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Report of Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)

Contents

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft 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 The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.38.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its fourteenth session in Vienna from 29 November to 10 December 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, India, Italy, Japan, Lithuania, Mexico, Nigeria, Republic of Korea, Russian Federation, Rwanda, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United States of America and Venezuela.

3. The session was also attended by observers from the following States: Antigua and Barbuda, Cuba, Democratic Republic of Congo, Denmark, Finland, Greece, Indonesia, Kuwait, Latvia, Netherlands, New Zealand, Norway, Peru, Romania, Saudi Arabia, Senegal, Slovakia, Slovenia and Yemen.

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

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

(b) **Intergovernmental organizations invited by the Commission**: European Commission (EC);

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

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

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

(a) Provisional agenda (A/CN.9/WG.III/WP.38);

(b) A note prepared by the Secretariat containing a first revision of the draft instrument (A/CN.9/WG.III/WP.32);

(c) A provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session (A/CN.9/WG.III/WP.36) and its thirteenth session (A/CN.9/WG.III/WP.39);

(d) Comments from Denmark, Finland, Norway and Sweden (the Nordic countries) on the freedom of contract (A/CN.9/WG.III/WP.40);

(e) Comments from the UNCTAD Secretariat (A/CN.9/WG.III/WP.41);

(f) A proposal by the United States of America (A/CN.9/WG.III/WP.42).

7. The Working Group adopted the following agenda:

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

I. Deliberations and decisions

8. The Working Group continued its review of the draft instrument on the carriage of goods [wholly or partly] [by sea] ("the draft instrument") on the basis of:

- The text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.32);
- A proposed interim redraft of the articles considered by the Working Group at its twelfth (A/CN.9/WG.III/WP.36) and thirteenth sessions (A/CN.9/WG.III/WP.39).

9. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

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

Draft article 14. Basis of liability

General discussion

10. The Working Group was reminded that it had most recently considered draft article 14 at its twelfth session (see A/CN.9/544, paras. 85-144), and articles related thereto at its thirteenth session, namely article 22 relating to liability of the carrier

with respect to the carriage by sea and article 23 on deviation (see A/CN.9/552, paras. 92-99 and 100-102 respectively).

11. The Working Group heard a short report from the informal consultation group (see A/CN.9/552, para. 167) established for continuation of the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in the preparation of the draft instrument. The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to draft article 14 in an effort to consider improvements to the drafting of the provision.

Draft paragraph 14 (1)

12. The Working Group considered the text of paragraph 1 of draft article 14 as contained in paragraphs 7 and 8 of document A/CN.9/WG.III/WP.36. A proposal was made to maintain the general principle in the draft paragraph that unexplained losses should be the responsibility of the carrier, but suggesting certain improvements to the drafting of the paragraph. It was proposed that the phrase "the nature and amount of the loss and" could be inserted in square brackets between the words "proves" and "that" at the end of the opening phrase of the draft paragraph. In addition, it was suggested that square brackets be placed around the phrase "neither its fault nor the fault of any person mentioned in article 14 bis caused or contributed to the loss, damage or delay" and that the following phrase be inserted as alternative text within square brackets immediately thereafter, "the occurrence that caused or contributed to the loss, damage or delay is not attributable to its fault nor to the fault of any person mentioned in article 14 bis".

13. There was a suggestion that both the text of draft paragraph 14 (1) in A/CN.9/WG.III/WP.36, and the text proposed in the paragraph above were overly complex and should be simplified and clarified. A further alternative text was proposed as follows:

> "1. The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery that took place during the period of the carrier's responsibility as defined in Chapter 3, unless the carrier proves, and in absence of proof to the contrary, that neither its fault or neglect nor the fault or neglect of any person mentioned in article 14 bis caused or contributed to the loss of or damage to the goods or delay in the delivery. The burden of proof of the nature and amount of the loss shall rest upon the claimant."

14. Some reservations were expressed that the proposed text set out in the paragraph above might not deal effectively and clearly with complex but important matters such as the question of the allocation of the burden of proof in determining liability. The Working Group decided to proceed with its consideration of draft paragraph 14 (1) on the basis of the text in A/CN.9/WG.III/WP.36, but to consider proposed changes to that text as they were raised.

"the nature and amount of the loss and"

15. It was suggested that, as presently drafted, paragraph 14 (1) could imply that the claimant must prove the physical loss, damage or delay in delivery, but not the amount of the loss resulting therefrom. To address that issue, the inclusion of the phrase, "the nature and amount of its loss", was suggested as noted in paragraph 12

above. Whilst this proposal received some support, the proposal was withdrawn as it raised questions of measure of damages which were not considered appropriate in the context of the liability regime set out in draft paragraph 14 (1).

"claimant"

16. The Working Group confirmed its agreement (see A/CN.9/544, paras. 105 and 133) that the term "claimant" was more appropriate than the term "shipper" to reflect the identity of the party who would be seeking redress against the carrier. Notwithstanding the suggestion contained in footnote 26 of A/CN.9/WG.III/WP.36 that the Working Group may wish to consider whether a definition of "claimant" should be included in draft article 63, under rights of suit, a proposal was made to include such a definition in draft article 1. Caution was expressed that, as the term "claimant" appeared in other provisions of the draft instrument, for example, in draft articles 19, 65, 68, 75 and 78 of the draft text, the Working Group should ensure that any definition was consistent with the intended meaning of the term when used elsewhere in the draft instrument.

"or contributed to"

17. It was agreed by the Working Group that the square brackets be removed from the term "or contributed to" in both instances in which it appeared in the draft paragraph. It was said that this phrase was necessary to include the case of concurring causes for loss, damage or delay, as considered in draft paragraph 14 (4). It was noted that these words might be problematic in some languages and should be reviewed with that in mind.

"and to the extent"

18. It was proposed that the words in square brackets "and to the extent" could be deleted on the basis that they could be in conflict with draft paragraph 4 on concurring causes for loss, damage or delay if the Working Group decided that all matters relating to the determination of the extent to which the carrier was liable in case of concurring causes should be decided by the court in which the claim was brought. However, it was suggested that the words should be retained in order to clarify that it was the carrier who bore the burden of proof in the case of concurring causes. The Working Group agreed to delete the words "and to the extent", bearing in mind the concern expressed regarding the burden of proof in cases of concurring causes.

Conclusions reached by the Working Group on paragraph 1

19. After discussion, the Working Group agreed to refer to an informal drafting group the following conclusions to be taken into account in preparing a revised text (see paras. 27 to 28 and 31 to 33 below):

- The term "claimant" should be included in paragraph 14 (1) but any definition of that term should be consistent with the use of that term in other provisions of the draft instrument;
- The square brackets around the phrase "or contributed to" should be deleted in both instances;

- The phrase “and to the extent” should be deleted.

Draft paragraph 14 (2)

20. The Working Group heard that the text of draft paragraph 14 (2) as contained in paragraph 7 of document A/CN.9/WG.III/WP.36 was considered to reflect accurately the views of the Working Group with respect to the shifting burden of proof following the claimant’s initial establishment of its claim pursuant to paragraph 14 (1). However, it was suggested that the drafting of paragraph 14 (2) in document A/CN.9/WG.III/WP.36 was cumbersome and difficult to read. In an effort to preserve the general approach set out in that document, but to remedy the perceived problems, alternative text was proposed as follows:

> “2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that the loss, damage or delay was caused by one of the events enumerated in paragraph 3, then the carrier shall be liable for such loss, damage or delay only if the claimant proves that:
>
> “(a) the event on which the carrier relies under this paragraph was caused by the fault of the carrier or of a person mentioned in article 14 bis [whereupon liability shall be determined in accordance with paragraph 1];
>
> “(b) an event other than those listed in paragraph 3 contributed to the loss, damage or delay, [whereupon liability shall be determined in accordance with paragraph 4]; or
>
> “[(c) the ship was unseaworthy, or improperly manned, equipped or supplied, or the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods, [whereupon the carrier shall not be liable if it proves that it complied with its obligation to exercise due diligence as required by article 13 (1) or that its failure to exercise due diligence did not contribute to the loss, damage or delay]; or]
>
> “[(c) the loss, damage or delay was caused by:
>
> “(i) the unseaworthiness of the ship;
>
> “(ii) the improper manning, equipping, and supplying of the ship; or
>
> “(iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,
>
> “whereupon the carrier shall be liable under paragraph 1 unless it proves that it complied with its obligation to exercise due diligence as required under article 13 (1).”

General discussion

21. The Working Group heard that subparagraphs (i) and (ii) of draft paragraph 14 (2) in document A/CN.9/WG.III/WP.36 had been redrafted to become subparagraphs 14 (2) (a) and (b) of the proposed text, and that draft

paragraph 14 (3) as set out in document A/CN.9/WG.III/WP.36 had been redrafted to reflect the two alternatives set out in draft subparagraph 14 (2) (c). The two alternatives proposed in that subparagraph concerned the burden of proof on the claimant in the event of unseaworthiness, and are further discussed below (see paras. 23 to 25). The Working Group agreed to use the proposed text for subparagraph 14 (2) as set out in paragraph 20 above as the basis for further consideration of that draft provision.

Subparagraphs 14 (2) (a) and (b)

22. There was general agreement in the Working Group with the proposed text for subparagraphs 14 (2) (a) and (b). It was suggested that the text in square brackets at the end of subparagraph 14 (2) (a) was unnecessary and should be deleted, particularly in light of the qualification in the opening phrase of draft paragraph 14 (2) that the carrier's proof under this provision was made "alternatively to proving the absence of fault as provided in paragraph 1". A further suggestion was made that the bracketed text at the end of subparagraph 14 (2) (b) should be deleted on the basis that it was unnecessary, and that, in any event, the reference made in that phrase ought to have been to draft paragraph 14 (1) for assessment of liability for the additional event, rather than to paragraph 14 (4) regarding concurring causes. Support was expressed in the Working Group for both of these suggestions, while some support was also expressed for the retention of the language at the end of subparagraph 14 (2) (b) and the deletion of the square brackets around it. The Working Group agreed to request an informal drafting group to consider the text of subparagraph 14 (2) (a) and (b) in light of those suggestions, with a view to preparing a new draft to clarify the text.

Subparagraph 14 (2) (c)

The two proposed alternatives

23. The Working Group considered the two alternatives with respect to the burden of proof on the claimant in the event of unseaworthiness set out in the proposed text of subparagraph 14 (2) (c). It was observed that the first alternative text of subparagraph 14 (2) (c) required the claimant to prove only the unseaworthiness of the ship or the failure of the carrier to properly man, equip and supply the vessel or the unfitness of the holds in order to shift the burden of proof back to the carrier, while the second alternative required the claimant to prove that the loss, damage or delay was actually caused by one of those failings on the part of the carrier. Concerns were raised regarding the burden that would be placed on the claimant in having to prove the causation further to the second alternative approach. Concerns were also raised with respect to the burden that the first alternative would place on the carrier, by requiring it to prove both the seaworthiness of the ship and the cause of the loss. The view was expressed that the first alternative would return the regime to the pre-Hague Rules era, with an overriding obligation of seaworthiness, such that unseaworthiness need not have caused the loss in order for the claim to succeed. Support was expressed in the Working Group for each of the two alternatives set out in subparagraph 14 (2) (c).

Possible compromise positions

24. The Working Group heard a proposal that a compromise position between the two alternatives being considered in subparagraph 14 (2) (c) could be achieved by reducing the burden on the claimant to prove causation. In this regard, it was suggested that the claimant should be required to prove both the unseaworthiness and that it caused or could reasonably have caused the loss or damage. Support was expressed in the Working Group for the adoption of such a compromise position. Concern was expressed that this compromise position could be seen negatively by domestic courts as an attempt to regulate procedure with respect to how the burden of proof should be evaluated. Concern was also expressed that the adoption of conditional language in this regard could give rise to ambiguities and thus result in increased litigation. Further, the view was expressed that, should this compromise position be adopted, it should be kept in mind when considering the overall balance of rights and liabilities in the draft instrument.

25. A second possible compromise was suggested. It was noted that paragraph 20 (4) of the draft instrument required the parties to the claim to give all reasonable facilities to each other for inspection and access to records and documents relevant to the carriage of goods in the context of providing notice of loss, damage or delay. It was suggested that a similar provision could be adopted with respect to the second alternative, in order to assist the claimant who could have practical difficulties in gaining access to the information necessary to prove that unseaworthiness was the cause of the loss or damage. Support was expressed in the Working Group for that position.

Conclusions reached by the Working Group on paragraph 14 (2)

26. After discussion, the Working Group decided that an informal drafting group should be requested to prepare a redraft of paragraph 14 (2) (see paras. 29 to 33 below), taking into account:

- The desire to clarify the text in subparagraphs 14 (2) (a) and (b);
- The goal of seeking a compromise position with respect to subparagraph 14 (2) (c), in keeping with those views suggested above in paragraphs 24 and 25.

First proposed redraft of paragraphs 14 (1) and (2)

27. An informal drafting group composed of a number of delegations prepared a redraft of draft paragraphs 14 (1) and (2), based upon the discussion in the Working Group (see paras. 12 to 26 above).

General discussion of paragraph 14 (1)

28. The Working Group heard that paragraph 14 (1) had been revised only with respect to its last four lines, in which the text had been clarified and split into two sentences as follows: “took place during the period of the carrier’s responsibility as defined in chapter 3. The carrier is relieved of its liability if it proves that the occurrence that caused or contributed to the loss, damage, or delay is not attributable to its fault or to the fault of any person mentioned in article 14 bis.”

Further, the phrase "shall be liable" had been changed to "is liable" to reflect modern usage.

General discussion of paragraph 14 (2)

29. The Working Group heard that, with respect to draft subparagraphs 14 (2) (a) and (b), the bracketed text at the end of each had been deleted. Draft subparagraph 14 (2) (b) was clarified by inserting after the phrase "loss, damage or delay" the following text based on paragraph (1), "unless the carrier proves that this event is not attributable to its fault or to the fault of any person mentioned in article 14 bis". Further, the informal drafting group had selected the second alternative for subparagraph 14 (2) (c) set out in paragraph 20 above as instructed by the Working Group, and, in fulfilment of the goal of seeking a compromise position, the phrase "or was probably" was inserted between the words "was" and "caused". In addition, the phrase "or contributed to by" was inserted at the end of the opening phrase of the subparagraph before the beginning of subparagraph (c) (i).

30. While general support was expressed for this revised text, some concerns were raised. Some doubts were expressed regarding the impact of the phrase "or contributed to by" in the second line of the chapeau of subparagraph 14 (2), since it was thought that if the carrier proved that the loss or damage was merely contributed to by one of the list of excepted perils, it could avoid liability altogether, or at least shift the burden of proof back to the claimant, and it was questioned whether that was consistent with the intended effect of paragraph 14 (4). Further, the view was reiterated that the carrier should not be held responsible for unexplained losses, however, the opposite view was also expressed, along with the view that this draft of paragraphs 14 (1) and (2) represented a clarification of the existing law that carriers were liable for unexplained losses. Some preference was expressed for the use of the phrase "could have reasonably caused or contributed to" rather than "was probably caused by or contributed to by" in the first line of subparagraph 14 (2) (c), since the latter seemed to demand a higher burden of proof and was thought to potentially be confusing in jurisdictions where the standard of proof was "on the balance of probabilities". However, the Working Group was reminded that the phrase chosen was intended to be compromise language in order to render acceptable the whole of article 14.

Second proposed redraft of paragraphs 14 (1) and (2)

31. Based on the discussion in the Working Group of the first proposed redraft of paragraphs 14 (1) and (2) (see paras. 27 to 30 above), an informal drafting group composed of a number of delegations prepared a second redraft. The text of the second redraft of draft paragraphs 14 (1) and (2) that was proposed to the Working Group for its consideration was as follows:

> "1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from 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 3. 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 in article 14 bis.

"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:

"(a) if the claimant proves that the fault of the carrier or of a person mentioned in article 14 bis 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 other than those 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 in article 14 bis, 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 (1); or

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

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

32. Concern was raised that this second proposed redraft of paragraphs 14 (1) and (2) would allow the carrier to escape "all or part of its liability" by proving that there was at least one cause, however incidental, of the loss, damage or delay that was not the fault of the carrier, even where the loss, damage or delay in its entirety would not have occurred without the carrier's fault. In response, there was support for the view that the provisions were to be interpreted as referring to causes that were legally significant, and that national courts could be relied upon to interpret the provisions in that fashion and to apportion liability for those legally significant events accordingly.

Conclusions reached by the Working Group on paragraphs 14 (1) and (2)

33. The Working Group agreed that the text of the second proposed redraft of paragraphs 14 (1) and (2) as set out in paragraph 31 above was broadly acceptable.

Draft paragraph 14 (3)

General discussion

34. The Working Group considered the text of paragraph 2 of draft article 14 as contained in document A/CN.9/WG.III/WP.36. It was proposed that the drafting and readability of article 14 would be improved if the list of excepted perils, previously in draft paragraph 2, were to become a new draft paragraph 14 (3). A further alternative was suggested that, in the interest of consistency, the list of excepted perils should be limited to perils which exemplify the lack of fault of the carrier, while other perils, such as the fire exception, should be contained in separate provisions. The Working Group took note of these proposals, and it decided to consider the substance of each of the perils on the basis of the text set out in paragraph 8 of A/CN.9/WG.III/WP.36. The Working Group decided to refer general drafting issues resulting from its consideration of the list of excepted perils to an informal drafting group (see paras. 75 to 80 below).

Retention of the list of "excepted perils" and placement of specific perils

35. Throughout the discussion of the list of excepted perils, there were suggestions that some of the perils should be deleted, as being events already covered pursuant to the general liability rule in draft paragraph 14 (1). That issue was raised particularly with respect to subparagraphs (a), (b), (g) and the fire exception. However, the Working Group was reminded that it had already decided (see A/CN.9/525, paras. 38 and 39, and A/CN.9/544, paras. 117 and 118) that maintaining the list of excepted perils, particularly in language close to that of the Hague-Visby language, was valuable for the purposes of legal certainty, even if it could be argued that it was logically unnecessary. Alternatively, there was some suggestion that certain of the perils listed might not be consistent with the intention in draft article 14 that the list of perils set out clear situations where the carrier was not at fault. That issue was raised particularly with respect to subparagraphs (a), (i), and the fire exception. The Working Group decided also to refer to an informal drafting group those issues regarding where those perils listed should best be placed in the text.

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

36. It was suggested that the phrase "Act of God" in subparagraph (a) should be deleted in an effort to further the goal of modernization of transport law, and be consistent with the logic of draft article 14. However, it was observed that due to its traditional importance, it would be useful to retain the Act of God peril, particularly since its deletion could be misinterpreted as having substantive meaning. There was some support for retaining the brackets around "Act of God", and it was proposed that the phrase should be moved, either with or without brackets, to a separate subparagraph, as, it was suggested, it did not match the logic underlying draft article 14. It was further suggested that alternative wording could be used, for

example, “natural phenomena”. However, support was expressed for keeping the phrase “Act of God” and removing the brackets.

37. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The brackets should be removed from around the words “Act of God”;

- The phrase could be placed on its own in a new draft subparagraph.

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

38. Some support was expressed for retaining the wording in brackets, but concern was raised that the bracketed text represented a departure from the text of article IV.2.g of the Hague-Visby Rules, “seizure under legal process”, which, it was suggested, should be retained to preserve case law. It was further suggested that the word “detention” could be added to the Hague-Visby wording after “seizure”, if the intention of the bracketed text was to broaden the meaning of the Hague-Visby text beyond arrest. It was noted that the Hague-Visby text was considered by some to be difficult to understand, and that situations might arise when the ship was detained as a result of the fault of the carrier, who should not, therefore, be relieved of responsibility. It was observed that detention could also occur through no fault of the carrier. The suggestion was made that such situations could be avoided by linking the interference to actions of governments or to authorities, however some doubts were raised regarding this approach, as magistrates enforcing claims against the carrier could be considered authorities.

39. It was noted that the Working Group was in general agreement with the principle intended in the subparagraph that the carrier should receive the benefit of an exemption when the arrest or detention was through no fault of its own, but that the exemption should not be available when it resulted from the carrier’s fault.

40. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- There was general agreement with the principle that the carrier should receive the benefit of the excepted peril when the arrest or detention was through no fault of its own, but that the wording needed to be clarified.

“(c) Act or omission of the shipper, the controlling party or the consignee”

41. It was proposed that, in addition to the “shipper”, this subparagraph should include a reference to the persons acting on behalf of the shipper, particularly those set out in article 32 of the draft instrument, in order to ensure that the carrier would not be held liable for acts performed by parties not under its control. It was also suggested that the provision should be coordinated with draft subparagraph (h) (see paras. 57 to 58 below).

42. After discussion, the Working Group decided that:

- The issue of adding parties acting on behalf of the shipper would be left to the consideration of the informal drafting group.

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

43. While the phrase "restraint of labour" had appeared in article IV.2.j of the Hague-Visby Rules, concerns were expressed regarding its meaning and, in particular, its application to the various forms of strike, which could include strikes arising from the fault of the carrier. It was also stated that while the precise meaning of the phrase was not entirely clear, it was preferable to retain it, since it was clearly broader than strikes and lockouts. It was further proposed that the words "restraints of labour" could be replaced by the more modern labour law term, "labour actions". However, it was suggested that in order to obtain the benefit of existing case law, the language of the Hague-Visby Rules should be retained unless it had created an ambiguity.

44. The Working Group agreed to retain the text of subparagraph (d) with no changes.

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

45. The Working Group agreed that the text of subparagraph (e) reflected established commercial practice and retained it with no changes.

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

46. It was suggested that this subparagraph should be deleted as redundant in light of subparagraph (c) considered above, or, in the alternative, that the words "by the shipper" should be added at the end of subparagraph (f) (see A/CN.9/WG.III/WP.36, footnote 39). In response, it was stated that the text of the Hague-Visby Rules should not be revised to address an issue which did not seem to have posed a problem. It was also observed that the draft instrument made clear that it was the obligation of the shipper to offer the cargo to the carrier in a condition ready for shipping, which entailed appropriate packing and marking. It was suggested that modernization of the text of the convention required acknowledgement of modern shipping practices, including increasing recourse to logistics companies.

47. It was suggested that the subparagraph should be clarified through the addition of the phrase, "except when this is done by or on behalf of the carrier" at the end of the provision.

48. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The phrase, "except when this is done by or on behalf of the carrier", should be added to the end of the subparagraph.

"(g) Latent defects in the ship not discoverable by due diligence"

49. The question was raised whether the phrase "not discoverable by due diligence" was redundant with respect to a latent defect. Further, some support was expressed for the view that the words "in the ship" represented a departure from the text of article IV.2.p of the Hague-Visby Rules, and should therefore be deleted to maintain uniformity of interpretation. It was suggested that latent defects for which the carrier should not be held liable could also occur outside the vessel, for example, in machinery such as cranes. The suggestion was also made that the entire

subparagraph (g) should be deleted in favour of the application of the general rule of exemption from liability absent fault as set out in paragraph 14 (1).

50. The Working Group agreed to retain the current text since alternative drafting proposals failed to gather sufficient support.

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

51. Concern was expressed that the expression "on behalf of the shipper" made the provision too broad, and it was suggested that the subparagraph should be limited to situations where the shipper had some actual control over the operation being performed on its behalf. The Working Group was reminded that this subparagraph should be considered in light of draft article 11 (2) regarding FIO (free in and out) and FIOS (free in and out, stowed) clauses, where certain of the carrier's obligations, including stowage, could be performed on behalf of the shipper. It was also noted that draft article 32 and subparagraph (c) (see paras. 41 and 42 above) should be considered in any clarification of subparagraph (g).

52. After discussion, the Working Group agreed to refer to an informal drafting group the decision:

- To delete the words "on behalf of the shipper";
- To place square brackets around the word "stowage" pending the outcome of deliberations on draft paragraph 11 (2).

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

Relationship to articles 12 and 13 (2)

53. It was suggested that consideration of subparagraph (i) regarding dangerous goods should be deferred until after both articles 12 and 13 (2) had been discussed and finalized. In that respect, it was suggested that the language used in subparagraph (i) was not entirely aligned with that used in draft articles 12 and 13 (2).

Placement of subparagraph (i)

54. It was suggested that subparagraph (i) was of an entirely different nature from the preceding subparagraphs (a) to (h). It was said that those subparagraphs contained presumptions as to the absence of fault on the part of the carrier, whereas subparagraph (i) could be seen as a justification for the carrier's actions to allow goods to be destroyed and thus did not sit well with provisions setting out a basis for the absence of fault. As well, it was said that while paragraphs (a) to (h) were appropriately placed in article 14 in that they were linked to the burden of proof of fault, subparagraph (i) was an exception to paragraph 14 altogether in that it excluded liability *a priori*. For that reason it was suggested that the subparagraph could be redrafted so as to expressly provide that it was subject to articles 12 and 13 (2). It was also suggested that the subparagraph should be moved from article 14.

General average

55. In response to a suggestion that subparagraph (i) might affect the law on general average, the Working Group was reminded that the question of general average was dealt with in Chapter 17 of the draft instrument and provided that the draft instrument did not prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average. The Working Group heard that it was not intended to allow the carrier to exercise its discretion to render harmless dangerous goods without being subject to possible liability under article 14. In that respect it was noted that articles 12 and 13 (2) were also subject to article 14.

Conclusions reached by the Working Group on draft subparagraph (i)

56. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The subparagraph should be kept in square brackets to highlight that the content of the provision and its location in the draft instrument would need to be revisited once the content of articles 12 and 13 (2) had been settled;
- The subparagraph should not be interpreted as affecting the rules on average;
- The placement of subparagraph (i) must be considered.

"(j) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

57. After discussion, the Working Group decided that this subparagraph should be deleted as redundant, since its substance had been moved to paragraph 14 (1) (see paras. 12 to 18 above).

"fire on the ship, unless caused by the fault or privity of the carrier"

58. The Working Group recalled that the inclusion of a specific fire exception in the list of excepted perils had been subject to a discussion most recently at its thirteenth session (A/CN.9/552, paras. 94-95), where a decision was made to retain the exception for further consideration in the context of draft article 14. The text of the exception on which the Working Group based its discussions was as follows: "fire on the ship, unless caused by the fault or privity of the carrier" (see draft article 22, in A/CN.9/WG.III/WP.32, reiterated in para. 9, A/CN.9/WG.III/WP.36, and in para. 11, A/CN.9/WG.III/WP.39). It was noted that the exact placement of this exception was yet to be determined but that, in accordance with a decision taken at the thirteenth session of the Working Group (A/CN.9/552, para. 99), it would be further considered in the context of draft article 14, and that it was possible that it could be included as a subparagraph in the list of "excepted perils".

59. Three options were proposed in respect of the fire exception:

- Delete the specific exception and deal with the risk of fire through the general rule set forth in draft article 14 on the basis that the carrier was best placed to identify the causes of fire;
- As a fallback position to the first option, retain the fire exception in the list of excepted perils but limit it to "fire on the ship" and delete the remainder of the proposed text;
- Include the proposed text in its entirety and place it outside the list as an exoneration, thereby following more closely the approach taken in the Hague-Visby Rules.

60. Support was expressed in favour of both the deletion and retention of the fire exception for the reasons stated previously in the Working Group (see, generally, A/CN.9/552, paras. 94-95). A further reason in favour of its deletion was said to be that including the exception for ships in a multimodal instrument could produce inequity, and was inappropriate given that in other modes of transport the exception did not apply. Further reasons in support of retention of the full Hague-Visby text of the fire exception were expressed on the basis that it represented a well-established rule both in jurisprudence and in practice.

61. While strong preference was generally expressed in the discussion for either the deletion or retention of the fire exception, several views were expressed that a compromise position could also be acceptable. That compromise position consisted of the fallback position set out in paragraph 59 above.

Conclusions reached by the Working Group on the fire exception

62. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- As an acceptable compromise, the fire exception should be retained, possibly as subparagraph (j) of the list of excepted perils in draft article 14, and the text following the phrase "fire on the ship" should be deleted.

Other excepted perils

63. The Working Group considered proposed draft subparagraphs (k), (l), (m) and (n) for the list of excepted perils. The text on which these subparagraphs were based was taken from draft article 22 (see A/CN.9/WG.III/WP.39, para. 11), for reincorporation into draft article 14, following the decision of the Working Group (see A/CN.9/552, paras. 93 and 99).

64. After discussion, the Working Group agreed to refer to an informal drafting group the decision that the following text be taken into account in preparing a revised text of the list of excepted perils in draft article 14:

"(k) Saving or attempting to save life at sea;

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

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

"(n) Perils, dangers and accidents of the sea or other navigable waters."

Pilot error

65. It was suggested that, notwithstanding the decision of the Working Group to delete error in navigation as a ground for exception to the carrier's liability (A/CN.9/525, para. 36), pilot error should be reintroduced to the list of excepted perils by inserting the following new draft subparagraph: "act, neglect or default of the pilot in the navigation of the ship". Three reasons were given for this proposal: pilot error was not necessarily the pure navigational fault of the carrier or its servants; it was not covered by the general liability rule in draft paragraph 14 (1); and it was not covered by the "perils of the sea" exception. Views for and against this inclusion were expressed similar to those raised in the Working Group during consideration of the issue of pilot error and compulsory pilotage in previous sessions (see A/CN.9/525, para. 43). It was also suggested that pilot error was already covered in the draft instrument: in the case of compulsory pilotage, the carrier could prove absence of fault under draft article 14, while in case of non-obligatory pilotage, the pilot was acting as agent of the carrier and therefore the carrier should bear responsibility for the pilot's acts. However, some hesitation was expressed whether draft article 14 could be interpreted to cover pilot error in this fashion.

66. After discussion, the Working Group decided that:

- Pilot error would not be reintroduced into the draft instrument as an exception to carrier liability.

Draft paragraph 14 (4) "concurring causes"

67. The Working Group proceeded to consider draft paragraph 14 (4) as contained in document A/CN.9/WG.III/WP.36, which dealt with the question of concurrent causes of loss, damage or delay. It was recalled that this paragraph had already been the subject of discussion in the Working Group (A/CN.9/525, paras. 46-56 and A/CN.9/544, paras. 135-144).

Scope of paragraph and relationship to remainder of draft article 14

68. The view was expressed that there could be three types of concurring causes, each of which should be subject to an allocation of liability by the court pursuant to paragraph (4):

- Those whereby each event could have caused the entire loss, damage or delay, irrespective of the other causes;

- Those whereby each event caused only a portion of the damage;

- And those whereby each event was insufficient to have independently caused the damage, but the combined result created the loss, damage or delay.

69. The Working Group was reminded of its agreement that the guiding principle of paragraph (4) should be that it not deal with the question of liability as that question was dealt with in paragraphs 14 (1) and (2) (A/CN.9/544, para. 142), and that paragraph (4) was intended to be confined to the distribution of loss amongst multiple parties, covering all types of concurring causes. Further, it was recalled that in earlier discussions, the Working Group had agreed in principle that when

there were multiple causes for loss, damage or delay, it should be left to the court to allocate liability for the loss based upon causation.

70. A doubt was raised regarding how draft paragraph 14 (4) would ever come into operation given that draft paragraph 14 (1) appeared to relieve the carrier from liability if it proved an occurrence that contributed to the loss. A minority view was that paragraph 14 (4) covered only those situations where each cause was responsible for part of the damage; otherwise, the carrier appeared to be fully liable under paragraph 14 (1). The addition of a provision on comparative negligence was suggested. Some concern was also raised regarding how resort would be had to paragraph (4) in cases of unseaworthiness. In clarification, it was said that paragraph (4) was intended to apply in situations where an event for which the carrier was responsible contributed to the loss, including one of the paragraph 14 (3) events or unseaworthiness, and where an event for which the carrier was not responsible also contributed to the loss.

Burden of proof

71. It was suggested that draft paragraph 14 (4) was unclear with respect to which party bore the burden of proving the existence and the extent of concurring causes, and that it did not adequately clarify this issue with respect to each of the possible types of concurring causes. A proposal was made to reintroduce the phrase "to the extent" in draft paragraph 14 (1) in order to clarify that the carrier should bear this burden. A further concern was raised regarding how the burden of proof would operate with respect to the issue of unseaworthiness.

72. In response, it was suggested that the intention of paragraph (4) was that the burden of proof of concurring causes would be dealt with in every conceivable situation in draft paragraphs 14 (1) and (2). In this regard, the burden of proof fell first to the claimant to prove its prima facie case in paragraph 14 (1), and pursuant to paragraph 14 (2), the burden was on the carrier to prove a cause relieving it of its liability, and on the claimant to prove a concurring cause for which the carrier was liable. At this stage, it was suggested, resort would be had to paragraph (4) to allow the court to determine the allocation of liability based on causation. In the case of unseaworthiness, the view was expressed that the draft article would operate such that where unseaworthiness was proved responsible for part of the loss, resort would be had to paragraph (4) and the carrier would be liable for that portion of the loss attributable to unseaworthiness, but not for that portion of the loss that was not caused by its fault.

"[The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis]"

73. It was recalled that when the draft paragraph had been discussed by the Working Group at an earlier session, the bracketed sentence had received support as a basis on which to continue further discussion (see A/CN.9/544, para. 143). It was suggested that, in keeping with the earlier discussions that had taken place in the Working Group regarding its agreement that this paragraph should only concern the distribution of the loss amongst more than one person, the provision should be kept as simple as possible to cover all types of concurring causes and that the courts should be given significant freedom to determine allocation. For that reason, it was

suggested that the bracketed sentence in draft paragraph 14 (4) was not appropriate, as it could be seen either to encourage courts, as a matter of course, to equally apportion liability, or as unnecessary interference with judicial discretion. An alternative view presented was that the purpose of the final sentence was to encourage courts accurately to apportion liability, and to apply a fifty-fifty apportionment only as a last resort.

Conclusions reached by the Working Group on paragraph (4)

74. After discussion, the Working Group agreed that further drafting (see paras. 75 to 80 below) should take into account the following conclusions:

- The intention of the draft paragraph was to grant courts the responsibility to allocate liability where there existed concurrent causes leading to the loss, damage or delay, some of which the carrier was responsible for and some for which it was not responsible;
- To consider and clarify any existing ambiguity in the intended operation of paragraphs 14 (1), (2) and (4);
- The bracketed text at the end of the subparagraph (4) should be deleted.

Proposed redraft of paragraphs 14 (3) and (4)

75. An informal drafting group composed of a number of delegations prepared a redraft of draft paragraphs 14 (3) and (4), based upon the discussion in the Working Group (see paras. 34 to 74 above). The text of the redraft that was proposed to the Working Group for its consideration was as follows:

"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 in article 14 bis;*

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

"(f) Fire on the ship;

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

"(h) Act or omission of the shipper or any person mentioned in article 32,** the controlling party, or the consignee;

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* Further examination is needed whether the reference to article 14 bis is necessary.

** Further examination is needed whether the reference to article 32 is necessary.

"(i) Handling, loading, [stowage,] or unloading of the goods [actually performed] by the shipper or any person mentioned in article 32,* the controlling party, or the consignee;

"(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 12 and 13 (2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.]

"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 be apportioned on the basis established in the previous paragraphs."

76. The Working Group heard that the informal drafting group had incorporated into this revised text the decisions made by the Working Group with respect to draft paragraph 14 (3), as discussed in paragraphs 34 to 66 above. Views were expressed that subparagraph (h) and (i) were repetitive, such that subparagraph (i) could be deleted and its content would be adequately covered by subparagraph (h). However, the view was also expressed that subparagraph (i) referred to physical events which were not necessarily covered by subparagraph (h). The Working Group was reminded that it had agreed to postpone a final decision with respect to subparagraph (i) until the Working Group had further considered draft article 11 (2), and it was agreed to add a footnote to subparagraph (i) noting that the final text of subparagraph 3 (i) would depend upon the outcome of the discussion of the Working Group on draft article 11 (2).

77. It was pointed out that the new language in draft paragraph 14 (4) was not meant to be a deviation from the Working Group's decision to leave the determination of apportionment to the court.

78. The Working Group considered the revised text of draft paragraph 14 (4) as set out in paragraph 75 above, and found it acceptable.

79. The Working Group expressed its appreciation to Professor Berlingieri of Italy for his leadership on this issue.

Conclusions reached by the Working Group on paragraphs 14 (3) and (4)

80. The Working Group decided that:

* Further examination is needed whether the reference to article 32 is necessary.

- The text of paragraphs 14 (3) and (4) was broadly acceptable, with the addition of a footnote to subparagraph 14 (3) (i) that its final text would depend upon the outcome of the discussion on draft article 11 (2).

Freedom of contract (draft articles 1, 2, 88 and 89)

81. The Working Group was reminded that it had most recently considered draft articles 1 and 2 at its twelfth session (see A/CN.9/544, paras. 51-84), and draft articles 88 and 89 at its eleventh session (see A/CN.9/526, paras. 203-218).

82. The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paragraph 11 above). The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to draft articles 1, 2, 88 and 89 in an effort to achieve consensus with respect to the best approach to be taken regarding freedom of contract issues. The Working Group agreed to divide matters relating to freedom of contract into three main issues for the purposes of analysis, i.e. scope of application, protection of third parties and Ocean Liner Service Agreements (OLSAs), and to proceed with the discussion accordingly.

Scope of application

83. It was noted that the scope of application issue would require a decision regarding the types of situations and contracts which would be subject to the mandatory rules of the draft instrument and which would not, or which provisions of the draft instrument would apply on a non-mandatory basis in which situations. The Working Group considered the text of draft article 2 as contained in document A/CN.9/WGIII/WP.36, particularly paragraph 3 thereof. It was suggested that there were three possible theoretical approaches to defining the scope of application of the draft instrument, each of them with advantages and disadvantages.

Documentary approach

84. The first approach, used in the Hague-Visby rules, was document-oriented and would require the issuance of a bill of lading or similar document to trigger the application of the draft instrument. One advantage of adopting this approach was that once the document was issued, it would automatically fall within the mandatory liability regime. Another advantage was said to be that this approach was well-known given its long history. However, a disadvantage of the documentary approach was thought to be that modern trade did not necessarily use bills of lading or similar documents, and, further, that new documents could be used in the future which might not fall within any definition devised for this approach. However, it was suggested that the inclusion of a non-exhaustive list of documents intended to be included within the mandatory coverage of the draft instrument, followed by a generic final category, could overcome concerns relating to definition. In response, it was observed that the addition of a generic closing category would not necessarily solve the problem, since it could itself create uncertainty. The view was also expressed that the documentary approach was obsolete, and that it did not fit easily within the scheme devised by the draft instrument.

Contractual approach

85. The second approach, used in the Hamburg Rules and found in draft paragraph 2 (3) of A/CN.9/WGIII/WP.36, was contract-oriented and would require the issuance of a contract of carriage of goods for the application of the draft instrument. It was stated that certain types of contracts of carriage would need to fall outside the scope of application of the draft convention despite being contracts of carriage, for example voyage charter parties, or specialized contracts of carriage, such as volume contracts, slot or space charter parties, heavy lift contracts and towage contracts, again creating possible definitional problems. However, it was also suggested that many of the contracts to be excluded under the contractual approach fell under the rubric of "non-liner trade" and therefore would also be excluded under the trade approach.

Trade approach

86. The third approach was trade-oriented and would apply the draft instrument on a mandatory basis to all contracts in the "liner trade", but would not apply it to the "non-liner" or "tramp" trade. The advantages of this approach were that it reflected well-established trade practice, and obviated the need to exhaustively define all possible types of contracts for the application of the draft instrument. However, this approach could also pose problems in the legal definition of the relevant categories, as well as with respect to the protection of third parties.

Contracts freely negotiated

87. It was also noted that another aspect relevant to the scope issue was whether a given contract of carriage had been freely negotiated between the parties or not. It was said that the draft instrument should apply to contracts freely negotiated on a non-mandatory basis, except for certain obligations that should not be capable of modification by mutual agreement, such as seaworthiness, while contracts that were not freely negotiated should be mandatorily subject to the draft instrument. Further, some concern was expressed in this regard for the plight of small shippers with unequal bargaining power who, it was said, could be disadvantaged when negotiating contracts which could fall outside of the mandatory application of the instrument.

Mandatory nature of specific provisions in the draft instrument

88. Another factor to be considered by the Working Group in this discussion was said to be which, if any, of the particular provisions of the draft instrument should be of a mandatory nature.

Conclusions reached by the Working Group on scope of application

89. After discussion, a broad consensus emerged within the Working Group that the draft instrument should be mandatorily applicable to traditional shipments with traditional bills of lading and sea waybills and to shipments under their electronic equivalents. There was also broad agreement that traditional charter parties, volume contracts in the non-liner trade, slot charters in the liner trade, and towage and heavy lift contracts should be excluded from the application of the draft instrument. A majority of the delegations favoured the contractual approach. However, it was

believed that a compromise could be achieved by using a combination of the trade approach, the contractual approach and the documentary approach. Other aspects could be factored into this effort to define the mandatory application of the draft instrument, such as the issue of whether or not a contract had been freely negotiated, and whether some provisions of the draft instrument should always be mandatory.

90. The Working Group decided that:

- An informal drafting group should be requested to prepare a provision on scope based on the views outlined in the paragraph above, and, in any event, taking into consideration the text as set out in draft paragraph 2 (3) of A/CN.9/WGIII/WP.36 (see paras. 105 to 109 below).

Third parties

91. It was recalled that the Working Group had agreed that the second issue in its analysis of freedom of contract would concern the mandatory nature of the draft instrument regarding the protection of third parties, where such third parties held rights under the draft instrument (A.CN.9/544, para. 81). Whilst the Working Group had before it a draft text relating to third parties contained in draft paragraph 2 (4) of A/CN.9/WG.III/WP.36 requiring the issuance of a negotiable transport document or electronic record, two alternative texts were proposed as follows:

> "Alternative 1: Notwithstanding paragraph 1, if a transport document or an electronic record is issued pursuant to a charter party, contract of affreightment, volume contract or similar agreement, then the provisions of this instrument apply to such a transport document or an electronic document or an electronic record to the extent that the transport document or the electronic record governs the relation between the carrier and any person named as consignor or consignee or any person being the holder, provided that the person is not the charterer or any other party to the contract mentioned in paragraph 1.
>
> "Alternative 2: Notwithstanding paragraph 1, the provisions of this instrument apply between the carrier and a third party who according to the provisions of this instrument has rights or duties in relation to the carrier, provided that this person is not the charterer or any other party to the contract mentioned in paragraph 1."

92. The Working Group heard that these alternative texts had been prepared to reflect the principle that third parties should have mandatory protection under the draft instrument, but that such protection should not be related to any negotiable transport document such as a bill of lading. Alternative 1 continued to require that the third party be connected to a document or to an electronic record but removed the requirement that the document or record be negotiable, whereas alternative 2 omitted any reference to a transport document or an electronic record of any type.

Defining the category of "third party"

93. A view was expressed that alternative 2 provided greater protection for third parties, however, some caution was raised that alternative 2 could be too broad, and could extend third party protection to unintended parties, such as an insurer or a creditor. Another issue raised with respect to alternative 2 was that the

phrase "rights or duties in relation to the carrier" raised the possibility that obligations could be imposed on third parties. Support was expressed for alternative 1 on the basis that it required that there be some connection between the third party and a document or electronic record, and that it made clearer who could take advantage of that provision. There was some support for another proposal to limit the definition of third parties to consignors, consignees, controlling parties, holders, persons referred to in draft article 31, and the "notify party". It was further suggested that the categories of consignor, consignee and document holders could encompass controlling parties and the notify party, thus making specific inclusion of them unnecessary.

Documentary basis, no documentary basis or negotiable documentary basis

94. There was support for the suggestion that failure to tie the identity of the third party to a document would make it difficult to establish the limits of the category, and could impose a heavy burden on the carrier to identify third parties. In addition, the suggestion was made that mandatory rules should govern the relationship between the carrier and third parties in order to standardize the contents of the document and to reduce transaction costs, especially in documentary credits. It was suggested that mandatory protection for such a purpose would not extend to third parties without a document or an electronic record. Further, it was thought that third parties should have some reliance on the documents in order to qualify for protection. It was suggested, however, that only documents or electronic records that transferred rights should require third party protection, since otherwise parties could negotiate for their own protection in the sales contract and other trade arrangements. The possibility was raised that this reasoning should also be extended to transferees of the right of control where no document was issued, but that, in any event, this issue should be kept in mind in future discussion on the right of control.

Additional considerations

95. The Working Group was reminded that the issue of third parties should be borne in mind when determining which provisions of the draft instrument would be mandatory, in order to ensure that third party protection was not rendered illusory. In addition, it was suggested that there could be some other categories of third parties deserving of protection under the draft instrument, and that the category of third parties should not yet be considered closed. It was also suggested that care should be taken in granting third party rights based on documents other than documents of title. Further, it was suggested that the meaning of "third parties" should be consistent with the meaning attributed to the use of that term in provisions relating to ocean liner service agreements (OLSAs) and in charter parties.

Conclusions reached by the Working Group with respect to third parties

96. The Working Group agreed that:

- Third parties should be protected in the draft instrument;
- The identification of such third parties should be made on the basis of the documentary approach in alternative 1;

- The third parties deserving of protection should be established clearly, but the categories should not yet be considered closed;
- The protection of third parties should be taken into account when determining which provisions of the draft instrument were to be mandatory;
- The meaning of the term "third party" should be consistent with its use elsewhere in the draft instrument, notably when used in provisions relating to OLSAs and charter parties.

Ocean Liner Service Agreements (draft article xx)

97. It was recalled that the Working Group had agreed that the third issue in its analysis of freedom of contract would concern the application of the draft instrument to Ocean Liner Service Agreements (OLSAs) (see A/CN.9/WG.III/WP.42 and A/CN.9/WG.III/WP.34, paras. 18-29 and 34-35), previously introduced at its twelfth session (see A/CN.9/544, para. 78).

Presentation of the proposal

98. The Working Group heard an introduction of the provision on OLSAs, which would be presumptively covered by the draft instrument, but which would be allowed to derogate from some of its terms under certain conditions. It was further said that OLSAs would further the goals of the draft instrument by providing a flexible market-driven solution which would also satisfy future needs in the industry. It was suggested that draft article xx, as contained in document A/CN.9/WG.III/WP.42, aimed at achieving a careful balance between the interests of shippers, carriers and intermediaries, as well as protecting weaker parties. It was added that these goals were achieved, in particular, by adopting the principles of equality of treatment of non-vessel and vessel operating carriers, transparency regarding the derogation, freely and mutually negotiated derogation, objectivity, automatic application of the draft instrument absent express derogation, and the protection of third parties.

General discussion

99. The Working Group considered the OLSA proposal, noting that the main effect of the proposed provision was to allow carriers to derogate from the draft instrument, which would represent a major exception to the mandatory regime of the draft instrument. It was said that this could be of particular concern, given the large amount of trade that OLSAs would cover. It was suggested that OLSAs could be defined broadly as volume contracts for the future carriage of a certain quantity of goods over a certain period of time in a series of shipments in the liner trade, a well-known feature of the industry.

100. Some general concerns regarding OLSAs were expressed. It was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. However, it was suggested that trade practice demonstrated that both carriers and shippers under OLSAs could gain commercial advantages by derogating from the standard liability regime, and, further, that most cargo claims were made by third parties who would be unaffected by any such derogation between OLSA

parties. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was said that in the current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns.

Definition of OLSA

101. It was suggested that the definition of OLSAs in draft paragraphs (2) and (3) of draft article xx was excessively detailed. It was said in response that the detail was intended to ensure that any derogation from the draft instrument was not casual or inadvertent. It was further observed that the requirement regarding the provision of a "service not otherwise mandatorily required" was rather vague and could potentially be subject to abuse by carriers wishing to circumvent the mandatory provisions of the draft instrument in the absence of some test regarding the significance of the additional service. Further concerns were expressed regarding the use of the term "mutually negotiated", which could give rise to evidentiary difficulties on the effective freedom of contract of the parties. There was some support for a proposal that this difficulty could be addressed by placing on the carrier the burden of proving the shipper's actual consent. However, in response, it was suggested that the very nature of OLSAs meant that the parties to them were experienced professionals capable of understanding the significance of their acts without further procedural safeguards.

Jurisdiction

102. One aspect of the OLSA proposal was that, in the interests of commercial certainty, the binding choice of forum provision in OLSAs should be extended to third parties who received written notice, provided that a number of conditions were met, such as the existence of a reasonable connection to the forum selected (see A/CN.9/WG.III/WP.34, para. 35, and A/CN.9/WG.III/WP.42, note 3). Concerns were raised regarding this proposal, given the proposed application of the jurisdiction provision to third parties not privy to the agreement, the sensitivity of the issue, and the appropriateness of dealing with it in an international instrument, particularly given jurisprudence on the extension of jurisdiction clauses to third parties.

Multimodal transport

103. Concerns were raised regarding the effects of the proposed OLSA regime on the multimodal transport network system. It was suggested that the proposed text did not affect the intended operation of the network system in article 8 of the draft instrument, as contractual agreements could not derogate from the mandatory liability provisions of unimodal transport conventions. However, it was also observed that the draft article on OLSAs did not specify the relationship of the contractual regime towards mandatory domestic law, which could result in ambiguity.

Conclusions reached by the Working Group on draft article xx

104. After discussion, the Working Group decided that:

- It was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally;
- Particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA;
- Optimum placement of an OLSA provision within the draft instrument should also be considered;
- The original proponents of the OLSA proposal were invited to work with other interested delegations on refining the OLSA definition.

Redraft of provisions relating to scope of application

105. As requested by the Working Group (see paras. 83 to 96 above), an informal drafting group composed of a number of delegations prepared a redraft of the provisions regarding scope of application. In presenting the redraft, the Working Group heard that that text used a "hybrid" approach, incorporating elements from all three of the possible approaches. The redrafted text was based on the broad consensus expressed by the Working Group and outlined in paragraphs 83 to 96 above and taking into consideration draft paragraph 1 (a) and draft article 2 as set out in A/CN.9/WG.III/WP.36. The text that was proposed to the Working Group for its consideration was as follows:

"Article 1

"(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. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

"[(--)"Liner service" means a maritime transportation service that

(i) is available to the general public through publication or otherwise; and

(ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]

"[(--) "Non-liner service" means any maritime transportation service that is not a liner service.]

"Article 2

"1. Subject to articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of

delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

"(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

"(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

"(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

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

"[References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

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

"Article 3

"1. This Instrument does not apply to

"(a) subject to article 5, charter parties, whether used in connection with liner services or not; and

"(b) subject to article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

"(c) subject to paragraph 2, other contracts in non-liner services.

"2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

"(a) evidences the carrier's or a performing party's receipt of the goods; and

"(b) evidences or contains the contract of carriage,

except in the relationship between the parties to a charter party or similar agreement.

"Article 4

"If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in articles 2, 3 (1) (a), 3 (1) (c), and 3(2).

"Article 5

"If a transport document or an electronic record is issued pursuant to a charter party or a contract under article 3 (1) (c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport

document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under article 3 (1) (c).”

106. The Working Group heard that the informal drafting group had not had sufficient time to consider OLSAs, nor draft articles 88 and 89. Further, the redrafted article 1 definition of “contract of carriage” had not changed in substance from the original text in A/CN.9/WG.III/WP.36, but for moving the requirement of the international sea leg to article 2 of the redraft. Definitions of “liner” and “non-liner service” were proposed for inclusion in the draft article 1 definition section. The Working Group heard that article 2 of the redraft contained mainly the original text of draft article 2, but for the addition of a “double” international requirement (of both the overall contract of carriage and the sea voyage itself), the use of the word “contractual” in square brackets to further define the terms, and the placing of paragraph 2 in square brackets. Further, paragraph 3 (1) of the redraft was intended to parallel the exclusion clause in the original paragraph 2 (3), by treating first charter parties, then volume contracts, contracts of affreightment and similar contracts, with subparagraph (c) of the redraft representing an attempt to assist in the identification of “similar contracts”. Paragraph 3 (2) of the redraft then used the combined elements of the draft instrument’s definition of “transport document” in the original draft article 1 (k) to place certain contracts in non-liner services that should not be excluded within the scope of the draft instrument. The Working Group heard that the effect of article 3 of the redraft, while complicated, was to ensure that those transactions covered by the Hague and Hague-Visby Rules would continue to be covered by the draft instrument. Article 4 of the redraft was said to be substantially similar to the original draft article 2 (5). Finally, it was said that article 5 of the redraft was intended to provide third party protection along the lines of the original draft paragraph 2 (4), but that the “non-negotiable document” approach outlined above in paragraph 94 had been used in the redraft.

107. While the Working Group agreed that the redrafted text would require further examination and discussion before any specific positions could be taken on it, a number of general comments were made. Doubts were expressed regarding whether the redraft adequately provided for the internationality of the sea leg of the carriage. The view was expressed that the redraft in fact required “double” internationality, in that the redrafted paragraph 2 (1) required that both the place of receipt and the place of delivery be in different States, and that the port of loading and the port of discharge be in different States.

108. Concern was also expressed as to whether the redraft should clarify what was meant in subparagraph 2 (b) by the terms “volume contracts” and “contracts of affreightment”. A suggestion was made that such terms should be defined to ensure consistency of judicial interpretation. In that respect, it was noted that the redrafted subparagraph 2 (b) was intended to give some assistance in standardizing the interpretation of those terms by describing “similar contracts” as “providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not”. Some hesitation was expressed against the inclusion of any further definition of these terms, particularly given their varied usage in different jurisdictions.

109. The Working Group agreed that the redraft represented a sound text upon which to base future discussions on scope of application, once further reflection and consultations had taken place.

Jurisdiction

General discussion

110. The Working Group proceeded to consider draft chapter 15 on jurisdiction contained in A/CN.9/WG.III/WP.32, consisting of Variant A and Variant B, noting that the difference between the two variants was the inclusion in Variant A of draft article 75 on *lis pendens* (see below, paras. 142 to 144). The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paras. 11 and 82 above). The Working Group heard that an exchange of views had taken place within the informal consultation group not simply with respect to the provisions of draft chapter 15, but with respect to broad principles regarding the desirability of including jurisdiction provisions in the draft instrument, and what form these provisions might take.

111. In general, the Working Group supported the inclusion of a chapter relating to jurisdiction. Some views were expressed that the question of jurisdiction should be left entirely to the choice of the parties to the contract of carriage. In addition, it was feared that negotiations in this complex subject area could ultimately result in a failure to reach consensus on the provisions of the draft instrument, or that jurisdiction provisions along the lines of the Hamburg Rules as currently in the draft instrument could create barriers to States wishing to ratify the instrument. The question was also raised whether draft subparagraph 2 (1) (d) regarding the scope of application of the draft instrument should be deleted (see A/CN.9/WG.III/WP.36, footnote 18) if the Working Group agreed to include a chapter on jurisdiction.

112. The Working Group heard that although the European Community had common rules in the area of jurisdiction as embodied in Brussels Regulation I (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), that would not prevent its members from negotiating rules in the draft instrument that derogated therefrom, if necessary.

Conclusions reached by the Working Group

113. After discussion, the Working Group agreed to include in the draft instrument a chapter on jurisdiction.

Article 72

Jurisdiction limited to Contracting States

114. There was broad support for the suggestion that the reference to action "in a court" was too broad and should be qualified by inclusion of the words "in a Contracting State". A related matter was said to be the question of whether it was appropriate that national law be used to establish the competent court for jurisdiction according to the chapeau of draft article 72. In this regard, reference

was made to paragraph 33 (1) of the Convention for the Unification of Certain Rules for International Carriage by Air ("the Montreal Convention"), which was said to allow resort to both national and international courts to establish jurisdiction. However, there was support for the view that resort to national law was appropriate and not unusual in transport conventions.

Conclusions reached by the Working Group

115. After discussion, the Working Group agreed to add the phrase "in a Contracting State" after the phrase "in a court" in the chapeau of draft article 72.

Parties to whom the rules should apply

116. While views were expressed that jurisdiction provisions should cover all contractual issues, the Working Group continued its deliberations on the assumption that, generally speaking, the provisions of draft article 72 were appropriate as a basis for discussion for jurisdiction over actions against the contracting carrier by the cargo claimant. However, it was felt that in cases against the maritime performing party, the connecting factors to establish jurisdiction against the contracting carrier currently set out in draft article 72 would not be appropriate. Further, it was suggested that at least two types of maritime performing parties would require different connecting factors in order for jurisdiction over them to be reasonable: jurisdiction over the stevedore or terminal operator should likely be limited to their principal place of business or the place where the service was performed, while jurisdiction over the ocean carrier could likely be reasonably established at the port of loading or the port of discharge. Support was expressed for that view.

Conclusions reached by the Working Group

117. After discussion, the Working Group agreed that:

- The list of connecting factors in draft article 72 would be appropriate only in actions by the cargo claimant against the contracting carrier;
- That actions against the maritime performing party should be subject to different connecting factors.

"plaintiff"

118. It was suggested that the term "plaintiff" currently used in the chapeau of draft article 72 to describe the person having the right to choose jurisdiction might not be appropriate. In that respect, it was noted that a carrier defending a claim for cargo loss or damage could effectively pre-empt the cargo claimant's choice of jurisdiction by bringing as plaintiff an action for a declaration of non-liability. To prevent that, it was suggested that the term used in the chapeau should make clear that the choice of jurisdiction should be reserved for the cargo claimant. It was suggested that that could be accomplished by replacing the term "plaintiff" with "claimant", and defining "claimant" in terms such as "the person who brings the action against the carrier".

Conclusions reached by the Working Group

119. After discussion, the Working Group agreed to replace the term "plaintiff" with a more appropriate term to clearly indicate the intention that it referred to the "cargo claimant" and not the carrier.

Concursus—Concentration of suits in a single forum

120. The question was raised whether the chapter on jurisdiction should ensure that multiple suits arising from the same incident should be concentrated into one single forum. While no specific agreement was reached on this point, it was suggested that the inclusion of the port of loading and the port of discharge as connecting factors in draft article 72 (see below, para. 128) could assist in providing an obvious and major point of commonality on which many cargo claimants would logically choose to base jurisdiction. Some preference was expressed for rules facilitating the concentration of suits in a single forum, rather than drafting a specific rule for such a purpose. It was also suggested that Brussels Regulation I contained a rule which might be instructive in this regard.

Conclusions reached by the Working Group

121. The Working Group did not reach specific agreement on this matter.

Paragraph (a) Principal place of business or habitual residence

122. In general, the Working Group supported paragraph (a). It was observed that, whilst paragraph (a) referred to the principal place of business of the defendant, article 34 of the draft instrument on contract particulars simply required the name and address of the carrier. The question was raised whether that information should be taken to be the principal place of business, or whether that requirement should be clarified. It was suggested that, in the event that paragraph (b) was deleted, the wording in paragraph (a) could be clarified, perhaps through a reference to the legal domicile of the defendant. While the question was raised whether domicile and principal place of business were truly different, reference was made to article 34 of the Montreal Convention, which referred to "the court of the domicile of the carrier or of its principal place of business through which the contract has been made".

123. Given this discussion, it was agreed that the reference to "principal place of business" should be included in square brackets for further discussion, and perhaps definition, and that the word "domicile" should be included in square brackets at the end of that paragraph.

Conclusions reached by the Working Group regarding paragraph (a)

124. After discussion, the Working Group agreed:

- To place "principal place of business" in square brackets;
- To insert "domicile" in square brackets at the end of the phrase.

Paragraph (b) Place of contract

125. Strong support was expressed for the deletion of paragraph (b). In keeping with footnotes 223 and 30 of A/CN.9/WG.III/WP.32, it was agreed that in modern transport practice, the place of conclusion of the contract was largely irrelevant to the performance of the contract of carriage and, given that the draft instrument did not distinguish between documentary and electronic contexts, that place could be difficult or impossible to determine. A suggestion was made that the branch through which the contract was made could have some continuing relevance as a connecting factor with respect to suits against parties other than the contracting carrier. It was suggested that this might be borne in mind for future consideration.

Conclusions reached by the Working Group regarding paragraph (b)

126. After discussion, the Working Group agreed to:

- Delete paragraph (b);
- Bear in mind in future discussions the issue of whether the branch through which the contract was made could be a significant connecting factor in actions against maritime performing parties.

Paragraph (c) Place of receipt or delivery

127. General support was expressed for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction. Concern was expressed that it was unclear whether the terms “place of receipt or the place of delivery” referred to the contractual or actual places of receipt and delivery. It was suggested that this be clarified.

128. It was suggested that, as proposed in paragraph 30 of A/CN.9/WG.III/WP.34, two additional places should be specified, namely the port of loading and the port of discharge. It was suggested that such an inclusion was desirable to encourage the result that all litigation in relation to an accident should take place in the same forum. However, it was suggested that including these additional places could create overly broad connecting factors for jurisdiction, which were unnecessary and could complicate matters. The view was expressed that any need to cover other places was met by paragraph (d) which permitted the plaintiff to choose any additional place.

Conclusions reached by the Working Group paragraph (c)

129. After discussion, the Working Group agreed:

- To include reference to port of loading and port of discharge in square brackets;
- To include the words “actual” and “contractual” in square brackets before the word “place” in both instances.

Paragraph (d) Place designated in the transport document and jurisdiction clauses

130. Three views emerged in respect of draft paragraph (d). One approach suggested that exclusive jurisdiction should be the principal rule, such that paragraph (d) should represent the only basis for jurisdiction, and whether or not the jurisdiction agreed upon in the contract of carriage was listed in the draft instrument, it would be the only applicable forum. Some support was expressed for the view that commercial parties should be free to choose jurisdiction, and it was suggested that it would provide commercial certainty.

131. Another view was that paragraph (d) should permit exclusive choice of jurisdiction by the contracting parties, but only if they chose one of the places listed in paragraphs (a) and (c). By way of explanation, it was suggested that, while cargo claimants are sophisticated business people, total freedom of choice of jurisdiction could be open to abuse by the carrier. For that reason, it was suggested that paragraph (d) should only permit a choice from places that objectively had a real connection to the transaction and only in places that were in a Contracting State.

132. A third view was that jurisdiction designated in the transport document would simply be considered an additional jurisdictional basis which would be added to the list of possible jurisdictions from which the cargo claimant could choose in the draft article. The view was expressed that it permitted a choice for the cargo claimant in addition to the places listed currently in paragraphs (a) and (c), but did not limit the cargo claimant to accepting the jurisdiction specified in the jurisdiction clause.

133. The Working Group did not reach a consensus on which view should prevail with respect to jurisdiction clauses in the contract of carriage.

Conclusions reached by the Working Group

134. The Working Group agreed to further consider this matter in light of the discussion, and did not reach specific agreement.

OLSAs

135. The Working Group next heard a proposal (see A/CN.9/WG.III/WP.34, paras. 34 and 35) that two exceptions to the general rules pertaining to jurisdiction as set out in article 72 should be included with respect to OLSAs. It was proposed that, as between parties to an OLSA, there should exist an opportunity to derogate from the terms of the draft instrument, including the choice of forum provisions, and that the choice of forum contained in the OLSA should be exclusive. It was suggested that the conditions and criteria required in order to be considered an OLSA would adequately safeguard the parties to the contract. A second related exception was said to be that when parties to an OLSA designated a forum for cargo claims, that choice should be binding upon third parties, provided that written notice be given to that party as to where the action could be brought and that the place chosen had a reasonable connection to the action. It was said that as the choice of forum was important in terms of providing predictability for commercial parties it was important that that choice be binding on third parties whose rights derived from the OLSA. It was further suggested that this approach could be seen as a compromise approach to the three views expressed with respect to jurisdiction clauses, in that the choice of forum in OLSAs would be exclusive, but otherwise, resort would be had to the list of places set out in the draft instrument.

136. The Working Group did not specifically discuss the OLSA proposal with respect to jurisdiction, although some general concerns were expressed as to the need for the inclusion of a clause on jurisdiction in relation to an OLSA.

Article 73

137. The Working Group considered the text of draft article 73, Variant A as contained in document A/CN.9/WG.III/WP.32. The Working Group heard that a portion of the text of subparagraph 21 (2) (a) and the entire text of subparagraph 21 (2) (b) of the Hamburg Rules had been inadvertently omitted from the text of draft article 73, Variant A, and that regard should be had to those provisions of the Hamburg Rules until that omission could be corrected.

General discussion

138. Concerns were raised with respect to the inclusion of an arrest provision in the jurisdiction chapter of the draft instrument. It was said that including the place of arrest as a basis for jurisdiction could be a highly complicating factor, which could cause problems with respect to the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Arrest of Ships, 1999 (the "Arrest Conventions"). It was also stated that not addressing the relationship to the Arrest Conventions in this instrument could give rise to uncertainty as to whether the jurisdiction provided for in those conventions could be upheld for claims falling under this instrument. Support was expressed for these concerns, and for the view that the connection between draft article 73 and the Arrest Conventions should be more closely examined before any decision was taken by the Working Group.

Conclusions reached by the Working Group on draft article 73

139. After discussion, the Working Group agreed to place square brackets around draft article 73, pending further evaluation of its relationship with the Arrest Conventions.

Article 74

140. The Working Group considered the text of draft article 74, Variant A as contained in document A/CN.9/WG.III/WP.32. The Working Group heard that draft article 74 represented a compromise between the cargo claimant and the carrier, such that the cargo claimant could choose the jurisdiction in which to sue pursuant to draft article 72, and that the carrier could not deny access to any of the forums listed. However, it was said that the other side of the coin was set out in draft article 74, which limited the cargo claimant to choosing from amongst the forums on that list. While some concern was expressed that the second sentence of draft article 74 referring to protective measures could raise issues with respect to the Arrest Conventions, the opposite view was expressed that that sentence was intended to avoid interference with protective measures, and as such, should not conflict with the Arrest Conventions. There was general support in the Working Group for draft article 74.

Conclusions reached by the Working Group on draft article 74

141. After discussion, the Working Group agreed to maintain draft article 74, but to consider the effects of the second sentence of the article when considering the interaction between draft article 73 and the Arrest Conventions.

Article 75

142. The Working Group considered the text of draft article 75, Variant A as contained in document A/CN.9/WG.III/WP.32. In reference to footnote 222 in A/CN.9/WG.III/WP.32, the Working Group heard that in keeping with the approach in the Hamburg Rules, Variant A contained a *lis pendens* provision in draft article 75, while Variant B did not, in keeping with the 1999 decision of the International Sub-Committee on Uniformity of the Law of Carriage by Sea of the Comité Maritime International (CMI). The Working Group heard that the CMI had reviewed and endorsed that 1999 decision at its 38th International Conference in June 2004.

143. There was support for the suggestion that draft article 75 should be deleted, and hence that Variant B of chapter 15 should be accepted as a basis for future discussion, since a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter, and the existence of diverse *lis pendens* approaches in various jurisdictions throughout the world. The question was raised regarding what the effect would be if such a provision were omitted from the draft instrument, and the view was expressed that the *lis pendens* issue would be left to national law. In response, however, it was suggested that national law might not adequately treat the problem, since some jurisdictions did not have international *lis pendens* rules, and some might not recognize and enforce international *lis pendens* rulings. While there was support for the deletion of draft article 75, Variant A, the Working Group agreed to maintain the provision but to place it in square brackets pending further discussion.

Conclusions reached by the Working Group on draft article 75

144. After discussion, the Working Group agreed to place square brackets around draft article 75, Variant A, pending further discussion.

Article 75 bis

145. The Working Group considered the text of draft article 75 bis, Variant A as contained in document A/CN.9/WG.III/WP.32. There was support for the view that the circumstances described in this provision, where parties could agree on the choice of jurisdiction after a claim arose, differed markedly from those considered with respect to choice of jurisdiction clauses, which came into existence prior to any damage or loss arising. There was general agreement that the principle set out in draft article 75 bis, Variant A was acceptable, however, it was also observed that if the Working Group ultimately agreed on an exclusive jurisdiction provision, this draft article could become redundant. In addition, the following concerns were expressed regarding the clarity of the text in that draft article.

"an agreement"

146. Questions were raised regarding the form of agreement that would be acceptable pursuant to the draft provision, in particular, whether express agreement was necessary, or whether implicit agreement would be acceptable.

"made by the parties"

147. Clarification was also sought regarding whether the term "parties" referred to in the provision referred to parties to the contract or carriage, or whether it was intended to mean the parties to the dispute arising from the loss or damage. There was support for the view that the intention of the provision was that it should refer to the parties to the dispute arising from the loss or damage, rather than to the parties to the contract of carriage. The suggestion was made that this understanding be clarified in the text of the provision.

"after a claim under the contract of carriage has arisen"

148. A further question was raised regarding whether the agreement under the draft article could only be made after the institution of a proceeding with respect to the loss or damage, or whether it referred instead to the moment when the loss or damage had occurred. There was support for the view that the intention of the provision was to refer to agreements made after the loss or damage had arisen. A further suggestion was made that the relevant moment should be when the parties had knowledge of the loss or damage. The Working Group agreed to place this phrase in square brackets pending further discussion.

Concursus concerns

149. Some support was expressed for the view that the concursus problem discussed generally with respect to jurisdiction (see above, paras. 120 to 121) could also arise in respect of draft article 75 bis, in that claims could be proceeding with respect to the contracting carrier and the maritime performing parties at the same time, thus perhaps compounding the problem of agreement on jurisdiction. It was suggested that this problem should be borne in mind in future discussions.

Conclusions reached by the Working Group on draft article 75 bis

150. After discussion, the Working Group agreed to:

- Place square brackets around the phrase, "after a claim under the contract of carriage has arisen", in order to indicate that further clarification could be necessary;
- Consider whether further clarifications were needed with regard to the form of the agreement necessary, and to the identity of the parties.

Arbitration

151. The Working Group proceeded to consider chapter 16 on arbitration contained in A/CN.9/WG.III/WP.32, consisting of Variant A and Variant B, the difference being the inclusion in Variant A of draft articles 78 and 80, respectively, on the seat

of arbitration and on mandatory provisions relating to arbitration. With reference to footnote 225 in A/CN.9/WG.III/WP.32, the Working Group heard that in keeping with the approach in the Hamburg Rules, Variant A reproduced the arbitration provisions in the Hamburg Rules, while Variant B was in keeping with the 1999 decision of the International Sub-Committee on Uniformity of the Law of Carriage by Sea of the CMI. The Working Group heard that the CMI had reviewed that 1999 decision at its 38th International Conference in June 2004, and that it had agreed on the principle expressed in draft article 76, and while support had also been expressed regarding draft article 79, no overall consensus regarding the arbitration chapter had been achieved.

152. The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paras. 11, 82 and 110 above). The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to the inclusion of arbitration rules in the draft instrument, and regarding the various aspects that those rules might entail.

Relation with general international arbitration practice

153. It was noted that draft chapter 16 was incorporated from the Hamburg Rules, which were drafted in 1978, before the wide acceptance of uniform standards for international arbitration. It was suggested that the draft instrument should be aligned, in particular, to the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), and that departures from these standards should be considered only in case of specific policy reasons. In this context, it was further stated that three points, in particular, needed careful consideration:

- The draft article 76 requirement of a written form for arbitration agreements might need to be coordinated with the current work of UNCITRAL on article 7 of the Model Law, which aimed at liberalizing the form requirement;
- The draft article 77 requirement of incorporation of the arbitration agreement in the transport document or electronic record might need to be coordinated with the general arbitration standard regarding incorporation by reference;
- Draft article 79, which might be interpreted as restricting the possibility of arbitration *ex aequo et bono* (in justice and fairness, i.e. overriding the strict rule of law, if necessary), may need to be reconsidered in view of the fact that in some parts of the world, such arbitration is also being practiced in the field of maritime law.

General discussion

154. The view was expressed that the principle of freedom of arbitration was a concept deeply rooted in both the Model Law and New York Convention, and that it required that no provisions on arbitration should be included in the draft instrument. It was further expressed that arbitration clauses were widely used in the non-liner trade, and that any interference with the existing practice of freedom of arbitration would not be accepted by commercial parties. Further, it was said that the non-liner trade, which often incorporated the Hague-Visby Rules into their charter parties,

would not be inclined to incorporate the draft instrument into future charter parties if the instrument contained rules on arbitration. In addition, it was expressed that arbitration procedures were essential to international trade, as were existing arbitration centres and rules on arbitration, such that including arbitration rules in the draft instrument could create commercial uncertainty. Support was expressed for this view.

155. However, it was also suggested that it would be beneficial to regulate in necessary detail matters relating to arbitration, possibly along the lines of the Hamburg Rules.

156. A third position was that the draft instrument should contain only basic provisions on arbitration so as not to disrupt the international arbitration regime, but so as to ensure the application of the mandatory provisions of the draft instrument. In particular, it was said that it should not be possible through simply choosing arbitration to circumvent the rules on jurisdiction that the Working Party had agreed were useful in preventing abuse in the draft instrument. Support was also expressed for this approach. Along these lines, it was suggested that the presence of an arbitration clause in a contract should not affect the claimant's right to litigate in places suggested in the draft instrument with one exception: if one of the places in which the claimant could initiate litigation was the place chosen for arbitration, the claimant could only arbitrate rather than litigate in that place. The claimant could choose to litigate in the other places.

Conclusions

157. After general discussion, the Working Group decided that:

- All of chapter 16 should be put in square brackets;
- The words "by agreement evidenced in writing" in draft article 76 should be put in square brackets;
- Draft article 79 should be put in square brackets;
- The Secretariat should be requested to explore the possible conflicts between the draft instrument and uniform international arbitration practice, as reflected in UNCITRAL instruments and model laws;
- Consideration should be given to the development of a formula to prevent the possibility that any mandatory rules of the draft instrument could be circumvented through resort to arbitration.

III. Other business

Electronic commerce issues

158. The Working Group heard that, following its completion of the UNCITRAL Model Law on Electronic Signatures in 2001, the Commission had asked that Working Group IV (Electronic commerce) consider three possible future areas of work. These were: the preparation of an international instrument dealing with issues of electronic contracting; undertaking a comprehensive survey of possible legal barriers to the development of electronic commerce in existing uniform law

conventions and trade agreements; and addressing the issues raised by the negotiability and transfer of rights in goods.

159. The Working Group heard that the Working Group on Electronic Commerce had reached the conclusion that, as negotiability and transfer of rights was a delicate area of law that would require very specific solutions, it should not be dealt with in the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/571). The Working Group heard that the development of that convention and the survey in respect of existing international instruments had been undertaken simultaneously and, at its forty-fourth session, the Working Group on Electronic Commerce had completed its consideration of the draft convention on the use of electronic communications in international contracts.

160. The Working Group was informed that the draft convention contained two provisions of interest in the context of the current work being undertaken by the Working Group. Draft paragraph 2 (2) of that draft convention expressly excluded "any transferable document (including a bill of lading) or instrument entitling the bearer or beneficiary to claim delivery of the goods or payment of a sum of money". Also, draft paragraph 19 (2) provided that the draft convention applied "to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement applies, unless the State has declared, that it will not be so bound". It was noted that, notwithstanding the exemption provided under draft paragraph 2 (2), draft paragraph 19 (2) had the effect that a contract of carriage, which was not of itself a document of title, might be covered by the provisions of the draft convention. The Working Group was invited to consider the implications of that provision.

161. The Working Group was also informed that, whilst the Working Group on Electronic Commerce had not yet had an opportunity to formally consider the electronic communications chapter and related provisions in the draft instrument currently being prepared, a number of delegations within that Working Group had expressed informal views on those areas in the draft instrument. These views included concerns with the notion used in the draft instrument of "negotiable electronic transport document" in view of the difficulties of achieving functional equivalence between paper documents of title and their electronic equivalent, and in particular, guaranteeing the uniqueness of electronic records. Additional aspects that might require further consideration included provisions on authentication of communications between the parties, in particular, in view of the cross-border nature of the draft instrument.

162. It was suggested that, given the areas of complementarity and mutual interest both in the draft convention and in the draft instrument, the work of both Working Groups could be assisted by the holding of an intersessional informal meeting of experts from both the electronic commerce and transport law fields. The Working Group agreed to that suggestion.

Scheduling of fifteenth and sixteenth sessions

163. The Working Group noted that its fifteenth session was scheduled to be held in New York from 18 to 28 April 2005. The Working Group took note with appreciation of the decision made by the Commission at its thirty-seventh session

that two-week sessions would be allocated to the Working Group for continuation of its work (see A/59/17, para. 136).

164. It was noted that, subject to the approval of the Commission at its thirty-eighth session, the sixteenth session of the Working Group was scheduled to be held in Vienna from 28 November to 9 December 2005 (see A/59/17, para. 137).

Planning of future work

165. With a view to structuring the discussion on the remaining provisions of the draft instrument, the Working Group adopted the following tentative agenda for its two subsequent sessions:

Fifteenth session (New York, 18 to 28 April 2005)

- Electronic commerce
- Transport documents
- Right of control
- Transfer of rights
- Continued discussion on freedom of contract, including OLSA and scope of application
- Continued discussion on jurisdiction and arbitration

Sixteenth session (Vienna, 28 November to 9 December 2005, subject to approval)

- Shipper's obligations
- Delivery of goods
- Limitation levels
- Right of and time for suit
- Pending issues

Round table on e-commerce, right of control and transfer of rights

166. The Working Group took note of the initiative by several delegations to continue its efforts in the informal consultation group for the continuation of the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft instrument (see A/CN.9/552, para. 167). The Working Group heard that the informal consultation group would next address the issues to be considered in New York in the spring of 2005, and that an informal round table meeting was planned for all interested members and observers on the topics of e-commerce, right of control and transfer of rights for 24 to 25 February 2005, possibly in London. Further, the Working Group heard that the informal consultation group was open to all delegations, and that submissions were welcome in all official languages, with multilingualism being the basis for the work. It was further noted that the past and future work of the informal consultation group would be placed on a secure website for archive purposes, if desired by the Working Group.

Notes

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