which will describe the formalities of the declaration process].

"Variant B

"A Contracting State may make a reservation in accordance with Article XX [which will describe the formalities of the reservation process] with respect to this chapter. "

271. It was explained that under the above text the arbitration agreement itself would be considered to be binding, and the cargo claimant would not be allowed to disregard the arbitration agreement by filing suit at court. Instead, the text used the approach taken in article 22 of the Hamburg Rules to provide a mechanism to protect the cargo claimant from being denied its right to choose the place of jurisdiction by way of enforcement of an arbitration clause. Under the above text, the claimant was given the option to either commence arbitral proceedings according to the terms of the arbitration agreement in the contract of carriage, or in any place specified by draft article 75 of the draft convention. It was noted that in the past the Working Group had been reluctant to follow the approach taken in the Hamburg Rules, mainly because of concerns that moving arbitration proceedings away from the place of arbitration originally agreed might in practice render arbitration impracticable, in particular where the arbitration rules of the arbitral institution chosen by the parties did not accommodate the conduct of arbitration proceedings away from the arbitral institution's seat. It was observed, however, that in view of the objections that had been raised to the text tentatively agreed at the Working Group's sixteenth session, reverting to the approach taken in article 22 of the Hamburg Rules, with the adjustments contained in the text proposed in paragraph 270 above would, in balance, offer a better alternative for achieving the Working Group's policy objective of protecting the interests of the cargo claimant in a manner that respected the general principle of the binding nature of arbitration agreements. Problems that might arise from a request by the claimant that

arbitration proceedings take place at a place other than the agreed place of arbitration would be solved within the framework of the New York Convention and in the light of the case law that had interpreted its text.

272. By way of further explanation of the text proposed in paragraph 270 above, it was said that an attempt was made to align that text as closely as possible with the approach taken in the chapter of the draft convention on jurisdiction. In particular, it was noted that draft article 83 (3) was intended to be the counterpart of draft article 76 with respect to volume contracts, and that draft article 83 (4) was intended to parallel the approach of draft article 76 with respect to the binding effect of arbitration agreements on third parties to the contract of carriage. Further, Variants A and B of draft article 85 bis reflected the proposed reservation or "opt in" approaches to the chapter on arbitration that were also suggested with respect to the chapter on jurisdiction, and it was said that should the Working Group adopt the partial "opt in" approach to the chapter on jurisdiction, corresponding changes would be necessary with respect to this provision as well, since whatever choice the Working Group made with respect to the particular mechanism according to which chapter 16 would apply should also extend to chapter 17.

General discussion

273. Although some delegations reiterated their opposition to including any provisions in the draft convention on arbitration, it was pointed out that the reservation or "opt in" approach set out in draft article 85 bis should alleviate those concerns. While there was agreement in the Working Group that further reflection would be necessary on the revised text in paragraph 270 above, support was expressed for the compromise approach and the principles expressed therein to allow for as broad an approach to arbitration as possible in the liner trade, while at the same time ensuring that the rules establishing jurisdiction in claims against the carrier in draft article 75 were not circumvented. Support was again expressed for the principle that there should be broad ability to resort to arbitration in the non-liner trade. Certain specific observations were made as follows with respect to the specific text of the chapter under consideration.

Draft article 83

274. The proposal was made to delete the phrase "against the carrier" in the chapeau of paragraph 2, since it was thought to be more in keeping with the nature of arbitration if a claim could be asserted by either party to the dispute. Support was expressed for this proposal. In response to a question regarding the operation of the word "binding" in the chapeau of draft article 83 (3) and its intended operation with draft article 83 (2), it was confirmed that the use of that term in that context was intended to completely prohibit "exclusive" arbitration agreements in the liner trade. It was proposed that in the case where the carrier took the initiative to have recourse to arbitration at the place designated by the draft convention, the other party could nonetheless determine that the proceedings would take place at one of the places specified in draft article 75 (a), (b) or (c).

275. Concern was also expressed with respect to draft article 83 (4) regarding the conditions under which third parties to arbitration agreements in contracts of carriage would be bound. It was thought that subparagraph (d) was problematic, in that it provided that one of the conditions for a third party to be bound by the

arbitration agreement was that the "applicable law" permitted that party to be so bound. In particular, it was thought that the phrase "applicable law" was too vague, in that it did not specify whether it was the procedural law or the law chosen by the arbitration itself, and that a more precise term should be used, such as the law of the contract of carriage, or the law of the arbitration proceedings, or the law of the State in which the arbitration proceedings took place. It was noted that a similar discussion had taken place in the Working Group regarding the law applicable to binding a third party in the case of choice of court provisions in a volume contract in draft article 76 (3) (d) (see para. 259 above), and doubt was expressed whether a decision could be reached in respect of this similar provision in the arbitration chapter, since it was thought to be more controversial than the provision in the jurisdiction chapter. The Working Group was therefore encouraged to refrain from making any specific reference about the applicable law in this regard. It was also stated that a third party should be bound by an arbitration clause only if it had agreed to it.

Draft article 84

276. It was observed that draft article 84 differed substantially from the version previously considered at the sixteenth session of the Working Group (see A/CN.9/591, para. 95). It was explained that draft article 84 was intended to preserve traditional resort to arbitration in charterparties in the non-liner trade, but to ensure the inclusion in that category of those situations where the draft convention was incorporated by reference. It was noted that paragraph 2 of draft article 84 had been redrafted from the previous version, but that the intention had been to keep the provision substantially the same, except for slightly limiting the circumstances under which a bill of lading issued pursuant to a charterparty could contain an arbitration clause. In particular, the revised approach was attempting to deal with a particular problem by allowing bills of lading issued pursuant to a charterparty to incorporate the charterparty's arbitration clause.

277. While the intended operation of this provision was thought to be helpful, there was support for the suggestion that paragraph 1 of draft article 84 should be deleted, as it was seen as a material rule that could affect the interpretation of such incorporation by reference, and could be used as a mechanism to affect charterparties, which were, in any event, intended to be outside of the scope of the draft convention. Further it was suggested that the phrase "or jurisdiction" should be added after the phrase "enforceability of an arbitration" in order to cover the limited number of cases where charterparties incorporated litigation rather than arbitration, and that the phrase "parties to and date of" should be deleted from subparagraph 2 (i). As a result of concerns that paragraph 2 set out conditions that could have the unwanted effect of establishing conditions that restricted the use of arbitration clauses in the non-liner trade, it was suggested that the text following the second instance of the phrase "or other contract of carriage" should be deleted.

Draft article 85 bis

278. It was noted that draft article 85 bis setting out the reservation and "opt in" alternatives for the application of the chapter on arbitration was not linked to similar provisions in chapter 16 on jurisdiction, since every State would have complete

freedom to decide on the application of chapter 17, but that the choice on whether or not to adopt chapter 16 would be made by some States in a joint fashion.

Conclusions reached by the Working Group regarding chapter 17 on arbitration:

279. After discussion, the Working Group decided that:

- The draft text set out in paragraph 270 above represented a good compromise and acceptable grounds on which to continue discussions toward final drafting;
- Delegations would still have the right to comment further on the text pending further consideration of the new version presented during the session; and
- Although some suggested drafting changes did not receive sufficient support, such as the deletion of the phrase "against the carrier" in draft article 83 (2), the Secretariat should prepare a revised version of the text, taking into account the above discussion and making any necessary drafting adjustments, particularly in light of any adjustment necessary with respect to a partial "opt in" approach.

III. Other business

Planning of future work

280. The Working Group agreed to complete consideration of any outstanding issues from its second reading, including freedom of contract, and to commence its third reading of the draft convention, at its nineteenth session (New York, 16 to 27 April, 2007). The Working Group also took note that its twentieth session was scheduled for 15 to 25 October 2007, subject to the approval of the Commission at its fortieth session in 2007.

281. The Working Group expressed its strong satisfaction with the continued progress made on the draft convention, particularly in light of the heavy agenda at its current session. The Working Group agreed that it was on target to complete its third and final reading of the draft convention at the end of 2007.

Notes

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