



General Assembly

Distr.: Limited
8 September 2005

Original: English

United Nations Commission on International Trade Law

Working Group III (Transport Law)
Sixteenth session
Vienna, 28 November - 9 December 2005

Comment [Start1]: Page: 1
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Transport Law

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

Note by the Secretariat

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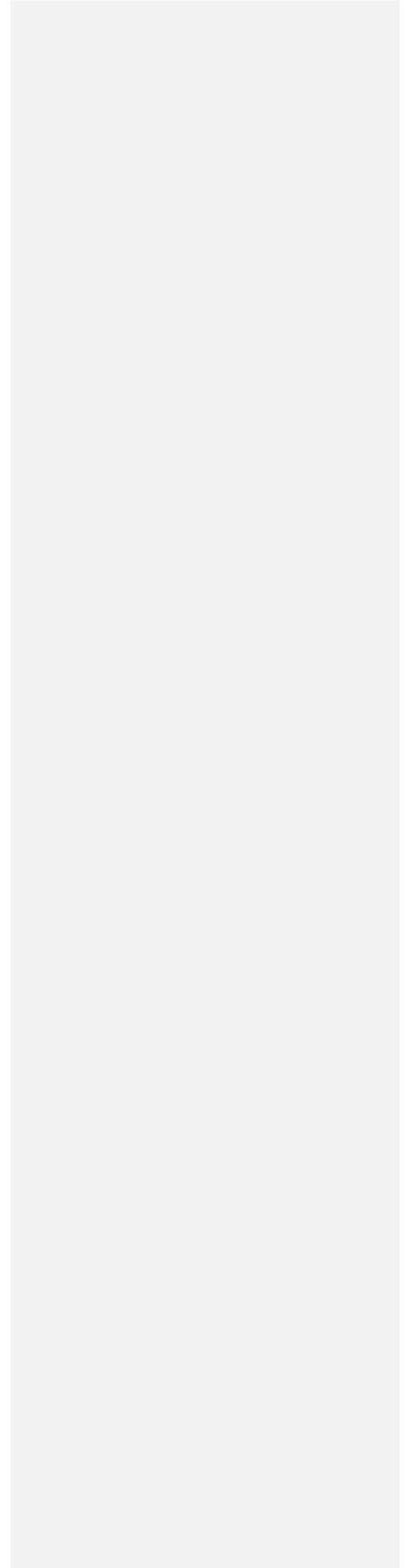
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Introduction

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 instrument 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 The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.48.

2. Annex I of this document contains a consolidation of revised provisions for a draft convention on the carriage of goods [wholly or partly] [by sea] prepared by the Secretariat for consideration by the Working Group. While the Working Group has not yet completed second reading of the draft convention, it was thought that the number of revisions to the most recent consolidated text of the draft convention (contained in document A/CN.9/WG.III/WP.32) that have been agreed upon by the Working Group called for the publication of a more recent consolidated text. Changes to the consolidated text previously considered by the Working Group (contained in documents A/CN.9/WG.III/WP.32) have been indicated in footnotes to that text by reference to the working paper in which such interim revised text appeared (A/CN.9/WG.III/WP.36, A/CN.9/WG.III/WP.39, A/CN.9/WG.III/WP.44, and A/CN.9/WG.III/WP.47), or to the paragraph of the report in which such text appeared (A/CN.9/572 and A/CN.9/576). For ease of reference and to facilitate discussion in the Working Group, Annex II of this document consists of the same document as Annex I, but with underlining and strikeout, where appropriate, to indicate the changes from previously published versions of the text. Where suggested corrections, clarifications, improvements and relocation of provisions are thought to relate to drafting only, they are indicated by underlining and strikeout in Annex II without further explanation. However, where more substantive changes are suggested to the text, these are explained in footnotes or through the introduction of variants in the text.

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



Annex I**Draft convention¹ on the carriage of goods [wholly or partly] [by sea]²**

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.³

(b) “Volume contract” means a contract that provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.⁴

(c) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.⁵

(d) “Carrier” means a person that enters into a contract of carriage with a shipper.

(e) “Performing party” means a person other than the carrier that physically performs or undertakes to perform any of the carrier’s responsibilities under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery⁶ of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control. The term “performing party” includes maritime performing parties and non-maritime performing parties as defined in subparagraphs (f) and (g) of this

¹ Without intending to predetermine the form of this Instrument, the word “Instrument” has been replaced with the word “Convention” throughout, in an effort to achieve consistency.

² As noted in para. 2 of A/CN.9/WG.III/WP.36, the Working Group decided to retain the current title unchanged for the purposes of future discussion.

³ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in paras. 53 and 58 of A/CN.9/576.

⁴ Corrections are to text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576. Amendment proposed to address concerns regarding previously bracketed phrase “a specified minimum quantity of”.

⁵ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576.

⁶ List expanded to parallel specific obligations set out in para. 14(1).

paragraph but does not include any person that is retained by a shipper, a person referred to in article 34, consignor, controlling party⁷ or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper, a person referred to in article 34, consignor, controlling party or consignee.⁸

(f) “Maritime performing party” means a performing party that performs any of the carrier’s responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] of a ship and their departure from the port of discharge from a ship [or final port of discharge as the case may be].⁹ In the event of a trans-shipment, the performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading are not maritime performing parties.¹⁰

(g) “Non-maritime performing party” means a performing party that performs any of the carrier’s responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge.¹¹

(h) “Shipper” means a person that enters into a contract of carriage with a carrier.

(i) “Consignor” means a person that delivers the goods to the carrier or a performing party for carriage.

(j) “Holder” means

(i) a person that is for the time being in possession of a negotiable transport document and

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

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

⁷ List expanded to be consistent with parties referred to in art. 10.

⁸ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

⁹ As set out in footnote 9 of A/CN.9/WG.III/WP.36, there was support in the Working Group for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, but that a widely shared view was that movement between two physically distinct ports should be considered as part of a non-maritime performing party’s functions. This clarification could be achieved by the inclusion here of the phrase “including inland movements within a single port”. It was further suggested at para. 31 of A/CN.9/544 that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. The Working Group may wish to consider this suggestion.

¹⁰ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

¹¹ As set out in footnote 10 of A/CN.9/WG.III/WP.36, a concern was raised regarding whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole.

(ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record.¹²

(k) "Consignee" means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic transport record.

(l) "Right of control" has the meaning given in article 54.

(m) "Controlling party" means the person that pursuant to article 56 is entitled to exercise the right of control.

(n) "Transport document" means a document issued pursuant to a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:

- (i) it evidences the carrier's or a performing party's receipt of goods under a contract of carriage, or
- (ii) it evidences or contains a contract of carriage.

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

(p) "Non-negotiable transport document" means a transport document that does not qualify as a negotiable transport document.

(q) "Electronic communication" means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.¹³

(r) "Electronic transport record" means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or

¹² Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 207 of A/CN.9/576.

¹³ Suggested clarification to ensure that the draft convention does not draw an unnecessary distinction between the means of transmission and the form in which the data are stored. The definition of "electronic communication" draws on the definition of "data message" in art. 2 of the United Nations Model Law on Electronic Commerce, 1996 ("MLEC"), without the illustrative list of techniques. In the MLEC and the United Nations Draft Convention on the Use of Electronic Communications in International Contracts ("draft Electronic Contracting Convention"), Annex I to *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17, (A/60/17)*, not all data messages are capable of having the same value as written paper documents, which is only possible in respect of data messages that are "accessible so as to be usable for subsequent reference". In the draft instrument, the notion of "electronic communication", also incorporates the criteria for the functional equivalence between data messages and written documents on art. 6 of MLEC and art. 9, para. 2 of draft Electronic Contracting Convention. Thus, an "electronic communication" under the instrument must always be capable of replicating the function of written documents.

a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions:

- (i) it evidences the carrier's or a performing party's receipt of goods under a contract of carriage, or
- (ii) it evidences or contains a contract of carriage.¹⁴

(s) "Negotiable electronic transport record" means an electronic transport record

- (i) that indicates, by statements such as "to order", or "negotiable", or other appropriate¹⁵ statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable", and

- (ii) the use of which meets the requirements of article 6(1).¹⁶

(t) "Non-negotiable electronic transport record" means an electronic transport record that does not qualify as a negotiable electronic transport record.¹⁷

(u) The "issuance" and the "transfer" of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person that has the rights in the negotiable electronic transport record.]¹⁸

(v) "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.¹⁹

¹⁴ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.47, that was approved for further discussion in paras. 207 and 210 of A/CN.9/576.

¹⁵ As set out in footnote 12 of A/CN.9/WG.III/WP.47, the Working Group may wish to consider whether the word "appropriate" is necessary in light of the use of the phrase "recognized as having the same effect" and whether similar language in draft para. 1(o) should be aligned accordingly.

¹⁶ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

¹⁷ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

¹⁸ Text as set out in para. 207 of A/CN.9/576, and as approved for further discussion in para. 210 of A/CN.9/576. As noted in para. 208 of A/CN.9/576, the square brackets around the second sentence are intended to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion. The Working Group may wish to consider the suggestion noted in para. 209 of A/CN.9/576, that the intention behind this draft para. should be explained in an explanatory note to the draft convention.

¹⁹ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

(w) “Goods” means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]] and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.²⁰

(x) “Ship” means any vessel used to carry goods by sea.²¹

(y) “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods,²² and any equipment ancillary to such unit load.²³

(z) “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.²⁴

(aa) “Domicile” means the place where (a) a company or other legal person [or association of natural or legal persons] has its (i) statutory seat or place of incorporation or registered office, as appropriate, (ii) central administration, or (iii) principal place of business, and (b) a natural person has her or his habitual residence.²⁵

[(bb) [Unless otherwise provided in this Convention] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.²⁶]

²⁰ With reference to the discussion in footnote 15 of A/CN.9/WG.III/WP.32, deletion of the phrase “or a performing party [received for carriage]” is suggested.

²¹ Definition added to clarify and standardize the use of “ship” and “vessel”, depending on which is intended in the particular provision in issue, such that “ship” means an ocean-going vessel, and “vessel” means all other vessels.

²² The alternatives “[capable of being carried by sea]” and “[designed for carriage by sea]” were deleted as unnecessary since these issues are addressed in the articles in which they arise, draft arts. 64 and 26.

²³ Note footnote to draft art 64(3) that the definition of “container” might need to be further considered to ensure that it covered pallets. It is proposed that reference to “pallets”, if any, should be addressed in para. 64(3) rather than here.

²⁴ Deletion of this definition is proposed given the deletion of the chapter on freight and the inclusion of “freight” in the definition of “contract of carriage” in para. 1(a).

²⁵ Suggested adjustments to text as set out in para. 115 of A/CN.9/576. It is suggested that reference should be made to associations, since these legal entities often own ships, but may not be included in “other legal persons”. “Place of incorporation or registered office” have been added for certainty, since “statutory seat” is not universally recognized. All of these changes conform with the text of art. 60 of Council Regulation (EC) No. 44/2001, 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16.01.2001] (“Brussels I”), from which the original text was drawn.

²⁶ Text as set out in para. 117 of A/CN.9/576, and as approved for further discussion in para. 120 of A/CN.9/576. If this definition is retained, the text must be aligned with draft arts. 8, 11, 75 and 77.

[(cc) [Unless otherwise provided in this Convention,] “the time of delivery” and “the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.^{27]}

Article 2. Interpretation of this Convention²⁸

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3. Form requirements²⁹

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 20(2), 24(1), 24(2), 24(3), 38(1)(b) and (c), 41(c), 47, 52, 56(1), 63(2), 64(1), 71, 76, 95(1) and 95(6)(b) must³⁰ be in writing. Electronic communications may be used for these purposes, provided the use of such means is with the express or implied consent of the party by which it is communicated and of the party to which it is communicated.”

Article 4. Applicability of defences and limitations³¹

1. The defences and limitations of liability provided for in this Convention and the responsibilities imposed by this Convention apply in any action against the carrier or a maritime performing party for loss of, or damage to, the goods covered by a contract of carriage and delay in delivery of such goods, or for the breach of

²⁷ *Ibid.* See note 26.

²⁸ Text as set out in para. 4 of A/CN.9/WG.III/WP.39.

²⁹ Text as set out in para. 6 of A/CN.9/WG.III/WP.47, with inclusion of references to draft arts. 20(2), 64(1), 56(1), 63(2), 95(1) and 95(6)(b) and corrections to the opening description of types of communication. The Working Group may wish to note that this list is not closed, pending further examination. Further, the Working Group may wish to consider whether it is advisable to include with the final text an explanatory note that any notices contemplated in this convention that are not included in art. 3 may be made by any means including orally or by exchange of data messages that do not meet the definition of “electronic communication”. It is implicit in the definition of “electronic communication” that it must be capable of replicating the function of written documents (see *supra*, note 13).

³⁰ While UNCITRAL practice has been to use the “shall” form in its instruments, it has been suggested that modern legislative drafting practice prefers to use other forms, such as “must”. While this version of the draft convention has adopted the more modern approach, the Working Group may wish to consider which approach is preferable.

³¹ Corrections are to text as set out in para. 10 of A/CN.9/WG.III/WP.39. This art. has been moved to chapter 1 (General provisions) because it relates to the broad applicability and preemptive effect of the draft Convention rather than simply to the liability of the carrier, where it was previously located.

any other obligation under this Convention,³² whether the action is founded in contract, in tort, or otherwise.³³

2. If an action is brought³⁴ against an employee or agent of the carrier or a maritime performing party, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [that person proves that]³⁵ it acted within the scope of its employment or agency.

CHAPTER 2. ELECTRONIC COMMUNICATION

Article 5. Use and effect of electronic communications³⁶

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document in pursuance of this Convention may be recorded or communicated by using electronic communications³⁷ instead of by means of the transport document, provided the issuance and subsequent use of an electronic transport record is with the express or implied consent of the carrier and the shipper; and

(b) The issuance, control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 6. Procedures for use of negotiable electronic transport records³⁸

1. The use of a negotiable electronic transport record must be subject to procedures that provide for:

(a) The method for the issuance and the³⁹ transfer of that record to an intended holder;

³² The addition of “the breach of any other obligation” is thought to have made the reference to “[or in connection with]” the goods unnecessary.

³³ As set out in footnote 52 of A/CN.9/WG.III/WP.39, the potentially repetitious nature of para. 20(4) and draft art. 4 was to be further considered in the next iteration of the draft convention. Adjustments to these provisions may have remedied the problem.

³⁴ The phrase “under this Convention” has not been repeated from the parallel provision in para. 20(4) because an action against an employee or agent will not be brought under the draft Convention since those persons are not subject to it, except for the maritime performing party, which is covered under para. 20(4).

³⁵ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the employee or agent

³⁶ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 187 of A/CN.9/576.

³⁷ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 187 of A/CN.9/576.

³⁸ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

³⁹ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as revised for further discussion in paras. 207 and 210 of A/CN.9/576.

- (b) An assurance that the negotiable electronic transport record retains its integrity;
 - (c) The manner in which the holder is able to demonstrate that it is the holder; and
 - (d) The way in which confirmation is given that delivery to the holder has been effected; or that, pursuant to articles 7(2) or 49(a)(ii), the negotiable electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.⁴⁰

Article 7. Replacement of negotiable transport document or negotiable electronic transport record⁴¹

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:
- (a) The holder must surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;
 - (b) The carrier must issue to the holder a negotiable electronic transport record that includes a statement that it is issued in substitution for the negotiable transport document; and
 - (c) The negotiable transport document ceases thereafter to have any effect or validity.
2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:
- (a) The carrier must issue to the holder, in substitution for that electronic transport record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic transport record; and
 - (b) Upon such substitution, the electronic transport record ceases to have any effect or validity.

⁴⁰ As set out in footnote 34 in A/CN.9/WG.III/WP.47, the term “readily ascertainable” was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft convention.

⁴¹ Text as set out in para. 5 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 189 of A/CN.9/576.

CHAPTER 3. SCOPE OF APPLICATION⁴²Article 8. General scope of application⁴³

1. Subject to article 9(1), this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a Contracting State⁴⁴; or

(b) The place of delivery [or port of discharge] is located in a Contracting State; or

(c) The contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract.⁴⁵

References to [places and]⁴⁶ ports mean the [places and] ports agreed in the contract of carriage.

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

Article 9. Specific exclusions and inclusions⁴⁷

1. This Convention does not apply to:

(a) Charterparties;

(b) Contracts for the use of a ship or of any space thereon;

(c) Except as provided in paragraph 2, other contracts in non-liner transportation; and

(d) Except as provided in paragraph 3, volume contracts.

2. Without prejudice to subparagraphs 1(a) and (b), this Convention applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods, except as between the parties to a charterparty or to a contract for the use of a ship or of any space thereon.

⁴² Where chapter and article titles were missing, language has been proposed for the consideration of the Working Group.

⁴³ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 62 of A/CN.9/576.

⁴⁴ In general, it is the practice of UNCITRAL to use the term "Contracting State" as opposed to "State Party", or similar language. This change has been effected throughout the draft convention.

⁴⁵ Reference may be had to the discussion of this para. As set out in para. 61 of A/CN.9/576.

⁴⁶ If art. 1 includes definitions of "place of receipt" and "place of delivery", as it currently does at draft paras. (bb) and (cc), the references to "place" would become unnecessary.

⁴⁷ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 66 of A/CN.9/576.

3. (a) This Convention applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter so specify.

(b) This Convention applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Convention under subparagraph (a).

Article 10. Application to certain parties⁴⁸

Notwithstanding article 9, if a transport document or an electronic transport record is issued pursuant to a charterparty or a contract under article 9 (1)(b) or (c), this Convention applies to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 34 that is not the charterer or the party to the contract under article 9 (1)(b) or (c).

CHAPTER 4. PERIOD OF RESPONSIBILITY⁴⁹

Article 11. Period of responsibility of the carrier

1. Subject to article 12, the responsibility of the carrier for the goods under this Convention covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.

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

3. If the consignor is required to hand over the goods at the place of receipt to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the carrier may collect them, the time and location of the carrier's collection of the goods from the authority or other third party is the time and location of the receipt of the goods by the carrier under paragraph 2.⁵⁰

4. The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of such agreement or of such customs, practices, or usages, the time and

⁴⁸ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 73 of A/CN.9/576, bearing in mind the possibility of inserting a reference to draft subpara. 9(1)(d) at the end of draft art. 10, and any necessary clarification of the treatment of receipts.

⁴⁹ Corrections are to text as set out in A/CN.9/WG.III/WP.32.

⁵⁰ This para. is proposed to address the situation when the consignor is required to hand over the goods to an authority, such as a customs authority, prior to them being handed over to the carrier. The text parallels that of para. 5.

location of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.

5. If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the consignee may collect them, such handing over is a delivery of the goods by the carrier to the consignee under paragraph 4.

6. For the purposes of determining the carrier's period of responsibility and subject to paragraph 14(2), the contract of carriage may not provide that:

(a) The time of receipt of the goods is subsequent to the commencement of their initial loading under the contract of carriage, or

(b) The time of delivery of the goods is prior to the completion of their final discharge under the contract of carriage.⁵¹

Article 12. Transport beyond the contract of carriage⁵²

Variant A of article 12⁵³

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

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

Variant B of article 12⁵⁴

On the request of the shipper, the carrier may agree to issue a single transport document or an electronic transport record that includes specified transport that is not covered by the contract of carriage. In such an event, the responsibility of the carrier covers the period of the contract of carriage and, unless otherwise agreed, the carrier, on behalf of the shipper, must arrange the additional transport as provided in such transport document or electronic transport record.

⁵¹ Para. 6 is suggested in order to ensure that fictions may not be included in the contract of carriage in order to reduce the carrier's period of responsibility.

⁵² Suggested improved title. The Working Group may wish to consider whether art. 12 is properly placed within chapter 4 on period of responsibility.

⁵³ Variant A is art. 12 as set out in A/CN.9/WG.III/WP.32.

⁵⁴ The first sentence of Variant B is intended as a clarification of para. 1 of Variant A. The second sentence of Variant B modifies para. 2 of Variant A by changing the obligation of the carrier in its arrangement of additional transport from one of due diligence to whatever is agreed in the contract of carriage or elsewhere.

CHAPTER 5. OBLIGATIONS OF THE CARRIER

Article 13. Carriage and delivery of the goods

The carrier must, subject to this Convention and in accordance with the terms of the contract of carriage,⁵⁵ carry the goods to the place of destination and deliver them to the consignee.

Article 14. Specific obligations

1. The carrier must during the period of its responsibility as defined in article 11, and subject to article 27, properly and carefully receive,⁵⁶ load, handle, stow, carry, keep, care for, discharge and deliver the goods.

[2. The parties may agree that the loading, stowing and discharging of the goods is to be performed by the shipper or any person referred to in article 35, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]⁵⁷

Article 15. Goods that may become a danger

Variant A⁵⁸

Notwithstanding articles 13, 14, and 16(1), the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, an actual danger to persons or property or an illegal or unacceptable danger to the environment.

Variant B⁵⁹

Notwithstanding articles 13, 14, and 16(1), the carrier may unload, destroy or render goods harmless if they become an actual danger to persons or property.

⁵⁵ Suggested deletion of “[properly and carefully]” as unnecessary and repetitious, since “subject to this Convention” already includes proper and careful carriage. Further, draft art. 13 is intended as a general obligation that is enhanced in subsequent articles.

⁵⁶ “Receive” and “deliver” added to ensure they are recognized as carrier’s obligations.

⁵⁷ As set out in footnote 47 of A/CN.9/WG.III/WP.32, it was noted in para. 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to arts. 13 and 14(1).

⁵⁸ Variant A of art. 15 is based on the original text of the draft convention (A/CN.9/WG.III/WP.21).

⁵⁹ Variant B is based on the principles expressed in art. 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods.

Article 16. Specific obligations applicable to the voyage by sea⁶⁰

1. The carrier is bound, before, at the beginning of, and during⁶¹ the voyage by sea, to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly man,⁶² equip and supply the ship and keep the ship so manned,⁶³ equipped and supplied throughout the voyage;⁶⁴
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers when supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.

[2. Notwithstanding articles 13, 14, and 16(1), the carrier may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril⁶⁵ human life or⁶⁶ other property involved in the common adventure.]⁶⁷

⁶⁰ Text as set out in para. 11 of A/CN.9/WG.III/WP.36, including footnotes.

⁶¹ As set out in footnote 55 of A/CN.9/WG.III/WP.36, the Working Group agreed that the carrier's obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft para. 16(1) surrounding the phrases "and during" in draft para. 16(1), "and keep" in draft subpara. 16(1)(a), and "and keep" in draft subpara. 16(1)(c) should thus be removed, and the text in them retained. The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft convention, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the convention.

⁶² As set out in footnote 56 of A/CN.9/WG.III/WP.36, a drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man ... the ship". The Working Group may wish to consider this suggestion.

⁶³ *Ibid.*

⁶⁴ As set out in footnote 58 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to make the necessary changes to subpara. (b) to ensure that this obligation was understood to be of a continuing nature. It is suggested that the addition of the phrase "throughout the voyage" could achieve this effect. A possible alternative could be to insert the phrase "and continuously" after the opening word, "Properly".

⁶⁵ As set out in footnote 59 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the presence of imminent danger, but that care should be taken not to prejudice or alter the rules on general average. Consistent with the language in Rule A of the York-Antwerp Rules of 1994, the phrase "from peril" was added after the word "preserving".

⁶⁶ As set out in footnote 60 to A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the preservation of human life. The phrase "human life" has been added before the phrase "or other property".

⁶⁷ As set out in footnote 61 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain draft para. 16(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 18 on general average.

CHAPTER 6. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

Article 17. Basis of liability⁶⁸

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that

- (a) the loss, damage, or delay; or
- (b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter 4. The carrier is relieved of all or part of its liability if it proves 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.

2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

(b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.

(c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

- (i) the unseaworthiness of the ship;
- (ii) the improper manning, equipping, and supplying of the ship; or
- (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,

and the carrier cannot prove that;

(A) it complied with its obligation to exercise due diligence as required under article 16(1); or

(B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.

3. The events mentioned in paragraph 2 are:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;

⁶⁸ Text as set out in paras. 31 and 75 of A/CN.9/572, and as broadly accepted in paras. 33 and 80 of A/CN.9/572.

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 19;⁶⁹

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects in the [ship][vessel][means of transport]⁷⁰ not discoverable by due diligence;

(h) Act or omission of the shipper or any person referred to in article 35,⁷¹ the controlling party, or the consignee;

(i) Handling, loading, [stowage,] or discharging⁷² of the goods [actually performed] by the shipper or any person referred to in article 35,⁷³ the controlling party, or the consignee;⁷⁴

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

(k) Insufficiency or defective condition of packing or marking not performed by [or on behalf of] the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

(o) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 15 and 16(2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.⁷⁵

4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability must be apportioned on the basis established in the previous paragraphs.

⁶⁹ Further examination is needed whether the reference to art. 19 is necessary.

⁷⁰ The Working Group may wish to consider which of the terms in square brackets is intended to be addressed in this para.

⁷¹ Further examination is needed whether the reference to art. 35 is necessary.

⁷² "Discharging" is suggested in order to be consistent with the language in draft art. 14.

⁷³ Further examination is needed whether the reference to art. 35 is necessary.

⁷⁴ As noted in para. 76 of A/CN.9/572, the Working Group agreed to add a footnote to para. (i) indicating that the final text of it would depend upon the outcome of the discussion on para. 14(2).

⁷⁵ The Working Group may wish to reconsider this provision in light of the treatment of draft art. 33.

Article 18. Carrier's liability for failure to provide information and instructions⁷⁶

The carrier is liable⁷⁷ for loss, damage [, delay]⁷⁸ or injury caused by a breach of its obligations under article 29, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person referred to in article 19 caused [or contributed to] the loss, damage [, delay] or injury.

Article 19. Vicarious liability of the carrier⁷⁹

1. Subject to paragraph 20(4),⁸⁰ the carrier is liable for the acts and omissions of:

(a) Any performing party, and

(b) Any other person, including a performing party's subcontractors, employees⁸¹ and agents, that performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own.

2. The carrier is liable under paragraph 1 only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

Article 20. Liability of maritime performing parties⁸²

1. A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this Convention, and entitled to the carrier's rights and immunities provided by this Convention if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; or (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Convention, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 65, 64⁸³ and 26(4), a maritime performing party is not bound

⁷⁶ Text as set out in para. 18 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 85 of A/CN.9/WG.III/WP.39, aspects of draft arts. 31 and 33 dealing with the liability of the carrier have been called "art. 18", for possible placement here.

⁷⁷ See *infra*, note 125.

⁷⁸ See *infra*, note 127.

⁷⁹ Corrections to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁸⁰ As set out in footnote 63 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain this opening phrase, although the suggestion was made that it should be replaced with the phrase "Subject to the liability and limitations of liability available to the carrier" since draft art. 19 dealt with actions brought against the carrier, while draft para. 20(4) dealt with actions brought against any person other than the carrier.

⁸¹ As set out in footnote 64 of A/CN.9/WG.III/WP.36, as a matter of drafting, further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

⁸² Corrections are to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁸³ As set out in footnote 69 of A/CN.9/WG.III/WP.36, the Working Group took note of the suggestion to limit the reference to draft art. 64, since it was stated that, while the reference to

by this agreement unless the maritime performing party expressly agrees to accept such responsibilities or such limits.

3. Subject to paragraph 4, a maritime performing party is liable for the acts and omissions of any person to which it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its subcontractors, employees, and agents, as if such acts or omissions were its own. A maritime performing party is liable under this paragraph only when the act or omission of the person concerned is within the scope of its contract, employment, or agency.⁸⁴

Variant A of paragraph 4⁸⁵

4. If an action under this Convention is brought against a maritime performing party, that party is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁸⁶ it acted within the scope of its contract, employment or agency.

Variant B of paragraph 4

4. If an action under this Convention is brought against any person, other than the carrier, referred to in article 19 or paragraph 3, [, including employees or agents of the contracting carrier or of a maritime performing party,]⁸⁷ that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁸⁸ it acted within the scope of its contract, employment, or agency.

Article 21. Joint and several liability and set-off⁸⁹

1. If the carrier and one or more maritime performing parties are liable⁹⁰ for the loss of, damage to, or delay in delivery of the goods, their liability is joint and

paras. (1), (3) and (4) of draft art. 64 was acceptable, para. (2) of draft art. 64 should not be referred to since the performing party was not liable in case of non-localized damage. The Working Group decided that this suggestion might need to be further discussed after a decision had been made regarding the inclusion of para. (2) of draft art. 64 in the draft convention.

⁸⁴ As set out in footnote 74 of A/CN.9/WG.III/WP.36, the Working Group reaffirmed its decision that the structure of this para. should mirror new draft art. 19, and took note of the views expressed regarding whether draft para. 20(3) should cover both maritime and non-maritime performing parties for continuation of the discussion at a future session.

⁸⁵ Suggested variant for para. 20(4) in order to respond to the Working Group's desire, as set out in footnote 77 of A/CN.9/WG.III/WP.36, to examine a variant limiting the scope of this para. to the maritime sphere, and in light of the text proposed for para. 4(2) which parallels this para., but in the context of employees and agents.

⁸⁶ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the maritime performing party.

⁸⁷ As set out in footnote 80 of A/CN.9/WG.III/WP.36, the Working Group may wish to consider the following simplified text for the opening phrase of the para. ending with "that person": "If an action under this Convention is brought against any maritime performing party [, including its sub-contractors, employees or agents,] that person ...".

⁸⁸ See *supra*, note 86.

⁸⁹ Text as set out in para. 2 of A/CN.9/WG.III/WP.39, including footnotes.

⁹⁰ As set out in footnote 3 of A/CN.9/WG.III/WP.39, it was noted that the scope of this para. should be limited to maritime performing parties. Since this draft para. has now been moved to a

several [, such that each such party is liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may have against other liable parties,]⁹¹ but only up to the limits provided for in articles 22, 64 and 26.

2. Without prejudice to article 66, the aggregate liability of all such persons must not exceed the overall limits of liability under this Convention.

[3. When a claimant has made a successful claim against a non-maritime performing party for the loss of, damage to, or delay in delivery of the goods, the amount received by the claimant is set off against any subsequent claim for that loss, damage or delay that the claimant makes against a carrier or a maritime performing party.]⁹²

Article 22. Delay⁹³

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage or journey.⁹⁴

Article 23. Calculation of compensation⁹⁵

1. Subject to article 64, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 11.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity

separate draft art., for greater clarity, the phrase “If more than one maritime performing party is liable” as it appears in A/CN.9/WG.III/WP.36, has been changed to “If the carrier and one or more maritime performing parties are liable”. The Working Group may also wish to consider whether this clarification alleviates the concerns raised at para. 14 of A/CN.9/552, but for the concern regarding set-off, which is considered in draft para. 21(3) below.

⁹¹ As set out in footnote 4 of A/CN.9/WG.III/WP.39, the phrase in square brackets has been added for clarification of the meaning of “joint and several liability”. However, the Working Group may wish to consider the use of the term “joint and several liability” in numerous international instruments, including: para. 10(4) of the Hamburg Rules; para. 27(4) of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, as amended by the Protocol of Modification of 1999 (“CIM-COTIF 1999”); para. 4(5) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (“CMNI”); para. 30(3) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by protocols in 1955 and 1975 (“Warsaw Convention”); and para. 36(3) of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (“Montreal Convention”).

⁹² As set out in footnote 7 of A/CN.9/WG.III/WP.39, a revised draft has been prepared, pending further discussion regarding the preparation of a uniform rule on set-off, or of leaving the issue to domestic law. See also *supra*, note 90. The Working Group may wish to consider whether this para. is necessary or whether it can be deleted.

⁹³ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.39.

⁹⁴ Art. 22(2), formerly draft art. 16(2) in A/CN.9/WG.III/WP.32, has been moved to become art. 65 in the new chapter on limitation of liability.

⁹⁵ Text as set out in para. 5 of A/CN.9/WG.III/WP.39.

exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 20.

Article 24. Notice of loss, damage, or delay⁹⁶

[Variant A of paragraph 1]⁹⁷

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice⁹⁸ of loss of or damage to⁹⁹ the goods, indicating the general nature of such loss or damage, was given [by or on behalf of the consignee] to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days][seven days][seven working days at the place of delivery][seven consecutive days] after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection¹⁰⁰ of the goods by the consignee and the carrier or the performing party against which liability is being asserted.]

[Variant B of paragraph 1]¹⁰¹

1. Notice of loss of or damage to¹⁰² the goods, indicating the general nature of such loss or damage, must be given [by or on behalf of the consignee] to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days]¹⁰³[___working days at the place of delivery] [___consecutive days] after the delivery of the goods. [A court [may] [must] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 17(1).] Such a notice is not required in respect of loss or damage that is

⁹⁶ Corrections are to text as set out in para. 9 of A/CN.9/WG.III/WP.39.

⁹⁷ As set out in footnote 39 of A/CN.9/WG.III/WP.39, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant A of para. 1 is the text in A/CN.9/WG.III/WP.32, but for the deletion of “[a reasonable time]” as decided at para. 75 of A/CN.9/552, and with the additions as noted.

⁹⁸ As set out in footnote 40 of A/CN.9/WG.III/WP.39, draft art. 3 of the draft convention states that the notice in, *inter alia*, draft para. 1 may be made using electronic communication; otherwise, it must be made in writing.

⁹⁹ “In connection with” deleted as unnecessary in this para.

¹⁰⁰ As set out in footnote 43 of A/CN.9/WG.III/WP.39, it was suggested in para. 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

¹⁰¹ As set out in footnote 44 of A/CN.9/WG.III/WP.39, Variant B of para. 1 is the text at para. 66 of A/CN.9/552.

¹⁰² See *infra*, note 212.

¹⁰³ As set out in para. 75 of A/CN.9/552, the Working Group had decided to delete the phrase “[a reasonable time]” from the original text from which this variant was derived.

ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against which liability is being asserted.]

2. No compensation is payable under article 22 unless notice of loss due to delay was given to the carrier within 21 consecutive days following delivery of the goods.
3. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.
4. In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods and must provide access to records and documents relevant to the carriage of the goods.

CHAPTER 7. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 25. Deviation during sea carriage

[Variant A]¹⁰⁴

1. The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life [or property] at sea[, or by any other [reasonable] deviation].
2. When under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this Convention.^{105]}

[Variant B]¹⁰⁶

1. The carrier is not liable for loss, damage, or delay in delivery caused by any deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.
2. To the extent that a deviation constitutes a breach of the carrier's obligations under a legal doctrine recognized by national law or in this Convention, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of a ship.

¹⁰⁴ As set out in footnote 59 of A/CN.9/WG.III/WP.39, Variant A is the draft art. as set out at A/CN.9/WG.III/WP.32.

¹⁰⁵ As set out in footnote 60 of A/CN.9/WG.III/WP.39 and in footnote 112 of A/CN.9/WG.III/WP.32, alternative language for this para. could read:

"Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this Convention."

If such language is adopted, the Working Group may wish to consider whether para. 1 is necessary.

¹⁰⁶ As set out in footnote 61 of A/CN.9/WG.III/WP.39, Variant B is the draft art. as proposed at para. 38 of A/CN.9/WG.III/WP.34.

3. To the extent that a deviation constitutes a breach of the carrier's obligations, the breach has effect only under the terms of this Convention. In particular, a deviation does not deprive the carrier of its rights under this Convention except to the extent provided in article 66.]

Article 26. Deck cargo on ships¹⁰⁷

1. Goods may be carried on or above the deck of a ship only if:

(a) Such carriage is required by applicable laws or administrative rules or regulations, or

(b) They are carried in or on containers [fitted to carry cargo on deck] on decks that are specially fitted to carry such containers, or

(c) [In cases not covered by subparagraphs (a) or (b) of this paragraph,] the carriage on deck [is in accordance with the contract of carriage, or] complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.

2. If the goods have been shipped in accordance with subparagraphs 1(a) or (c), the carrier is not liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to subparagraph 1(b), the carrier is liable for loss of or damage to such goods, or for delay in delivery, under the terms of this Convention without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under paragraph 1, the carrier is liable, irrespective of article 17, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.¹⁰⁸

3. If the goods have been shipped in accordance with subparagraph 1(c), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier has the burden of proving that carriage on deck complies with subparagraph 1(c) and, if a negotiable transport document or a negotiable electronic transport record is issued, is not entitled to invoke that subparagraph against a third party that has acquired such negotiable transport document or electronic transport record in good faith.¹⁰⁹

[4. If the carrier is liable under this article for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided in articles 22, 64 and 66(1); but, if the carrier and shipper [expressly] agreed that the goods would be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods [[that exclusively][to the extent that such damage] resulted from their carriage on deck]^{110,]}¹¹¹

¹⁰⁷ Corrections are to text as set out in para. 13 of A/CN.9/WG.III/WP.39.

¹⁰⁸ As set out in footnote 63 of A/CN.9/WG.III/WP.39, para. 2 may need to be discussed in greater detail in conjunction with draft para. 17(4), however, changes to para. 17(4) may render this discussion unnecessary.

¹⁰⁹ As set out in footnote 64 of A/CN.9/WG.III/WP.39, discussion of para. 3 and whether it should cover third-party reliance on non-negotiable transport documents and electronic transport records would continue after discussion of third-party rights and freedom of contract.

¹¹⁰ As set out in footnote 67 of A/CN.9/WG.III/WP.39, square brackets were placed around "that exclusively resulted from their carriage on deck". A further alternative has been added.

¹¹¹ As set out in footnote 69 of A/CN.9/WG.III/WP.39, square brackets were placed around para.

[Article 27. Carriage preceding or subsequent to sea carriage

1. When a claim or dispute arises out of loss of or damage to goods or delay occurring solely during the carrier's period of responsibility but:

(a) Before the time of their loading on to the ship;

(b) After their discharge from the ship to the time of their delivery to the consignee; and, at the time of such loss, damage or delay, provisions of an international convention [or national law]:

(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable]¹¹², and

(ii) specifically provide for carrier's liability, limitation of liability, or time for suit, and

(iii) cannot be departed from by private contract either at all or to the detriment of the shipper, such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.]

[2. Paragraph 1 does not affect the application of article 64(2).¹¹³]

[3. Article 27 applies regardless of the national law otherwise applicable to the contract of carriage.¹¹⁴]

CHAPTER 8. OBLIGATIONS OF THE SHIPPER

Article 28. Delivery for carriage¹¹⁵

The shipper must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow,

4, for discussion at a future session, with further study of its relationship with draft art. 66.

¹¹² As set out in para. 55 of A/CN.9/WG.III/WP.21, this bracketed text reflected the situation under the 1980 Convention concerning International Carriage by Rail ("COTIF"). Once the 1999 Protocol for the Modification of COTIF enters into force, expected to be in the fall of 2005, the Working Group may wish to delete the bracketed language.

¹¹³ If para. 64(2) is deleted, this para. should also be deleted.

¹¹⁴ As set out in para. 54 of A/CN.9/WG.III/WP.21, this para. is a conflict of law provision that was intended to safeguard the applicability of inland transport conventions. Further, as set out in footnotes 42 and 231 of A/CN.9/WG.III/WP.32, draft art. 27 inspired a request that a conflict of convention provision be inserted into chapter 19. Draft art. 89 was inserted in response to that request.

¹¹⁵ Text as set out in para. 14 of A/CN.9/WG.III/WP.39, including footnotes.

lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.¹¹⁶

Article 29. Carrier's obligation to provide information and instructions¹¹⁷

The carrier must provide to the shipper, on its request [and in a timely manner]¹¹⁸, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 28.¹¹⁹ [The information and instructions so provided must be accurate and complete.]¹²⁰

Article 30. Shipper's obligation to provide information, instructions and documents¹²¹

The shipper must provide to the carrier [in a timely manner, such accurate and complete]¹²² information, instructions, and documents as are reasonably necessary for:

(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, except to the extent that the shipper may reasonably assume that such information is already known to the carrier¹²³;

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

(c) The compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38(1)(b) and (c); the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is

¹¹⁶ As set out in footnote 71 of A/CN.9/WG.III/WP.39, to improve the wording as suggested at paras. 122 and 123 of A/CN.9/552, the Working Group may wish to consider alternative language for the second sentence of draft art. 28:

"In the event the goods are delivered in or on a container or trailer packed by the shipper, this obligation extends to the stowage, lashing and securing of the goods in or on the container or trailer."

¹¹⁷ Text as set out in para. 15 of A/CN.9/WG.III/WP.39, including footnotes.

¹¹⁸ As set out in footnote 72 of A/CN.9/WG.III/WP.39, former draft art. 28 of A/CN.9/WG.III/WP.32 was deleted and replaced by a mention in draft art. 29 that the shipper should provide "[in a timely manner]" the information and instructions required.

¹¹⁹ As set out in footnote 73 of A/CN.9/WG.III/WP.39, further consideration might need to be given to the alternative wording at para. 128 of A/CN.9/552, "unless the carrier may reasonably assume that such information is already known to the shipper".

¹²⁰ As set out in footnote 74 of A/CN.9/WG.III/WP.39, "[the information and instructions given must be accurate and complete]" has been added for future discussion.

¹²¹ Corrections are to text as set out in para. 16 of A/CN.9/WG.III/WP.39.

¹²² As set out in footnote 75 of A/CN.9/WG.III/WP.39, "[in a timely manner, such accurate and complete information, instructions and documents ...]" has been added for future discussion.

¹²³ As set out in footnote 76 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, but "except to the extent that the shipper may reasonably assume that such information is already known to the carrier" was added to the end of subpara. (a).

to be issued, if any, unless the shipper may reasonably assume that such information is already known to the carrier.

Article 31. Basis of shipper's liability¹²⁴

1. The shipper is liable¹²⁵ for¹²⁶ loss, damage [, delay]¹²⁷ or injury caused by the goods, and for breach of its obligations under article 28 and paragraph 30(a), [unless][unless and to the extent that][except to the extent that] the shipper proves that neither its fault nor the fault of any person referred to in article 35 caused or contributed to the loss, damage [, delay] or injury.

[Variant A of paragraph 2]¹²⁸

2. The shipper is liable¹²⁹ for loss or damage caused by a breach of its obligations under paragraphs 30(b) and (c).]

[Variant B of paragraph 2]¹³⁰

2. The shipper is deemed to have guaranteed to the carrier the timeliness, accuracy and completeness at the time of receipt by the carrier of the information, instructions and documents that the shipper is required to provide under paragraphs 30(b) and (c). The shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from any breach of obligations under paragraphs 30(b) and (c). The right of the carrier to such indemnity in no way limits its responsibility under the contract of carriage to any person other than the shipper.]

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier are jointly liable to the consignee or the controlling party¹³¹ for any such loss or damage [or injury].¹³²

¹²⁴ Corrections are to text as set out in para. 18 of A/CN.9/WG.III/WP.39.

¹²⁵ As set out in footnote 77 of A/CN.9/WG.III/WP.39, para. 31(1) has been redrafted to mirror the provision on carrier's liability at draft para. 17(1) of A/CN.9/WG.III/WP.36. The parties to whom the shipper is liable have been deleted in keeping with draft art. 17 and, as noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party as originally expressed in draft art. 29 in A/CN.9/WG.III/WP.32 might need to be reconsidered later.

¹²⁶ The phrase "loss resulting from" was deleted to conform with the approach taken in draft art. 17.

¹²⁷ As set out in footnote 78 of A/CN.9/WG.III/WP.39, "delay" arises by virtue of creating a mirror provision of draft art. 17, but it has been placed in square brackets since it has not been specifically discussed in the context of draft art. 31.

¹²⁸ As set out in footnote 80 of A/CN.9/WG.III/WP.39, a rule of strict liability was retained in square brackets in cases where the shipper failed to meet the requirements of subparas. (b) and (c) of draft art. 30.

¹²⁹ See *supra*, note 125.

¹³⁰ As set out in footnote 82 of A/CN.9/WG.III/WP.39, a provision similar to art. III.5 of the Hague Rules has been introduced in square brackets. This provision has been revised as indicated from the version set out in A/CN.9/WG.III/WP.39.

¹³¹ As set out in footnote 83 of A/CN.9/WG.III/WP.39, the issue of liability to the consignee and the controlling party might need to be reconsidered later.

¹³² As set out in footnote 84 of A/CN.9/WG.III/WP.39, para. 3 of Variant B of draft art. 31

[Article 32. Material misstatement by shipper¹³³

A carrier is not liable for delay in the delivery of, the loss of, or damage to or in connection with the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document or electronic transport record.]¹³⁴

Article 33. Special rules on dangerous goods¹³⁵

1. “Dangerous goods” means goods which by their nature or character are, or reasonably appear likely to become, a danger to persons or property or an illegal or unacceptable danger to the environment.
2. The shipper must mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such failure.
3. The shipper must inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such shipment.

Article 34. Assumption of shipper’s rights and obligations¹³⁶

If a person identified as “shipper” in the contract particulars, although not the shipper as defined in paragraph 1(h), [accepts][receives][becomes a holder of] the transport document or electronic transport record, then such person is (a) [subject to the responsibilities and liabilities] imposed on the shipper under this chapter and under article 59, and (b) entitled to the shipper’s rights and immunities provided by this chapter and by chapter 14.

(A/CN.9/WG.III/WP.32) was retained for future discussion. The Working Group may wish to consider whether this provision on concurrent causes should also mirror the corresponding para. in draft art. 17.

¹³³ Corrections are to text as set out in para. 20 of A/CN.9/WG.III/WP.39.

¹³⁴ As set out in footnote 90 of A/CN.9/WG.III/WP.39, draft art. 32 has been included in square brackets, and issues of causation and inclusion of damages for delay would be discussed at a future session. Further, draft art. 32 could be placed in chapter 6 on the liability of the carrier.

¹³⁵ This text is thought to better reflect the discussion in and request of the Working Group as set out in paras. 146 to 148 of A/CN.9/552, and replaces the text proposed in para. 19 of A/CN.9/WG.III/WP.39.

¹³⁶ Corrections are to text as set out in para. 21 of A/CN.9/WG.III/WP.39. As set out in footnote 91 of A/CN.9/WG.III/WP.39, further thought should be given to the scope of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known.

Article 35. Vicarious liability of the shipper¹³⁷

The shipper is liable for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons [except the carrier or performing parties] that act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Liability is imposed on the shipper under this article only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency.¹³⁸

[Article 36. Cessation of shipper's liability¹³⁹

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

- (a) With respect to any liability under this chapter of the shipper or a person referred to in article 34; or
- (b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security¹⁴⁰ for the payment of such amounts.
- (c) To the extent that it conflicts with article 63.^{141]}

CHAPTER 9. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS¹⁴²

Article 37. Issuance of the transport document or the electronic transport record

Upon delivery of the goods to the carrier or performing party:

- (a) The consignor is entitled to obtain a transport document or, subject to article 5(a), an electronic transport record evidencing the carrier's or performing party's receipt of the goods; and

¹³⁷ Corrections are to text as set out in para. 22 of A/CN.9/WG.III/WP.39. Changes have been made to this provision to align it with art. 19, relating to the vicarious liability of the carrier.

¹³⁸ As set out in footnote 94 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, and questions regarding the interaction of this provision with para. 14 (2) and draft art. 32 should be considered at a future session.

¹³⁹ Former para. 43(2) of A/CN.9/WG.III/WP.32, moved to this placement from the now-deleted Chapter 9 on freight.

¹⁴⁰ Given the deletion of former draft art. 45 from A/CN.9/WG.III/WP.32, the phrase "pursuant to art. 45 or otherwise" has been deleted from the draft art. in order to take into account that deletion.

¹⁴¹ As set out in footnote 208, *infra*, former draft art. 62 of A/CN.9/WG.III/WP.32 was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

¹⁴² But for the indicated renumbering, drafting improvements and proposed titles for draft arts., as well as the adjustments that arose as a result of electronic commerce considerations and which were approved by the Working Group in para. 200 of A/CN.9/576 (for revisions to art. 37) and in paras. 207, 209 and 210 of A/CN.9/576 (for revisions to art. 39), this chapter remains largely unchanged from A/CN.9/WG.III/WP.32.

(b) The shipper or, if the shipper instructs the carrier, the person referred to in article 34, is entitled to obtain from the carrier an appropriate negotiable transport document or, subject to paragraph 5(a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one.¹⁴³

Article 38. Contract Particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 37 must include:

- (a) A description of the goods;
- (b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;
- (c) (i) The number of packages, the number of pieces, or the quantity, as furnished by the shipper before the carrier or a performing party receives the goods and
 - (ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods¹⁴⁴;
- (d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;
- (e) The name and address of the carrier; and
- (f) The date
 - (i) on which the carrier or a performing party received the goods, or
 - (ii) on which the goods were loaded on board the ship, or
 - (iii) on which the transport document or electronic transport record was issued.¹⁴⁵

¹⁴³ As set out in footnote 127 of A/CN.9/WG.III/WP.32, with respect to para. (a), it was acknowledged that, since not all transport documents as defined under draft art. 1(n) served the function of evidencing receipt of the goods by the carrier, it was important to make it clear that, under para. (a), the transport document should serve the receipt function.

¹⁴⁴ As set out in footnote 129 of A/CN.9/WG.III/WP.32, the concern was expressed in para. 28 of A/CN.9/526 that this phrase might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase "as furnished by the shipper" with the phrase "if furnished by the shipper".

¹⁴⁵ As set out in footnote 130 of A/CN.9/WG.III/WP.32, it was suggested that the Working Group should consider redrafting para. 1 to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to draft art. 48, *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory elements, and to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

2. The phrase “apparent order and condition of the goods” in paragraph 1 refers to the order and condition of the goods based on:

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

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

Article 39. Signature¹⁴⁶

1. A transport document must be signed by the carrier or a person having authority from the carrier.

2. An electronic transport record must include the electronic signature of the carrier or a person having authority from the carrier. Such electronic signature must identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.¹⁴⁷

Article 40. Deficiencies in the contract particulars

1. The absence of one or more of the contract particulars referred to in article 38(1), or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

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

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

(b) If the contract particulars do not indicate that the goods have been loaded on board a ship, the date on which the carrier or a performing party received the goods.

¹⁴⁶ While this draft art. has been revised by the Working Group as indicated during its review of the electronic commerce aspects of the draft convention, the original text as set out in A/CN.9/WG.III/WP.32 attached the following at footnote 132: The Working Group may wish to consider whether “signature” should be defined as, for example, in para. 14(3) of the Hamburg Rules, particularly in light of modern practice.

¹⁴⁷ As a consequence of its review of the electronic commerce provisions of the draft convention at its fifteenth session, these changes were approved for further discussion by the Working Group in paras. 205 and 207 of A/CN.9/576. The United Nations Model Law on Electronic Signatures 2001 defines an electronic signature as, “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory’s approval of the information contained in the data message.” Since this term only appears once in the draft convention, it is suggested that no definition is needed. The provision retains, however, the reference to the essential functions of the electronic signature (i.e. identifying the signatory and indicating its approval of the record). The only difference is the use of the word “authorization” rather than “approval” in the draft convention.

[3. If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]¹⁴⁸

4. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the consignor, the transport document or electronic transport record is either prima facie or conclusive evidence under article 43, as the case may be, that the goods were in apparent good order and condition at the time the consignor delivered them to the carrier or a performing party.

Article 41. Qualifying the description of the
goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38(1)(a), 38(1)(b) or 38(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

- (a) For non-containerized goods
 - (i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or
 - (ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.
- (b) For goods delivered to the carrier or a performing party in a closed container, unless¹⁴⁹ the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however,

¹⁴⁸ As set out in footnote 137 of A/CN.9/WG.III/WP.32., the prevailing view in the Working Group was that para. 3 identified a serious problem that must be treated in the draft convention, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep para. 3 in square brackets in the draft convention, and to discuss it in greater detail at a future date.

¹⁴⁹ As set out in footnote 140 of A/CN.9/WG.III/WP.32, the phrase “unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate” has been moved to this position in the chapeau from its original position at the end of the para. in order to clarify that it is intended to apply to the entire para.

that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate¹⁵⁰, the carrier may include a qualifying clause in the contract particulars with respect to

- (i) the leading marks on the goods inside the container, or
- (ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.

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

- (i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or
- (ii) the carrier can show that there was no reasonable means of checking the weight of the container.¹⁵¹

Article 42. Reasonable means of checking and good faith

For purposes of article 41:

(a) A “reasonable means of checking” must be not only physically practicable but also commercially reasonable.

(b) The carrier acts in “good faith” when issuing a transport document or an electronic transport record if

- (i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and
- (ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.

¹⁵⁰ As set out in footnote 141 of A/CN.9/WG.III/WP.32, another suggestion was that language along the lines of subpara. (a)(ii) should be included also in para. (b) to address the situation in which the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in para. 37 of A/CN.9/526 that the carrier that decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft convention should deal with the situation in which the carrier agreed not to qualify the description of the goods, for example, so as not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, when the carrier acting in bad faith had voluntarily agreed not to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

¹⁵¹ As set out in footnote 129 of A/CN.9/WG.III/WP.32, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. However, it was thought that the word “commercially” was unnecessary in light of the definition in para. 42(a), and it was deleted.

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

Article 43. Prima facie and conclusive evidence

Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is:

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

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

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

(ii) Variant A of paragraph (b)(ii)¹⁵²

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

(ii) Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic transport record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.]¹⁵³

Article 44. Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 41, then the transport document or electronic transport document does not constitute prima facie or conclusive evidence under article 43 to the extent that the description of the goods is qualified by the clause.¹⁵⁴

¹⁵² Variant A of subpara. (b)(ii) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

¹⁵³ As set out in footnote 145 of A/CN.9/WG.III/WP.32, the prevailing view in the Working Group was to retain subpara. (b)(ii) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paras. 45 to 47 of A/CN.9/526. Variant B was proposed in A/CN.9/WG.III/WP.32 to respond to concerns that Variant A appeared to introduce a novel use for non-negotiable documents that was unknown in European law.

¹⁵⁴ As set out in footnote 146 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider the alternative language for draft art. 44 suggested in paras. 153 and 154 of A/CN.9/WG.III/WP.21:

"If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under art. 43, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under para. 2."

[Article 45. “Freight prepaid”¹⁵⁵

If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement “freight prepaid” or a statement of a similar nature, then neither the holder nor the consignee, is liable for the payment of the freight. This article does not apply if the holder or the consignee is also the shipper.]

CHAPTER 10. DELIVERY TO THE CONSIGNEE¹⁵⁶

Article 46. Obligation to accept delivery

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage]¹⁵⁷ must accept delivery of the goods at the time and location referred to in article 11(4). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party acts in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier [or of the performing party]¹⁵⁸ done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.]¹⁵⁹

It would then be necessary to add a new provision, perhaps as para. 2, which might provide: “A qualifying clause in the contract particulars is effective for the purposes of para. 1 under the following circumstances:

- (a) For non-containerized goods, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms.
- (b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms if
 - (i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and
 - (ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that
 - (1) a container was opened for the purpose of inspection,
 - (2) the inspection was properly witnessed, and
 - (3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection.”

¹⁵⁵ Former draft para. 44(1) from A/CN.9/WG.III/WP.32 retained as agreed (see paras. 162 to 164 of A/CN.9/552) in draft art. 45.

¹⁵⁶ The original text of this chapter with drafting improvements and corrections suggested in red-line underline and strike-out, is taken from A/CN.9/WG.III/WP.32.

¹⁵⁷ As set out in footnote 160 of A/CN.9/WG.III/WP.32, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

¹⁵⁸ As set out in footnote 161 of A/CN.9/WG.III/WP.32, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of draft art. 46 could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”.

¹⁵⁹ As set out in footnote 162 of A/CN.9/WG.III/WP.32, suggestions were made that draft art. 46 and draft arts. 51, 52 and 53 could be merged, or that to reduce the confusion caused by the interplay of draft art. 46 and draft arts. 51, 52, and 53, the second sentence of draft art. 46 could

Article 47. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee must acknowledge receipt¹⁶⁰ of the goods from the carrier or the performing party in the manner that is customary at the place of destination.

Article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply:

(a) If the name and address of the consignee is not referred to in the contract particulars the controlling party must advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;¹⁶¹

(b) Variant A of paragraph (b)¹⁶²

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee upon the consignee's production of proper identification;¹⁶³

Variant B of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. As a prerequisite for delivery, the consignee must produce proper identification.

Variant C of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. The carrier may refuse delivery if the consignee does not produce proper identification.

(c) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if it, after reasonable effort, is unable to identify the controlling

be deleted, and draft arts. 51, 52, and 53 could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

¹⁶⁰ It was thought that deletion of the phrase "shall confirm delivery" and replacement with the phrase "must acknowledge receipt" was preferable since the consignee could confirm its own act, but not the fulfilment of the carrier's obligation.

¹⁶¹ As set out in footnote 164 of A/CN.9/WG.III/WP.32, the suggestion made in para. 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to draft subpara. 38(1)(f), *supra*.

¹⁶² As set out in footnote 165 of A/CN.9/WG.III/WP.32, Variant A of para. (b) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

¹⁶³ As set out in footnote 166 of A/CN.9/WG.III/WP.32, the suggestion made in para. 76 of A/CN.9/526 that para. (b) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier, has been incorporated in the text of both Variant B and C.

party, the shipper. In such event, the controlling party or shipper must give instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 is deemed to be the shipper for purposes of this paragraph. The carrier that delivers the goods upon instruction of the controlling party or the shipper under this paragraph is discharged from its obligations to deliver the goods under the contract of carriage.¹⁶⁴

Article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

When a negotiable transport document or a negotiable electronic transport record has been issued, the following paragraphs apply:

(a) (i) Without prejudice to article 46 the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods at the time and location referred to in article 11(4) to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(ii) Without prejudice to article 46 the holder of a negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier must deliver the goods at the time and location referred to in article 11(4) to such holder if it demonstrates in accordance with the procedures referred to in article 6 that it is the holder of the electronic transport record. Upon such delivery, the electronic transport record ceases to have any effect or validity.¹⁶⁵

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier must so advise the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper must give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person referred to in article 34 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁶

¹⁶⁴ As set out in footnote 167 of A/CN.9/WG.III/WP.32, a suggestion was made during the consideration of draft para. 49(b) and (c) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as para. (c).

¹⁶⁵ As set out in footnote 168 of A/CN.9/WG.III/WP.32, subject to the note of caution raised in para. 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in para. 81 of A/CN.9/526, the Working Group found the substance of paras. (a)(i) and (ii) to be generally acceptable.

¹⁶⁶ As set out in footnote 169 of A/CN.9/WG.III/WP.32, the suggestion made in para. 82 of A/CN.9/526, that the carrier should have the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery appear to be already addressed by the text of para. (b).

(c) [Notwithstanding paragraph (d),]¹⁶⁷ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) is discharged from its obligation to deliver the goods under the contract of carriage to the holder¹⁶⁸, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 6, that it is the holder.

Variant A of paragraph (d)¹⁶⁹

(d) [Except as provided in paragraph (c)]¹⁷⁰ if the delivery of the goods by the carrier at the place of destination occurs without the surrender of the negotiable transport document to the carrier or without the demonstration referred to in paragraph (a)(ii), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights [against the carrier]¹⁷¹ under the contract of carriage only if: (i) the passing of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods; or (ii) unless such person at the time it became a holder did not have and could not reasonably have had knowledge of such delivery. [This paragraph does not apply when the goods are delivered by the carrier pursuant to paragraph (c).]¹⁷²

¹⁶⁷ As set out in footnote 170 of A/CN.9/WG.III/WP.32, it was suggested that it was unclear how paras. (c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. A link between paras. (c) and (d) already exists, since para. (c) starts with the words, "Notwithstanding paragraph (d)". Other alternatives are possible, for example, to start para. (d) with the words, "Except as provided", or to add at the end of that para. a new sentence reading, "This paragraph does not apply where the goods are delivered by the carrier pursuant to paragraph (c)." The various alternatives are provisionally inserted in square brackets.

¹⁶⁸ It is suggested that the square brackets around "to the holder", which appeared in the original text in A/CN.9/WG.III/WP.21, be deleted and the phrase retained in order to clarify the text.

¹⁶⁹ Variant A is the text as it appeared in A/CN.9/WG.III/WP.32, revised as indicated.

¹⁷⁰ See *supra*, note 167.

¹⁷¹ As set out in footnote 172 of A/CN.9/WG.III/WP.32, the first concern expressed in para. 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. A solution might be to indicate in subpara. (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under draft art. 13, but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for draft art. 61, *infra*. The second concern expressed in para. 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase "could not reasonably have had knowledge of such delivery" has not specifically been addressed.

¹⁷² See *supra*, note 167.

Variant B of paragraph (d), which comprises (d) and (e)¹⁷³

(d) If the goods are delivered pursuant to paragraph (c), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods, when only the transfer of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods.

(e) Notwithstanding paragraphs (c) and (d), the holder that did not have or could not reasonably have had knowledge of such delivery at the time it became a holder acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record.

Article 50. Failure to give adequate instructions¹⁷⁴

If the controlling party or the shipper does not give the carrier adequate instructions under articles 48 and 49 or if the controlling party or the shipper cannot be found¹⁷⁵, the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles 51, 52 and 53.

Article 51. When goods are undeliverable

1. The carrier is entitled to exercise the rights and remedies referred to in paragraph 2 at the risk and expense¹⁷⁶ of the person entitled to the goods, if the goods have arrived at the place of destination and:

(a) The consignee did not actually accept delivery of the goods under this chapter at the time and location referred to in article 11(4) [and no express or implied contract has been concluded between the carrier or the performing party and the consignee with respect to the custody of the goods]¹⁷⁷; or

¹⁷³ Variant B is proposed as improved drafting of the same principles set out in Variant A.

¹⁷⁴ It is suggested that the clarity of the text is improved by placing the text of draft para. 49(e) in a separate article as draft art. 50.

¹⁷⁵ As set out in footnote 174 of A/CN.9/WG.III/WP.32, this addition has been made on the basis of the suggestion in para. 89 of A/CN.9/526 that para. (e) should be aligned with para. (b) through the insertion of this phrase. Further adjustments have been made, and the square brackets removed, in order to clarify the text.

¹⁷⁶ As set out in footnote 176 of A/CN.9/WG.III/WP.32, concern was expressed that when the carrier exercised its rights under draft art. 51 it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase "and expense" in para. 1 is intended to meet these concerns.

¹⁷⁷ As set out in footnote 175 of A/CN.9/WG.III/WP.32, concern was expressed with respect to the phrase "no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage" as confusing, since it could be seen to concern a contract for warehousing if it is one that "succeeds to the contract of carriage",

(b) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee.

2. The rights and remedies referred to in paragraph 1 are:

(a) To store the goods at any suitable place;

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

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

3. If the goods are sold under paragraph 2(c), the carrier must hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier.

Article 52. Notice of arrival at destination

The carrier is allowed to exercise the rights referred to in article 51 only after it has given reasonable advance¹⁷⁸ notice that the goods have arrived at the place of destination to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper.

Article 53. Carrier's liability for undeliverable goods

When exercising its rights referred to in article 51(2), the carrier or a performing party is liable¹⁷⁹ for loss of or damage to the goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]¹⁸⁰.

and the notion of "express or implied" was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

¹⁷⁸ As set out in footnote 177 of A/CN.9/WG.III/WP.32, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase "reasonable advance" before the word "notice" in draft art. 52 is intended to meet these concerns.

¹⁷⁹ As set out in footnote 178 of A/CN.9/WG.III/WP.32, the concern expressed in para. 94 of A/CN.9/526 that the wording of draft art. 53 could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words "acts as an agent of the person entitled to the goods but without any liability" and the addition of the words "is only liable", is intended to meet this concern.

¹⁸⁰ As set out in footnote 179 of A/CN.9/WG.III/WP.32, it was suggested that the phrase "or of the performing party" be added after the phrase "personal act or omission of the carrier", and that the word "personal" be deleted. Both of these suggestions have been adopted in the text..

CHAPTER 11. RIGHT OF CONTROL¹⁸¹

Article 54. Definition of right of control

The right of control of the goods [means][is] the right under the contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility as stated in article 11(1).¹⁸² Such right includes and is limited to:

- (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage¹⁸³;
- (b) The right to demand delivery of the goods [before their arrival at the place of destination][at an intermediate port or place en route]¹⁸⁴; and
- (c) The right to replace the consignee by any other person including the controlling party.¹⁸⁵

[Article 55. Variations to the contract of carriage

1. The controlling party is the exclusive person that may exercise the right of control and may agree with the carrier to a variation of the contract of carriage other than the variations referred to in article 54 (b) and (c).¹⁸⁶

¹⁸¹ The original text of this chapter, with drafting improvements, proposed variants and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

¹⁸² As set out in footnote 181 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider whether this sentence should be somewhat altered and moved to the draft para. 1(l) definition of "right of control".

¹⁸³ As set out in footnote 182 of A/CN.9/WG.III/WP.32, the concern was raised in para. 102 of A/CN.9/526 that the phrase "give or modify instructions...that do not constitute a variation of the contract" might be read as contradictory. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or "normal" modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. It is suggested that moving para. (d) to a separate art. in draft art. 55 may alleviate this concern.

¹⁸⁴ This proposed alternative in square brackets is intended to clarify that the delivery of the goods before arrival at destination is not meant to be any change of destination, but only delivery at a place en route.

¹⁸⁵ As set out in footnote 180 of A/CN.9/WG.III/WP.32, the concerns raised in para. 103 of A/CN.9/526 that para. (d) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. In order to address those concerns and to avoid confusion between the right of control and the right to agree with the carrier on variations to the contract of carriage, it is suggested that former para. 54(d) be moved to a separate art. in draft art. 55. It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition based upon it is included in draft para. 1(l).

¹⁸⁶ Para. 1 includes former para. 54(d), as well as text to emphasize the exclusivity of the position of the controlling party.

2. Any variation to the contract of carriage, including those referred to in article 54 (b) and (c), upon becoming effective, must be stated in the [negotiable] transport document or incorporated in the [negotiable] electronic transport record and be initialed or signed in accordance with article 39.^{187]}

Article 56. Applicable rules based on transport document or electronic transport record issued

1. When no negotiable transport document or no negotiable electronic transport record is issued, the following rules apply:

(a) The shipper is the controlling party unless the shipper [and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party]¹⁸⁸.

(b) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor [or the transferee][or, if applicable law permits, the transferee]¹⁸⁹ must notify the carrier of such transfer.

(c) When the controlling party exercises the right of control in accordance with article 54, it must produce proper identification.

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]¹⁹⁰

¹⁸⁷ Para. 2 is suggested as desirable to ensure that amendments to the contract of carriage are signed or, at least initialed, as is the current practice. Should this proposal be accepted by the Working Group, it is suggested that reference be made to the draft art. 39 signature requirement. Draft paras. 56(2)(d) and (3)(c) have been deleted in light of this proposed para. 2.

¹⁸⁸ As set out in footnote 184 of A/CN.9/WG.III/WP.32, the question was raised in para. 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, para. 1(b) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words “unless the shipper” in square brackets for possible deletion and inserting instead, in square brackets, the text “designates the consignee or another person as the controlling party”.

¹⁸⁹ As set out in footnote 185 of A/CN.9/WG.III/WP.32, the concern mentioned in para. 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words “or the transferee” para. 1(b). This phrase is placed in square brackets, along with alternative text consistent with that approved for further discussion in draft art. 63.

¹⁹⁰ As set out in footnote 186 of A/CN.9/WG.III/WP.32, the controlling party remained in control of the goods until their final delivery. However, nothing is said in draft art. 56 regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic transport record is issued. It is thought that something could be said to take care of the observation that has been made, and para. 1(d) has been added. Note, however, that para. 106 of A/CN.9/526 also notes the concern that the common shipper’s instruction to the

2. When a negotiable transport document is issued, the following rules apply:

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

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 61, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(c) In order to exercise the right of control, the holder must, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] must be produced, failing which the right of control cannot be exercised.¹⁹¹

3. When a negotiable electronic transport record is issued:

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

(b) In order to exercise the right of control, the holder must, if the carrier so requires, demonstrate, in accordance with the procedures referred to in article 6, that it is the holder.

4. Notwithstanding article 63¹⁹², a person, not being the shipper or the person referred to in article 34, that transferred the right of control without having exercised that right, is upon such transfer discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Convention.

carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since art. 54 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under art. 11, it may be unnecessary to state when the right of control ends.

¹⁹¹ As set out in footnote 188 of A/CN.9/WG.III/WP.32, the Working Group was in agreement that para. 2(c) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added para. 2(c).

¹⁹² Reference was to draft art. 62 of A/CN.9/WG.III/WP.32, which was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

Article 57. Carrier's execution of instruction

1. Variant A of paragraph 1, including para. 1 bis¹⁹³

Subject to paragraphs 1 *bis*, 2 and 3, the carrier must execute any instruction referred to in article 54¹⁹⁴ if it:

- (a) Can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;
- (b) Will not interfere with the normal operations of the carrier or a performing party; and
- (c) Would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage.

1 bis. If it is reasonably expected that one or more of the conditions referred to in subparagraphs (a), (b) and (c) is not satisfied, then the carrier is under no obligation to execute the instruction.¹⁹⁵

Variant B of paragraph 1

Subject to paragraphs 2 and 3, the carrier is bound to execute the instructions referred to in article 54¹⁹⁶ if:

- (a) The person giving such instructions is entitled to exercise the right of control;
- (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
- (c) The instructions will not interfere with the normal operations of the carrier or a performing party.¹⁹⁷

¹⁹³ Variant A of para. 1 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. As set out in footnote 192 of A/CN.9/WG.III/WP.32, the Working Group generally agreed that para. 1 should be recast to reflect the views and suggestions in paras. 114 to 116. It was agreed that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session, and this has been attempted in Variant B.

¹⁹⁴ Reference to "(a),(b) or (c)" has been deleted in light of the drafting proposal to move para. 54(d) to a separate provision in draft art. 55.

¹⁹⁵ Para. 1 *bis* was created out of the final sentence of Variant A of para. 1 purely as a drafting suggestion with no substantive change intended.

¹⁹⁶ See note 194, *supra*.

¹⁹⁷ Variant B was suggested in A/CN.9/WG.III/WP.32 to respond to concerns set out in footnote 193 of A/CN.9/WG.III/WP.32. To avoid a contradiction between para. 1(c) and draft para. 54(b) with respect to the right of control and the possible generation of "additional expenses", it was suggested that either the carrier should be under no obligation to execute the instruction received under draft para. 54(b) or that para. 1(c) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses. Further, as noted in para. 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of para. 1(c). In view of these suggestions, para. 1 could be reworded as indicated, and the right of the carrier under para. 3 could be made more stringent, as indicated *infra*, note 200. In addition, para. 1(c) has been deleted.

2. In any event, the controlling party must reimburse¹⁹⁸ the carrier, performing parties, and any persons interested in other goods carried on the same voyage or journey for any additional expense that they may incur and must indemnify them against any loss or damage that they may suffer as a result of executing any instruction under this article.¹⁹⁹

3. At the request of the carrier, the controlling party must provide security²⁰⁰ for the amount of the reasonably expected additional expense, loss or damage. [The carrier is entitled to obtain security from the controlling party if it:

- (a) Reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and
- (b) Is nevertheless willing to execute the instruction.]

4. The carrier is liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in breach of its obligation under paragraph 1.²⁰¹

Article 58. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 54(b) are deemed to be delivered at the place of destination and the provisions of chapter 10 relating to such delivery are applicable to such goods.

¹⁹⁸ As set out in footnote 194 of A/CN.9/WG.III/WP.32, the notion of “indemnity” inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party.

¹⁹⁹ As set out in footnote 195 of A/CN.9/WG.III/WP.32, the changes to para. 2 have been made in view of the suggestion in para. 117 of A/CN.9/526 that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

²⁰⁰ As set out in footnote 196 of A/CN.9/WG.III/WP.32, although para. 3 was found “generally acceptable”, as noted in para. 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on draft para. 57(1). See note 197, *supra*.

²⁰¹ As set out in footnote 197 of A/CN.9/WG.III/WP.32, a question was raised regarding the nature of the obligation incurred by the carrier under draft art. 57, and whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft convention should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new para. 4 has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

Article 59. Obligation to provide information, instructions or documents to carrier

If the carrier or a performing party during the period that it has custody of the goods reasonably requires information, instructions, or documents in addition to those referred to in article 30(a), the controlling party, on request of the carrier or such performing party, must provide such information.²⁰² If the carrier, after reasonable effort, is unable to identify and find the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper or the person referred to in article 34 must do so.

Article 60. Variation by agreement

Articles 54(b) and (c), and 57 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 56(1)(b). If a negotiable transport document or a negotiable electronic transport record is issued, any agreement referred to in this article must be stated or incorporated²⁰³ in the contract particulars.

CHAPTER 12. TRANSFER OF RIGHTS²⁰⁴

Article 61. When a negotiable transport document or negotiable electronic transport record is issued

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

- (a) If an order document, duly endorsed either to such other person or in blank, or,
- (b) If a bearer document or a blank endorsed document, without endorsement, or,
- (c) If a document made out to the order of a named person and the transfer is between the first holder and such named person, without endorsement.²⁰⁵

²⁰² As set out in footnote 199 of A/CN.9/WG.III/WP.32, the suggestion to add reference to the performing party in addition to the carrier was generally supported. In view also of the recommendation mentioned in para. 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of draft art. 59.

²⁰³ As set out in footnote 200 of A/CN.9/WG.III/WP.32, there was broad support in the Working Group that the revised draft of art. 60 should avoid suggesting any restriction to the freedom of parties to derogate from chapter 11. Further, it appears to be implied that the last sentence of draft art. 60 should apply only if a negotiable document or electronic transport record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

²⁰⁴ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

²⁰⁵ As set out in footnote 201 of A/CN.9/WG.III/WP.32, there was strong support in the Working Group to maintain the text of draft para. 61(1) as drafted in order to promote harmonization and to

2. If a negotiable electronic transport record is issued, its holder is entitled to transfer the rights incorporated in such electronic transport record, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 6.²⁰⁶

Article 62. Liability of holder

1. Without prejudice to article 59, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of being a holder.

2. Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes [any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record] [the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic transport record].²⁰⁷

3. For the purpose of paragraphs 1 and 2 [and article 46]²⁰⁸, any holder that is not the shipper does not exercise any right under the contract of carriage solely by reason of the fact that it:

(a) Under article 7 agrees with the carrier to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document, or

(b) Under article 61 transfers its rights.

accommodate negotiable electronic transport records. The concern raised in para. 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

²⁰⁶ As set out in footnote 202 of A/CN.9/WG.III/WP.32, para. 2 was discussed during the fifteenth session of the Working Group in conjunction with the other provisions in the draft convention regarding electronic transport records.

²⁰⁷ As set out in footnote 204 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of para. 2 with due consideration being given to the views expressed. However, the views expressed in the preceding paras. 137 to 139 of A/CN.9/526 were not consistent. Those that favoured a revision of the text requested that the subpara. stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract, and an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under draft art. 28).

²⁰⁸ Inclusion of the text in square brackets will depend upon the decision of the Working Group regarding the inclusion of the bracketed text in draft art. 46.

Article 63²⁰⁹ When no negotiable transport document or negotiable electronic transport record is issued

If no negotiable transport document or no negotiable electronic transport record is issued, the following paragraphs apply to the transfer of rights under a contract of carriage:

(a) The transfer is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer;

(b) The transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage; and

(c) Regardless of the law applicable pursuant to paragraphs (a) and (b),

(i) A transfer that is otherwise permissible under the applicable law may be made by electronic means,

(ii) A transfer must be notified to the carrier by the transferor or, if applicable law permits, by the transferee²¹⁰, and

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

CHAPTER 13: LIMITATION OF LIABILITY

Article 64. Basis of limitation of liability²¹¹

1. Subject to articles 65 and 66(1), the carrier's liability for breaches of its obligations under this Convention²¹² is limited to [...] units of account per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except when the nature and value of the goods have been declared by the shipper before shipment and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

²⁰⁹ Draft art. 63, formerly draft art. 61 *bis*, has replaced draft arts. 61 and 62 from A/CN.9/WG.III/WP.32, as agreed by the Working Group in para. 213 of A/CN.9/576, following its consideration of the electronic commerce aspects of art. 63, as set out in para. 12 of A/CN.9/WG.III/WP.47, and its consideration of replacing draft arts. 61 and 62 with draft art. 63 in paras. 212 and 213 of A/CN.9/576.

²¹⁰ As set out in footnote 57 of A/CN.9/WG.III/WP.47, while notification of the transfer by the transferor was a common rule, some jurisdictions require the notification of the transfer to be accomplished by the transferee. It was therefore suggested to substitute the phrase "either by the transferor or the transferee" with the phrase "by the transferor or, if other applicable law permits, by the transferee", so as to set the burden of notification on the transferor, while preserving the possibility of a notification by the transferee, where permissible.

²¹¹ Corrections are to text of paras. 1 and 3, and Variant B of para. 2 as set out in para. 6 of A/CN.9/WG.III/WP.39; Variant A of para. 2 is proposed new text.

²¹² The addition of breaches of the carrier's obligations is thought to have made the reference to "[or in connection with]" the goods unnecessary.

Variant A of paragraph 2²¹³

[2. Notwithstanding paragraph 1, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]²¹⁴ during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable under article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, then the carrier's liability for such loss, damage, [or delay] is limited according to the limitation terms of any international convention [or national law]²¹⁵ that would have been applicable if the place where the damage occurred had been established, or the limitation terms of this Convention, whichever would result in the highest limitation amount.]

Variant B of paragraph 2²¹⁶

[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]²¹⁷ during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national]²¹⁸ mandatory provisions that govern the different parts of the transport applies.]

3. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods,²¹⁹ the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport are deemed one shipping unit.

4. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that

²¹³ Variant A is intended as a clarification of the text of Variant B that appeared in para. 6 of A/CN.9/WG.III/WP.39, and is not intended to change the suggested approach.

²¹⁴ See, *infra*, note 217.

²¹⁵ Text placed in square brackets to mirror the text in art. 27(1), pending a decision by the Working Group.

²¹⁶ Variant B is the text as it appeared in para. 6 of A/CN.9/WG.III/WP.39.

²¹⁷ As set out in footnote 16 of A/CN.9/WG.III/WP.39, draft para. 2 was maintained in square brackets, and reference to delay in delivery was introduced in square brackets, for future discussion.

²¹⁸ See, *supra*, 215.

²¹⁹ As set out in footnote 17 of A/CN.9/WG.III/WP.39, the definition of "container" in draft art. 1 might need to be further considered to ensure that it covered pallets. The text proposed for addition mirrors that of art. IV.5 of the Hague-Visby Rules and of art. 6(2) of the Hamburg Rules.

is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.²²⁰

Article 65. Liability for loss caused by delay²²¹

Variant A²²²

Subject to paragraph 66(2), compensation for physical loss of or damage to the goods caused by delay must be calculated in accordance with article 23 and[, unless otherwise agreed,] liability²²³ for economic loss caused by delay is limited to an amount equivalent to [one times] the freight payable on the goods delayed. The total amount payable under this article and paragraph 64(1) may not exceed the limit that would be established under paragraph 64(1) in respect of the total loss of the goods concerned.

Variant B²²⁴

Subject to paragraph 66(2), unless otherwise agreed,²²⁵ if delay in delivery causes [consequential]²²⁶ loss not resulting from loss of or damage to the goods carried and hence not covered by article 23, the liability²²⁷ for such loss is limited to an amount equivalent to [one times]²²⁸ the freight payable

²²⁰ The text of para. 4 is substantially the same as para. 1 of the text adopted on a non-mandatory basis by the United Nations Commission on International Trade Law (UNCITRAL) at its fifteenth session (A/37/17, paras. 53-55 and 63, and Annex I, reproduced in UNCITRAL Yearbook, Vol. XIII: 1982, pp.10-11) as preferred text for the unit of account provision in the preparation of future international conventions containing limitation of liability provisions. The Working Group may wish to consider the addition of the following para., which is para. 2 of the text adopted in 1982 by the Commission:

“5. The calculation referred to in the last sentence of paragraph 4 is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for amounts in this article as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.”

²²¹ Former draft art. 16(2) as it appeared in A/CN.9/WG.III/WP.32 was moved here to become a separate art. in chapter 13.

²²² Variant A is based on the suggested alternative wording for the first sentence of para. 2 set out in footnote 11 of A/CN.9/WG.III/WP.39. No change is intended but for the clarification of the wording regarding consequential damages as suggested in para. 25 of A/CN.9/552.

²²³ The word “liability” is suggested to make the text consistent with the new chapter created for “limitation of liability”.

²²⁴ Variant B is a slightly revised version of the text in A/CN.9/WG.III/WP.32 as set out in para. 3 of A/CN.9/WG.III/WP.39, and as agreed in paras. 20, 22, 24, 28 and 31 of A/CN.9/552.

²²⁵ As set out in footnote 10 of A/CN.9/WG.III/WP.39, the words “unless otherwise agreed” were inserted at the beginning of para. 2, but the issue should be reassessed in the context of draft art. 66 and chapter 20.

²²⁶ As set out in footnote 11 of A/CN.9/WG.III/WP.39, clarification of the wording regarding consequential damages has been suggested.

²²⁷ See *supra*, note 223.

²²⁸ As set out in footnote 12 of A/CN.9/WG.III/WP.39, the words “[one times] the freight payable on the goods delayed” were inserted in para. 2 for continuation of the discussion at a future session.

on the goods delayed. The total amount payable under this article and article 64(1) may not exceed the limit that would be established under article 64(1) in respect of the total loss of the goods concerned.

Article 66. Loss of the right to limit liability²²⁹

1. Neither the carrier nor any of the persons referred to in article 19 may limit their liability as provided in articles 64 and 26(4)²³⁰, [or as provided in the contract of carriage,]²³¹ if the claimant proves that²³² the loss of, or the damage to the goods or the breach of the carrier's obligation under this Convention²³³ resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

2. Neither the carrier nor any of the persons mentioned in article 19 may limit their liability as provided in article 65 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.²³⁴

CHAPTER 14. RIGHTS OF SUIT²³⁵

Article 67. Parties

Variant A²³⁶

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

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

²²⁹ Corrections are to text as set out in para. 8 of A/CN.9/WG.III/WP.39.

²³⁰ As set out in footnote 34 of A/CN.9/WG.III/WP.39, the suggestion to add a reference to art. 23 might need to be further discussed in the context of chapter 20.

²³¹ As set out in footnote 35 of A/CN.9/WG.III/WP.39, the words "[or as provided in the contract of carriage,]" were maintained in square brackets pending further discussion on chapter 20.

²³² Reference to delay was deleted here in favour of the addition of para. 66(2).

²³³ The addition of "the breach of the carrier's obligation" is thought to have made the reference to "[or in connection with]" the goods unnecessary.

²³⁴ It is proposed that loss of the right to limit liability for loss due to delay should be dealt with separately from para. 1, and para. 2 has been added for that purpose.

²³⁵ The original text of this chapter, with drafting improvements and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

²³⁶ Variant A of art. 67 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. The changes to the original text, particularly combining subparas. (c) and (d) and placing the last sentence of the original text of the art. in a separate para. 2, are not intended to be substantive, but are only drafting suggestions to avoid any ambiguity there may have been in the original text.

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

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

2. In case of any passing of rights of suit through transfer or subrogation under subparagraph 1(c), the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Convention.²³⁷

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.²³⁸

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

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

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and²³⁹

(b) When the claimant is not the holder, it must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage,

²³⁷ As set out in footnote 210 of A/CN.9/WG.III/WP.32, while strong support was expressed for the deletion of draft art. 67, the Working Group decided to defer any decision regarding draft art. 67 until it had completed its review of the draft arts. and further discussed the scope of application of the draft convention.

²³⁸ As set out in footnote 211 of A/CN.9/WG.III/WP.32, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether Variant B adequately deals with the situation of the freight forwarder.

²³⁹ As set out in footnote 212 of A/CN.9/WG.III/WP.32, although no request appears to have been made to the Secretariat in respect of draft art. 68, from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the phrase, "irrespective of whether it suffered loss or damage itself" is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft convention.

prove that the holder did not suffer the loss or damage in respect of which the claim is made.²⁴⁰

CHAPTER 15. TIME FOR SUIT²⁴¹

Article 69. Limitation of actions

Variant A²⁴²

The carrier is discharged from all liability under this Convention²⁴³ if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper is discharged from all liability under chapter 8 of this Convention if judicial or arbitral proceedings have not been instituted within a period of [one] year.²⁴⁴

Variant B

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

Article 70. Commencement of limitation period

The period referred to in article 69 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 11(4) or 11(5) or, in cases in which no goods have been delivered, on the [last] day on which the goods

²⁴⁰ It was thought that moving former draft art. 65 to become para. (b) under art. 68 was a drafting improvement to unite these provisions in a single article.

²⁴¹ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

²⁴² Variant A of art. 69 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

²⁴³ This text is suggested to make this provision consistent with draft art. 64.

²⁴⁴ As set out in footnote 215 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to place "one" in square brackets, and to prepare a revised draft of draft art. 69, with due consideration being given to the views expressed.

Concern was raised in para. 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to Chapter 8 of the draft convention, and why it did not also refer to shipper liability pursuant to other arts., such as the since-deleted chapter 9 on freight. A further suggestion was made that all persons subject to liability under the contract of carriage should be included in draft art. 69. It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft convention, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that Chapter 15 would apply to all liabilities regulated in the draft convention.

The suggestion in para. 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft convention is barred (or any right extinguished) might be a good solution.

Concern was also raised in para. 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (art. III.3), COTIF-CIM (art. 47), Warsaw Convention (art. 29) and probably CMR (art. 32). It extinguishes the action under the Hamburg Rules (art. 20), the 1980 Multimodal Convention (art. 25), CMNI (art. 24) and Montreal Convention (art. 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

should have been delivered. The day on which the period commences is not included in the period.²⁴⁵

Article 71. Extension of limitation period

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

Article 72. Action for indemnity

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

(a) The time allowed by applicable law in the jurisdiction²⁴⁶ where proceedings are instituted; or

(b) Variant A of paragraph (b)²⁴⁷

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

- (i) settled the claim; or
- (ii) been served with process in the action against itself.

Variant B of paragraph (b)

90 days commencing from the day when either

- (i) the person instituting the action for indemnity has settled the claim; or
- (ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.²⁴⁸

²⁴⁵ As set out in footnote 216 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to retain the text of draft art. 70, with consideration being given to possible alternatives to reflect the views expressed.

Concern was raised in para. 170 of A/CN.9/526 that since the date of delivery “in the contract of carriage” might be much earlier than the date of actual delivery, the date of actual delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day “on which the carrier has completed delivery”, which is the day of actual delivery.

Concern was also raised in para. 171 of A/CN.9/526 with respect to the “last day” on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, when goods have not been delivered, the “last day” is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in para. 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under draft subpara. 72(b)(ii) as noted in para. 172, or in a separate para. of the draft convention. See *infra* the alternative text for draft art. 73.

²⁴⁶ The text is suggested in order to accommodate the inclusion of federal jurisdictions in States.

²⁴⁷ Variant A of art. 72 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

Article 73. Counterclaims

A counterclaim by a person held liable under this Convention may be instituted even after the expiration of the period referred to in article 69 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.²⁴⁹

Article 74. Actions against the bareboat charterer

[If the registered owner of a ship defeats the presumption that it is the carrier under article 40(3), an action against the bareboat charterer may be instituted even after the expiration of the period referred to in article 69 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction²⁵⁰ where proceedings are instituted; or

(b) 90 days commencing from the day when the registered owner [both
(i) proves that the ship was under a bareboat charter at the time of the carriage; and]
[(ii)] adequately identifies the bareboat charterer.]²⁵¹

²⁴⁸ As set out in footnote 219 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 72, with due consideration being given to the views expressed.

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

²⁴⁹ As set out in footnote 220 of A/CN.9/WG.III/WP.32, it was reiterated in para. 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to draft subpara. 72(b)(ii) or in a separate subpara., but they should be treated in similar fashion to draft subpara. 72(b)(i). Draft art. 73 sets out this provision as a separate art.

²⁵⁰ See note 246, *supra*.

²⁵¹ As set out in footnote 221 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 74, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain draft para. 40(3) in square brackets, and that it therefore requested the Secretariat to retain draft art. 74 in square brackets, bearing in mind that the fate of the latter art. was linked to that of the former.

Concern was raised in para. 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by para. (b)(ii).

It was also suggested that subparas. (i) and (ii) of para. (b) be combined into one, since subpara. (ii) could be considered a sufficiently rigorous condition to subsume subpara. (i). A revised text is proposed.

CHAPTER 16. JURISDICTION

Article 75. Actions against the carrier²⁵²

In judicial proceedings against the carrier²⁵³ relating to carriage of goods under this Convention the plaintiff²⁵⁴, at its option, may institute an action in a court in a Contracting State that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the defendant;²⁵⁵ or
- (b) The contractual place of receipt or the contractual place of delivery; or²⁵⁶
- [(c) the port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or]
- (d) Any additional place [designated][agreed upon]²⁵⁷ for that purpose in the transport document or electronic transport record.²⁵⁸

[Article 76. Exclusive jurisdiction agreements²⁵⁹

1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction. Such jurisdiction is exclusive, provided that the agreement conferring it:

- (a) Is evidenced in writing or by electronic communication;
- (b) Clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and
- (c) Expressly provides that the jurisdiction of the chosen court is to be exclusive.²⁶⁰

²⁵² Text as set out in para. 111 of A/CN.9/576, with suggested and previously approved revisions as noted.

²⁵³ Text as agreed for further discussion in para. 114 of A/CN.9/576.

²⁵⁴ Text as agreed for further discussion in para. 114 of A/CN.9/576.

²⁵⁵ Text as agreed for further discussion in para. 116 of A/CN.9/576.

²⁵⁶ Text as agreed for further discussion in para. 120 of A/CN.9/576.

²⁵⁷ Text as agreed for further discussion in para. 124 of A/CN.9/576.

²⁵⁸ As noted in para. 124 of A/CN.9/576, matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

²⁵⁹ As requested in para. 168 of A/CN.9/576, this draft art. on exclusive jurisdiction agreements has been prepared for consideration by the Working Group.

²⁶⁰ Text proposed to fulfil the conditions suggested in para. 161 of A/CN.9/576. If this approach is adopted, this provision should be added to the list of notices set out in draft art. 3, and draft para. 75(e) could be deleted.

2. When an exclusive forum is agreed under paragraph 1, the shipper and the carrier may also expressly agree that the exclusive choice of forum is binding on any other person bringing an action under this Convention, and it is so binding, provided that:²⁶¹

Variant A of subparagraph 2(a)

(a) Such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record]; and

Variant B of subparagraph 2(a)

(a) Such person is given adequate notice of the place where the action can be brought; and

Variant C of subparagraph 2(a)²⁶²

(a) Such person expressly consents to the agreement, and such consent complies with the requirements of article 95(6)(b); and

(b) The forum is in one of the places designated under paragraphs 75(a), (b) or (c).]

Article 77. Actions against the maritime performing party²⁶³

In judicial proceedings against the maritime performing party relating to carriage of goods under this Convention, the plaintiff, at its option, may institute an action in a court in a Contracting State that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The place where the goods are [initially] received by the maritime performing party; and the place where the goods are [ultimately] delivered by the maritime performing party.

Article 78. No additional bases of jurisdiction

Subject to article 80, no judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not designated under article 75 or 77²⁶⁴.

²⁶¹ Text proposed to fulfil the conditions suggested in para. 164 of A/CN.9/576. If this approach is not adopted, this provision should be removed from the list of notices set out in draft article 3.

²⁶² Variant C suggests the alternative that the third party must expressly consent to be bound by the choice of jurisdiction clause, in similar fashion to the consent required in draft subpara. 95(6)(b).

²⁶³ Text as set out in para. 125 of A/CN.9/576, with suggested and previously approved revisions as noted.

²⁶⁴ In order to address the concerns raised in para. 42 of A/CN.9/576, and for the purposes of clarification, it is suggested that the first sentence of former draft art. 74 be placed in a separate art. as art. 78, and that arrest and provisional or protective measures should be treated in the same art., as has been proposed in draft art. 79.

Article 79. Arrest and provisional or protective measures²⁶⁵

1. Nothing in this Convention affects jurisdiction with regard to:
 - (a) Arrest [pursuant to applicable rules of international law [or the law of the forum state]]; or
 - (b) Provisional or protective measures.
2. For the purpose of this article "provisional or protective measures" means:
 - (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or
 - (b) An order securing the amount in dispute; or
 - (c) An order appointing a receiver; or
 - (d) Any other orders to ensure that any judgment or arbitral is not rendered ineffectual by the dissipation of assets by the other party; or
 - (e) An interim injunction or other interim order.]²⁶⁶

Article 80. Consolidation and removal of actions

Variant A of paragraph 1²⁶⁷

1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in one of the places specified in article 77, whether or not that place is specified in article 75.]²⁶⁸

Variant B of paragraph 1

1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. If no place is specified in both articles, then such action must be instituted in one of the places designated under article 77.]²⁶⁹

²⁶⁵ Suggested adjustments are to text as set out in para. 130 of A/CN.9/576, as agreed for further discussion at para. 136 of A/CN.9/576.

²⁶⁶ Corrections are to text as agreed for further discussion in para. 142 of A/CN.9/576.

²⁶⁷ While Variant C of draft para. 80(1) is the text as agreed for further discussion in para. 149 of A/CN.9/576, it is suggested that Variants A and B are improved drafts that set out two alternative approaches between which the Working Group could choose. Variant B would require that in order to determine where an action against both the carrier and the maritime performing party should be instituted, resort must first be had to a place that is designated in both arts. 74 and 76, and that only thereafter could resort be had to a the place designated only in art. 76. The approach in Variant A is that such an action could only be instituted in a place designated under art. 76, regardless of whether or not that place was designated under art. 74.

²⁶⁸ The Working Group may wish to note that this approach may raised difficulties in situations when the action is against more than one maritime performing party, or when none of the places designated under art. 77 is in a contracting State.

²⁶⁹ *Ibid.*

Variant C of paragraph 1²⁷⁰

- [1. If the cargo claimant institutes actions *in solidum* against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 77, where actions can be instituted against the maritime performing party.]
2. If the carrier or maritime performing party institutes an action under this Convention, then the claimant, at the request of the defendant, must withdraw the action and recommence it in one of the places designated under articles 75 or 77, whichever is applicable, at the choice of the defendant.²⁷¹

Article 81. Agreement after dispute has arisen²⁷²

Notwithstanding the preceding articles of this chapter, an agreement made by the parties to the dispute under the contract of carriage after the dispute has arisen, that designates the place where the claimant may institute an action, is effective.²⁷³

CHAPTER 17. ARBITRATION²⁷⁴

Variant A

Article 82.

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

Article 83.

If a negotiable transport document or a negotiable electronic transport record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. When a charterparty contains a provision that disputes arising thereunder must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain a special annotation providing that such provision is binding upon the holder,

²⁷⁰ Text as agreed for further discussion in para. 149 of A/CN.9/576.

²⁷¹ Text as agreed for further discussion in para. 152 of A/CN.9/576, with drafting suggestions. As noted in para. 152 of A/CN.9/576, consideration should be given to limiting the application of this provision to declaratory relief sought by the carrier or the maritime performing party.

²⁷² Text taken from Variant A of A/CN.9/WG.III/WP.32.

²⁷³ Text as agreed for further discussion in para. 171 of A/CN.9/576.

²⁷⁴ Note the decision of the Working Group in para. 179 of A/CN.9/576 that a new draft of this chapter will be submitted for the consideration of the Working Group at a future session. Such a draft is anticipated for introduction at the sixteenth session of the Working Group. As set out in footnote 225 of A/CN.9/WG.III/WP.32, Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paras. that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic transport record in good faith.

Article 84.

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

- (a) A place in a State within whose territory is situated:
 - (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
 - [(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]
 - (iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or
- (b) Any other place designated for that purpose in the arbitration clause or agreement.

Article 85.

The arbitrator or arbitration tribunal must apply the rules of this Convention.

Article 85 *bis*.

Article 83 and 84 are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement that is inconsistent therewith is void.

Article 86.

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

Variant B

Article 82.

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

Article 83.

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

the negotiable transport document or the negotiable electronic transport record in good faith.²⁷⁵

Article 84.²⁷⁶

Article 85.

The arbitrator or arbitration tribunal must apply the rules of this Convention.

Article 86.

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

CHAPTER 18. GENERAL AVERAGE²⁷⁷

Article 87. Provisions on general average

Nothing in this Convention prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

Article 88. Contribution in general average

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

2. All [actions for] [rights to] contribution in general average are [time-barred] [extinguished] if judicial or arbitral proceedings are not instituted within a period of [one year] from the date of the issuance of the general average statement.²⁷⁸

²⁷⁵ As set out in footnote 227 of A/CN.9/WG.III/WP.32, the amended text of art. 83 of the provision on arbitration in Variant B is not a reproduction of Art. 22(2) of the Hamburg Rules, since it was thought that Art. 22(2) of the Hamburg Rules was too specific.

²⁷⁶ As set out in footnote 228 of A/CN.9/WG.III/WP.32, in order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this para. has been omitted. No decision was reached by the CMI regarding a suitable replacement para. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

²⁷⁷ The original text of this chapter, with drafting improvements suggested, is taken from A/CN.9/WG.III/WP.32.

²⁷⁸ As set out in footnote 230 of A/CN.9/WG.III/WP.32, it was suggested that the fact that the time for suit provisions of the draft convention do not apply to general average should be expressed more clearly. Since para. 1 states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.

CHAPTER 19. OTHER CONVENTIONS²⁷⁹

Article 89. International instruments governing other modes of transport

Subject to article 92, nothing contained in this Convention prevents a Contracting State from applying any other international instrument which is already in force at the date of this Convention and that applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.²⁸⁰

Article 90. Prevalence over earlier conventions

[As between parties to this Convention, it prevails over those][Subject to article 102, this Convention prevails between its parties over those]²⁸¹ of an earlier convention to which they may be parties [that are incompatible with those of this Convention].²⁸²

Article 91. Global limitation of liability

This Convention does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of vessels.

As further suggested in para. 188 of A/CN.9/526, a separate provision could be established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of para. 2. Such a provision should probably cover both claims for contribution and claims for indemnities.

In para. 189 of A/CN.9/526, the question was raised whether para. 1 should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

²⁷⁹ The original text of this chapter, with suggested drafting improvements, is taken from A/CN.9/WG.III/WP.32.

²⁸⁰ As set out in footnote 231 of A/CN.9/WG.III/WP.32, in connection with draft art. 27 and discussions relating to the relationship of the draft convention with other transport conventions and with domestic legislation, the Secretariat was instructed in paras. 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in Chapter 19. It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new draft art. 89 is based on art. 25(5) of the Hamburg Rules.

²⁸¹ Proposed alternate language.

²⁸² As set out in footnote 232 of A/CN.9/WG.III/WP.32, the suggestion in para. 196 of A/CN.9/526 that it would be helpful if draft art. 91 were amended to add language stating that the draft convention would prevail over other transport conventions except in relation to States that are not member of the convention is in line with the provisions of art. 30(4) of the Vienna Convention. It is suggested, however, that this new provision should be added in a separate para., rather than to the present draft art. 91, that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as draft art. 90.

Article 92. Other provisions on carriage of passengers and luggage

No liability arises under this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is liable under any convention or national law relating to the carriage of passengers and their luggage.

Article 93. Other provisions on damage caused by nuclear incident

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

(a) under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997,²⁸³ or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.²⁸⁴

CHAPTER 20. VALIDITY OF CONTRACTUAL STIPULATIONS

Article 94. General provisions

1. Unless otherwise specified in this Convention, any provision is void if:

(a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

²⁸³ In order to capture subsequent amendments to these instruments or new instruments negotiated in the future, the Working Group may wish to consider an additional phrase such as "including any amendment to these instruments and any future instrument in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident", or the inclusion of a simple tacit amendment procedure limited to this provision that could be commenced by the depositary.

²⁸⁴ As set out in footnote 235 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to update the list of conventions and instruments in draft art. 93, and to prepare a revised draft with due consideration being given to the views expressed.

In para. 200 of A/CN.9/526, it was pointed out that the list of conventions in draft art. 89 was not complete and reference was made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in para. 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in draft art. 93, such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent para. 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

(b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) It assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.²⁸⁵

[2. Unless otherwise specified in this Convention, any provision is void if:

(a) It directly or indirectly excludes, limits, [or increases] the obligations under chapter 8 of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34; or

(b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in article 34 for breach of any of their obligations under chapter 8.]²⁸⁶

Article 95. Special rules for volume contracts ²⁸⁷

1. Notwithstanding article 94, if terms of a volume contract are subject to this Convention under article 9(3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Convention provided that the volume contract [is agreed to in writing or electronically], contains a prominent statement that it derogates from this Convention, and:

(a) Is individually negotiated; or

(b) Prominently specifies the sections of the volume contract containing the derogations.²⁸⁸

2. A derogation under paragraph 1 must be set forth in the contract and may not be incorporated by reference from another document.²⁸⁹

3. A [carrier's public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.²⁹⁰

4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Convention under article 9(3)(a).²⁹¹

5. Paragraph 1 is not applicable to:

(a) Obligations stipulated in article 16(1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];

²⁸⁵ As approved for further discussion in para. 77 of A/CN.9/576.

²⁸⁶ As approved for further discussion in para. 85 of A/CN.9/576, following an examination of the shipper's obligations in Chapter 8.

²⁸⁷ Text as set out in para. 52 of A/CN.9/576.

²⁸⁸ As approved for further discussion in para. 85 of A/CN.9/576.

²⁸⁹ As approved for further discussion in para. 89 of A/CN.9/576.

²⁹⁰ As noted in para. 89 of A/CN.9/576, it was decided that this para. should be retained in the text as a basis for continuation of the discussion.

²⁹¹ As approved for further discussion in para. 92 of A/CN.9/576.

(b) Rights and obligations stipulated in articles, [28], [29], [30], [33] and [66] [and the liability arising from the breach thereof]].²⁹²

6. Paragraph 1 applies:

(a) Between the carrier and the shipper;

(b) Between the carrier and any other party that has expressly consented [in writing or electronically] to be bound by the terms of the volume contract that derogate from this Convention. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from this Convention and the consent shall not be set forth in a [carrier's public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]²⁹³

Article 96. Special rules for live animals and certain other goods²⁹⁴

Notwithstanding chapters 5 and 6 of this Convention and the obligations of the carrier²⁹⁵, the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except when it is proved that the loss, damage, or delay resulted from an action or omission of the carrier [or of a person referred to in article 19] or of a maritime performing party²⁹⁶ done recklessly and with knowledge that such loss, damage, or delay would probably occur; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

²⁹² As approved for further discussion in para. 99 of A/CN.9/576, bearing in mind the drafting suggestions expressed on the inclusion of other arts. of the draft convention and to the provisions of the draft convention on jurisdiction and arbitration; clarification of the relationship between draft para. 95(5) and the other paras. in draft art. 94, as well as with the provisions of other international transport instruments; and the possibility of inserting in a separate para. of draft para. 95(5) a reference to liability for intentional or reckless behaviour should be the object of further discussion.

²⁹³ As approved for further discussion in para. 104 of A/CN.9/576, along with the suggestion to insert a reference to paras. (1) to (5) of draft art. 95 in the chapeau of draft para. 95(6) should be considered.

²⁹⁴ Text as set out in para. 52 of A/CN.9/576.

²⁹⁵ As approved for further discussion in paras. 106 and 109 of A/CN.9/576.

²⁹⁶ As approved for further discussion in paras. 107 and 109 of A/CN.9/576.

CHAPTER 21. FINAL CLAUSES

Article 97. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention²⁹⁷.

Article 98. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.²⁹⁸

Article 99. Reservations

No reservations may be made to this Convention²⁹⁹.

Article 100. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

²⁹⁷ Text taken from art. 15 of the draft Electronic Contracting Convention and art. 27 of the Hamburg Rules.

²⁹⁸ Text taken from art. 16 of the draft Electronic Contracting Convention.

²⁹⁹ Text taken from art. 22 of the draft Electronic Contracting Convention and art. 29 of the Hamburg Rules.

4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State³⁰⁰.

Article 101. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of [one year from] [six months after] the date of deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession.
2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of [one year] [six months] after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State must apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State³⁰¹.

Article 102. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to any or all of the following instruments: the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; and the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979; or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, must at the same time denounce, as the case may be, the relevant international agreements to that effect.
2. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraph 1 are not effective until such denunciations as may be required on the part of those States in respect of these instruments have themselves become effective. The depositary of this Convention must consult with the Government of Belgium, as the

³⁰⁰ Text is taken from art. 18 of the draft Electronic Contracting Convention. See also art. 52 of the Convention on International Interests in Mobile Equipment, Cape Town, 16 November 2001.

³⁰¹ Text is taken from art. 30 of the Hamburg Rules. Note that the second suggested time period in square brackets is drawn from art. 23 of the draft Electronic Contracting Convention. The time selected for entry into force, which is a function of both the number of ratifications required and of the length of time required after the deposit of the appropriate instrument, is generally the time considered appropriate for business practice to adjust to the new regime.

depository of other relevant conventions, so as to ensure necessary co-ordination in this respect³⁰².

Article 103. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depository must convene a conference of the Contracting States for revising or amending it.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended³⁰³.

Article 104. Amendment of limitation amounts³⁰⁴

1. Without prejudice to article 103, the special procedure in this article applies solely for the purposes of amending the limitation amount set out in paragraph 64(1) of this Convention.
2. Upon the request of at least [one quarter³⁰⁵] of the Contracting States to this Convention³⁰⁶, the depository must circulate any proposal to amend the limitation

³⁰² Text is taken from paras. 99(3) and (6) of the United Nations Convention on Contracts for the International Sale of Goods. See also art. 31 of the Hamburg Rules, and art. 55 of the Montreal Convention. The approach taken in the Montreal Convention does not require a formal denunciation of other conventions, but rather holds that the Montreal Convention prevails as between States Parties that are also common parties to another convention. As such, the regime in place between a Contracting State of the new convention in issue and a non-contracting State would continue to apply even after the new convention came into force, and until both States became Contracting States of the new convention.

³⁰³ Text is taken from art. 32 of the Hamburg Rules. Amendment procedures are not common in UNCITRAL texts, but the Hamburg rules have a general provision in art. 32 and a special provision in art. 33 for revision of the limitation amounts and the unit of account. In the draft Electronic Contracting Convention, the Commission decided not to have a provision on amendments because the States parties to that Convention may initiate an amendment procedure under general treaty law (typically, with a diplomatic conference and an amending protocol, such as in the case of the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980, New York, 14 June 1974), if applicable, after discussion in the Commission. Note that the amendment provisions at draft art. 25 and at draft art. 103 may be adopted independently.

³⁰⁴ Text as set out in para. 7 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 19 of A/CN.9/WG.III/WP.39, the proposal is based upon the amendment procedure set out at art. 23 of the 2002 Protocol to the Athens Convention ("Athens Convention") and at art. 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade ("OTT Convention"). Similar approaches have been taken in a number of International Maritime Organization ("IMO") conventions, such as the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (not yet in force) ("2003 Protocol to the IOPC Fund 1992"); the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976; and the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

amount specified in paragraph 64(1) of this Convention to all of the Contracting States³⁰⁷ and must convene a meeting of a Committee composed of a representative from each of the Contracting States to consider the proposed amendment.

3. The meeting of the Committee must take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

4. Amendments must be adopted by the Committee by a two-thirds majority of its members present and voting.³⁰⁸

5. When acting on a proposal to amend the limits, the Committee will take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.³⁰⁹

6. (a) No amendment of the limit under this article may be considered less than [five³¹⁰] years from the date on which this Convention was opened for signature nor less than [five] years from the date of entry into force of a previous amendment under this article.

(b) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention increased by [six] per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.³¹¹

(c) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention multiplied by [three].³¹²

³⁰⁵ As set out in footnote 21 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention refers to "one half" rather than "one quarter" of the Contracting States.

³⁰⁶ As set out in footnote 22 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention includes the phrase "but in no case less than six" of the Contracting States.

³⁰⁷ As set out in footnote 24 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention also includes reference to Members of the IMO.

³⁰⁸ As set out in footnote 25 of A/CN.9/WG.III/WP.39, para. 23(5) of the Athens Convention is as follows: "Amendments shall be adopted by a two-thirds majority of the Contracting States to the Convention as revised by this Protocol present and voting in the Legal Committee ... on condition that at least one half of the Contracting States to the Convention as revised by this Protocol shall be present at the time of voting."

³⁰⁹ As set out in footnote 26 of A/CN.9/WG.III/WP.39, this provision has been taken from para. 23(6) of the Athens Convention. See, also, para. 24(4) of the OTT Convention.

³¹⁰ As set out in footnote 27 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in this draft para. should be seven years rather than five years.

³¹¹ As set out in footnote 28 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which corresponds to the limit laid down in this Convention increased or decreased by twenty-one per cent in any single adjustment."

³¹² As set out in footnote 29 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which in total exceeds the limit laid down in this Convention by more than one hundred per cent, cumulatively."

7. Any amendment adopted in accordance with paragraph 4 must be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of [eighteen³¹³] months after the date of notification, unless within that period not less than [one fourth³¹⁴] of the States that were Contracting States at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and has no effect.

8. An amendment deemed to have been accepted in accordance with paragraph 7 enters into force [eighteen]³¹⁵ months after its acceptance.

9. All Contracting States are bound by the amendment unless they denounce this Convention in accordance with article 105 at least six months before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.

10. When an amendment has been adopted but the [eighteen]-month period for its acceptance has not yet expired, a State that becomes a Contracting State during that period is bound by the amendment if it enters into force. A State that becomes a Contracting State after that period is bound by an amendment that has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State, if later.

Article 105. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary³¹⁶.

³¹³ As set out in footnote 30 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

³¹⁴ As set out in footnote 31 of A/CN.9/WG.III/WP.39, the OTT Convention specifies at para. 24(7) "not less than one third of the States that were States Parties".

³¹⁵ Recent IMO conventions have reduced this period to twelve months when urgency is important. See, for example, the 2003 Protocol to the IOPC Fund 1992, at para. 24(8).

³¹⁶ Text is taken from art. 34 of the Hamburg Rules. The second sentence of para. 2 is not strictly necessary but is present in the Hamburg Rules and in some other UNCITRAL treaties, including the draft Electronic Contracting Convention. It is not present, for instance, in art. 27 of the United Nations International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (the most recent text deposited with the Secretary-General), which provides some slightly modified alternative language:

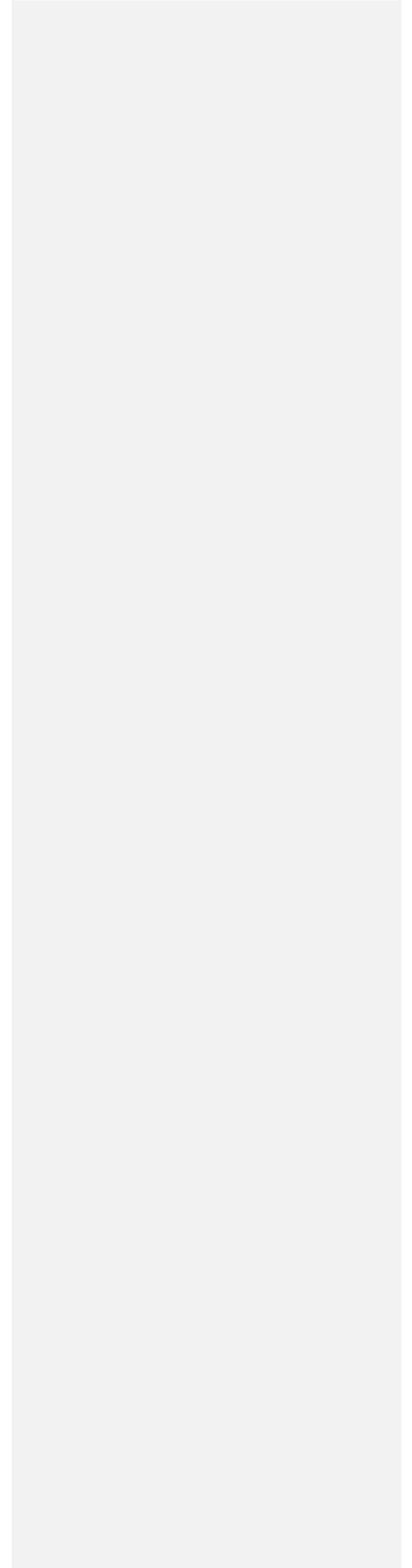
"1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations."

DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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Annex II³¹⁷

Transport Law

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

Note by the Secretariat

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³¹⁷ For ease of reference and to facilitate discussion in the Working Group, Annex II contains a text of the Draft convention on the carriage of goods [wholly or partly][by sea] that illustrates through underlining and strikethrough changes made to each of the provisions from their most recently published version.

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Annex II

Draft convention³¹⁸ on the carriage of goods [wholly or partly] [by sea]³¹⁹

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport ~~prior to or after~~ in addition to the sea carriage.³²⁰

(b) “Volume contract” means a contract that provides for the carriage of ~~a~~ specified ~~minimum~~ quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.³²¹

(c) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by ~~vessels~~ ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.³²²

~~(b)~~ (d) “Carrier” means a person that enters into a contract of carriage with a shipper.

(e) “Performing party” means a person other than the carrier that physically performs or undertakes ~~physically~~ to perform any of the carrier’s responsibilities under a contract of carriage, including the carriage, handling, custody, or storage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery³²³ of the goods, to the extent that ~~that~~ such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control. The term “performing party” includes maritime performing parties and non-maritime

³¹⁸ Without intending to predetermine the form of this Instrument, the word “Instrument” has been replaced with the word “Convention” throughout, in an effort to achieve consistency.

³¹⁹ As noted in para. 2 of A/CN.9/WG.III/WP.36, the Working Group decided to retain the current title unchanged for the purposes of future discussion.

³²⁰ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in paras. 53 and 58 of A/CN.9/576.

³²¹ Corrections are to text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576. Amendment proposed to address concerns regarding previously bracketed phrase “a specified minimum quantity of”.

³²² Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 58 of A/CN.9/576.

³²³ List expanded to parallel specific obligations set out in para. 14(1).

performing parties as defined in subparagraphs (f) and (g) of this paragraph but does not include any person ~~who that~~ is retained by a shipper, a person referred to in article 34, consignor, controlling party³²⁴ or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper, a person referred to in article 34, consignor, controlling party or consignee.³²⁵

(f) “Maritime performing party” means a performing party ~~who that~~ performs any of the carrier’s responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] of a ship and their departure from the port of discharge from a ship [or final port of discharge as the case may be].³²⁶ In the event of a trans-shipment, the performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading shall be deemed not to be maritime performing parties.³²⁷

(g) “Non-maritime performing party” means a performing party ~~who that~~ performs any of the carrier’s responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge.³²⁸

(h) “Shipper” means a person that enters into a contract of carriage with a carrier.

(ie) “Consignor” means a person that delivers the goods to the carrier or a performing party for carriage.

(j) “Holder” means

(i) a person that is for the time being in possession of a negotiable transport document and

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

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

³²⁴ List expanded to be consistent with parties referred to in art. 10.

³²⁵ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

³²⁶ As set out in footnote 9 of A/CN.9/WG.III/WP.36, there was support in the Working Group for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, but that a widely shared view was that movement between two physically distinct ports should be considered as part of a non-maritime performing party’s functions. This clarification could be achieved by the inclusion here of the phrase “including inland movements within a single port”. It was further suggested at para. 31 of A/CN.9/544 that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. The Working Group may wish to consider this suggestion.

³²⁷ Corrections are to text as set out in para. 4 of A/CN.9/WG.III/WP.36.

³²⁸ As set out in footnote 10 of A/CN.9/WG.III/WP.36, a concern was raised regarding whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole.

(ii) ~~the shipper, the consignee, or~~ the person to ~~whom which~~ a negotiable electronic transport record has been ~~issued or~~ transferred and ~~who that~~ has exclusive control of that negotiable electronic transport record.³²⁹

(ki) “Consignee” means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic transport record.

(lg) “Right of control” has the meaning given in article ~~5354~~.

(mh) “Controlling party” means the person that pursuant to article ~~5456~~ is entitled to exercise the right of control.

(nk) “Transport document” means a document issued pursuant to a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:

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

(ii) it evidences or contains a contract of carriage;
~~or both.~~

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

(pm) “Non-negotiable transport document” means a transport document that does not qualify as a negotiable transport document.

(qn) “Electronic communication” means communication information generated, sent, received or stored by electronic, optical, ~~or digital images or by~~ similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.³³⁰ ~~Communication includes generation, storing, sending, and receiving.~~

³²⁹ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 207 of A/CN.9/576.

³³⁰ Suggested clarification to ensure that the draft convention does not draw an unnecessary distinction between the means of transmission and the form in which the data are stored. The definition of “electronic communication” draws on the definition of “data message” in art. 2 of the United Nations Model Law on Electronic Commerce, 1996 (“MLEC”), without the illustrative list of techniques. In the MLEC and the United Nations Draft Convention on the Use of Electronic Communications in International Contracts (“draft Electronic Contracting Convention”), Annex I to *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17, (A/60/17)*, not all data messages are capable of having the same value as written paper documents, which is only possible in respect of data messages that are “accessible so as to be usable for subsequent reference”. In the draft instrument, the notion of “electronic communication”, also incorporates the criteria for the functional equivalence between data messages and written documents on art. 6 of MLEC and art. 9, para. 2 of draft Electronic Contracting Convention. Thus, an “electronic communication” under the instrument must always be capable of replicating the function of written documents.

(re) “Electronic transport record” means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions:

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

(ii) it evidences or contains a contract of carriage;

~~or both;~~

~~— It includes information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record.~~³³¹

(sp) “Negotiable electronic transport record” means an electronic transport record

(i) that indicates, by statements such as “to order”, or “negotiable”, or other appropriate³³² statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”, and

(ii) the use of which meets the requirements of article 6(1).³³³

(tr) “Non-negotiable electronic transport record” means an electronic transport record that does not qualify as a negotiable electronic transport record.³³⁴

(u) The “issuance” and the “transfer” of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person ~~who~~that has the rights in the negotiable electronic transport record.]³³⁵

³³¹ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.47, that was approved for further discussion in paras. 207 and 210 of A/CN.9/576.

³³² As set out in footnote 12 of A/CN.9/WG.III/WP.47, the Working Group may wish to consider whether the word “appropriate” is necessary in light of the use of the phrase “recognized as having the same effect” and whether similar language in draft para. 1(o) should be aligned accordingly.

³³³ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

³³⁴ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

³³⁵ Text as set out in para. 207 of A/CN.9/576, and as approved for further discussion in para. 210 of A/CN.9/576. As noted in para. 208 of A/CN.9/576, the square brackets around the second

(~~yf~~) “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.³³⁶

(~~wj~~) “Goods” means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]] and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.³³⁷

(x) “Ship” means any vessel used to carry goods by sea.³³⁸

(~~ys~~) “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods,³³⁹ ~~[capable of being carried by sea][designed for carriage by sea]~~ and any equipment ancillary to such unit load.³⁴⁰

(~~zñ~~) “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.³⁴¹

(~~aa~~) “Domicile” means the place where (a) a company or other legal person for association of natural or legal persons has its (i) statutory seat or place of incorporation or registered office, as appropriate, (ii) ~~or~~ central administration, or (iii) principal place of business, and (b) a natural person has his or her habitual residence.³⁴²

sentence are intended to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion. The Working Group may wish to consider the suggestion noted in para. 209 of A/CN.9/576, that the intention behind this draft para. should be explained in an explanatory note to the draft convention.

³³⁶ Text as set out in para. 3 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 185 and 210 of A/CN.9/576.

³³⁷ With reference to the discussion in footnote 15 of A/CN.9/WG.III/WP.32, deletion of the phrase “or a performing party [received for carriage]” is suggested.

³³⁸ Definition added to clarify and standardize the use of “ship” and “vessel”, depending on which is intended in the particular provision in issue, such that “ship” means an ocean-going vessel, and “vessel” means all other vessels.

³³⁹ The alternatives “[capable of being carried by sea]” and “[designed for carriage by sea]” were deleted as unnecessary since these issues are addressed in the articles in which they arise, draft arts. 64 and 26.

³⁴⁰ Note footnote to draft art 64(3) that the definition of “container” might need to be further considered to ensure that it covered pallets. It is proposed that reference to “pallets”, if any, should be addressed in para. 64(3) rather than here.

³⁴¹ Deletion of this definition is proposed given the deletion of the chapter on freight and the inclusion of “freight” in the definition of “contract of carriage” in para. 1(a).

³⁴² Suggested adjustments to text as set out in para. 115 of A/CN.9/576. It is suggested that reference should be made to associations, since these legal entities often own ships, but may not be included in “other legal persons”. “Place of incorporation or registered office” have been added for certainty, since “statutory seat” is not universally recognized. All of these changes conform with the text of art. 60 of Council Regulation (EC) No. 44/2001, 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16.01.2001] (“Brussels I”), from which the original text was drawn.

[(bb) [Unless otherwise provided in this Convention] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.³⁴³]

[(cc) [Unless otherwise provided in this Convention,] “the time of delivery” and “the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final ~~vessel or vehicle~~ means of transport in which they are carried under the contract of carriage.³⁴⁴]

Article ~~2 bis~~ 2. Interpretation of this Convention ³⁴⁵

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 53. Form requirements³⁴⁶

The notices, ~~and~~ confirmation, consent, agreement, declaration and other communications referred to in articles ~~20(2), 2024(1), 2024(2), 2024(3), 3438(1)(b) and (c), 41(c), 4747, 5452, 56(1), 61bis63(2), 64(1), 71, 76, 88a95(1) and 95(6)(b), the declaration in article 68, and the agreement as to weight in article 37(1)(e) shall~~ must³⁴⁷ be made in writing. Electronic communications may be used for these purposes, provided the use of such means is with the express or implied consent of

³⁴³ Text as set out in para. 117 of A/CN.9/576, and as approved for further discussion in para. 120 of A/CN.9/576. If this definition is retained, the text must be aligned with draft arts. 8, 11, 75 and 77.

³⁴⁴ *Ibid.* See note 343.

³⁴⁵ Text as set out in para. 4 of A/CN.9/WG.III/WP.39.

³⁴⁶ Text as set out in para. 6 of A/CN.9/WG.III/WP.47, with inclusion of references to draft arts. 20(2), 64(1), 56(1), 63(2), 95(1) and 95(6)(b) and corrections to the opening description of types of communication. The Working Group may wish to note that this list is not closed, pending further examination. Further, the Working Group may wish to consider whether it is advisable to include with the final text an explanatory note that any notices contemplated in this convention that are not included in art. 3 may be made by any means including orally or by exchange of data messages that do not meet the definition of “electronic communication”. It is implicit in the definition of “electronic communication” that it must be capable of replicating the function of written documents (see *supra*, note 330).

³⁴⁷ While UNCITRAL practice has been to use the “shall” form in its instruments, it has been suggested that modern legislative drafting practice prefers to use other forms, such as “must”. While this version of the draft convention has adopted the more modern approach, the Working Group may wish to consider which approach is preferable.

the party by which it is communicated and of the party to which it is communicated.”

Article ~~214. Non-contractual claims~~Applicability of defences and limitations³⁴⁸

1. The defences and ~~limits~~sations of liability provided for in this Convention and the responsibilities imposed by this Convention apply in any action against the carrier or a maritime performing party for loss of, or damage to, ~~for in connection with~~³⁴⁹ the goods covered by a contract of carriage and delay in delivery of such goods, or for the breach of any other obligation under this Convention,³⁵⁰ whether the action is founded in contract, in tort, or otherwise.³⁵¹

2. If an action is brought³⁵² against an employee or agent of the carrier or a maritime performing party, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [that person proves that]³⁵³ it acted within the scope of its employment or agency.

CHAPTER 2. ELECTRONIC COMMUNICATION

Article 35. Use and effect of electronic communications³⁵⁴

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document in pursuance of this Convention may be recorded or communicated by using electronic communications³⁵⁵ instead of by means of the transport document, provided the issuance and subsequent use of an electronic transport record is with the express or implied consent of the carrier and the shipper; and

³⁴⁸ Corrections are to text as set out in para. 10 of A/CN.9/WG.III/WP.39. This art. has been moved to chapter 1 (General provisions) because it relates to the broad applicability and preemptive effect of the draft Convention rather than simply to the liability of the carrier, where it was previously located.

³⁴⁹ See *infra*, note 538.

³⁵⁰ The addition of “the breach of any other obligation” is thought to have made the reference to “[or in connection with]” the goods unnecessary.

³⁵¹ As set out in footnote 52 of A/CN.9/WG.III/WP.39, the potentially repetitious nature of para. 20(4) and draft art. 4 was to be further considered in the next iteration of the draft convention. Adjustments to these provisions may have remedied the problem.

³⁵² The phrase “under this Convention” has not been repeated from the parallel provision in para. 20(4) because an action against an employee or agent will not be brought under the draft Convention since those persons are not subject to it, except for the maritime performing party, which is covered under para. 20(4).

³⁵³ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the employee or agent

³⁵⁴ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 187 of A/CN.9/576.

³⁵⁵ Text as set out in para. 4 of A/CN.9/WG.III/WP.47, and as revised for further discussion in para. 187 of A/CN.9/576.

(b) The issuance, control, or transfer of an electronic transport record ~~shall have~~^{has} the same effect as the issuance, possession, or transfer of a transport document.

Article 6. Procedures for use of negotiable electronic transport records³⁵⁶

1. The use of a negotiable electronic transport record ~~shall~~^{must} be subject to procedures ~~which that~~ provide for:

(a) ~~a~~^{The} method ~~to effect~~^{for} the ~~exclusive~~^{issuance and the}³⁵⁷ transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The way in which confirmation is given that delivery to the holder has been effected; or that, pursuant to articles ~~47~~(2) or 49(a)(ii), the negotiable electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.³⁵⁸

Article ~~47~~. Replacement of negotiable transport document or negotiable electronic transport record³⁵⁹

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

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

(b) The carrier ~~shall~~^{must} issue to the holder a negotiable electronic ~~transport~~ record that includes a statement that it is issued in substitution for the negotiable transport document; ~~and~~

~~whereupon~~ (c) The negotiable transport document ceases ~~thereafter~~ to have any effect or validity.

³⁵⁶ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as approved for further discussion in paras. 207 and 210 of A/CN.9/576.

³⁵⁷ Text as set out in para. 7 of A/CN.9/WG.III/WP.47, and as revised for further discussion in paras. 207 and 210 of A/CN.9/576.

³⁵⁸ As set out in footnote 34 in A/CN.9/WG.III/WP.47, the term "readily ascertainable" was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft convention.

³⁵⁹ Text as set out in para. 5 of A/CN.9/WG.III/WP.47, and as approved for further discussion in para. 189 of A/CN.9/576.

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

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

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

CHAPTER 3. SCOPE OF APPLICATION³⁶⁰

Article 28. General sScope of application³⁶¹

1. Subject to article 39(1), this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a Contracting State³⁶²~~Party~~; or

(b) The place of delivery [or port of discharge] is located in a Contracting State~~Party~~; or

[(c) The contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract.]³⁶³

References to [places and]³⁶⁴ ports mean the [places and] ports agreed in the contract of carriage.

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

³⁶⁰ Where chapter and article titles were missing, language has been proposed for the consideration of the Working Group.

³⁶¹ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 62 of A/CN.9/576.

³⁶² In general, it is the practice of UNCITRAL to use the term “Contracting State” as opposed to “State Party”, or similar language. This change has been effected throughout the draft convention.

³⁶³ Reference may be had to the discussion of this para. As set out in para. 61 of A/CN.9/576.

³⁶⁴ If art. 1 includes definitions of “place of receipt” and “place of delivery”, as it currently does at draft paras. (bb) and (cc), the references to “place” would become unnecessary.

Article 39. Specific exclusions and inclusions³⁶⁵

1. This Convention does not apply to:
 - (a) Charterparties;
 - (b) Contracts for the use of a ship or of any space thereon;
 - (c) Except as provided in paragraph 2, other contracts in non-liner transportation; and
 - (d) Except as provided in paragraph 3, volume contracts.
2. Without prejudice to subparagraphs 1(a) and (b), this Convention applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods, except as between the parties to a charterparty or to a contract for the use of a ship or of any space thereon.
3. (a) This Convention applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter so specify.
(b) This Convention applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Convention under subparagraph (a).

Article 410. Application to certain parties³⁶⁶

Notwithstanding article 39, if a transport document or an electronic transport record is issued pursuant to a charterparty or a contract under article 39 (1)(b) or (c), ~~the provisions of this Convention apply~~ies to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article ~~34~~34 that is not the charterer or the party to the contract under article 39 (1)(b) or (c).

CHAPTER 34. PERIOD OF RESPONSIBILITY³⁶⁷

Article 711. Period of responsibility of the carrier

1. Subject to article 912, the responsibility of the carrier for the goods under this Convention covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.
2. The time and location of receipt of the goods is the time and location agreed in the contract of carriage or, failing ~~any specific provision relating to the receipt of the goods in such contracts~~such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of ~~any~~

³⁶⁵ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 66 of A/CN.9/576.

³⁶⁶ Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in para. 73 of A/CN.9/576, bearing in mind the possibility of inserting a reference to draft subpara. 9(1)(d) at the end of draft art. 10, and any necessary clarification of the treatment of receipts.

³⁶⁷ Corrections are to text as set out in A/CN.9/WG.III/WP.32.

such ~~provisions in the contract of carriage agreement~~ or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

3. If the consignor is required to hand over the goods at the place of receipt to an authority or other third party to which, pursuant to applicable law or regulation, the goods must be handed over and from which the carrier may collect them, the time and location of the carrier's collection of the goods from the authority or other third party is the time and location of the receipt of the goods by the carrier under paragraph 2.³⁶⁸

~~34. The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contracts such agreement, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage agreement or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle means of transport in which they are carried under the contract of carriage.~~

~~45. If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to whom which, pursuant to applicable law or regulation applicable at the place of delivery, the goods must be handed over and from whom which the consignee may collect them, such handing over will be regarded as a delivery of the goods by the carrier to the consignee under paragraph 34.~~

6. For the purposes of determining the carrier's period of responsibility and subject to paragraph 14(2), the contract of carriage may not provide that:

(a) The time of receipt of the goods is subsequent to the commencement of their initial loading under the contract of carriage, or

(b) The time of delivery of the goods is prior to the completion of their final discharge under the contract of carriage.³⁶⁹

³⁶⁸ This para. is proposed to address the situation when the consignor is required to hand over the goods to an authority, such as a customs authority, prior to them being handed over to the carrier. The text parallels that of para. 5.

³⁶⁹ Para. 6 is suggested in order to ensure that fictions may not be included in the contract of carriage in order to reduce the carrier's period of responsibility.

Article ~~9~~12. ~~Mixed-contracts of carriage and forwarding~~Transport beyond the contract of carriage³⁷⁰

Variant A of article 12³⁷¹

1. The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers.
2. In such event the carrier ~~shall~~must exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.

Variant B of article 12³⁷²

On the request of the shipper, the carrier may agree to issue a single transport document or an electronic transport record that includes specified transport that is not covered by the contract of carriage. In such an event, the responsibility of the carrier covers the period of the contract of carriage and, unless otherwise agreed, the carrier, on behalf of the shipper, must arrange the additional transport as provided in such transport document or electronic transport record.

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

Article ~~10~~13. Carriage and delivery of the goods

The carrier ~~shall~~must, subject to this Convention and in accordance with the terms of the contract of carriage, ~~[properly and carefully]~~³⁷³ carry the goods to the place of destination and deliver them to the consignee.

Article ~~11~~14. Specific obligations

1. The carrier ~~shall~~must during the period of its responsibility as defined in article ~~7~~11, and subject to article ~~8~~27, properly and carefully receive³⁷⁴ load, handle, stow, carry, keep, care for, ~~and~~ discharge and deliver the goods.

³⁷⁰ Suggested improved title. The Working Group may wish to consider whether art. 12 is properly placed within chapter 4 on period of responsibility.

³⁷¹ Variant A is art. 12 as set out in A/CN.9/WG.III/WP.32.

³⁷² The first sentence of Variant B is intended as a clarification of para. 1 of Variant A. The second sentence of Variant B modifies para. 2 of Variant A by changing the obligation of the carrier in its arrangement of additional transport from one of due diligence to whatever is agreed in the contract of carriage or elsewhere.

³⁷³ Suggested deletion of “[properly and carefully]” as unnecessary and repetitious, since “subject to this Convention” already includes proper and careful carriage. Further, draft art. 13 is intended as a general obligation that is enhanced in subsequent articles.

³⁷⁴ “Receive” and “deliver” added to ensure they are recognized as carrier’s obligations.

[2. The parties may agree that ~~certain of the functions referred to in paragraph 1 shall loading, stowing and discharging of the goods is to~~ be performed by ~~or on behalf of~~ the shipper ~~or any person referred to in article 35~~, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]³⁷⁵

Article ~~4215~~. Goods that may become a danger

Variant A³⁷⁶

Notwithstanding articles ~~4013~~, ~~414~~, and ~~4316~~(1), the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, an actual danger to persons or property or an illegal or unacceptable danger to the environment.

Variant B³⁷⁷

Notwithstanding articles ~~4013~~, ~~414~~, and ~~4316~~(1), the carrier may unload, destroy or render ~~dangerous~~ goods harmless if they become an actual danger to ~~life-persons~~ or property.

Article ~~4316~~. Additional-Specific obligations applicable to the voyage by sea³⁷⁸

1. The carrier ~~shall be~~ bound, before, at the beginning of, and during³⁷⁹ the voyage by sea, to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly man,³⁸⁰ equip and supply the ship and keep the ship so manned,³⁸¹ equipped and supplied throughout the voyage;³⁸²

³⁷⁵ As set out in footnote 47 of A/CN.9/WG.III/WP.32, it was noted in para. 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to arts. 13 and 14(1).

³⁷⁶ Variant A of art. 15 is based on the original text of the draft convention (A/CN.9/WG.III/WP.21).

³⁷⁷ Variant B is based on the principles expressed in art. 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods.

³⁷⁸ Text as set out in para. 11 of A/CN.9/WG.III/WP.36, including footnotes.

³⁷⁹ As set out in footnote 55 of A/CN.9/WG.III/WP.36, the Working Group agreed that the carrier's obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft para. 16(1) surrounding the phrases "and during" in draft para. 16(1), "and keep" in draft subpara. 16(1)(a), and "and keep" in draft subpara. 16(1)(c) should thus be removed, and the text in them retained. The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft convention, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the convention.

³⁸⁰ As set out in footnote 56 of A/CN.9/WG.III/WP.36, a drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man ... the ship". The Working Group may wish to consider this suggestion.

³⁸¹ *Ibid.*

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers ~~where-when~~ supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.

[2. Notwithstanding articles ~~4013~~, ~~4114~~, and ~~4316~~(1), the carrier may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril³⁸³ human life or³⁸⁴ other property involved in the common adventure.]³⁸⁵

CHAPTER ~~56~~. LIABILITY OF THE CARRIER ~~FOR LOSS, DAMAGE OR DELAY~~

Article ~~4417~~. Basis of liability³⁸⁶

1. The carrier is liable for ~~loss resulting from~~ loss of or damage to the goods, as well as ~~from for~~ delay in delivery, if the claimant proves that

- (a) the loss, damage, or delay; or
- (b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter ~~34~~. The carrier is relieved of all or part of its liability if it proves 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 ~~mentioned-referred to~~ in article ~~44 bis~~19.

2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability ~~except in the following situations-subject to the following provisions:~~

(a) If the claimant proves that the fault of the carrier or of a person ~~mentioned-referred to~~ in article ~~44 bis-19~~ caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

³⁸² As set out in footnote 58 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to make the necessary changes to subpara. (b) to ensure that this obligation was understood to be of a continuing nature. It is suggested that the addition of the phrase "throughout the voyage" could achieve this effect. A possible alternative could be to insert the phrase "and continuously" after the opening word, "Properly".

³⁸³ As set out in footnote 59 of A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the presence of imminent danger, but that care should be taken not to prejudice or alter the rules on general average. Consistent with the language in Rule A of the York-Antwerp Rules of 1994, the phrase "from peril" was added after the word "preserving".

³⁸⁴ As set out in footnote 60 to A/CN.9/WG.III/WP.36, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the preservation of human life. The phrase "human life" has been added before the phrase "or other property".

³⁸⁵ As set out in footnote 61 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain draft para. 16(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 18 on general average.

³⁸⁶ Text as set out in paras. 31 and 75 of A/CN.9/572, and as broadly accepted in paras. 33 and 80 of A/CN.9/572.

(b) If the claimant proves that an event ~~other than those~~^{not} listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person ~~mentioned referred to~~ in article ~~14 bis~~¹⁹, then the carrier is liable for part of the loss, damage, or delay.

(c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

- (i) the unseaworthiness of the ship;
- (ii) the improper manning, equipping, and supplying of the ship; or
- (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,

and the carrier cannot prove that;

(A) it complied with its obligation to exercise due diligence as required under article ~~13~~¹⁶(1); or

(B) the loss, damage, or delay was not caused by any of the circumstances ~~mentioned-referred to~~ in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.

3. The events mentioned in paragraph 2 are:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person ~~mentioned-referred to~~ in article ~~14 bis~~¹⁹;³⁸⁷
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects in the ~~[ship]~~^[vessel]~~[means of transport]~~³⁸⁸ not discoverable by due diligence;
- (h) Act or omission of the shipper or any person ~~mentioned-referred to~~ in article ~~32~~³⁵;³⁸⁹ the controlling party, or the consignee;
- (i) Handling, loading, [stowage,] or ~~unloading-discharging~~³⁹⁰ of the goods [actually performed] by the shipper or any person ~~mentioned-referred to~~ in article ~~32~~³⁵; ³⁹¹ the controlling party, or the consignee;³⁹²

³⁸⁷ Further examination is needed whether the reference to art. 19 is necessary.

³⁸⁸ The Working Group may wish to consider which of the terms in square brackets is intended to be addressed in this para.

³⁸⁹ Further examination is needed whether the reference to art. 35 is necessary.

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

(k) Insufficiency or defective condition of packing or marking not performed by [or on behalf of] the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

(o) Acts of the carrier or a performing party in pursuance of the powers conferred by articles ~~1215~~ and ~~1316~~(2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.³⁹³

4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability ~~shall~~must be apportioned on the basis established in the previous paragraphs.

Article ~~13-bis~~18. Carrier's liability for failure to provide information and instructions³⁹⁴

The carrier ~~shall be~~is liable³⁹⁵ for loss, damage [, delay]³⁹⁶ or injury caused by a breach of its obligations under article ~~2629~~, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person ~~mentioned-referred to~~ in article ~~14-bis-19~~ caused [or contributed to] the loss, damage [, delay] or injury.

Article ~~14-bis~~19. Vicarious liability of the carrier³⁹⁷

1. Subject to paragraph ~~1520~~(4),³⁹⁸ the carrier ~~shall be responsible~~is liable for the acts and omissions of:

(a) Any performing party, and

³⁹⁰ "Discharging" is suggested in order to be consistent with the language in draft art. 14.

³⁹¹ Further examination is needed whether the reference to art. 35 is necessary

³⁹² As noted in para. 76 of A/CN.9/572, the Working Group agreed to add a footnote to para. (i) indicating that the final text of it would depend upon the outcome of the discussion on para. 14(2).

³⁹³ The Working Group may wish to reconsider this provision in light of the treatment of draft art. 33.

³⁹⁴ Text as set out in para. 18 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 85 of A/CN.9/WG.III/WP.39, aspects of draft arts. 31 and 33 dealing with the liability of the carrier have been called "art. 18", for possible placement here.

³⁹⁵ See *infra*, note 445.

³⁹⁶ See *infra*, note 447.

³⁹⁷ Corrections to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

³⁹⁸ As set out in footnote 63 of A/CN.9/WG.III/WP.36, the Working Group decided to maintain this opening phrase, although the suggestion was made that it should be replaced with the phrase "Subject to the liability and limitations of liability available to the carrier" since draft art. 19 dealt with actions brought against the carrier, while draft para. 20(4) dealt with actions brought

(b) Any other person, including a performing party's subcontractors, employees³⁹⁹ and agents, ~~who that~~ performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own.

2. The carrier is ~~responsible-liable~~ under ~~this provision paragraph 1~~ only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

Article ~~1520~~. Liability of maritime performing parties⁴⁰⁰

1. A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this Convention, and entitled to the carrier's rights and immunities provided by this Convention if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; ~~and-or~~ (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Convention, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods ~~shall be is~~ higher than the limits imposed under articles ~~16(2)65, 1864~~⁴⁰¹ and ~~2426~~(4), a maritime performing party ~~shall is~~ not be bound by this agreement unless the maritime performing party expressly agrees to accept such responsibilities or such limits.

3. Subject to paragraph 4, a ~~maritime~~ performing party ~~shall be responsible is liable~~ for the acts and omissions of any person to ~~whom which~~ it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its subcontractors, employees, and agents, as if such acts or omissions were its own. A ~~maritime~~ performing party is ~~responsible-liable~~ under this ~~provision paragraph~~ only when the act or omission of the person concerned is within the scope of its contract, employment, or agency.⁴⁰²

against any person other than the carrier.

³⁹⁹ As set out in footnote 64 of A/CN.9/WG.III/WP.36, as a matter of drafting, further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

⁴⁰⁰ Corrections are to text as set out in para. 12 of A/CN.9/WG.III/WP.36.

⁴⁰¹ As set out in footnote 69 of A/CN.9/WG.III/WP.36, the Working Group took note of the suggestion to limit the reference to draft art. 64, since it was stated that, while the reference to paras. (1), (3) and (4) of draft art. 64 was acceptable, para. (2) of draft art. 64 should not be referred to since the performing party was not liable in case of non-localized damage. The Working Group decided that this suggestion might need to be further discussed after a decision had been made regarding the inclusion of para. (2) of draft art. 64 in the draft convention.

⁴⁰² As set out in footnote 74 of A/CN.9/WG.III/WP.36, the Working Group reaffirmed its decision that the structure of this para. should mirror new draft art. 19, and took note of the views expressed regarding whether draft para. 20(3) should cover both maritime and non-maritime performing parties for continuation of the discussion at a future session.

Variant A of paragraph 4⁴⁰³

4. If an action under this Convention is brought against a maritime performing party, that party is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁴⁰⁴ it acted within the scope of its contract, employment or agency.

Variant B of paragraph 4

4. If an action under this Convention is brought against any person, other than the carrier, ~~mentioned-referred to~~ in article ~~14-bis~~19 ~~and-or~~ paragraph 3, [, including employees or agents of the contracting carrier or of a maritime performing party,]⁴⁰⁵ that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Convention if [it proves that]⁴⁰⁶ it acted within the scope of its contract, employment, or agency.

Article ~~15-bis~~21. Joint and several liability and set-off⁴⁰⁷

1. If the carrier and one or more maritime performing parties are liable⁴⁰⁸ for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several [, such that each such party ~~shall-be~~ liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may ~~take-have~~ against other liable parties,]⁴⁰⁹ but only up to the limits provided for in articles ~~1622, 1864~~ and ~~2426~~.

⁴⁰³ Suggested variant for para. 20(4) in order to respond to the Working Group's desire, as set out in footnote 77 of A/CN.9/WG.III/WP.36, to examine a variant limiting the scope of this para. to the maritime sphere, and in light of the text proposed for para. 4(2) which parallels this para., but in the context of employees and agents.

⁴⁰⁴ The Working Group may wish to consider whether the bracketed text should be deleted in order to reduce the burden of proof on the maritime performing party.

⁴⁰⁵ As set out in footnote 80 of A/CN.9/WG.III/WP.36, the Working Group may wish to consider the following simplified text for the opening phrase of the para. ending with "that person": "If an action under this Convention is brought against any maritime performing party [, including its sub-contractors, employees or agents,] that person ...".

⁴⁰⁶ See *supra*, 404.

⁴⁰⁷ Text as set out in para. 2 of A/CN.9/WG.III/WP.39, including footnotes.

⁴⁰⁸ As set out in footnote 3 of A/CN.9/WG.III/WP.39, it was noted that the scope of this para. should be limited to maritime performing parties. Since this draft para. has now been moved to a separate draft art., for greater clarity, the phrase "If more than one maritime performing party is liable" as it appears in A/CN.9/WG.III/WP.36, has been changed to "If the carrier and one or more maritime performing parties are liable". The Working Group may also wish to consider whether this clarification alleviates the concerns raised at para. 14 of A/CN.9/552, but for the concern regarding set-off, which is considered in draft para. 21(3) below.

⁴⁰⁹ As set out in footnote 4 of A/CN.9/WG.III/WP.39, the phrase in square brackets has been added for clarification of the meaning of "joint and several liability". However, the Working Group may wish to consider the use of the term "joint and several liability" in numerous international instruments, including: para. 10(4) of the Hamburg Rules; para. 27(4) of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, as amended by the Protocol of Modification of 1999 ("CIM-COTIF 1999"); para. 4(5) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 ("CMNI"); para. 30(3) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by protocols in 1955 and 1975 ("Warsaw Convention"); and para.

2. Without prejudice to article ~~1966~~, the aggregate liability of all such persons ~~shall must~~ not exceed the overall limits of liability under this Convention.

[3. ~~Where-When~~ a claimant has made a successful claim against a non-maritime performing party for the loss of, damage to, or delay in delivery of the goods, the amount received by the claimant ~~shall be is~~ set off against any subsequent claim for that loss, damage or delay that the claimant makes against a carrier or a maritime performing party.]⁴¹⁰

Article ~~1622~~. Delay⁴¹¹

~~1.~~—Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage ~~or journey~~.⁴¹²

Article ~~1723~~. Calculation of compensation⁴¹³

1. Subject to article ~~1864~~, the compensation payable by the carrier for loss of or damage to the goods ~~shall be is~~ calculated by reference to the value of such goods at the place and time of delivery established in accordance with article ~~711~~.

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

3. In case of loss of or damage to the goods, the carrier ~~shall is not be~~ liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except ~~where-when~~ the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of ~~article 88~~chapter 20.

36(3) of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (“Montreal Convention”).

⁴¹⁰ As set out in footnote 7 of A/CN.9/WG.III/WP.39, a revised draft has been prepared, pending further discussion regarding the preparation of a uniform rule on set-off, or of leaving the issue to domestic law. See also *supra*, note 407. The Working Group may wish to consider whether this para. is necessary or whether it can be deleted.

⁴¹¹ Corrections are to text as set out in para. 3 of A/CN.9/WG.III/WP.39.

⁴¹² Art. 22(2), formerly draft art. 16(2) in A/CN.9/WG.III/WP.32, has been moved to become art. 65 in the new chapter on limitation of liability.

⁴¹³ Text as set out in para. 5 of A/CN.9/WG.III/WP.39.

Article ~~20~~24. Notice of loss, damage, or delay⁴¹⁴[Variant A of paragraph 1⁴¹⁵

1. The carrier ~~shall be~~is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice⁴¹⁶ of loss of or damage to ~~for in connection with~~⁴¹⁷ the goods, indicating the general nature of such loss or damage, ~~shall have been~~was given [by or on behalf of the consignee] to the carrier or the performing party ~~who that~~ delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days][seven days][seven working days] at the place of delivery][seven consecutive days] after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection⁴¹⁸ of the goods by the consignee and the carrier or the performing party against ~~whom which~~ liability is being asserted.]

[Variant B of paragraph 1⁴¹⁹

1. Notice of loss of or damage to ~~for in connection with~~⁴²⁰ the goods, indicating the general nature of such loss or damage, ~~shall must~~ be given [by or on behalf of the consignee] to the carrier or the performing party ~~who that~~ delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days][~~a reasonable time~~]⁴²¹[___working days at the place of delivery] [___consecutive days] after the delivery of the goods. [A court [may] [~~shall must~~] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article ~~14~~17(1).] Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against ~~whom which~~ liability is being asserted.]
2. No compensation ~~shall be~~is payable under article ~~16~~22 unless notice of loss due to delay was given to the carrier within 21 consecutive days following delivery of the goods.
3. When the notice referred to in this article is given to the performing party that delivered the goods, it ~~shall have~~has the same effect as if that notice was given to

⁴¹⁴ Corrections are to text as set out in para. 9 of A/CN.9/WG.III/WP.39.

⁴¹⁵ As set out in footnote 39 of A/CN.9/WG.III/WP.39, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant A of para. 1 is the text in A/CN.9/WG.III/WP.32, but for the deletion of “[a reasonable time]” as decided at para. 75 of A/CN.9/552, and with the additions as noted.

⁴¹⁶ As set out in footnote 40 of A/CN.9/WG.III/WP.39, draft art. 3 of the draft convention states that the notice in, *inter alia*, draft para. 1 may be made using electronic communication; otherwise, it must be made in writing.

⁴¹⁷ “In connection with” deleted as unnecessary in this para.

⁴¹⁸ As set out in footnote 43 of A/CN.9/WG.III/WP.39, it was suggested in para. 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

⁴¹⁹ As set out in footnote 44 of A/CN.9/WG.III/WP.39, Variant B of para. 1 is the text at para. 66 of A/CN.9/552.

⁴²⁰ See *infra*, note 538.

⁴²¹ As set out in para. 75 of A/CN.9/552, the Working Group had decided to delete the phrase “[a reasonable time]” from the original text from which this variant was derived.

the carrier, and notice given to the carrier ~~shall have~~has the same effect as a notice given to a maritime performing party.

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

CHAPTER ~~67~~. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE BY SEA ~~[OR BY OTHER NAVIGABLE WATERS]~~

~~Article 22~~⁴²²

~~1. Notwithstanding the provisions of article 14(1) the carrier shall not be liable for loss, damage or delay arising or resulting from fire on the ship, unless caused by the fault or privity of the carrier.~~

~~2. Article 14 shall also apply in the case of the following events:~~

~~— (a) Saving or attempting to save life or reasonable measures to save or attempt to save property at sea;~~

~~— (b) Reasonable attempts to avoid damage to the environment;~~

~~— (c) Perils, dangers and accidents of the sea or other navigable waters.~~

Article ~~23~~²⁵. Deviation during sea carriage

[Variant A]⁴²³

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

2. ~~Where~~When under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this Convention.^{424]}

⁴²² Text deleted from A/CN.9/WG.III/WP.32, as set out in para 11 of A/CN.9/WG.III/WP.39, the contents of this draft art. has been merged with draft art. 17.

⁴²³ As set out in footnote 59 of A/CN.9/WG.III/WP.39, Variant A is the draft art. as set out at A/CN.9/WG.III/WP.32.

⁴²⁴ As set out in footnote 60 of A/CN.9/WG.III/WP.39 and in footnote 112 of A/CN.9/WG.III/WP.32, alternative language for this para. could read:

“Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this Convention.”

If such language is adopted, the Working Group may wish to consider whether para. 1 is necessary.

[Variant B]⁴²⁵

1. The carrier is not liable for loss, damage, or delay in delivery caused by any deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.
2. To the extent that a deviation constitutes a breach of the carrier's obligations under a legal doctrine recognized by national law or in this Convention, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of ~~an ocean-going vessel~~ a ship.
3. To the extent that a deviation constitutes a breach of the carrier's obligations, the breach has effect only under the terms of this Convention. In particular, a deviation does not deprive the carrier of its rights under this Convention except to the extent provided in article ~~1966~~.

Article ~~2426~~. Deck cargo on ships⁴²⁶

1. Goods may be carried on or above the deck of a ship only if:
 - (a) Such carriage is required by applicable laws or administrative rules or regulations, or
 - (b) They are carried in or on containers [fitted to carry cargo on deck] on decks that are specially fitted to carry such containers, or
 - (c) [In cases not covered by subparagraphs (a) or (b) of this ~~article~~paragraph,] the carriage on deck [is in accordance with the contract of carriage, or] complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.
2. If the goods have been shipped in accordance with subparagraphs 1(a) or (c), the carrier ~~shall is not be~~ liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to subparagraph 1(b), the carrier ~~shall be is~~ liable for loss of or damage to such goods, or for delay in delivery, under the terms of this Convention without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under paragraph 1, the carrier ~~shall be is~~ liable, irrespective of article ~~1417~~, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.⁴²⁷
3. If the goods have been shipped in accordance with subparagraph 1(c), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier ~~shall have has~~ the burden of proving that carriage on deck complies with subparagraph 1(c) and, if a negotiable transport document or a negotiable electronic transport record is issued, is not entitled to invoke that

⁴²⁵ As set out in footnote 61 of A/CN.9/WG.III/WP.39, Variant B is the draft art. as proposed at para. 38 of A/CN.9/WG.III/WP.34.

⁴²⁶ Corrections are to text as set out in para. 13 of A/CN.9/WG.III/WP.39.

⁴²⁷ As set out in footnote 63 of A/CN.9/WG.III/WP.39, para. 2 may need to be discussed in greater detail in conjunction with draft para. 17(4), however, changes to para. 17(4) may render this discussion unnecessary.

~~provision-subparagraph~~ against a third party that has acquired such negotiable transport document or electronic ~~transport~~ record in good faith.⁴²⁸

[4. If the carrier ~~is liable~~ under this article ~~24 is liable~~ for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided ~~for~~ in articles ~~1622, and 1864 and 66(1)~~; ~~however~~~~but~~, if the carrier and shipper [expressly] ~~have~~ agreed that the goods ~~will~~~~would~~ be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods ~~[that {exclusively}]~~~~[to the extent that such damage]~~ resulted from their carriage on deck]^{429,]⁴³⁰}

[Article ~~827~~. Carriage preceding or subsequent to sea carriage

1. ~~Where-When~~ a claim or dispute arises out of loss of or damage to goods or delay occurring solely during ~~the carrier's period of responsibility but either of the following periods:~~

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

(b) ~~from the time of~~~~After~~ their discharge from the ~~vessel~~~~ship~~ to the time of their delivery to the consignee; and, at the time of such loss, damage or delay, ~~there are~~ provisions of an international convention [or national law] ~~that:~~

(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable]⁴³¹, and

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

(iii) cannot be departed from by private contract either at all or to the detriment of the shipper, such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.]

[2. ~~The provisions under article 8 shall~~~~Paragraph 1 does~~ not affect the application of article ~~1864~~(2).⁴³²]

⁴²⁸ As set out in footnote 64 of A/CN.9/WG.III/WP.39, discussion of para. 3 and whether it should cover third-party reliance on non-negotiable transport documents and electronic transport records would continue after discussion of third-party rights and freedom of contract.

⁴²⁹ As set out in footnote 67 of A/CN.9/WG.III/WP.39, square brackets were placed around "that exclusively resulted from their carriage on deck". A further alternative has been added.

⁴³⁰ As set out in footnote 69 of A/CN.9/WG.III/WP.39, square brackets were placed around para. 4, for discussion at a future session, with further study of its relationship with draft art. 66.

⁴³¹ As set out in para. 55 of A/CN.9/WG.III/WP.21, this bracketed text reflected the situation under the 1980 Convention concerning International Carriage by Rail ("COTIF"). Once the 1999 Protocol for the Modification of COTIF enters into force, expected to be in the fall of 2005, the Working Group may wish to delete the bracketed language.

⁴³² If para. 64(2) is deleted, this para. should also be deleted.

[3. Article ~~827~~ applies regardless of the national law otherwise applicable to the contract of carriage.⁴³³]

CHAPTER ~~78~~. OBLIGATIONS OF THE SHIPPER

Article ~~2528~~. Delivery ~~ready~~-for carriage⁴³⁴

The shipper ~~shall~~must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.⁴³⁵

Article ~~2629~~. Carrier's obligation to provide information and instructions⁴³⁶

The carrier ~~shall~~must provide to the shipper, on its request [and in a timely manner]⁴³⁷, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article ~~2528~~.⁴³⁸ [The information and instructions so provided ~~shall~~must be accurate and complete.]⁴³⁹

Article ~~2730~~. Shipper's obligation to provide information, instructions and documents⁴⁴⁰

The shipper ~~shall~~must provide to the carrier [in a timely manner, such accurate and complete]⁴⁴¹ information, instructions, and documents as are reasonably necessary for:

⁴³³ As set out in para. 54 of A/CN.9/WG.III/WP.21, this para. is a conflict of law provision that was intended to safeguard the applicability of inland transport conventions. Further, as set out in footnotes 42 and 231 of A/CN.9/WG.III/WP.32, draft art. 27 inspired a request that a conflict of convention provision be inserted into chapter 19. Draft art. 89 was inserted in response to that request.

⁴³⁴ Text as set out in para. 14 of A/CN.9/WG.III/WP.39, including footnotes.

⁴³⁵ As set out in footnote 71 of A/CN.9/WG.III/WP.39, to improve the wording as suggested at paras. 122 and 123 of A/CN.9/552, the Working Group may wish to consider alternative language for the second sentence of draft art. 28:

"In the event the goods are delivered in or on a container or trailer packed by the shipper, this obligation extends to the stowage, lashing and securing of the goods in or on the container or trailer."

⁴³⁶ Text as set out in para. 15 of A/CN.9/WG.III/WP.39, including footnotes.

⁴³⁷ As set out in footnote 72 of A/CN.9/WG.III/WP.39, former draft art. 28 of A/CN.9/WG.III/WP.32 was deleted and replaced by a mention in draft art. 29 that the shipper should provide "[in a timely manner]" the information and instructions required.

⁴³⁸ As set out in footnote 73 of A/CN.9/WG.III/WP.39, further consideration might need to be given to the alternative wording at para. 128 of A/CN.9/552, "unless the carrier may reasonably assume that such information is already known to the shipper".

⁴³⁹ As set out in footnote 74 of A/CN.9/WG.III/WP.39, "[the information and instructions given must be accurate and complete]" has been added for future discussion.

⁴⁴⁰ Corrections are to text as set out in para. 16 of A/CN.9/WG.III/WP.39.

(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, ~~unless except to the extent that~~ the shipper may reasonably assume that such information is already known to the carrier⁴⁴²;

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

(c) The compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article ~~3438~~(1)(b) and (c); the name of the party to be identified as the shipper in the contract particulars; ~~and the name of the consignee, if any; or and the name of the person to whose order the transport document or electronic transport record is to be issued, if any,~~ unless the shipper may reasonably assume that such information is already known to the carrier.

~~Article 28.~~⁴⁴³

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

Article ~~29~~31. Basis of shipper's liability⁴⁴⁴

1. The shipper ~~shall be~~ liable⁴⁴⁵ for⁴⁴⁶ ~~loss resulting from~~ loss, damage [, delay]⁴⁴⁷ or injury caused by the goods, and ~~from a~~for breach of its obligations under article ~~2528~~ and paragraph ~~2730~~(a), [~~unless~~]~~unless and to the extent that~~ [~~and except to the extent that~~] the shipper proves that neither its fault nor the fault of any person ~~mentioned referred to~~ in article ~~3235~~ caused ~~{or contributed to}~~ the loss, damage [, delay] or injury.

⁴⁴¹ As set out in footnote 75 of A/CN.9/WG.III/WP.39, “[in a timely manner, such accurate and complete information, instructions and documents ...]” has been added for future discussion.

⁴⁴² As set out in footnote 76 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, but “except to the extent that the shipper may reasonably assume that such information is already known to the carrier” was added to the end of subpara. (a).

⁴⁴³ Text deleted from A/CN.9/WG.III/WP.32, as set out in para. 17 of A/CN.9/WG.III/WP.39. See *supra*, note 437.

⁴⁴⁴ Corrections are to text as set out in para. 18 of A/CN.9/WG.III/WP.39.

⁴⁴⁵ As set out in footnote 77 of A/CN.9/WG.III/WP.39, para. 31(1) has been redrafted to mirror the provision on carrier's liability at draft para. 17(1) of A/CN.9/WG.III/WP.36. The parties to whom the shipper is liable have been deleted in keeping with draft art. 17 and, as noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party as originally expressed in draft art. 29 in A/CN.9/WG.III/WP.32 might need to be reconsidered later.

⁴⁴⁶ The phrase “loss resulting from” was deleted to conform with the approach taken in draft art. 17.

⁴⁴⁷ As set out in footnote 78 of A/CN.9/WG.III/WP.39, “delay” arises by virtue of creating a mirror provision of draft art. 17, but it has been placed in square brackets since it has not been specifically discussed in the context of draft art. 31.

[Variant A of paragraph 2⁴⁴⁸

2. The shipper ~~shall be~~ liable⁴⁴⁹ for loss or damage caused by a breach of its obligations under paragraphs ~~27~~30(b) and (c).]

[Variant B of paragraph 2⁴⁵⁰

2. The shipper ~~shall be~~ deemed to have guaranteed to the carrier the ~~accuracy, timeliness, accuracy and completeness~~ at the time of receipt by the carrier of the ~~marks, number, quantity and weight, as furnished by him, and information, instructions and documents that the shipper is required to provide under paragraphs 30(b) and (c).~~ †The shipper ~~shall~~ must indemnify the carrier against all loss, damages and expenses arising or resulting from ~~inaccuracies in such particulars~~ any breach of obligations under paragraphs 30(b) and (c). The right of the carrier to such indemnity ~~shall~~ in no way limits ~~his~~ its responsibility under the contract of carriage to any person other than the shipper.]

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier ~~shall be~~ jointly liable to the consignee or the controlling party⁴⁵¹ for any such loss or damage [or injury].⁴⁵²

[Article ~~29 bis~~32. Material misstatement by shipper⁴⁵³

A carrier is not liable for delay in the delivery of, the loss of, or damage to †or in connection with‡ the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document ~~or electronic transport record.~~]⁴⁵⁴

~~Article 30.~~⁴⁵⁵

~~Variant A~~

⁴⁴⁸ As set out in footnote 80 of A/CN.9/WG.III/WP.39, a rule of strict liability was retained in square brackets in cases where the shipper failed to meet the requirements of subparas. (b) and (c) of draft art. 30.

⁴⁴⁹ See *supra*, note 445.

⁴⁵⁰ As set out in footnote 82 of A/CN.9/WG.III/WP.39, a provision similar to art. III.5 of the Hague Rules has been introduced in square brackets. This provision has been revised as indicated from the version set out in A/CN.9/WG.III/WP.39.

⁴⁵¹ As set out in footnote 83 of A/CN.9/WG.III/WP.39, the issue of liability to the consignee and the controlling party might need to be reconsidered later.

⁴⁵² As set out in footnote 84 of A/CN.9/WG.III/WP.39, para. 3 of Variant B of draft art. 31 (A/CN.9/WG.III/WP.32) was retained for future discussion. The Working Group may wish to consider whether this provision on concurrent causes should also mirror the corresponding para. in draft art. 17.

⁴⁵³ Corrections are to text as set out in para. 20 of A/CN.9/WG.III/WP.39.

⁴⁵⁴ As set out in footnote 90 of A/CN.9/WG.III/WP.39, draft art. 32 has been included in square brackets, and issues of causation and inclusion of damages for delay would be discussed at a future session. Further, draft art. 32 could be placed in chapter 6 on the liability of the carrier.

⁴⁵⁵ Text deleted from A/CN.9/WG.III/WP.32, as set out in para. 18 of A/CN.9/WG.III/WP.39.

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

Variant B

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

Variant C

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

Article ~~30~~33. Special rules on dangerous goods⁴⁵⁶

1. “Dangerous goods” means goods which by their nature or character are, or reasonably appear likely to become, a danger to persons or property or an illegal or unacceptable danger to the environment.
2. The shipper must mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such failure.
3. The shipper must inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier and any performing party for all loss, damages, delay and expenses directly or indirectly arising out of or resulting from such shipment.

Article ~~31~~34. Assumption of shipper’s rights and obligations⁴⁵⁷

If a person identified as “shipper” in the contract particulars, although not the shipper as defined in ~~article-paragraph 1(dh)~~, [accepts][receives][becomes a holder of] the transport document or electronic transport record, then such person is (a)

⁴⁵⁶ This text is thought to better reflect the discussion in and request of the Working Group as set out in paras. 146 to 148 of A/CN.9/552, and replaces the text proposed in para. 19 of A/CN.9/WG.III/WP.39.

⁴⁵⁷ Corrections are to text as set out in para. 21 of A/CN.9/WG.III/WP.39. As set out in footnote 91 of A/CN.9/WG.III/WP.39, further thought should be given to the scope of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known.

[subject to the responsibilities and liabilities] imposed on the shipper under this chapter and under article ~~5759~~, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter ~~4314~~.

Article ~~3235~~. ~~Responsibility for sub-contractors, employees and agents~~ Vicarious liability of the shipper⁴⁵⁸

The shipper ~~shall be responsible~~ is liable for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons ~~[except the carrier or performing parties]~~ who ~~that~~ act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. ~~Responsibility-Liability~~ is imposed on the shipper under this ~~provision-article~~ only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency.⁴⁵⁹

[Article 36. ~~Cessation of shipper's liability~~⁴⁶⁰

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

- (a) With respect to any liability under this chapter of the shipper or a person ~~mentioned-referred to~~ in article ~~3434~~; or
- (b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security⁴⁶¹ for the payment of such amounts.
- (c) To the extent that it conflicts with article ~~6362~~.⁴⁶²

⁴⁵⁸ Corrections are to text as set out in para. 22 of A/CN.9/WG.III/WP.39. Changes have been made to this provision to align it with art. 19, relating to the vicarious liability of the carrier.

⁴⁵⁹ As set out in footnote 94 of A/CN.9/WG.III/WP.39, the current text was maintained for future discussion, and questions regarding the interaction of this provision with para. 14 (2) and draft art. 32 should be considered at a future session.

⁴⁶⁰ Former para. 43(2) of A/CN.9/WG.III/WP.32, moved to this placement from the now-deleted Chapter 9 on freight.

⁴⁶¹ Given the deletion of former draft art. 45 from A/CN.9/WG.III/WP.32, the phrase "pursuant to art. 45 or otherwise" has been deleted from the draft art. in order to take into account that deletion.

⁴⁶² As set out in footnote 535, *infra*, former draft art. 62 of A/CN.9/WG.III/WP.32 was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

CHAPTER 89. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS⁴⁶³Article 3337. Issuance of the transport document or the electronic transport record

Upon delivery of the goods to the carrier or performing party:

(a) The consignor is entitled to obtain a transport document or, ~~if the carrier so agrees~~ subject to article 5(a), an electronic transport record evidencing the carrier's or performing party's receipt of the goods; and

(b) The shipper or, if the shipper ~~so indicates to instructs~~ the carrier, the person referred to in article 3134, is entitled to obtain from the carrier an appropriate negotiable transport document or, subject to paragraph 5(a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one. ~~If pursuant to article 3 the carrier and the shipper have agreed to the use of an electronic transport record, the shipper is entitled to obtain from the carrier a negotiable electronic transport record unless they have agreed not to use a negotiable electronic transport record or it is the custom, usage or practice in the trade not to use one.~~⁴⁶⁴

Article 3438. Contract Particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 3337 must include:

(a) A description of the goods;

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

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

(ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods⁴⁶⁵;

⁴⁶³ But for the indicated renumbering, drafting improvements and proposed titles for draft arts., as well as the adjustments that arose as a result of electronic commerce considerations and which were approved by the Working Group in para. 200 of A/CN.9/576 (for revisions to art. 37) and in paras. 207, 209 and 210 of A/CN.9/576 (for revisions to art. 39), this chapter remains largely unchanged from A/CN.9/WG.III/WP.32.

⁴⁶⁴ As set out in footnote 127 of A/CN.9/WG.III/WP.32, with respect to para. (a), it was acknowledged that, since not all transport documents as defined under draft art. 1(n) served the function of evidencing receipt of the goods by the carrier, it was important to make it clear that, under para. (a), the transport document should serve the receipt function.

⁴⁶⁵ As set out in footnote 129 of A/CN.9/WG.III/WP.32, the concern was expressed in para. 28 of A/CN.9/526 that this phrase might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase "as furnished by the shipper" with

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

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

(f) The date

- (i) on which the carrier or a performing party received the goods, or
- (ii) on which the goods were loaded on board the vesselship, or
- (iii) on which the transport document or electronic transport record was

issued.⁴⁶⁶

2. The phrase “apparent order and condition of the goods” in paragraph 1 refers to the order and condition of the goods based on:

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

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

Article ~~3539~~. Signature⁴⁶⁷

~~(a)1.~~ A transport document ~~shall~~must be signed by the carrier or a person having authority from the carrier.

~~(b)2.~~ An electronic transport record ~~shall~~must include ~~be authenticated by the~~ electronic signature of the carrier or a person having authority from the carrier. ~~For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier's authorization of the electronic record. Such electronic signature must identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.~~⁴⁶⁸

the phrase “if furnished by the shipper”.

⁴⁶⁶ As set out in footnote 130 of A/CN.9/WG.III/WP.32, it was suggested that the Working Group should consider redrafting para. 1 to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to draft art. 48, *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory elements, and to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

⁴⁶⁷ While this draft art. has been revised by the Working Group as indicated during its review of the electronic commerce aspects of the draft convention, the original text as set out in A/CN.9/WG.III/WP.32 attached the following at footnote 132: The Working Group may wish to consider whether “signature” should be defined as, for example, in para. 14(3) of the Hamburg Rules, particularly in light of modern practice.

⁴⁶⁸ As a consequence of its review of the electronic commerce provisions of the draft convention at its fifteenth session, these changes were approved for further discussion by the Working Group in paras. 205 and 207 of A/CN.9/576. The United Nations Model Law on Electronic Signatures 2001 defines an electronic signature as, “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory’s

Article 3640. Deficiencies in the contract particulars

1. The absence of one or more of the contract particulars referred to in article 3438(1), or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate ~~the—its~~ significance ~~thereof~~, then the date is considered to be:
 - (a) If the contract particulars indicate that the goods have been loaded on board a vesselship, the date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the vesselship; or
 - (b) If the contract particulars do not indicate that the goods have been loaded on board a vesselship, the date on which the carrier or a performing party received the goods.
- [3. If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vesselship, then the registered owner of the vesselship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage ~~which~~ that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]⁴⁶⁹
4. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipperconsignor, the transport document or electronic transport record is either prima facie or conclusive evidence under article 3943, as the case may be, that the goods were in apparent good order and condition at the time the shipper-consignor delivered them to the carrier or a performing party.

approval of the information contained in the data message.” Since this term only appears once in the draft convention, it is suggested that no definition is needed. The provision retains, however, the reference to the essential functions of the electronic signature (i.e. identifying the signatory and indicating its approval of the record). The only difference is the use of the word “authorization” rather than “approval” in the draft convention.

⁴⁶⁹ As set out in footnote 137 of A/CN.9/WG.III/WP.32., the prevailing view in the Working Group was that para. 3 identified a serious problem that must be treated in the draft convention, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep para. 3 in square brackets in the draft convention, and to discuss it in greater detail at a future date.

Article 374I. Qualifying the description of the goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information ~~mentioned—referred to~~ in article 3438(1)(a), 3438(1)(b) or 3438(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non-containerized goods

- (i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or
- (ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.

(b) For goods delivered to the carrier or a performing party in a closed container, unless⁴⁷⁰ the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate⁴⁷¹, the carrier may include a qualifying clause in the contract particulars with respect to

- (i) the leading marks on the goods inside the container, or
- (ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.

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

⁴⁷⁰ As set out in footnote 140 of A/CN.9/WG.III/WP.32, the phrase “unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate” has been moved to this position in the chapeau from its original position at the end of the para. in order to clarify that it is intended to apply to the entire para.

⁴⁷¹ As set out in footnote 141 of A/CN.9/WG.III/WP.32, another suggestion was that language along the lines of subpara. (a)(ii) should be included also in para. (b) to address the situation in which the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in para. 37 of A/CN.9/526 that the carrier that decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft convention should deal with the situation in which the carrier agreed not to qualify the description of the goods, for example, so as not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, when the carrier acting in bad faith had voluntarily agreed not to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

- (i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or
- (ii) the carrier can show that there was no ~~commercially~~ reasonable means of checking the weight of the container.⁴⁷²

Article ~~3842~~. Reasonable means of checking and good faith

For purposes of article ~~3741~~:

- (a) A “reasonable means of checking” must be not only physically practicable but also commercially reasonable.
- (b) The carrier acts in “good faith” when issuing a transport document or an electronic transport record if
 - (i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and
 - (ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.
- (c) The burden of proving whether the carrier acted in good faith when issuing a transport document or an electronic transport record is on the party claiming that the carrier did not act in good faith.

Article ~~3943~~. Prima facie and conclusive evidence

Except as otherwise provided in article ~~4044~~, a transport document or an electronic transport record that evidences receipt of the goods is:

- (a) Prima facie evidence of the carrier’s receipt of the goods as described in the contract particulars; and
- (b) Conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars
 - [(i)] if a negotiable transport document or a negotiable electronic transport record has been transferred to a third party acting in good faith [or

⁴⁷² As set out in footnote 129 of A/CN.9/WG.III/WP.32, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. However, it was thought that the word “commercially” was unnecessary in light of the definition in para. 42(a), and it was deleted.

(ii) Variant A of paragraph (b)(ii)⁴⁷³

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

(ii) Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic transport record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.]⁴⁷⁴

Article ~~40~~44. Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article ~~37~~41, then the transport document will-or electronic transport document does not constitute prima facie or conclusive evidence under article ~~39~~43 to the extent that the description of the goods is qualified by the clause.⁴⁷⁵

⁴⁷³ Variant A of subpara. (b)(ii) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

⁴⁷⁴ As set out in footnote 145 of A/CN.9/WG.III/WP.32, the prevailing view in the Working Group was to retain subpara. (b)(ii) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paras. 45 to 47 of A/CN.9/526. Variant B was proposed in A/CN.9/WG.III/WP.32 to respond to concerns that Variant A appeared to introduce a novel use for non-negotiable documents that was unknown in European law.

⁴⁷⁵ As set out in footnote 146 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider the alternative language for draft art. 44 suggested in paras. 153 and 154 of A/CN.9/WG.III/WP.21:

"If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under art. 43, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under para. 2."

It would then be necessary to add a new provision, perhaps as para. 2, which might provide:

"A qualifying clause in the contract particulars is effective for the purposes of para. 1 under the following circumstances:

(a) For non-containerized goods, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms.

(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of art. 41 will be effective according to its terms if

(i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and

(ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that

(1) a container was opened for the purpose of inspection,

(2) the inspection was properly witnessed, and

(3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection."

CHAPTER 9. FREIGHT⁴⁷⁶~~Article 41.~~

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

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

~~Article 42.~~~~Variant A~~

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

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

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

~~Variant B~~

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

⁴⁷⁶ Text of this chapter deleted from A/CN.9/WG.III/WP.32, as set out in para. 23 of A/CN.9/WG.III/WP.39. Note that former draft para. 43(2) from A/CN.9/WG.III/WP.32 was retained as agreed, but moved to Chapter 8: Obligations of the shipper, following draft art. 35, where it appears as new draft art. 36. Note also that former draft para. 45(1) from A/CN.9/WG.III/WP.32 has been retained, but that by virtue of the deletion of Chapter 9 on Freight, it will become draft art. 45, the final draft art. in chapter 9: Transport documents and electronic transport records.

~~Article 43.~~⁴⁷⁷

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

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

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

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

~~— (c) To the extent that it conflicts with article 62.~~

[Article 44.5. “Freight prepaid”⁴⁷⁸

~~1. If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement “freight prepaid” or a statement of a similar nature, then neither the holder nor the consignee, shall be liable for the payment of the freight. This provision shall not apply if the holder or the consignee is also the shipper.]~~

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

~~2. Variant A of paragraph 2~~

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

~~Variant B of paragraph 2~~

~~If the contract particulars in a transport document or an electronic record contain the statement “freight collect”, or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes~~

⁴⁷⁷ Former draft para. 43(2) from A/CN.9/WG.III/WP.32 retained as agreed and moved to end of Chapter 8, where it appears as draft art. 36.

⁴⁷⁸ Former draft para. 44(1) from A/CN.9/WG.III/WP.32 retained as agreed (see paras. 162 to 164 of A/CN.9/552) in draft art. 45.

~~delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight.~~

~~Article 45.~~

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

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

~~— (b) any damages due to the carrier under the contract of carriage;~~

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

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

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

CHAPTER 10. DELIVERY TO THE CONSIGNEE⁴⁷⁹

Article 46. Obligation to accept delivery

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage]⁴⁸⁰ ~~shall~~must accept delivery of the goods at the time and location ~~mentioned-referred to~~ in article 711(34). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party ~~will~~acts in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier [or of the performing party]⁴⁸¹ done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.]⁴⁸²

⁴⁷⁹ The original text of this chapter with drafting improvements and corrections suggested in red-line underline and strike-out, is taken from A/CN.9/WG.III/WP.32.

⁴⁸⁰ As set out in footnote 160 of A/CN.9/WG.III/WP.32, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

⁴⁸¹ As set out in footnote 161 of A/CN.9/WG.III/WP.32, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of draft art. 46 could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”.

⁴⁸² As set out in footnote 162 of A/CN.9/WG.III/WP.32, suggestions were made that draft art. 46

Article 47. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee ~~shall confirm delivery~~must acknowledge receipt⁴⁸³ of the goods ~~by from~~ the carrier or the performing party in the manner that is customary at the place of destination.

Article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

~~If~~When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply:

(a) If the name and address of the consignee is not ~~mentioned-referred~~ to in the contract particulars the controlling party ~~shall~~must advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;⁴⁸⁴

(b) Variant A of paragraph (b)⁴⁸⁵

The carrier ~~shall~~must deliver the goods at the time and location mentioned in article ~~71(34)~~ to the consignee upon the consignee's production of proper identification;⁴⁸⁶

Variant B of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. As a prerequisite for delivery, the consignee ~~shall~~must produce proper identification.

Variant C of paragraph (b)

The carrier must deliver the goods at the time and location mentioned in article 11(4) to the consignee. The carrier may refuse delivery if the consignee does not produce proper identification.

and draft arts. 51, 52 and 53 could be merged, or that to reduce the confusion caused by the interplay of draft art. 46 and draft arts. 51, 52, and 53, the second sentence of draft art. 46 could be deleted, and draft arts. 51, 52, and 53 could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

⁴⁸³ It was thought that deletion of the phrase "shall confirm delivery" and replacement with the phrase "must acknowledge receipt" was preferable since the consignee could confirm its own act, but not the fulfilment of the carrier's obligation.

⁴⁸⁴ As set out in footnote 164 of A/CN.9/WG.III/WP.32, the suggestion made in para. 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to draft subpara. 38(1)(f), *supra*.

⁴⁸⁵ As set out in footnote 165 of A/CN.9/WG.III/WP.32, Variant A of para. (b) is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

⁴⁸⁶ As set out in footnote 166 of A/CN.9/WG.III/WP.32, the suggestion made in para. 76 of A/CN.9/526 that para. (b) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier, has been incorporated in the text of both Variant B and C.

(c) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier ~~shall-must so~~ advise the controlling party or, if it, after reasonable effort, is unable to identify the controlling party, the shipper, ~~accordingly~~. In such event, ~~the-such~~ controlling party or shipper ~~shall-must~~ give instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person ~~mentioned-referred to~~ in article ~~3134~~ ~~shall-beis~~ deemed to be the shipper for purposes of this paragraph. The carrier that delivers the goods upon instruction of the controlling party or the shipper under this paragraph is discharged from its obligations to deliver the goods under the contract of carriage.⁴⁸⁷

Article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

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

(a) (i) Without prejudice to article 46 the holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier ~~shall-must~~ deliver the goods at the time and location ~~mentioned-referred to~~ in article ~~711(34)~~ to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(ii) Without prejudice to article 46 the holder of a negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier ~~shall-must~~ deliver the goods at the time and location ~~mentioned-referred to~~ in article ~~711(34)~~ to such holder if it demonstrates in accordance with the ~~rules of procedures mentioned-referred to~~ in article 6 that it is the holder of the electronic transport record. Upon such delivery, the electronic transport record ceases to have any effect or validity.⁴⁸⁸

(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier ~~shall-must so~~ advise ~~accordingly~~ the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper ~~shall-must~~ give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or

⁴⁸⁷ As set out in footnote 167 of A/CN.9/WG.III/WP.32, a suggestion was made during the consideration of draft para. 49(b) and (c) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as para. (c).

⁴⁸⁸ As set out in footnote 168 of A/CN.9/WG.III/WP.32, subject to the note of caution raised in para. 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in para. 81 of A/CN.9/526, the Working Group found the substance of paras. (a)(i) and (ii) to be generally acceptable.

the shipper, then the person ~~mentioned-referred to~~ in article 3134 shall be deemed to be the shipper for purposes of this paragraph.⁴⁸⁹

(c) [Notwithstanding ~~the provision of~~ paragraph (d) ~~of this article~~,]⁴⁹⁰ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) ~~of this article shall be~~ discharged from its obligation to deliver the goods under the contract of carriage ~~to the holder~~⁴⁹¹, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the rules of procedures referred to in article 6, that it is the holder.

Variant A of paragraph (d)⁴⁹²

(d) [Except as provided in paragraph (c) ~~above~~]⁴⁹³ if the delivery of the goods by the carrier at the place of destination ~~takes place~~occurs without the surrender of the negotiable transport document ~~being surrendered~~ to the carrier or without the demonstration referred to in paragraph (a)(ii) ~~above~~, a ~~holder who person that~~ becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to ~~these goods~~them pursuant to any contractual or other arrangement other than the contract of carriage ~~will only~~ acquires rights [against the carrier]⁴⁹⁴ under the contract of carriage only if: (i) the passing of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods ~~; or (ii)~~ unless such ~~holder person~~ a holder did not have ~~or and~~ could not

⁴⁸⁹ As set out in footnote 169 of A/CN.9/WG.III/WP.32, the suggestion made in para. 82 of A/CN.9/526, that the carrier should have the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery appear to be already addressed by the text of para. (b).

⁴⁹⁰ As set out in footnote 170 of A/CN.9/WG.III/WP.32, it was suggested that it was unclear how paras. (c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. A link between paras. (c) and (d) already exists, since para. (c) starts with the words, "Notwithstanding paragraph (d)". Other alternatives are possible, for example, to start para. (d) with the words, "Except as provided", or to add at the end of that para. a new sentence reading, "This paragraph does not apply where the goods are delivered by the carrier pursuant to paragraph (c)." The various alternatives are provisionally inserted in square brackets.

⁴⁹¹ It is suggested that the square brackets around "to the holder", which appeared in the original text in A/CN.9/WG.III/WP.21, be deleted and the phrase retained in order to clarify the text.

⁴⁹² Variant A is the text as it appeared in A/CN.9/WG.III/WP.32, revised as indicated.

⁴⁹³ See *supra*, note 490.

⁴⁹⁴ As set out in footnote 172 of A/CN.9/WG.III/WP.32, the first concern expressed in para. 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. A solution might be to indicate in subpara. (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under draft art. 13, but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for draft art. 61, *infra*. The second concern expressed in para. 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase "could not reasonably have had knowledge of such delivery" has not specifically been addressed.

reasonably have had knowledge of such delivery. [This paragraph does not apply ~~where~~ when the goods are delivered by the carrier pursuant to paragraph (c) ~~above~~.]⁴⁹⁵

Variant B of paragraph (d), which comprises (d) and (e)⁴⁹⁶

(d) If the goods are delivered pursuant to paragraph (c), a person that becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to them pursuant to any contractual or other arrangement other than the contract of carriage acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods, when only the transfer of the negotiable transport document or negotiable electronic transport record was effected in pursuance of contractual or other arrangements made before such delivery of the goods.

(e) Notwithstanding paragraphs (c) and (d), the holder that did not have or could not reasonably have had knowledge of such delivery at the time it became a holder acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record.

Article 50. Failure to give adequate instructions⁴⁹⁷

~~(e)~~ If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods for in cases where under articles 48 and 49 or if the controlling party or the shipper cannot be found,⁴⁹⁸ the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles ~~5051, 5152~~ and ~~5253~~.

Article 5051. When goods are undeliverable

1. The carrier is entitled to exercise the rights and remedies referred to in paragraph 2 at the risk and expense⁴⁹⁹ of the person entitled to the goods. ~~If~~ the goods have arrived at the place of destination and:

(a) ~~the goods are not actually taken over by~~ The consignee did not actually accept delivery of the goods under this chapter at the time and location

⁴⁹⁵ See *supra*, note 490.

⁴⁹⁶ Variant B is proposed as improved drafting of the same principles set out in Variant A.

⁴⁹⁷ It is suggested that the clarity of the text is improved by placing the text of draft para. 49(e) in a separate article as draft art. 50.

⁴⁹⁸ As set out in footnote 174 of A/CN.9/WG.III/WP.32, this addition has been made on the basis of the suggestion in para. 89 of A/CN.9/526 that para. (e) should be aligned with para. (b) through the insertion of this phrase. Further adjustments have been made, and the square brackets removed, in order to clarify the text.

⁴⁹⁹ As set out in footnote 176 of A/CN.9/WG.III/WP.32, concern was expressed that when the carrier exercised its rights under draft art. 51 it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase "and expense" in para. 1 is intended to meet these concerns.

~~mentioned referred to~~ in article 711(34) [and no express or implied contract has been concluded between the carrier or the performing party and the consignee ~~that succeeds to the contract of carriage with respect to the custody of the goods~~]⁵⁰⁰; or

(b) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee;

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

2. ~~Under the circumstances specified~~The rights and remedies referred to in paragraph 1, ~~the carrier is entitled, at the risk and account and at the expense⁵⁰¹ of the person entitled to the goods, to exercise some or all of the following rights and remedies are:~~

(a) To store the goods at any suitable place;

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

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

3. If the goods are sold under paragraph 2(c), the carrier must hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any deduct from the proceeds of the sale the amount necessary to

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

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

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

Article 5452. Notice of arrival at destination

The carrier is ~~only~~ allowed to exercise the rights referred to in article 5051 only after it has given ~~a~~ reasonable advance⁵⁰² notice that the goods have arrived at the

⁵⁰⁰ As set out in footnote 175 of A/CN.9/WG.III/WP.32, concern was expressed with respect to the phrase “no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage” as confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

⁵⁰¹ As set out in footnote 176 of A/CN.9/WG.III/WP.32, concern was expressed that when the carrier exercised its rights under draft art. 51 it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase “and expense” in para. 1 is intended to meet these concerns.

⁵⁰² As set out in footnote 177 of A/CN.9/WG.III/WP.32, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase “reasonable

place of destination to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper ~~that the goods have arrived at the place of destination.~~

Article ~~52~~53. Carrier's liability for undeliverable goods

When exercising its rights referred to in article ~~50~~51(2), the carrier or a performing party ~~shall be~~is liable⁵⁰³ for loss of or damage to ~~these~~ goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]⁵⁰⁴.

CHAPTER 11. RIGHT OF CONTROL⁵⁰⁵

Article ~~53~~54. Definition of right of control

~~{The right of control of the goods [means][is][includes][comprises] the right to agree with the carrier to a variation of the contract of carriage and the right under the contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility as stated in article 71(1).}~~⁵⁰⁶ Such right ~~to give the carrier instructions comprises rights includes and is limited~~ to:

(a) The right to give or modify instructions in respect of the goods ~~{that do not constitute a variation of the contract of carriage}~~⁵⁰⁷;

(b) The right to demand delivery of the goods ~~[before their arrival at the place of destination][at an intermediate port or place en route]~~⁵⁰⁸; and

advance" before the word "notice" in draft art. 52 is intended to meet these concerns.

⁵⁰³ As set out in footnote 178 of A/CN.9/WG.III/WP.32, the concern expressed in para. 94 of A/CN.9/526 that the wording of draft art. 53 could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words "acts as an agent of the person entitled to the goods but without any liability" and the addition of the words "is only liable", is intended to meet this concern.

⁵⁰⁴ As set out in footnote 179 of A/CN.9/WG.III/WP.32, it was suggested that the phrase "or of the performing party" be added after the phrase "personal act or omission of the carrier", and that the word "personal" be deleted. Both of these suggestions have been adopted in the text..

⁵⁰⁵ The original text of this chapter, with drafting improvements, proposed variants and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

⁵⁰⁶ As set out in footnote 181 of A/CN.9/WG.III/WP.32, the Working Group may wish to consider whether this sentence should be somewhat altered and moved to the draft para. 1(l) definition of "right of control".

⁵⁰⁷ As set out in footnote 182 of A/CN.9/WG.III/WP.32, the concern was raised in para. 102 of A/CN.9/526 that the phrase "give or modify instructions...that do not constitute a variation of the contract" might be read as contradictory. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or "normal" modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. It is suggested that moving para. (d) to a separate art. in draft art. 55 may alleviate this concern.

⁵⁰⁸ This proposed alternative in square brackets is intended to clarify that the delivery of the

(c) The right to replace the consignee by any other person including the controlling party;⁵⁰⁹

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

[Article 55. Variations to the contract of carriage

1. The controlling party is the exclusive person that may exercise the right of control and may agree with the carrier to a variation of the contract of carriage other than the variations referred to in article 54 (b) and (c).⁵¹⁰

2. Any variation to the contract of carriage, including those referred to in article 54 (b) and (c), upon becoming effective, must be stated in the [negotiable] transport document or incorporated in the [negotiable] electronic transport record and be initialed or signed in accordance with article 39.⁵¹¹

Article 54~~56~~. Applicable rules based on transport document or electronic transport record issued

1. When no negotiable transport document or no negotiable electronic transport record is issued, the following rules apply:

(a) The shipper is the controlling party unless the shipper [and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party]⁵¹².

goods before arrival at destination is not meant to be any change of destination, but only delivery at a place en route.

⁵⁰⁹ As set out in footnote 180 of A/CN.9/WG.III/WP.32, the concerns raised in para. 103 of A/CN.9/526 that para. (d) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. In order to address those concerns and to avoid confusion between the right of control and the right to agree with the carrier on variations to the contract of carriage, it is suggested that former para. 54(d) be moved to a separate art. in draft art. 55. It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition based upon it is included in draft para. 1(l).

⁵¹⁰ Para. 1 includes former para. 54(d), as well as text to emphasize the exclusivity of the position of the controlling party.

⁵¹¹ Para. 2 is suggested as desirable to ensure that amendments to the contract of carriage are signed or, at least initialed, as is the current practice. Should this proposal be accepted by the Working Group, it is suggested that reference be made to the draft art. 39 signature requirement. Draft paras. 56(2)(d) and (3)(c) have been deleted in light of this proposed para. 2.

⁵¹² As set out in footnote 184 of A/CN.9/WG.III/WP.32, the question was raised in para. 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, para. 1(b) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words "unless the shipper" in square brackets for possible deletion and inserting instead, in square brackets, the text

(b) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor [or the transferee] ~~shall~~ or, if applicable law permits, the transferee ~~must~~ ⁵¹³ notify the carrier of such transfer.

(c) When the controlling party exercises the right of control in accordance with article ~~535~~ 4, it ~~shall~~ must produce proper identification.

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]⁵¹⁴

2. When a negotiable transport document is issued, the following rules apply:

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

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article ~~596~~ 1, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(c) In order to exercise the right of control, the holder ~~shall~~ must, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] ~~shall~~ must be produced, failing which the right of control cannot be exercised.⁵¹⁵

“designates the consignee or another person as the controlling party”.

⁵¹³ As set out in footnote 185 of A/CN.9/WG.III/WP.32, the concern mentioned in para. 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words “or the transferee” para. 1(b). This phrase is placed in square brackets, along with alternative text consistent with that approved for further discussion in draft art. 63.

⁵¹⁴ As set out in footnote 186 of A/CN.9/WG.III/WP.32, the controlling party remained in control of the goods until their final delivery. However, nothing is said in draft art. 56 regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic transport record is issued. It is thought that something could be said to take care of the observation that has been made, and para. 1(d) has been added. Note, however, that para. 106 of A/CN.9/526 also notes the concern that the common shipper’s instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since art. 54 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under art. 11, it may be unnecessary to state when the right of control ends.

⁵¹⁵ As set out in footnote 188 of A/CN.9/WG.III/WP.32, the Working Group was in agreement that para. 2(c) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be

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

3. When a negotiable electronic transport record is issued:

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

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

~~—(e)— Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated in the electronic transport record.—~~

4. Notwithstanding article ~~6263~~⁵¹⁶, a person, not being the shipper or the person referred to in article ~~3434~~, that transferred the right of control without having exercised that right, ~~shall-is~~ upon such transfer ~~be~~ discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Convention.

Article ~~5557~~. Carrier's execution of instruction

1. Variant A of paragraph 1, including para. 1 bis⁵¹⁷

Subject to paragraphs 1 bis, 2 and 3 ~~of this article, if the carrier must execute~~ any instruction ~~mentioned-referred to~~ in article ~~5354~~⁵¹⁸ ~~(a), (b) or (c) if it:~~

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

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

produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added para. 2(c).

⁵¹⁶ Reference was to draft art. 62 of A/CN.9/WG.III/WP.32, which was deleted in favour of draft art. 61 bis, which has been renumbered as draft art. 63.

⁵¹⁷ Variant A of para. 1 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. As set out in footnote 192 of A/CN.9/WG.III/WP.32, the Working Group generally agreed that para. 1 should be recast to reflect the views and suggestions in paras. 114 to 116. It was agreed that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session, and this has been attempted in Variant B.

⁵¹⁸ Reference to "(a),(b) or (c)" has been deleted in light of the drafting proposal to move para. 54(d) to a separate provision in draft art. 55.

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

~~1 bis. then the carrier shall execute the instruction.~~ If it is reasonably expected that one or more of the conditions mentioned-referred to in subparagraphs (a), (b), and (c) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.⁵¹⁹

Variant B of paragraph 1

Subject to paragraphs 2 and 3 of this article, the carrier shall be bound to must execute the instructions mentioned-referred to in article 5354⁵²⁰ (a), (b), and (c) if:

- (a) The person giving such instructions is entitled to exercise the right of control;
- (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
- (c) The instructions will not interfere with the normal operations of the carrier or a performing carrier party.⁵²¹

2. In any event, the controlling party shall-must reimburse⁵²² the carrier, performing parties, and any persons interested in other goods carried on the same voyage or journey for any additional expense that they may incur and must indemnify them against any loss or damage that they may suffer as a result of executing any instruction under this article.⁵²³

⁵¹⁹ Para. 1 bis was created out of the final sentence of Variant A of para. 1 purely as a drafting suggestion with no substantive change intended.

⁵²⁰ See note 518, *supra*.

⁵²¹ Variant B was suggested in A/CN.9/WG.III/WP.32 to respond to concerns set out in footnote 193 of A/CN.9/WG.III/WP.32. To avoid a contradiction between para. 1(c) and draft para. 54(b) with respect to the right of control and the possible generation of "additional expenses", it was suggested that either the carrier should be under no obligation to execute the instruction received under draft para. 54(b) or that para. 1(c) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses. Further, as noted in para. 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of para. 1(c). In view of these suggestions, para. 1 could be reworded as indicated, and the right of the carrier under para. 3 could be made more stringent, as indicated *infra*, note 524. In addition, para. 1(c) has been deleted.

⁵²² As set out in footnote 194 of A/CN.9/WG.III/WP.32, the notion of "indemnity" inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of "remuneration", which was more in line with the rightful exercise of its right of control by the controlling party.

⁵²³ As set out in footnote 195 of A/CN.9/WG.III/WP.32, the changes to para. 2 have been made in view of the suggestion in para. 117 of A/CN.9/526 that the new structure of the para. should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

3. ~~At the request of the carrier, the controlling party must provide security⁵²⁴ for the amount of the reasonably expected additional expense, loss or damage. [If the carrier is entitled to obtain security from the controlling party if it:~~

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

(b) Is nevertheless willing to execute the instruction.]
~~then the carrier is entitled to obtain security from the controlling party.] If requested by the carrier, the controlling party shall provide security for the amount of the reasonably expected additional expense, loss, or damage.~~

4. The carrier ~~shall be~~ liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in breach of its obligation under paragraph 1 ~~of this article~~.⁵²⁵

Article ~~5658~~. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article ~~5354~~(b) are deemed to be delivered at the place of destination and the provisions of chapter 10 relating to such delivery, ~~as laid down in chapter 10,~~ are applicable to such goods.

Article ~~5759~~. Obligation to provide information, instructions or documents to carrier

If ~~the carrier or a performing party~~ during the period that ~~the carrier or a performing party~~ ~~it has custody of~~ holds the goods ~~in its custody, the carrier or a performing party~~ reasonably requires information, instructions, or documents in addition to those referred to in article ~~2730~~(a), the controlling party, on request of the carrier or such performing party, ~~shall~~ must provide such information.⁵²⁶ If the carrier, after reasonable effort, is unable to identify and find the controlling party; or the controlling party is unable to provide adequate information, instructions, or

⁵²⁴ As set out in footnote 196 of A/CN.9/WG.III/WP.32, although para. 3 was found “generally acceptable”, as noted in para. 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on draft para. 57(1). See note 521, *supra*.

⁵²⁵ As set out in footnote 197 of A/CN.9/WG.III/WP.32, a question was raised regarding the nature of the obligation incurred by the carrier under draft art. 57, and whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft convention should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new para. 4 has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

⁵²⁶ As set out in footnote 199 of A/CN.9/WG.III/WP.32, the suggestion to add reference to the performing party in addition to the carrier was generally supported. In view also of the recommendation mentioned in para. 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of draft art. 59.

documents to the carrier, ~~the obligation to do so shall be on~~ the shipper or the person referred to in article ~~3434 must do so~~.

Article ~~5860~~. Variation by agreement

Articles ~~5354~~(b) and (c), and ~~5557~~ may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article ~~5456~~(1)(b). If a negotiable transport document or a negotiable electronic transport record is issued, any agreement referred to in this ~~paragraph~~ article must be stated or incorporated⁵²⁷ in the contract particulars.

CHAPTER 12. TRANSFER OF RIGHTS⁵²⁸

Article ~~5961~~. When a negotiable transport document or negotiable electronic transport record is issued

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

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

(b) If a bearer document or a blank endorsed document, without endorsement, or,

(c) If a document made out to the order of a named ~~party-person~~ and the transfer is between the first holder and such named ~~partyperson~~, without endorsement.⁵²⁹

2. If a negotiable electronic transport record is issued, its holder is entitled to transfer the rights incorporated in such electronic transport record, whether it be made out to order or to the order of a named ~~partyperson~~, by ~~passing~~transferring the electronic transport record in accordance with the ~~rules-of-procedures~~ referred to in article 6.⁵³⁰

⁵²⁷ As set out in footnote 200 of A/CN.9/WG.III/WP.32, there was broad support in the Working Group that the revised draft of art. 60 should avoid suggesting any restriction to the freedom of parties to derogate from chapter 11. Further, it appears to be implied that the last sentence of draft art. 60 should apply only if a negotiable document or electronic transport record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

⁵²⁸ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

⁵²⁹ As set out in footnote 201 of A/CN.9/WG.III/WP.32, there was strong support in the Working Group to maintain the text of draft para. 61(1) as drafted in order to promote harmonization and to accommodate negotiable electronic transport records. The concern raised in para. 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

⁵³⁰ As set out in footnote 202 of A/CN.9/WG.III/WP.32, para. 2 was discussed during the fifteenth session of the Working Group in conjunction with the other provisions in the draft convention regarding electronic transport records.

Article ~~606~~². Liability of holder

1. Without prejudice to article ~~575~~⁹, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of ~~becoming~~^{being} a holder.

2. Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes [any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record] [the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic transport record].⁵³¹

3. For the purpose of paragraphs 1 and 2 [and article 46]⁵³², ~~any~~^a holder that is not the shipper ~~and that does not exercise any right under the contract of carriage solely by reason of the fact that it:~~

(a) Under article ~~47~~⁴ agrees with the carrier to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document, or

(b) Under article ~~596~~¹ transfers its rights,
~~does not exercise any right under the contract of carriage for the purpose of paragraphs 1 and 2.~~

~~Article 61.~~⁵³³

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

~~Article 62.~~⁵³⁴

⁵³¹ As set out in footnote 204 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of para. 2 with due consideration being given to the views expressed. However, the views expressed in the preceding paras. 137 to 139 of A/CN.9/526 were not consistent. Those that favoured a revision of the text requested that the subpara. stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract, and an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under draft art. 28).

⁵³² Inclusion of the text in square brackets will depend upon the decision of the Working Group regarding the inclusion of the bracketed text in draft art. 46.

⁵³³ Text deleted from A/CN.9/WG.III/WP.32 as agreed by the Working Group in para. 213 of A/CN.9/576.

~~[If the transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record has been issued includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor shall not be discharged from liability unless with the consent of the carrier.]~~

Article ~~61 bis~~⁵³⁵ When no negotiable transport document or negotiable electronic transport record is issued

~~1.~~ 1. If no negotiable transport document ~~and or~~ no negotiable electronic transport record is issued, the following paragraphs apply to the transfer of rights under a contract of carriage:

(a) The transfer is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer;

(b) ~~[However, t~~The transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage; ~~and]~~

~~2.~~ (c) Regardless of the law applicable pursuant to paragraphs 4(a) and (b),

(i) A ~~the~~ transfer that is otherwise permissible under the applicable law may be made by electronic means;

(ii) In any event, the transfer must be notified to the carrier by the transferor or, if applicable law permits, by the transferee;⁵³⁶ and

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

⁵³⁴ Text deleted from A/CN.9/WG.III/WP.32 as agreed by the Working Group in para. 213 of A/CN.9/576.

⁵³⁵ Draft art. 63, formerly draft art. 61 *bis*, has replaced draft arts. 61 and 62 from A/CN.9/WG.III/WP.32, as agreed by the Working Group in para. 213 of A/CN.9/576, following its consideration of the electronic commerce aspects of art. 63, as set out in para. 12 of A/CN.9/WG.III/WP.47, and its consideration of replacing draft arts. 61 and 62 with draft art. 63 in paras. 212 and 213 of A/CN.9/576.

⁵³⁶ As set out in footnote 57 of A/CN.9/WG.III/WP.47, while notification of the transfer by the transferor was a common rule, some jurisdictions require the notification of the transfer to be accomplished by the transferee. It was therefore suggested to substitute the phrase "either by the transferor or the transferee" with the phrase "by the transferor or, if other applicable law permits, by the transferee", so as to set the burden of notification on the transferor, while preserving the possibility of a notification by the transferee, where permissible.

CHAPTER 13: LIMITATION OF LIABILITY

Article ~~18~~64. ~~Limits-Basis of limitation~~ of liability⁵³⁷

1. Subject to articles ~~16(2)~~65 and 66(1), the carrier's liability ~~for breaches of its obligations under this Convention~~⁵³⁸ ~~for loss of or damage to~~ ~~[or in connection with] the goods~~ is limited to [...] units of account per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except ~~where-when~~ the nature and value of the goods ~~has-have~~ been declared by the shipper before shipment and included in the contract particulars, or ~~where-when~~ a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

Variant A of paragraph 2⁵³⁹

[2. Notwithstanding paragraph 1, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]⁵⁴⁰ during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable under article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, then the carrier's liability for such loss, damage, [or delay] is limited according to the limitation terms of any international convention [or national law]⁵⁴¹ that would have been applicable if the place where the damage occurred had been established, or the limitation terms of this Convention, whichever would result in the highest limitation amount.]

Variant B of paragraph 2⁵⁴²

[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]⁵⁴³ during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national]⁵⁴⁴ mandatory provisions that govern the different parts of the transport ~~shall apply~~ies.]

⁵³⁷ Corrections are to text of paras. 1 and 3, and Variant B of para. 2 as set out in para. 6 of A/CN.9/WG.III/WP.39; Variant A of para. 2 is proposed new text.

⁵³⁸ The addition of breaches of the carrier's obligations is thought to have made the reference to "[or in connection with]" the goods unnecessary.

⁵³⁹ Variant A is intended as a clarification of the text of Variant B that appeared in para. 6 of A/CN.9/WG.III/WP.39, and is not intended to change the suggested approach.

⁵⁴⁰ See, *infra*, note 543.

⁵⁴¹ Text placed in square brackets to mirror the text in art. 27(1), pending a decision by the Working Group.

⁵⁴² Variant B is the text as it appeared in para. 6 of A/CN.9/WG.III/WP.39.

⁵⁴³ As set out in footnote 16 of A/CN.9/WG.III/WP.39, draft para. 2 was maintained in square brackets, and reference to delay in delivery was introduced in square brackets, for future discussion.

⁵⁴⁴ See, *supra*, note 541.

3. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods,⁵⁴⁵ the packages or shipping units enumerated in the contract particulars as packed in or on such ~~container-article of transport~~ are deemed packages or shipping units. If not so enumerated, the goods in or on such ~~container-article of transport~~ are deemed one shipping unit.

4. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts ~~mentioned-referred to~~ in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.⁵⁴⁶

Article 16(2)65. Liability for loss caused by delay⁵⁴⁷

Variant A⁵⁴⁸

Subject to paragraph 66(2), compensation for physical loss of or damage to the goods caused by delay must be calculated in accordance with article 23 and[, unless otherwise agreed,] liability⁵⁴⁹ for economic loss caused by delay is limited to an amount equivalent to [one times] the freight payable on the goods delayed. The total amount payable under this article and

⁵⁴⁵ As set out in footnote 17 of A/CN.9/WG.III/WP.39, the definition of “container” in draft art. 1 might need to be further considered to ensure that it covered pallets. The text proposed for addition mirrors that of art. IV.5 of the Hague-Visby Rules and of art. 6(2) of the Hamburg Rules.

⁵⁴⁶ The text of para. 4 is substantially the same as para. 1 of the text adopted on a non-mandatory basis by the United Nations Commission on International Trade Law (UNCITRAL) at its fifteenth session (A/37/17, paras. 53-55 and 63, and Annex I, reproduced in UNCITRAL Yearbook, Vol. XIII: 1982, pp.10-11) as preferred text for the unit of account provision in the preparation of future international conventions containing limitation of liability provisions. The Working Group may wish to consider the addition of the following para., which is para. 2 of the text adopted in 1982 by the Commission:

“5. The calculation referred to in the last sentence of paragraph 4 is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for amounts in this article as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.”

⁵⁴⁷ Former draft art. 16(2) as it appeared in A/CN.9/WG.III/WP.32 was moved here to become a separate art. in chapter 13.

⁵⁴⁸ Variant A is based on the suggested alternative wording for the first sentence of para. 2 set out in footnote 11 of A/CN.9/WG.III/WP.39. No change is intended but for the clarification of the wording regarding consequential damages as suggested in para. 25 of A/CN.9/552.

⁵⁴⁹ The word “liability” is suggested to make the text consistent with the new chapter created for “limitation of liability”.

paragraph 64(1) may not exceed the limit that would be established under paragraph 64(1) in respect of the total loss of the goods concerned.

Variant B⁵⁵⁰

~~2. Subject to paragraph 66(2). Unless~~ otherwise agreed,⁵⁵¹ if delay in delivery causes [consequential]⁵⁵² loss not resulting from loss of or damage to the goods carried and hence not covered by article ~~1723~~, the ~~amount payable as compensation liability~~⁵⁵³ for such loss ~~shall be~~ limited to an amount equivalent to [one times]⁵⁵⁴ the freight payable on the goods delayed. The total amount payable under this ~~provision article~~ and article ~~1864(1) shall may~~ not exceed the limit that would be established under article ~~1864(1)~~ in respect of the total loss of the goods concerned.

Article ~~1966~~. Loss of the right to limit liability⁵⁵⁵

~~1. Neither the carrier nor any of the persons mentioned referred to in article 14 bis 19 shall be entitled to may~~ limit their liability as provided in articles ~~16(2), 1864 and 2426(4)~~⁵⁵⁶ of this Convention, [or as provided in the contract of carriage.]⁵⁵⁷ if the claimant proves that ~~the delay in delivery of,~~⁵⁵⁸ the loss of, or the damage to ~~for in connection with~~ the goods ~~or the breach of the carrier's obligation under this Convention~~⁵⁵⁹ resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

~~2. Neither the carrier nor any of the persons mentioned in article 19 may limit their liability as provided in article 65 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.~~⁵⁶⁰

⁵⁵⁰ Variant B is a slightly revised version of the text in A/CN.9/WG.III/WP.32 as set out in para. 3 of A/CN.9/WG.III/WP.39, and as agreed in paras. 20, 22, 24, 28 and 31 of A/CN.9/552.

⁵⁵¹ As set out in footnote 10 of A/CN.9/WG.III/WP.39, the words "unless otherwise agreed" were inserted at the beginning of para. 2, but the issue should be reassessed in the context of draft art. 66 and chapter 20.

⁵⁵² As set out in footnote 11 of A/CN.9/WG.III/WP.39, clarification of the wording regarding consequential damages has been suggested.

⁵⁵³ See *supra*, note 549.

⁵⁵⁴ As set out in footnote 12 of A/CN.9/WG.III/WP.39, the words "[one times] the freight payable on the goods delayed" were inserted in para. 2 for continuation of the discussion at a future session.

⁵⁵⁵ Corrections are to text as set out in para. 8 of A/CN.9/WG.III/WP.39.

⁵⁵⁶ As set out in footnote 34 of A/CN.9/WG.III/WP.39, the suggestion to add a reference to art. 23 might need to be further discussed in the context of chapter 20.

⁵⁵⁷ As set out in footnote 35 of A/CN.9/WG.III/WP.39, the words "[or as provided in the contract of carriage,]" were maintained in square brackets pending further discussion on chapter 20.

⁵⁵⁸ Reference to delay was deleted here in favour of the addition of para. 66(2).

⁵⁵⁹ The addition of "the breach of the carrier's obligation" is thought to have made the reference to "[or in connection with]" the goods unnecessary.

⁵⁶⁰ It is proposed that loss of the right to limit liability for loss due to delay should be dealt with separately from para. 1, and para. 2 has been added for that purpose.

CHAPTER ~~13~~14. RIGHTS OF SUIT⁵⁶¹Article ~~63~~67. PartiesVariant A⁵⁶²

1. Without prejudice to articles ~~64~~68 and ~~65~~68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:

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

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

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

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

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

2. In case of any passing of rights of suit through ~~assignment-transfer~~ or subrogation ~~as referred to above~~under subparagraph 1(c), the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Convention.⁵⁶³

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation

⁵⁶¹ The original text of this chapter, with drafting improvements and corrections suggested in underline and strikeout, is taken from A/CN.9/WG.III/WP.32.

⁵⁶² Variant A of art. 67 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21. The changes to the original text, particularly combining subparas. (c) and (d) and placing the last sentence of the original text of the art. in a separate para. 2, are not intended to be substantive, but are only drafting suggestions to avoid any ambiguity there may have been in the original text.

⁵⁶³ As set out in footnote 210 of A/CN.9/WG.III/WP.32, while strong support was expressed for the deletion of draft art. 67, the Working Group decided to defer any decision regarding draft art. 67 until it had completed its review of the draft arts. and further discussed the scope of application of the draft convention.

arising under or in connection with such contract, ~~where~~ when that person suffered loss or damage.⁵⁶⁴

Article ~~64~~68. When negotiable transport document or negotiable electronic transport record is issued

In the event that a negotiable transport document or negotiable electronic transport record is issued,⁵

(a) ~~†~~The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it ~~itself~~ having suffered loss or damage itself; ~~and~~.⁵⁶⁵

~~Article 65.~~

(b) ~~In the event that a negotiable transport document or negotiable electronic record is issued and~~ When the claimant is not the holder, ~~such claimant~~ it must, in addition to ~~its burden of proof~~ proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.⁵⁶⁶

CHAPTER ~~14~~15. TIME FOR SUIT⁵⁶⁷

Article ~~66~~69. Limitation of actions

Variant A⁵⁶⁸

The carrier ~~shall be~~ is discharged from all liability ~~in respect of the goods~~ under this Convention⁵⁶⁹ if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper ~~shall be~~ is discharged from all liability

⁵⁶⁴ As set out in footnote 211 of A/CN.9/WG.III/WP.32, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether Variant B adequately deals with the situation of the freight forwarder.

⁵⁶⁵ As set out in footnote 212 of A/CN.9/WG.III/WP.32, although no request appears to have been made to the Secretariat in respect of draft art. 68, from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the phrase, "irrespective of whether it suffered loss or damage itself" is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft convention.

⁵⁶⁶ It was thought that moving former draft art. 65 to become para. (b) under art. 68 was a drafting improvement to unite these provisions in a single article.

⁵⁶⁷ The original text of this chapter is taken from A/CN.9/WG.III/WP.32, with drafting improvements and corrections suggested in underline and strikeout.

⁵⁶⁸ Variant A of art. 69 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

⁵⁶⁹ This text is suggested to make this provision consistent with draft art. 64.

under chapter 78 of this Convention if judicial or arbitral proceedings have not been instituted within a period of [one] year.⁵⁷⁰

Variant B

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

Article 6770. Commencement of limitation period

The period ~~mentioned-referred to~~ in article 6669 commences on the day on which the carrier has completed delivery ~~to the consignee~~ of the goods concerned pursuant to article 711(34) or 711(45) or, in cases ~~where-in which~~ no goods have been delivered, on the [last] day on which the goods should have been delivered. The day on which the period commences is not included in the period.⁵⁷¹

⁵⁷⁰ As set out in footnote 215 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to place "one" in square brackets, and to prepare a revised draft of draft art. 69, with due consideration being given to the views expressed.

Concern was raised in para. 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to Chapter 8 of the draft convention, and why it did not also refer to shipper liability pursuant to other arts., such as the since-deleted chapter 9 on freight. A further suggestion was made that all persons subject to liability under the contract of carriage should be included in draft art. 69. It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft convention, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that Chapter 15 would apply to all liabilities regulated in the draft convention.

The suggestion in para. 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft convention is barred (or any right extinguished) might be a good solution.

Concern was also raised in para. 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (art. III.3), COTIF-CIM (art. 47), Warsaw Convention (art. 29) and probably CMR (art. 32). It extinguishes the action under the Hamburg Rules (art. 20), the 1980 Multimodal Convention (art. 25), CMNI (art. 24) and Montreal Convention (art. 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

⁵⁷¹ As set out in footnote 216 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to retain the text of draft art. 70, with consideration being given to possible alternatives to reflect the views expressed.

Concern was raised in para. 170 of A/CN.9/526 that since the date of delivery "in the contract of carriage" might be much earlier than the date of actual delivery, the date of actual delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day "on which the carrier has completed delivery", which is the day of actual delivery.

Concern was also raised in para. 171 of A/CN.9/526 with respect to the "last day" on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, when goods have not been delivered, the "last day" is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in para. 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under draft subpara. 72(b)(ii) as noted in para. 172, or in a separate para. of the draft convention. See *infra* the alternative text for draft art. 73.

Article ~~68~~71. Extension of limitation period

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

Article ~~69~~72. Action for indemnity

An action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the period ~~mentioned-referred to~~ in article ~~66~~69 if the indemnity action is instituted within the later of:

(a) The time allowed by ~~the applicable law of~~ the ~~State-jurisdiction~~⁵⁷² where proceedings are instituted; or

(b) Variant A of paragraph (b)⁵⁷³

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

- (i) settled the claim; or
- (ii) been served with process in the action against itself.

Variant B of paragraph (b)

90 days commencing from the day when either

- (i) the person instituting the action for indemnity has settled the claim; or
- (ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.⁵⁷⁴

Article ~~70~~73. Counterclaims

A counterclaim by a person held liable under this Convention may be instituted even after the expiration of the ~~limitation-period mentioned-referred to~~ in article ~~66~~69 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.⁵⁷⁵

⁵⁷² The text is suggested in order to accommodate the inclusion of federal jurisdictions in States.

⁵⁷³ Variant A of art. 72 is based on the original text of the draft convention in A/CN.9/WG.III/WP.21.

⁵⁷⁴ As set out in footnote 219 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 72, with due consideration being given to the views expressed.

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

⁵⁷⁵ As set out in footnote 220 of A/CN.9/WG.III/WP.32, it was reiterated in para. 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to draft subpara. 72(b)(ii) or in a separate subpara., but they should be treated in similar fashion to draft subpara. 72(b)(ii). Draft art. 73 sets out this provision as a separate art.

Article ~~74~~74. Actions against the bareboat charterer

[If the registered owner of a ~~vessel~~ ship defeats the presumption that it is the carrier under article ~~364~~40(3), an action against the bareboat charterer may be instituted even after the expiration of the period ~~mentioned-referred to~~ in article ~~666~~69 if the action is instituted within the later of:

- (a) The time allowed by the applicable law ~~of-in~~ the State-jurisdiction⁵⁷⁶ where proceedings are instituted; or
- (b) 90 days commencing from the day when the registered owner [both
 - (i) proves that the ship was under a bareboat charter at the time of the carriage; and]
 - [(ii) adequately identifies the bareboat charterer.]⁵⁷⁷

CHAPTER ~~15~~16. JURISDICTIONArticle ~~72~~75. Actions against the carrier⁵⁷⁸

In judicial proceedings against the carrier⁵⁷⁹ relating to carriage of goods under this Convention the plaintiff⁵⁸⁰, at its option, may institute an action in a court in a Contracting State ~~whichever~~, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The ~~[principal place of business] or, in the absence thereof, the habitual residence-domicile~~ of the defendant ~~[or domicile]~~;⁵⁸¹ or
- (b) The ~~[actual/contractual]~~ place of receipt or the ~~[actual/contractual]~~ place of delivery; or⁵⁸²
- [(c) the port where the goods are initially loaded on ~~an-ocean-vessels~~ a ship; or

⁵⁷⁶ See note 572, *supra*.

⁵⁷⁷ As set out in footnote 221 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to prepare a revised draft of draft art. 74, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain draft para. 40(3) in square brackets, and that it therefore requested the Secretariat to retain draft art. 74 in square brackets, bearing in mind that the fate of the latter art. was linked to that of the former.

Concern was raised in para. 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by para. (b)(ii).

It was also suggested that subparas. (i) and (ii) of para. (b) be combined into one, since subpara. (ii) could be considered a sufficiently rigorous condition to subsume subpara. (i). A revised text is proposed.

⁵⁷⁸ Text as set out in para. 111 of A/CN.9/576, with suggested and previously approved revisions as noted.

⁵⁷⁹ Text as agreed for further discussion in para. 114 of A/CN.9/576.

⁵⁸⁰ Text as agreed for further discussion in para. 114 of A/CN.9/576.

⁵⁸¹ Text as agreed for further discussion in para. 116 of A/CN.9/576.

⁵⁸² Text as agreed for further discussion in para. 120 of A/CN.9/576.

~~—(d) the port where the goods are finally discharged from an ocean vessel a ship; or]~~

~~{(de) Any additional place [designated][agreed upon]⁵⁸³ for that purpose in the transport document or electronic transport record.}~~⁵⁸⁴

[Article 76. Exclusive jurisdiction agreements]⁵⁸⁵

1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction. Such jurisdiction is exclusive, provided that the agreement conferring it:

(a) Is evidenced in writing or by electronic communication;

(b) Clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and

(c) Expressly provides that the jurisdiction of the chosen court is to be exclusive.⁵⁸⁶

2. When an exclusive forum is agreed under paragraph 1, the shipper and the carrier may also expressly agree that the exclusive choice of forum is binding on any other person bringing an action under this Convention, and it is so binding, provided that:⁵⁸⁷

Variant A of subparagraph 2(a)

(a) Such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record]; and

Variant B of subparagraph 2(a)

(a) Such person is given adequate notice of the place where the action can be brought; and

⁵⁸³ Text as agreed for further discussion in para. 124 of A/CN.9/576.

⁵⁸⁴ As noted in para. 124 of A/CN.9/576, matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

⁵⁸⁵ As requested in para. 168 of A/CN.9/576, this draft art. on exclusive jurisdiction agreements has been prepared for consideration by the Working Group.

⁵⁸⁶ Text proposed to fulfil the conditions suggested in para. 161 of A/CN.9/576. If this approach is adopted, this provision should be added to the list of notices set out in draft art. 3, and draft para. 75(e) could be deleted.

⁵⁸⁷ Text proposed to fulfil the conditions suggested in para. 164 of A/CN.9/576. If this approach is not adopted, this provision should be removed from the list of notices set out in draft article 3.

Variant C of subparagraph 2(a)⁵⁸⁸

(a) Such person expressly consents to the agreement, and such consent complies with the requirements of article 95(6)(b); and

(b) The forum is in one of the places designated under paragraphs 75(a), (b) or (c).]

Article ~~72-bis~~77. Actions against the maritime performing party⁵⁸⁹

In judicial proceedings ~~by the shipper or other cargo interest~~ against the maritime performing party relating to carriage of goods under this Convention, the ~~claimant~~plaintiff, at its option, may institute an action in a Contracting State party which that, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The ~~principal place of business or [, in the absence thereof,] the habitual/permanent residence/domicile~~ of the ~~defendant~~maritime performing party; or

(b) The place where the goods are [initially] received by the maritime performing party; ~~or~~and

~~—(c)—~~The place where the goods are [ultimately] delivered by the maritime performing party.

Article 7478. No additional bases of jurisdiction

Subject to article 80. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not ~~specified in~~designated under article ~~72/75 or 72-bis/77~~⁵⁹⁰ ~~or 73. This article does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.~~

Article ~~73/79~~. Arrest and provisional or protective measures⁵⁹¹

1. Nothing in this chapter ~~Conventions~~shall affect jurisdiction with regard to:

~~—(a)—~~ Arrest [pursuant to applicable rules ~~of the law of the state or of international law [or the law of the forum state]]]; ~~or-~~~~

(b) Provisional or protective measures.

⁵⁸⁸ Variant C suggests the alternative that the third party must expressly consent to be bound by the choice of jurisdiction clause, in similar fashion to the consent required in draft subpara. 95(6)(b).

⁵⁸⁹ Text as set out in para. 125 of A/CN.9/576, with suggested and previously approved revisions as noted.

⁵⁹⁰ In order to address the concerns raised in para. 42 of A/CN.9/576, and for the purposes of clarification, it is suggested that the first sentence of former draft art. 74 be placed in a separate art. as art. 78, and that arrest and provisional or protective measures should be treated in the same art., as has been proposed in draft art. 79.

⁵⁹¹ Suggested adjustments are to text as set out in para. 130 of A/CN.9/576, as agreed for further discussion at para. 136 of A/CN.9/576.

- [2. For the purpose of this article “provisional or protective measures” means:
- (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or
 - (b) An order securing the amount in dispute; or
 - (c) An order appointing a receiver; or
 - (d) Any other orders to ensure that any judgment or arbitral award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
 - (e) An interim injunction or other interim order.]⁵⁹²

Article ~~74~~⁸⁰. Consolidation and removal of actions

Variant A of paragraph 1⁵⁹³

[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in one of the places specified in article 77, whether or not that place is specified in article 75.]⁵⁹⁴

Variant B of paragraph 1

[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. If no place is specified in both articles, then such action must be instituted in one of the places designated under article 77.]⁵⁹⁵

Variant C of paragraph 1⁵⁹⁶

[1. If the cargo claimant institutes actions *in solidum* against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 77, where actions can be instituted against the maritime performing party.]

2. If the carrier or maritime performing party institutes an action under this Convention ~~against the shipper or other cargo interest~~, then the claimant, at the ~~petition~~^{request} of the defendant, must ~~remove~~^{withdraw} the action ~~to and~~

⁵⁹² Corrections are to text as agreed for further discussion in para. 142 of A/CN.9/576.

⁵⁹³ While Variant C of draft para. 80(1) is the text as agreed for further discussion in para. 149 of A/CN.9/576, it is suggested that Variants A and B are improved drafts that set out two alternative approaches between which the Working Group could choose. Variant B would require that in order to determine where an action against both the carrier and the maritime performing party should be instituted, resort must first be had to a place that is designated in both arts. 74 and 76, and that only thereafter could resort be had to a the place designated only in art. 76. The approach in Variant A is that such an action could only be instituted in a place designated under art. 76, regardless of whether or not that place was designated under art. 74.

⁵⁹⁴ The Working Group may wish to note that this approach may raised difficulties in situations when the action is against more than one maritime performing party, or when none of the places designated under art. 77 is in a contracting State.

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Text as agreed for further discussion in para. 149 of A/CN.9/576.

recommence it in one of the places ~~referred to in~~ articles 75 or 77, whichever is applicable, at the choice of the defendant.⁵⁹⁷

~~Article 75.~~⁵⁹⁸

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

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

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

~~Article 75 bis~~ 81. Agreement after dispute has arisen⁵⁹⁹

Notwithstanding the preceding articles of this chapter, an agreement made by the parties to the dispute under the contract of carriage, after ~~a claim under the contract of carriage~~ the dispute has arisen, ~~which~~ that designates the place where the claimant may institute an action, is effective.⁶⁰⁰

CHAPTER ~~16~~ 17. ARBITRATION⁶⁰¹

Variant A

Article ~~76~~ 82.

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

⁵⁹⁷ Text as agreed for further discussion in para. 152 of A/CN.9/576, with drafting suggestions. As noted in para. 152 of A/CN.9/576, consideration should be given to limiting the application of this provision to declaratory relief sought by the carrier or the maritime performing party.

⁵⁹⁸ Text deleted from A/CN.9/WG.III/WP.32 as agreed in para. 155 of A/CN.9/576.

⁵⁹⁹ Text taken from Variant A of A/CN.9/WG.III/WP.32.

⁶⁰⁰ Text as agreed for further discussion in para. 171 of A/CN.9/576.

⁶⁰¹ Note the decision of the Working Group in para. 179 of A/CN.9/576 that a new draft of this chapter will be submitted for the consideration of the Working Group at a future session. Such a draft is anticipated for introduction at the sixteenth session of the Working Group. As set out in footnote 225 of A/CN.9/WG.III/WP.32, Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paras. that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

Article ~~7783~~.

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

Article ~~7884~~.

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

- (a) A place in a State within whose territory is situated:
 - (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
 - [(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]
 - (iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or
- (b) Any other place designated for that purpose in the arbitration clause or agreement.

Article ~~7985~~.

The arbitrator or arbitration tribunal ~~shall~~ must apply the rules of this Convention.

Article ~~8085~~ *bis*.

Article ~~7783~~ and ~~7884~~ ~~shall be~~ are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement ~~which that~~ is inconsistent therewith ~~shall be null and~~ is void.

Article ~~80 bis~~ ~~86~~.

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

Variant BArticle ~~768~~2.

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

Article ~~773~~3.

If a negotiable transport document or a negotiable electronic transport record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. ~~Where~~When a charterparty contains a provision that disputes arising thereunder ~~shall~~must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain a special annotation providing that such provision ~~shall be~~is binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic transport record in good faith.⁶⁰²

Article ~~784~~4.⁶⁰³Article ~~795~~5.

The arbitrator or arbitration tribunal ~~shall~~must apply the rules of this Convention.

Article ~~806~~6.

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

CHAPTER ~~4718~~. GENERAL AVERAGE⁶⁰⁴Article ~~8487~~. Provisions on general average

Nothing in this Convention prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

⁶⁰² As set out in footnote 227 of A/CN.9/WG.III/WP.32, the amended text of art. 83 of the provision on arbitration in Variant B is not a reproduction of Art. 22(2) of the Hamburg Rules, since it was thought that Art. 22(2) of the Hamburg Rules was too specific.

⁶⁰³ As set out in footnote 228 of A/CN.9/WG.III/WP.32, in order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this para. has been omitted. No decision was reached by the CMI regarding a suitable replacement para.. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

⁶⁰⁴ The original text of this chapter, with drafting improvements suggested, is taken from A/CN.9/WG.III/WP.32.

Article ~~82~~88. Contribution in general average

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

2. All [actions for] [rights to] contribution in general average ~~shall bear~~ [time-barred] [extinguished] if judicial or arbitral proceedings ~~have are~~ not ~~been~~-instituted within a period of [one year] from the date of the issuance of the general average statement.⁶⁰⁵

CHAPTER ~~18~~19. OTHER CONVENTIONS⁶⁰⁶

Article ~~83~~89. International instruments governing other modes of transport

Subject to article ~~86~~92, nothing contained in this Convention ~~shall prevent~~s a ~~e~~Contracting ~~s~~State from applying any other international instrument which is already in force at the date of this Convention and ~~which that~~ applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.⁶⁰⁷

⁶⁰⁵ As set out in footnote 230 of A/CN.9/WG.III/WP.32, it was suggested that the fact that the time for suit provisions of the draft convention do not apply to general average should be expressed more clearly. Since para. 1 states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.

As further suggested in para. 188 of A/CN.9/526, a separate provision could be established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of para. 2. Such a provision should probably cover both claims for contribution and claims for indemnities.

In para. 189 of A/CN.9/526, the question was raised whether para. 1 should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

⁶⁰⁶ The original text of this chapter, with suggested drafting improvements, is taken from A/CN.9/WG.III/WP.32.

⁶⁰⁷ As set out in footnote 231 of A/CN.9/WG.III/WP.32, in connection with draft art. 27 and discussions relating to the relationship of the draft convention with other transport conventions and with domestic legislation, the Secretariat was instructed in paras. 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in Chapter 19. It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new draft art. 89 is based on art. 25(5) of the Hamburg Rules.

Article 8490. Prevalence over earlier conventions

[As between parties to this Convention, its ~~provisions~~ prevails over those][Subject to article 102, this Convention prevails between its parties over those]⁶⁰⁸ of an earlier ~~treaty convention~~ to which they may be parties [that are incompatible with those of this Convention].⁶⁰⁹

Article 8591. Global limitation of liability

This Convention does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of ~~ships~~vessels.

Article 8692. Other provisions on carriage of passengers and luggage

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

Article 8793. Other provisions on damage caused by nuclear incident

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

(a) under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997,⁶¹⁰ or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons ~~who~~ that may suffer

⁶⁰⁸ Proposed alternate language.

⁶⁰⁹ As set out in footnote 232 of A/CN.9/WG.III/WP.32, the suggestion in para. 196 of A/CN.9/526 that it would be helpful if draft art. 91 were amended to add language stating that the draft convention would prevail over other transport conventions except in relation to States that are not member of the convention is in line with the provisions of art. 30(4) of the Vienna Convention. It is suggested, however, that this new provision should be added in a separate para., rather than to the present draft art. 91, that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as draft art. 90.

⁶¹⁰ In order to capture subsequent amendments to these instruments or new instruments negotiated in the future, the Working Group may wish to consider an additional phrase such as "including any amendment to these instruments and any future instrument in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident", or the inclusion of a simple tacit amendment procedure limited to this provision that could be commenced by the depositary.

damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.⁶¹¹

CHAPTER ~~1920. [LIMITS OF CONTRACTUAL FREEDOM]~~~~[VALIDITY OF CONTRACTUAL STIPULATIONS]~~

Article ~~8894. General provisions~~

1. Unless otherwise specified in this Convention, any provision is ~~null and~~ void if:

(a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) It assigns a benefit of insurance of the goods in favour of the carrier or a person ~~mentioned-referred to~~ in article ~~14bis~~~~19~~.⁶¹²

[2. Unless otherwise specified in this Convention, any provision is ~~null and~~ void if:

(a) It directly or indirectly excludes, limits, [or increases] the obligations under chapter ~~78~~ of the shipper, consignor, consignee, controlling party, holder, or person referred to in article ~~3134~~; or

(b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in article ~~3134~~ for breach of any of their obligations under chapter ~~78~~.]⁶¹³

Article ~~88a~~~~95. Special rules for volume contracts~~⁶¹⁴

1. Notwithstanding article ~~8894~~, if terms of a volume contract are subject to this Convention under article ~~39~~(3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Convention provided that the volume contract [is agreed to in writing or electronically], contains a prominent statement that it derogates from ~~provisions of the~~~~this~~ Convention, and:

⁶¹¹ As set out in footnote 235 of A/CN.9/WG.III/WP.32, the Working Group requested the Secretariat to update the list of conventions and instruments in draft art. 93, and to prepare a revised draft with due consideration being given to the views expressed.

In para. 200 of A/CN.9/526, it was pointed out that the list of conventions in draft art. 89 was not complete and reference was made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in para. 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in draft art. 93, such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent para. 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

⁶¹² As approved for further discussion in para. 77 of A/CN.9/576.

⁶¹³ As approved for further discussion in para. 85 of A/CN.9/576, following an examination of the shipper's obligations in Chapter 8.

⁶¹⁴ Text as set out in para. 52 of A/CN.9/576.

- (a) Is individually negotiated; or
- (b) Prominently specifies the sections of the volume contract containing the derogations.⁶¹⁵
2. A derogation under paragraph 1 ~~shall~~ **must** be set forth in the contract and may not be incorporated by reference from another document.⁶¹⁶
3. A [carrier's public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.⁶¹⁷
4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Convention under article ~~39~~(3)(a).⁶¹⁸
5. Paragraph 1 is not applicable to:
- (a) Obligations stipulated in article ~~13~~16(1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];
- (b) Rights and obligations stipulated in articles, [~~25~~28], [~~26~~29], [~~27~~30], [~~XX~~33] and [~~19~~66] [and the liability arising from the breach thereof].⁶¹⁹
6. Paragraph 1 applies:
- (a) Between the carrier and the shipper;
- (b) Between the carrier and any other party that has expressly consented [in writing or electronically] to be bound by the terms of the volume contract that derogate from ~~the provisions of~~ this Convention. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from ~~provisions of the~~this Convention and the consent shall not be set forth in a [carrier's public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]⁶²⁰

⁶¹⁵ As approved for further discussion in para. 85 of A/CN.9/576.

⁶¹⁶ As approved for further discussion in para. 89 of A/CN.9/576.

⁶¹⁷ As noted in para. 89 of A/CN.9/576, it was decided that this para. should be retained in the text as a basis for continuation of the discussion.

⁶¹⁸ As approved for further discussion in para. 92 of A/CN.9/576.

⁶¹⁹ As approved for further discussion in para. 99 of A/CN.9/576, bearing in mind the drafting suggestions expressed on the inclusion of other arts. of the draft convention and to the provisions of the draft convention on jurisdiction and arbitration; clarification of the relationship between draft para. 95(5) and the other paras. in draft art. 94, as well as with the provisions of other international transport instruments; and the possibility of inserting in a separate para. of draft para. 95(5) a reference to liability for intentional or reckless behaviour should be the object of further discussion.

⁶²⁰ As approved for further discussion in para. 104 of A/CN.9/576, along with the suggestion to insert a reference to paras. (1) to (5) of draft art. 95 in the chapeau of draft para. 95(6) should be considered.

Article ~~899~~6. Special rules for live animals and certain other goods⁶²¹

Notwithstanding chapters ~~4~~5 and ~~5~~6 of this Convention and the obligations of the carrier⁶²², the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except ~~where-when~~ it is proved that the loss, damage, or delay resulted from an action or omission of the carrier [or of a person ~~mentioned-referred to~~ in article ~~14bis~~19] or of a maritime performing party⁶²³ done recklessly and with knowledge that such loss, damage, or delay would probably occur; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 21. FINAL CLAUSES

Article 97. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention⁶²⁴.

Article 98. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States [at [...] from [...] to [...]] and thereafter] at the United Nations Headquarters in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States ~~that~~ are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.⁶²⁵

Article 99. Reservations

No reservations may be made to this Convention⁶²⁶.

⁶²¹ Text as set out in para. 52 of A/CN.9/576.

⁶²² As approved for further discussion in paras. 106 and 109 of A/CN.9/576.

⁶²³ As approved for further discussion in paras. 107 and 109 of A/CN.9/576.

⁶²⁴ Text taken from art. 15 of the draft Electronic Contracting Convention and art. 27 of the Hamburg Rules.

⁶²⁵ Text taken from art. 16 of the draft Electronic Contracting Convention.

Article 100. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State⁶²⁷.

Article 101. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of [one year from] [six months after] the date of deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the [twentieth] [third] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of [one year] [six months] after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State **must** apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State⁶²⁸.

⁶²⁶ Text taken from art. 22 of the draft Electronic Contracting Convention and art. 29 of the Hamburg Rules.

⁶²⁷ Text is taken from art. 18 of the draft Electronic Contracting Convention. See also art. 52 of the Convention on International Interests in Mobile Equipment, Cape Town, 16 November 2001.

⁶²⁸ Text is taken from art. 30 of the Hamburg Rules. Note that the second suggested time period in square brackets is drawn from art. 23 of the draft Electronic Contracting Convention. The time selected for entry into force, which is a function of both the number of ratifications required and of the length of time required after the deposit of the appropriate instrument, is generally the time considered appropriate for business practice to adjust to the new regime.

Article 102. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to any or all of the following instruments: the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; and the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979; or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, must at the same time denounce, as the case may be, the relevant international agreements to that effect.

2. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraph 1 are not effective until such denunciations as may be required on the part of those States in respect of these instruments have themselves become effective. The depositary of this Convention must consult with the Government of Belgium, as the depositary of other relevant conventions, so as to ensure necessary co-ordination in this respect⁶²⁹.

Article 103. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary must convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended⁶³⁰.

⁶²⁹ Text is taken from paras. 99(3) and (6) of the United Nations Convention on Contracts for the International Sale of Goods. See also art. 31 of the Hamburg Rules, and art. 55 of the Montreal Convention. The approach taken in the Montreal Convention does not require a formal denunciation of other conventions, but rather holds that the Montreal Convention prevails as between States Parties that are also common parties to another convention. As such, the regime in place between a Contracting State of the new convention in issue and a non-contracting State would continue to apply even after the new convention came into force, and until both States became Contracting States of the new convention.

⁶³⁰ Text is taken from art. 32 of the Hamburg Rules. Amendment procedures are not common in UNCITRAL texts, but the Hamburg rules have a general provision in art. 32 and a special provision in art. 33 for revision of the limitation amounts and the unit of account. In the draft Electronic Contracting Convention, the Commission decided not to have a provision on amendments because the States parties to that Convention may initiate an amendment procedure under general treaty law (typically, with a diplomatic conference and an amending protocol, such as in the case of the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980, New York, 14 June 1974), if applicable, after discussion in the Commission. Note that the amendment provisions at draft art. 25 and at draft art. 103 may be adopted independently.

Article ~~18 bis~~104. Amendment of limitation amounts⁶³¹

1. Without prejudice to ~~the provisions of~~ article 103, the special procedure in this article ~~shall apply~~ applies solely for the purposes of amending the limitation amount set out in paragraph ~~1864~~(1) of this Convention.
2. Upon the request of at least ~~[one quarter~~^{632]} of the ~~States Parties Contracting States~~ to this Convention⁶³³, the depositary ~~shall~~ must circulate any proposal to amend the limitation amount specified in paragraph ~~1864~~(1) of this Convention to all of the ~~States Parties Contracting States~~⁶³⁴ and ~~shall~~ must convene a meeting of a Committee composed of a representative from each of the ~~States Parties Contracting States~~ to consider the proposed amendment.
3. The meeting of the Committee ~~shall~~ must take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.
4. Amendments ~~shall~~ must be adopted by the Committee by a two-thirds majority of its members present and voting.⁶³⁵
5. When acting on a proposal to amend the limits, the Committee ~~shall~~ must take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.⁶³⁶
6. (a) No amendment of the limit under this article may be considered less than ~~[five~~^{637]} years from the date on which this Convention was opened for signature nor

⁶³¹ Text as set out in para. 7 of A/CN.9/WG.III/WP.39, including footnotes. As set out in footnote 19 of A/CN.9/WG.III/WP.39, the proposal is based upon the amendment procedure set out at art. 23 of the 2002 Protocol to the Athens Convention ("Athens Convention") and at art. 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade ("OTT Convention"). Similar approaches have been taken in a number of International Maritime Organization ("IMO") conventions, such as the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (not yet in force) ("2003 Protocol to the IOPC Fund 1992"); the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976; and the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

⁶³² As set out in footnote 21 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention refers to "one half" rather than "one quarter" of the Contracting States.

⁶³³ As set out in footnote 22 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention includes the phrase "but in no case less than six" of the Contracting States.

⁶³⁴ As set out in footnote 24 of A/CN.9/WG.III/WP.39, para. 23(2) of the Athens Convention also includes reference to Members of the IMO.

⁶³⁵ As set out in footnote 25 of A/CN.9/WG.III/WP.39, para. 23(5) of the Athens Convention is as follows: "Amendments shall be adopted by a two-thirds majority of the Contracting States to the Convention as revised by this Protocol present and voting in the Legal Committee ... on condition that at least one half of the Contracting States to the Convention as revised by this Protocol shall be present at the time of voting."

⁶³⁶ As set out in footnote 26 of A/CN.9/WG.III/WP.39, this provision has been taken from para. 23(6) of the Athens Convention. See, also, para. 24(4) of the OTT Convention.

⁶³⁷ As set out in footnote 27 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of

less than ~~[five]~~ years from the date of entry into force of a previous amendment under this article.

(b) No limit may be increased so as to exceed an amount ~~which-that~~ corresponds to the limit laid down in this Convention increased by ~~[six]~~ per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.⁶³⁸

(c) No limit may be increased so as to exceed an amount ~~which-that~~ corresponds to the limit laid down in this Convention multiplied by ~~[three]~~.⁶³⁹

7. Any amendment adopted in accordance with paragraph 4 ~~shall-must~~ be notified by the depositary to all ~~States-PartiesContracting States~~. The amendment ~~shall-be is~~ deemed to have been accepted at the end of a period of ~~[eighteen]~~⁶⁴⁰ months after the date of notification, unless within that period not less than ~~[one fourth]~~⁶⁴¹ of the States that were ~~States-PartiesContracting States~~ at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and ~~shall-havehas~~ no effect.

8. An amendment deemed to have been accepted in accordance with paragraph 7 ~~shall-enters~~ into force ~~[eighteen]~~⁶⁴² months after its acceptance.

9. All ~~States-PartiesContracting States~~ ~~shall-bear~~ bound by the amendment unless they denounce this Convention in accordance with article 105 at least six months before the amendment enters into force. Such denunciation ~~shall-takes~~ effect when the amendment enters into force.

10. When an amendment has been adopted but the ~~[eighteen]-~~month period for its acceptance has not yet expired, a State ~~which-that~~ becomes a ~~Contracting State Party~~ during that period ~~shall-beis~~ bound by the amendment if it enters into force. A State ~~which-that~~ becomes a ~~Contracting State Party~~ after that period ~~shall-beis~~ bound by an amendment ~~which-that~~ has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State, if later.

A/CN.9/WG.III/WP.34 suggest that the time period in this draft para. should be seven years rather than five years.

⁶³⁸ As set out in footnote 28 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which corresponds to the limit laid down in this Convention increased or decreased by twenty-one per cent in any single adjustment."

⁶³⁹ As set out in footnote 29 of A/CN.9/WG.III/WP.39, no similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which in total exceeds the limit laid down in this Convention by more than one hundred per cent, cumulatively."

⁶⁴⁰ As set out in footnote 30 of A/CN.9/WG.III/WP.39, paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

⁶⁴¹ As set out in footnote 31 of A/CN.9/WG.III/WP.39, the OTT Convention specifies at para. 24(7) "not less than one third of the States that were States Parties".

⁶⁴² Recent IMO conventions have reduced this period to twelve months when urgency is important. See, for example, the 2003 Protocol to the IOPC Fund 1992, at para. 24(8).

Article 105. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary⁶⁴³.

DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

⁶⁴³ Text is taken from art. 34 of the Hamburg Rules. The second sentence of para. 2 is not strictly necessary but is present in the Hamburg Rules and in some other UNCITRAL treaties, including the draft Electronic Contracting Convention. It is not present, for instance, in art. 27 of the United Nations International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (the most recent text deposited with the Secretary-General), which provides some slightly modified alternative language:

- “1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.”