

**CMI
DRAFT INSTRUMENT
ON TRANSPORT LAW**

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INTRODUCTION

Background

A draft Outline Instrument¹ was prepared in advance of the CMI Conference in Singapore in February 2001. This draft was not considered in detail at the Conference, which concentrated on the main issues of principle. The conclusions of the debate at the Conference are included in the Report of Committee A², which was adopted by the Conference at its Plenary Session. In accordance with the Resolution of the CMI Assembly of 16 February 2001³,

¹ Published in CMI Yearbook 2000 at pp. 122-171.

² Published in CMI Yearbook 2001 at p. 182.

³ Published in CMI Yearbook 2001 at p. 188.

CMI Draft Instrument on Transport Law

the draft was revised in the light of these conclusions and a Revised Draft Outline Instrument dated 31 May 2001 (“the May draft”)⁴ was circulated for comment to all national associations and a number of international organisations, including consultative members of the CMI, together with a Consultation Paper⁵ which asked for responses to a number of specific questions. A further meeting of the International Sub Committee on Issues of Transport Law, which had been established in November 1999 (“ISC”), was held in July as part of this consultation process.

Responses and comments were received from fifteen national associations and nine international organisations and a synopsis of these responses and comments has been prepared⁶. These responses and comments, and the views expressed at the ISC meeting in July, were analysed and a provisional draft of this Instrument was prepared. This provisional draft was circulated to all national associations and the international organisation and some further comments were received. It was then considered at a meeting of the ISC in November 2001 and amendments to the bold text were agreed at that meeting.

The bold text of this Instrument is intended to reflect the views of the majority. Where there are differing views on some issues of principle, bracketed text has been included. In other cases views have been referred to in the commentary.

Electronic Commerce

It was resolved at the CMI Assembly in Singapore that the ISC should complete the Outline Instrument to include principles and provisions to facilitate the needs of electronic commerce. The May draft was reviewed by the E-Commerce Working Group and this Instrument includes provisions recommended by that Group.

The Instrument should apply to all contracts of carriage, including those concluded electronically. To reach this goal, the Instrument must be medium neutral as well as technology neutral. This means that it must be adapted to all types of systems, not only those based on a registry such as Bolero. It must be suited to systems operating in a closed environment (such as an intranet), as well as those operating in an open environment (such as the internet). One must also be careful not to be limited by what is currently in use, keeping in mind that technology evolves rapidly and that what appears impossible today is probably already on the current agenda of software developers.

It is recommended that there should be a clear statement in a preamble or in the Instrument that one of the intentions of the Instrument is to remove paper based obstacles to electronic transactions by adopting the relevant principles of the UNCITRAL Model Law on Electronic Commerce, 1996.

4 Published in CMI Yearbook 2001 at p. 357.

5 Published in CMI Yearbook 2001 at p. 379.

6 Published in CMI Yearbook 2001 at p. 383.

One way to achieve this goal would be simply to define the word "document" to include information recorded in any medium. This would cover information recorded by electronic means as well as by written words on paper. Some consider this avenue the better way, but in view of the widespread feeling still existing that "document" means paper, a different expression has been used to deal with contracts concluded electronically or evidenced by messages communicated electronically. The expression "electronic record" has been chosen as a medium neutral expression. "Contract particulars" was found to be a suitable expression that can easily apply to particulars recorded in a transport document or in an electronic record.

Chapter 2 includes general provisions dealing with consent. First, the consent to the issuance and use of an electronic record and second, even when a transport document is issued, consent to communicate by electronic means to exchange information as well as notices, such as, for example, those provided for in articles 6.9.1 or 6.9.2. There is also a provision to deal with cases where a party wishes to opt out of a particular medium either to go from electronic record to paper or vice versa. This should only be allowed if there is mutual consent and under strict conditions. This problem is referred to in the CMI Rules on Electronic Bills of Lading. Finally, Chapter 2 deals with rules of procedure that must be agreed upon and included in the contract particulars that appear in a negotiable electronic record. At this stage, there is no general custom, no uniformity, and not even a predominant system in place. Such a provision is therefore necessary to ensure that there is no misunderstanding as to the functioning of the system used in respect of transfer of the electronic record or as to what needs to be done to obtain delivery as holder of the electronic record.

The Instrument adopts the proposition that negotiability can be achieved and effected by electronic means. The notion of exclusive control over the electronic record ought to be consistent with the notion of negotiability. It is certainly as consistent with it as is the physical possession of a piece of paper. Accordingly, provisions have only been included that would place electronic records on an equivalent basis to transport documents; and this approach is extended to putting negotiable transport documents on an equivalent basis to negotiable electronic records. It is appreciated that differing interpretations of negotiability in different jurisdictions may not enable it to be determined whether in all jurisdictions an electronic record might, at this time, be regarded as being capable of providing what is regarded as true negotiability. Nevertheless, recognizing the rapid advance nationally and internationally of e-commerce and of e-commerce legislation which seeks to introduce parity between paper and electronic means, it is considered that the relevant provisions are acceptable.

Among the representations and ideas which have been considered was one that indicated that there was no more need for negotiable documents, be they on paper or in the form of an electronic record, and that in any event the focus should be on the transfer of rights (to obtain delivery or the right of control) under the contract of carriage without documentation. With respect to the first point, this position is based on the fact that the financing of shipments

carried by air is in no way impeded by the use of air waybills. The increased popularity of sea waybills is also mentioned. This may well be true, but it is believed that there are still some trades where negotiable documents are called for. The Instrument should ensure that nothing prevents the use of electronic records to evidence such contracts of carriage in the future. The Instrument also clearly provides that the transfer of rights under contracts of carriage may be done electronically.

Jurisdiction and Arbitration

The Instrument does not contain any provisions dealing with jurisdiction or arbitration and these topics have not been considered by the ISC. It seemed premature to consider these topics before some conclusions had been reached on the nature of the Instrument, including its mandatory effect, the range of topics which it should cover and the scope of its application. These issues were reviewed at the Singapore Conference and the scope and substance of the Instrument have become clearer, but the time available following the Conference has not permitted the introduction of new topics.

Whilst the Hague and Hague-Visby Rules contain no provisions on jurisdiction and arbitration, provisions are contained in articles 21 and 22 of the Hamburg Rules. The CMR contains provisions on jurisdiction and arbitration in articles 31 and 33, but the Budapest Convention⁷ contains no such provisions.

The CMI International Sub Committee on the Uniformity of the Carriage of Goods By Sea considered that uniform rules should contain a provision on jurisdiction along the lines of article 21 of the Hamburg Rules, but not including the provisions of article 21 which were in conflict with article 7(1) of the 1952 Arrest Convention, and a majority was in favour of a provision along the lines of article 22 of the Hamburg Rules, but with the omission of subparagraph (3)⁸.

These topics give rise to policy issues which require detailed consideration.

1 DEFINITIONS

For the purposes of this Instrument:

1.1 Carrier means a person that enters into a contract of carriage with a shipper.

This definition follows the same principle as laid down in the Hague-Visby Rules and the Hague Rules: the carrier is a contractual person. A carrier may have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A carrier will typically perform all of its functions through such persons.

⁷ Budapest Convention on the Contract for Carriage of Goods in Inland Navigation 2000.

⁸ The report of the Chairman on the work of the Uniformity Sub Committee is published in CMI Yearbook 1999 at pp 105-116.

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

This definition excludes a person who is entitled to take delivery of the goods on some other basis than the contract of carriage, e.g. the true owner of stolen goods.

1.3 Consignor means a person that delivers the goods to a carrier for carriage.

A consignor may include the shipper, the person referred to in article 7.7 or somebody else who on their behalf or on their request actually delivers the goods to the carrier or to the performing party. See also the commentary to article 7.7.

1.4 Container includes any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

1.5 Contract of carriage means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another.

This definition includes carriage preceding or subsequent to carriage by sea if such carriage is covered by the same contract.

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

1.7 Controlling party means the person that pursuant to article 11.2 is entitled to exercise the right of control.

1.8 Electronic communication means communication by electronic, optical, or digital images or by similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. Communication includes generation, storing, sending, and receiving.

1.9 Electronic record means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party that

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

(b) evidences or contains a contract of carriage,

or both.

It includes information attached or otherwise linked to the electronic record contemporaneously with or subsequent to its issue by the carrier or a performing party.

This definition should cover every type of system actual and future. It follows as much as possible the content of the definition of transport

document. It is apt to include information added after its issuance, for example, under article 11.2 (c)(iii). This will also cover electronic signature logically associated with an electronic record as well as electronic endorsement which could also be attached or otherwise logically associated with the electronic record.

1.10 Freight means the remuneration payable to a carrier for the carriage of goods under a contract of carriage.

1.11 Goods means the wares, merchandise, and articles of every kind whatsoever that a carrier or a performing party received for carriage and includes the packing and any equipment and container not supplied by or on behalf of a carrier or a performing party.

This provision covers substantially the definitions of ‘goods’ in the Hague-Visby Rules and Hamburg Rules. Carriage of goods on deck is dealt with in article 6.6 and live animals in article 17.2(a).

1.12 Holder means a person that (a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and (b) either:

- (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or**
- (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or**
- (iii) if a negotiable electronic record is used, is pursuant to article 2.4 able to demonstrate that it has [access to] [control of] such record.**

This definition may include the shipper, the consignee, and any possible intermediate holder. An agent of any of these persons acting in its own name may be a holder.

A suggestion was made that paragraph (a) should require a holder to be in “lawful” possession of a negotiable transport document. This suggestion was not adopted. Using the term “lawful” without specifying what is meant by “lawful” possession would invite reference to national law, thus undermining uniformity. Specifying what is meant by “lawful” possession would greatly expand the scope of the Instrument. In any event, paragraph (b)(i) largely addresses the underlying concern for order documents. For bearer documents, it was thought that there is no real problem in practice that needs to be addressed here. If a practical problem did exist, it would not concern bearer documents in a wrongdoer’s hands (a problem for which other remedies exist) but documents in the hands of a good faith purchaser who claims through a wrongdoer. It is thought that such a good faith purchaser deserves protection, and that those who choose to use bearer documents should recognize such risks.

It is believed that paragraph (b)(iii) adequately covers not only register-based systems (such as Bolero) but also systems using PDF format in

conjunction with other technology, systems giving access to the carrier database through a password or other security arrangement, and other systems. The words between brackets are meant as alternatives between which a choice has to be made in the light of ongoing developments. "Access" may have too technical a connotation and "control" a too legal one.

1.13 Negotiable electronic record means an electronic record

- (i) **that indicates, by statements such as "to order", or "negotiable", or other appropriate statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable", and**
- (ii) **is subject to rules of procedure as referred to in article 2.4, which include adequate provisions relating to the transfer of that record to a further holder and the manner in which the holder of that record is able to demonstrate that it is such holder.**

The words "referred to" ensure that the parties can simply incorporate by reference a rule book applicable to their systems, if any, rather than include the full text of the applicable procedures.

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

The purpose of this definition is to give indications for identifying a negotiable transport document by scrutinizing its face. Further indications already appear in the definition of "transport document" in article 1.20 below. The rules as to delivery under such a document appear in article 10.3.2. The rules as to transfer of such a document appear in article 12.1. Both of these rely on the definition of "holder" which appears in article 1.12.

The use of the English word "negotiable" has been much discussed, and it is undoubtedly true that in some common law countries the word is not technically correct when applied to a bill of lading. Some would prefer the word "transferable" as being more neutral. It has been thought best to retain "negotiable" on the basis that even if in some legal systems inaccurate, it is well understood internationally (as is evidenced by the use of the word "non-negotiable" in article VI of the Hague Rules), and that a change of nomenclature might encourage a belief that a change of substance was intended.

1.15 Non-negotiable electronic record means an electronic record that does not qualify as a negotiable electronic record.

1.16 Non-negotiable transport document means a transport document that does not qualify as a negotiable transport document.

1.17 Performing party means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.

There is a broad range of views on the "performing party" definition. At one end of the range, some favour including any party that performs any of the carrier's responsibilities under a contract of carriage if that party is working, directly or indirectly, for the carrier. It is felt that such a broad definition would bring into the Instrument's coverage any person that could plausibly be a defendant in a tort, bailment, or other non-contractual action when cargo was lost or damaged. It would thus achieve greater uniformity by reducing the number of actions that could be brought outside of the Instrument. Such a broad definition might be drafted with the following language at the start of the first sentence:

"a person that performs, undertakes to perform, or procures to be performed any of a contracting carrier's responsibilities under a contract of carriage, to the extent that . . ."

At the other end of the range, some advocate excluding the "performing party" definition entirely. In their view, such a definition is unnecessary because the defined "performing party" should be irrelevant under the Instrument's substantive rules. They argue that the Instrument should govern relations only between the shipper and the carrier, and that it should not govern relations between the shipper and those that are engaged, either directly or indirectly, by the carrier.

Between these two views at either end of the spectrum, any number of intermediate positions are possible. The two views that have attracted the most support are the relatively restrictive definition represented by the current text and a relatively inclusive definition that might be drafted with the following language at the start of the first sentence:

"a person other than the carrier that performs or undertakes to perform any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that ..."

Both of these intermediate positions limit the "performing party" definition to those that are involved in the carrier's core responsibilities — carriage, handling, custody, or storage of the goods. Thus ocean carriers, inland carriers, stevedores, and terminal operators, for example, would be included under either "performing party" definition. In contrast, a security company that guards a container yard, an intermediary responsible only for preparing documents on the carrier's behalf, and a ship yard that repairs a vessel (thus ensuring seaworthiness) on the carrier's behalf would not be

included under either definition.

The difference between these two definitions is in the treatment of intermediate contractors. A basic hypothetical example illustrates the distinction. Suppose that a non-vessel operating carrier (NVO) contracts to carry goods from a port in one country (Rotterdam, for example) to an inland city in another country (Atlanta, for example). The NVO thus qualifies as the "carrier." Suppose that the NVO then contracts with an ocean carrier for the Rotterdam-to-Savannah carriage and with a trucking company for the inland carriage. If the ocean carrier arranges to have the goods carried on a vessel belonging to a different ocean carrier that has been time chartered to the first ocean carrier, and to have that vessel loaded and unloaded by independent stevedores, then both ocean carriers and both stevedores are performing parties under the relatively inclusive definition, but only the second ocean carrier and the stevedores are performing parties under the relatively restrictive definition represented by the current text. Although the first ocean carrier "undertakes to perform" the ocean carriage, it does not "physically" perform the ocean carriage. Similarly, if the trucking company subcontracts with an independent driver who owns his own truck to carry the goods from Savannah to Atlanta, both the trucking company and the truck's owner-driver are performing parties under the relatively inclusive definition, but only the truck's owner-driver is a performing party under the relatively restrictive definition. Although the trucking company "undertakes to perform" the inland carriage, it does not "physically" perform the inland carriage.

All of the possibilities discussed here assume a functional definition, depending on whether a person is performing some of the carrier's duties under the contract of carriage, without regard for any contractual formalities. Under the relatively restrictive definition represented by the current text, several separate contracts may intervene between the carrier and a performing party. Under the relatively inclusive definition, the class of "performing parties" would include not only the carrier's immediate sub-contractors but also the entire line of subsidiary persons that perform the contract (*i.e.*, the sub-contractor's sub-contractors, that party's sub-contractors, and so on down the line to the party that physically performs the carrier's duties).

The second sentence of the definition clarifies that "performing parties" are only those that work, directly or indirectly, for the contracting carrier. If the consignor or consignee has an employee or agent performing a task that would otherwise be the carrier's responsibility under the contract of carriage, that employee or agent would not thereby become a "performing party."

The phrase "or fails to perform in whole or in part" is bracketed because some take the view that it is unnecessary. They argue that a person that fails to perform a task that it was obligated to perform is already covered by the phrase "a person . . . that physically performs." Others take the view that a person that fails to perform a task does not "physically perform," and argue that the bracketed language is necessary to ensure that a person is treated as a "performing party" whether it performs its duties perfectly, performs its duties poorly, or fails to perform its duties at all.

1.18 Right of control has the meaning given in article 11.1.

1.19 Shipper means a person that enters into a contract of carriage with a carrier.

This definition mirrors the definition of “carrier”. The shipper is a contractual person who may have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A shipper will typically perform all of its functions through such persons. The shipper may be the same person as the consignee, as is the case in many fob sales. See also the commentary to article 7.7.

1.20 Transport document means a document issued pursuant to a contract of carriage by a carrier or a performing party that

- (a) evidences a carrier’s or a performing party’s receipt of goods under a contract of carriage, or**
 - (b) evidences or contains a contract of carriage,**
- or both.**

This definition should be read as preliminary to those of “negotiable transport document” and “non-negotiable transport document” in articles 1.14 and 1.16.

Paragraph (a) would include a bill of lading issued to and still in the possession of a charterer, which does not evidence or contain a contract of carriage but functions only as a receipt, and some types of receipt issued before carriage or during transshipment. Paragraph (b) would include a bill of lading when operating as such, and a waybill.

2 ELECTRONIC COMMUNICATION

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

This provision lays down the general principle of equivalence between electronic and paper communication for the purpose of this Instrument. Further, the emphasis is on the consent of the parties to communicate electronically.

It is felt that it is not necessary to mention the subsequent holder as well. By accepting the transfer of an electronic record a holder agrees to use electronic procedures; otherwise he could not become a holder.

2.2.1 If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic record,

- (a) the holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier; and**

- (b) the carrier shall issue to the holder a negotiable electronic record that includes a statement that it is issued in substitution for the negotiable transport document,**

whereupon the negotiable transport document shall cease to have any effect or validity.

2.2.2 If a negotiable electronic record has been issued and the carrier and the holder agree to replace that electronic record by a negotiable transport document,

- (a) the carrier shall issue to the holder, in substitution for that electronic record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic record; and**
- (b) upon such substitution, the electronic record shall cease to have any effect or validity.**

It is expected that for a certain period there is a need for a provision dealing with a switch between a paper document and its electronic equivalent and vice versa. This article sets out a substitution rule and provides that in the case of such substitution no concurrent documents could be in circulation.

2.3 The notices and confirmation referred to in articles 6.9.1, 6.9.2, 6.9.3, 8.2.1 (b) and (c), 10.2, 10.4.2, the declaration in article 14.3 and the agreement as to weight in article 8.3.1 (c) may be made using electronic communication, provided the use of such means is with the express or implied consent of the party by whom it is communicated and of the party to whom it is communicated. Otherwise, it must be made in writing.

This article provides that all communications specifically provided for in this Instrument may be made electronically provided that the parties to the communication so agree.

2.4 The use of a negotiable electronic record shall be subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 2.2.1. The rules of procedure shall be referred to in the contract particulars and shall include adequate provisions relating to

- (a) the transfer of that record to a further holder,**
- (b) the manner in which the holder of that record is able to demonstrate that it is such holder, and**
- (c) the way in which confirmation is given that**
- (i) delivery to the consignee has been effected; or**
- (i) pursuant to articles 2.2.2 or 10.3.2(i)(b), the negotiable electronic record has ceased to have any effect or validity.**

In order to achieve equivalence between a paper negotiable document and an electronic negotiable record, the agreed rules governing the use of such record have to include provisions relating to the typical 'document of title' functions of the record. In paragraph (a) it is specified that the rules have to

provide for ‘electronic endorsements’ and in paragraph (b) that they have to provide for the electronic equivalency of the identification function of a paper document of title. (See also the definition of “holder” under article 1.13). In paragraph (c) it is provided that the manner in which it is confirmed that a record is exhausted has to be indicated in the agreed rules as well.

The words “referred to” in this provision ensure that the parties could simply incorporate by reference the agreed rules applicable to their systems rather than include the full text of the applicable procedures.

3 SCOPE OF APPLICATION

3.1 Subject to article 3.3.1, the provisions of this Instrument apply to all contracts of carriage in which the place of receipt and the place of delivery are in different States if

- (a) **the place of receipt [or port of loading] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or**
- (b) **the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or**
- (c) **[the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or]**
- (d) **[the contract of carriage is entered into in a Contracting State or the contract particulars state that the transport document or electronic record is issued in a Contracting State, or]**
- (e) **the contract of carriage provides that the provisions of this Instrument, or the law of any State giving effect to them, are to govern the contract.**

Historically, the application of transport conventions has been tied to the issuance of a particular type of transport document, such as a bill of lading. Over time, bills of lading have been increasingly replaced by other, often non-negotiable, documents. Moreover, with the growth of electronic commerce it may be anticipated that traditional documents, perhaps even the electronic records as defined in this Instrument, will also become less relevant. The scope of application of this Instrument has therefore been defined without reference to whether a transport document (of any type) is or is to be issued.

Views are divided as to whether the port of loading should be included in paragraph (a) as a place that invokes the application of the Instrument. For port-to-port shipments, it is agreed that the port of loading should invoke the application of the Instrument, but the port of loading would already be included as the place of receipt. For door-to-door shipments when the port of loading and the place of receipt are in the same State, it would also be unnecessary to mention both. For door-to-door shipments when the port of loading and the place of receipt are in different States, some object that the identity of the port

of loading is an essentially random factor having no necessary connection with the overall (*i.e.*, door-to-door) performance of the contract, and that it should therefore not be included in paragraph (a). Others feel that the identity of the port of loading is not a random factor when it is "specified either in the contract of carriage or in the contract particulars." On the contrary, the identity of the port of loading is an essential aspect of a predominately maritime contract and should be included in a predominately maritime convention. Furthermore, including the port of loading in paragraph (a) would broaden the scope of application of the Instrument and produce greater uniformity.

The debate on paragraph (b) as to whether the port of discharge should be included mirrors the debate on paragraph (a) concerning the inclusion of the port of loading.

Views are divided as to whether paragraph (c) should be included. Some object that it might be uncertain when the goods were received by the carrier whether the Instrument would apply or not.

Views are also divided as to whether paragraph (d) should be included. Paragraph (d) may give rise to some uncertainty as to where the contract of carriage was entered into or the electronic record issued.

Paragraph (e) is in accord with the provisions of article X of the Hague-Visby Rules, but concern has been expressed that paragraph (e) might have unintended consequences. Some fear that a charter party, for example, might have a choice-of-law clause calling for the law of a country that had ratified the Instrument, and that this might have the effect not only of subjecting the charter party to this Instrument but also of invalidating specific clauses in the charter party that were inconsistent with the Instrument, notwithstanding the parties' express agreement to those inconsistent terms. It is agreed that this result would be undesirable, but doubt has been expressed that this result would be likely under the current language in paragraph (e).

It has also been questioned how the courts would apply the phrase "the law of any State giving effect to them" in paragraph (e) if a State had enacted a national law based on the Instrument that did not fully conform to the Instrument.

3.2 The provisions of this Instrument apply without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

In order to avoid any doubt, this provision lists certain factors that might otherwise have been thought relevant but that are instead explicitly made irrelevant for determining the application of this Instrument.

3.2.1 The provisions of this Instrument do not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

The wide applicability of this Instrument under article 3.1 implies that certain exceptions should be made. Some contracts may qualify as "contracts of carriage" for which it is neither necessary nor desirable to apply mandatory law. Moreover, some provisions of this Instrument may be less suitable for application to certain contracts of carriage. Charter parties, for example, have

long been excluded from mandatory law. Widespread support exists for similarly excluding contracts of affreightment, volume contracts, towage contracts, and similar agreements. But opinions are divided as to whether the term “charter parties” should be defined, and as to the extent to which other similar contracts should also be excluded.

Efforts to define charter parties have been troublesome for generations. The lack of a definition in prior conventions has not caused great difficulties in practice, and some feel that it might be risky to attempt a definition at a time when commercial practices were changing rapidly. Others feel that a definition is necessary because the charter party exclusion is assuming increased importance in the Instrument.

If it is ultimately concluded that a definition is necessary, something along the following lines might be suitable: “contracts for the [use] [disposal] [provision] of a ship, or part thereof, to be employed in the carriage of goods, whether on time- or voyage basis, such as a charter party, or a slot- or space-charter.” The three bracketed terms, “[use] [disposal] [provision],” are meant as alternatives. One of the three should be chosen. Some preference has been expressed for the term “use.”

The issue as to the exclusion of other similar contracts is unresolved. Although there is general support for the proposition that some contracts similar to charter parties should receive the same treatment as charter parties, it remains unclear how far the exclusion should be extended. Towage contracts were first mentioned fairly late in the consultation process, and thus they are mentioned only here in the commentary rather than in the text.

One suggestion is to extend charter party treatment to modern equivalents of the charter party, such as slot charters and space charters, but to recognise a different sort of freedom of contract for negotiated contracts between sophisticated parties that less closely resemble traditional charter parties, such as contracts of affreightment and volume contracts. The suggestion has been made that contracts of affreightment should be subject to the Instrument as a default rule, but that the parties to these contracts should have the freedom to derogate from the terms of the Instrument. Such derogations, however, would only be binding on the immediate parties to the contract. Transport documents issued under these contracts would still need to comply with the terms of this Instrument when they were passed to a third party who was not bound by the original parties’ agreement.

If it is ultimately concluded that a definition of these additional terms is necessary, something along the following lines might be suitable:

“A volume contract is a written contract between one or more shippers and one or more carriers in which the shipper or shippers agree to provide a certain volume or portion of cargo over a fixed period of time and the carrier or carriers agree to a certain freight rate or rate schedule and service level. A towage contract is a contract for the towing or pushing of floating objects, whether on time or voyage basis.”

Some consider that it would be valuable to stress that in cases in which the Instrument did not apply as a matter of law it would still be open to the parties to incorporate the terms of the Instrument into their agreement as a

matter of contract. This contractual incorporation could be done in whole (incorporating the entire Instrument) or in part (incorporating selected provisions of the Instrument).

3.3.2 Notwithstanding the provisions of article 3.3.1, if a negotiable transport document or a negotiable electronic record is issued pursuant to a charter party, [contract of affreightment, volume contract, or similar agreement], then the provisions of this Instrument apply to the contract evidenced by or contained in that document or that electronic record from the time when and to the extent that the document or the electronic record governs the relations between the carrier and a holder other than the charterer.

Whether the bracketed language is included in this provision will turn on whether similar bracketed language is included in article 3.3.1. If the bracketed language is included, then the reference to the “charterer” at the end of the article will need to be redrafted. Including volume contracts in this provision may make article 3.4 unnecessary.

3.4 If a contract provides for the future carriage of goods in a series of shipments, the provisions of this Instrument apply to each shipment to the extent that articles 3.1, 3.2, and 3.3 so specify.

This provision may need to be revised or deleted in light of the resolution of the issue discussed in the commentary to article 3.3.1.

4 PERIOD OF RESPONSIBILITY

4.1.1 Subject to the provisions of article 4.3, the responsibility of the carrier for the goods under this Instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.

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

Because of their legal consequences, it is considered important that the beginning and the end of the period of responsibility of the carrier should be specified as precisely as possible.

The provision emphasises that receipt is primarily a contractual matter. As an example: if it is agreed that the carrier will receive a cargo of oil ‘when passing ship’s manifolds’, then the responsibility of the carrier for the oil starts at such place and point in time. Of course, often the agreed place and time of delivery of the goods to the carrier and their actual taking into custody will coincide. But they may differ, in which case the *agreed* time and place prevails.

When no express or implied agreement has been made about the time and place of receipt, but certain customs, practices or usages of the trade, including those at the place of receipt, exist, then such customs, practices or usages apply. If no agreement, customs, practices or usages are applicable a general fall back provision applies. In such case the actual taking of the goods into the custody of the carrier is the relevant time and place of receipt.

4.1.3 The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.

Articles 4.1.2 and 4.1.3 together secure that when tackle-to-tackle transport is agreed (as will often be the case in bulk trades), the responsibility of the carrier does not extend beyond tackle.

4.1.4 If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to whom, pursuant to law or regulation applicable at the place of delivery, the goods must be handed over and from whom the consignee may collect them, such handing over will be regarded as a delivery of the goods by the carrier to the consignee under article 4.1.3.

4.2.1 Carriage preceding or subsequent to sea carriage

Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:

- (a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;
- (b) from the time of their discharge from the vessel to the time of their delivery to the consignee;

and, at the time of such loss, damage or delay, there are provisions of an international convention that

- (i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and
- (ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and
- (iii) cannot be departed from by private contract either at all or to the detriment of the shipper,

such provisions shall, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Instrument.

4.2.2 Article 4.2.1 applies regardless of the national law otherwise applicable to the contract of carriage.

The great majority of contracts of carriage by sea include land carriage, whether occurring before or after the sea leg or both. It is necessary therefore to make provision for the relationship between this Instrument and conventions governing inland transport which may apply in some (particularly European) countries. This article deals with that problem, and provides for a network system, but one as minimal as possible. The Instrument is only displaced where a convention which constitutes mandatory law for inland carriage is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of the inland carriage. This means that where the damage occurred during more than one leg of the carriage, or where it cannot be proved where the loss or damage occurred, this Instrument will prevail during the whole door to door transit period.

The Instrument leaves it open for countries adhering to this Instrument to exclude it wholly or in part from the inland carriage by giving any future international convention mandatory status, whether for a particular mode of inland transport, or for the inland part of any contract for carriage by sea which includes such transport. It could also be argued that provisions of the national law of a contracting state relating to inland carriage should prevail over the corresponding provisions of this Instrument, but this would further restrict the uniform applicability of the Instrument.

The essence of such a network system is that the provisions mandatorily applicable to inland transport apply directly to the contractual relationship between the carrier on the one hand and the shipper or consignee on the other. If the inland transport has been subcontracted by the carrier, they apply to the relation between carrier and subcarrier also. But in respect of the first relationship the provisions of this Instrument may supplement the provisions mandatorily applicable to the inland transport; whereas as between carrier and subcarrier the inland provisions are alone relevant (supplemented as necessary by any applicable national law). If a cargo claim is directed by a third party against a performing party by virtue of the provisions of article 6.3.1, that party is liable to the claimant in the same way as the carrier, that is to say, under the provisions of this Instrument, subject to mandatory provisions governing the inland leg of the transport.

It should also be noted that the proposed limited network system only applies to provisions directly relating to the liability of the carrier, including limitation and time for suit. Provisions in other conventions that may indirectly affect liability, such as jurisdiction provisions, should be disregarded. Also many other legal provisions mandatorily applicable to inland transport are not superimposed on the contract regulated by this Instrument because they are directed specifically to inland transport rather than to a contract involving carriage by sea, and their application to a contract of the latter type would be inappropriate and even sometimes cause confusion. Two examples may be given. The first is the requirements of the CMR Convention relating to the

consignment note. These may apply between carrier and subcarrier, but their application to the main contract of carriage regulated by this Instrument would be inconsistent with the document (or electronic record) required by this Instrument for the whole journey. The second example is the provisions of the CMR relating to the right to give instructions to the carrier (articles 12-14). These again can only be applied to the relation between carrier and subcarrier (in which relation the carrier is “sender”): for the main contract of carriage, chapter 11 of this Instrument must apply.

For the limited network system to apply, the damage must have occurred during the precarriage or oncarriage. In this respect a choice can be made between the place where the damage is caused, where it occurs and where it is detected. The time of detection is often after delivery and, thus, would not produce a balanced result. The place where the damage is caused may be before the voyage begins, e.g. in case of the damage caused by the shipper having the cargo badly stowed in a container. The most serious objection against the place where the damage is caused is that the question of proper causation according to the applicable law has to be resolved before it can be determined whether the provisions of this Instrument or of another convention are applicable. The place where a damage has occurred is a factual matter, is usually relatively easy to establish and may be expected to produce fair results. Therefore, the place of occurrence must be regarded as the proper choice within the scope of the network system and article 4.2.1 so provides.

It is intended that article 4.2.2 should make article 4.2.1 mandatory whatever law governs the contract of carriage (as under article 7.2 of the Rome Convention on the Law Applicable to Contractual Obligations). As an example may be taken a contract of carriage from Singapore to Antwerp, Belgium, under which the goods are to be shipped through a Dutch port of discharge, Rotterdam, and carried thence by land. The contract is governed by Singapore law, whether by express choice of the parties or by operation of other principles of the conflict of laws. Before a court in a country adhering to this Instrument, Singapore law would be displaced to the extent that mandatory provisions of an international convention governing road haulage, also adopted by that country, are applicable to the inland leg of the journey.

The bracketed language in article 4.2.1(i) reflects the situation under the 1980 COTIF Convention, where the applicability of the Convention is tied to the issue of a railway bill. If at the time that this Instrument enters into force the 1980 COTIF Convention has already been replaced by the 1999 Convention, the bracketed language may be deleted, unless other international mandatory law makes it necessary.

4.3 Mixed contracts of carriage and forwarding

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

4.3.2 In such event the carrier shall exercise due diligence in selecting the

other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.

This is the first of several articles in which it is provided that the parties may “expressly agree” on some issue. This phrase implies something beyond a pre-printed clause in the standard terms and conditions in the fine print on the back of a transport document (or the electronic equivalent). Rather, there should be some indication that the issue was the subject of discussion between the parties, and that each party in fact agreed to it. At the very least, a term that has been “expressly agreed” (both under this article and under other articles in which the same phrase is employed) should be stated separately on the transport document or electronic record. For example, declarations of higher value for the purpose of avoiding package limitations of current conventions are customarily indicated in a separate box on the face of the bill of lading. Similar treatment would be appropriate in this context.

These mixed contracts are a common feature in the liner trade. However, their legal character is not always well understood and, in practice, many create ambiguities. They may refer to “connecting carrier” arrangements. Such arrangements may apply where a carrier is able to carry out only part of the voyage with a vessel under its own control and has agreed with the shipper to take care that the other part(s) are carried out by other carrier(s) with whom it may have an arrangement to do so. Occasionally the connecting carrier may be an inland carrier.

Article 4.3.1 is intended to make clear that this type of contract is perfectly legitimate. If a transport document or an electronic record is issued, the mixed character must be reflected in such document or record, so as to protect third parties relying on the contents of such documents or records. Article 4.3.2 puts some basic obligations on the carrier, when acting in its capacity as agent, and is meant to protect the shipper and/or the consignee.

5. OBLIGATIONS OF THE CARRIER

5.1 The carrier shall, subject to the provisions of this Instrument and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

This provision states the basic obligation of the carrier. The reference to the provisions of this Instrument makes clear that the terms of the contract do not stand alone.

5.2.1. The carrier shall during the period of its responsibility as defined in article 4.1, and subject to article 4.2, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.

5.2.2 The parties may agree that certain of the functions referred to in article 5.2.1 shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.

5.3 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, a danger to persons or property or an illegal or unacceptable danger to the environment.

5.4 The carrier shall be bound, before, at the beginning of, [and during] the voyage by sea, to exercise due diligence to:

- (a) make [and keep] the ship seaworthy;**
- (b) properly man, equip and supply the ship;**
- (c) make [and keep] the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.**

5.5 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier in the case of carriage by sea [or by inland waterway] may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving other property involved in the common adventure.

The above provisions state the obligations of the carrier as positive duties, and are similar in effect to articles II and III.1 of the Hague and Hague-Visby Rules. A body of opinion exists that the general liability regime of article 6.1 below makes a positive provision such as this unnecessary, but the majority view has favoured the retention of such a provision. It spells out not only the carrier's obligations with regard to the carriage, but also those with respect to the ship, which are consistent with its public law obligations regarding safety and the preservation of the environment. Including such a provision would also preserve the benefit of much existing case law.

As regards article 5.4 the words in square brackets "and during" "and keep", if inserted, would make the seaworthiness duty continuous throughout the voyage, which is not so under the Hague and Hague-Visby Rules. The change has received support on the basis that it would seem somewhat out of tune with the ISM Code and safe shipping requirements for the law to be stated otherwise. Some think however that if the ship becomes unseaworthy during the voyage, the duty to put matters right may, depending on the circumstances, be part of the duty to care for the goods, already contained in article 5.2.1; this is particularly so if the defence of nautical fault is abolished (as to which see below). It is also said that a continuing duty may impose harsh and sometimes impracticable duties on the carrier while at sea and hence significantly broaden its responsibilities; and that it would also require the generating of new case law to work out its meaning and implications.

As regards containers, the wide definition in article article 1.4 should be borne in mind.

Article 5.2.2 is intended to make provision for fio(s) clauses and the like, which are rare in the liner trade but common in the charter party trade. The applicability of this Instrument to negotiable transport documents issued under a charter party makes this provision desirable.

The provision as to sacrifice in article 5.5 is confined to sea (or water) transport because the notion of sacrifice for the preservation of the common adventure is a maritime one, linking with general average. The opinion has been expressed that it is not necessary to deal with this point in the Instrument.

There has been a proposal for a specific provision requiring carriers in refrigerated trades to make available temperature data on request. It was thought that this was too specific for a general Instrument such as this. If it were to be thought appropriate it might be considered in connection with article 6.9.4.

6 LIABILITY OF THE CARRIER

6.1 Basis of liability

6.1.1 The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in article 4, unless the carrier proves that neither its fault nor that of any person referred to in article 6.3.2(a) caused or contributed to the loss, damage or delay.

This provision constitutes the basic rule of liability. The overall result is similar to that of article 5.1 of the Hamburg Rules and the technique to that of article IV.2(q) of the Hague Rules. The actual wording is however not the same as either.

The Hamburg Rules require that the carrier prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Article IV.2(q) of the Hague Rules requires that the carrier show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents of servants of the carrier contributed to the loss or damage. This article refers to the fault of the carrier itself or that of persons performing its functions, the latter being incorporated by the reference to article 6.3.

The question of carrier's liability for delay is provided for and commented on in article 6.4.

6.1.2 [Notwithstanding the provisions of article 6.1.1 the carrier shall not be responsible for loss, damage or delay arising or resulting from

(a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;

(b) fire on the ship, unless caused by the fault or privity of the carrier.]

These are the first two of the carrier's traditional exceptions, as provided in the Hague and Hague-Visby Rules. There is considerable opposition to the retention of either. As regards paragraph (a) there is little support for the "management" element, which is simply productive of disputes as to the difference between management of the ship and the carrier's normal duties as to care and carriage of the goods. The general exception is however justified

by some on the basis that should it be removed, there would be a considerable change to the existing position regarding spreading of the risks of sea carriage, which would of course impact on the insurance position. It would not be possible to retain this exception as part of the modified “presumption” regime which is set out in article 6.1.3 below, since it is a direct exoneration for negligence: it must either be an exoneration or fall. The exception is therefore preserved here in its original form to make the position clear.

There is also a view that even if this exception is removed, an exception should remain for “act, neglect or default of a compulsory pilot in the navigation of the ship”, on the ground that this covers a situation in which the carrier can justifiably feel aggrieved at being expected to answer. Such an exception would most naturally be a genuine exoneration. It could alternatively be included under the presumption regime set out below, though since by its wording it relates to loss caused not by the negligence of the carrier it would be slightly less appropriate there.

As regards paragraph (b), the Hague and Hague-Visby Rules not only reduce the circumstances in which the carrier might be liable in respect of fire (by requiring actual fault or privity, and probably also some form of management failure by the carrier) but can also be taken to impose a burden of proof on the claimant. The Hamburg Rules do not appear to require management failure but specifically impose the burden of proof on the claimant. The above provision follows the Hague and Hague-Visby Rules. The fire exception has however been modified to make clear that the fire must be on the carrying vessel: the Hague and Hague-Visby Rules wording gives no indication in this respect.

The exception is usually justified on the ground that accidents by fire raise serious problems of proof, and it is preserved here in its Hague and Hague-Visby Rules form in view of that opinion. It is not however necessary that this exception appears as a direct exoneration: the phrase “fire on the vessel” could if desired be placed within the events listed under the “presumption” regime set out below for the remaining Hague and Hague-Visby Rules excepted perils. That would necessitate removing the restriction to the actual fault or privity of the carrier. The result would then be very similar to that created by the Hamburg Rules by reason of the conjoined effect of article 6.3.2, under which the carrier is responsible for the acts of those carrying out its responsibilities under its control. The claimant’s burden of proof would not be increased.

It is of course possible to take the view that no special exception is required, and that fire can be dealt with under the general rule of article 6.1.1.

6.1.3 Notwithstanding the provisions of article 6.1.1, if the carrier proves that loss of or damage to the goods or delay in delivery has been caused by one of the following events it shall be presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused or contributed to cause that loss, damage or delay.

This provision represents a much modified (but in some respects extended) version of most of the remaining excepted perils of the Hague and

Hague-Visby Rules: in particular they appear here only as presumptions. The consultation indicated a division of opinion as to whether the traditional excepted perils should be retained as exonerations from liability or whether they should appear (in so far as possible) as presumptions only. The basis for the second approach is that certain events are typical of situations where the carrier is not at fault; and that it is justifiable, where the carrier proves such an event, for the burden of proof to be reversed.

A body of opinion would however prefer to retain all the excepted perils, whether with or without the nautical fault exception, as genuine exonerations, i.e. exceptions from liability. Certainly the nautical fault exception would only be effective as such, and it is for that reason preserved in article 6.1.2 above as a direct exoneration.

Another view is that since most of the exceptions are usually interpreted as not applying where the carrier is negligent, there is not a great deal of difference in practice between the two approaches.

A quite different approach however is that the exceptions should be deleted completely, since the events to which they refer are covered by the general principle of liability. This is opposed on the grounds that in some countries the complete deletion of the catalogue might be taken by judges inexperienced in maritime law as indicating an intention to change the law. It is said that even if the list is not needed in some countries, it is useful in others and does no harm in those countries that do not need it.

For expository purposes the matters concerned are referred to in this commentary as "exceptions", though there is obviously a substantial difference, in theory at least, between them as exonerations, and as events raising a presumption only.

What follows is therefore a new presentation of the exceptions (mostly, but not all, the traditional ones) as part of a presumption-based regime. In accordance with a view frequently expressed in the consultation, these exceptions are listed in approximately the familiar order in which they appear in the Hague and Hague-Visby Rules. Their preservation can be justified in part on the basis that they have generated valuable case law over the decades since 1924.

It has been mentioned above that many of the exceptions are usually interpreted as only applicable where the carrier has not been negligent in incurring the excepted peril. But there are at least two other exceptions which are, at least in some jurisdictions, specifically defined in terms requiring the absence of negligence on the carrier's part. They are Act of God and perils of the sea. To establish these excepted perils at present, it would, at least in some jurisdictions, be necessary for the carrier to prove by way of defence that it was not negligent in getting into the situation involved. Both an Act of God and a peril of the sea can be defined as acts occurring without a carrier's negligence which could not reasonably have been guarded against. To define them for a "presumption" regime without reference to absence of fault is not so easy. New definitions might have to be evolved, referring only to serious external events which could raise a (rebuttable) presumption of non-liability. This might involve loss of existing case law in some jurisdictions. For this reason these two excepted perils are listed in brackets at the end. They would not sit well in a presumption-

based regime and it seems likely that situations which might attract either of them could fairly easily be dealt with under the basic rule of article 6.1.1.

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

These are basically traditional exceptions, but “hostilities, armed conflict, piracy and terrorism” have been added to expand on the word “war”, which might or might not at present be interpreted to cover some of the other matters. They will of course require interpretation. “Act of God” appears in brackets because, though traditional, it is usually defined by reference to the absence of negligence, which means that, as suggested above, it does not sit easily as creating a presumption.

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

This is a survival of the old “restraint of princes” exception. There may be doubt as to what the English phrase “public authorities” is taken to cover in various countries. It may therefore be prudent to retain a reference to judicial restraints.

(iii) act or omission of the shipper, the controlling party or the consignee;

“Controlling party” is defined in article 1.7.

(iv) strikes, lock-outs, stoppages or restraints of labour;

This is similar to the Hague Rules, except that it omits “whether partial or general”.

(v) saving or attempting to save life or property at sea;

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

(vii) insufficiency or defective condition of packing or marking;

The English version of the Hague Rules used the words “insufficiency or inadequacy” (French “imperfection”). The words “defective condition” may make it clearer that the provision covers marks which fade, are washed out in rain, etc.

(viii) latent defects not discoverable by due diligence.

The meaning of this Hague Rules exception is notoriously unclear. In particular, it gives no indication as to in what the defect must be, whether in the ship, the goods or shore equipment. It appears that in some jurisdictions reliance on it may have advantages connected with the burden of proof. The matter could be clarified by referring to the ship, its apparatus and equipment.

(ix) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

The purpose of this provision, which is new, is to make provision for situations where article 5.2.2 permits functions to be performed by these parties.

(x) acts of the carrier or a performing party in pursuance of the powers conferred by article 5.3 and 5.5 when the goods have become a danger to persons, property or the environment or have been sacrificed;

[(xi) perils, dangers and accidents of the sea or other navigable waters;]

If the exceptions are retained as exonerations this provision should be restored somewhere nearer its original position as exception (iii). If however the presumption technique is adopted, for the reasons given above it is doubtful whether this exception could effectively be retained at all.

Most of the above exceptions relate to carriage by sea. It is for consideration whether further exceptions should be introduced to cover typical incidents of land carriage, or whether these would be adequately dealt with by the general provision in article 6.1.1.

6.1.4 [If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.]

[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is

(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and

(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.

If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]

These alternative provisions deal with concurrent and consecutive causes of damage, and apply regardless of whether any of the provisions of articles 6.1.2 and 6.1.3 are adopted: a provision would be required even if article 6.1.1 formed the sole liability regime.

The first alternative is intended to be much the same in effect as article 5.7 of the Hamburg Rules (as well as current law in many countries), but it has been sought to simplify the wording and make clear where the burden of proof lies.

The second alternative is intended to introduce an entirely new approach in which the burden of proof is shared, and each party bears the risk of non-persuasion in certain respects. The consultation process revealed some support for such a new approach. Most significantly, the second alternative would relieve the carrier of the burden of having to prove a negative. Several delegates

and industry representatives report that the practical effect of the current regimes that are similar to the first alternative is to impose full liability on the carrier whenever there are multiple causes of loss or damage.

The final sentence at the end of the second alternative is a fall-back provision to cover the rare situations in which adequate proof is lacking. It is intended as a last resort when a court is entirely unable to apportion the loss. Such a provision would be unnecessary under the first alternative. The fall-back rule under the first alternative would be to impose full liability on the carrier whenever the carrier is unable to discharge its burden of proof.

6.2 Calculation of compensation

6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in articles 6.2.1 and 6.2.2.

This provision follows the principle apparently reflected in the Hague-Visby Rules article IV.5(b). It clarifies what is believed to be the intention of the Hague-Visby language to include a decrease in the value of the goods and to exclude consequential damages. Loss or damage due to delay is dealt with in article 6.4.

6.3 Liability of Performing Parties

6.3.1

- (a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this Instrument, and entitled to the carrier's rights and immunities provided by this Instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.**
- (b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods shall be higher than the limits imposed under articles 6.4.2, 6.6.4, and 6.7, a performing party shall not be bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.**

Paragraph (a) imposes liability on “performing parties” – those that perform the carrier’s core obligations under the contract of carriage. This provision does not define the extent of the performing parties’ liability. That is determined under other provisions. In particular, the extent of the liability is specified in part by article 4.2, which establishes a “network” system that also applies to performing parties (such as inland carriers).

It is important to distinguish the performing party’s liability from the carrier’s liability. The carrier is liable (subject to the terms of this Instrument) under the contract of carriage for the entire period of responsibility under article 4.1. A performing carrier, in contrast, is not liable under the contract of carriage, and under this Instrument it is not liable in tort. In return for escaping liability in tort, the performing carrier assumes liability under the Instrument during the period it has custody of the goods or when it is otherwise participating in the performance of the contract of carriage. The burden is on the cargo claimant to show that the loss or damage occurred under circumstances that are sufficient to impose liability on the relevant performing party.

Paragraph (b) provides that each performing party is entitled to its own liability determination. A carrier’s agreement to assume higher liability (an agreement for which the carrier alone has presumably been compensated) does not bind a performing party that did not assume the same agreement. Thus a performing party may safely rely on the terms of this Instrument in the absence of its own express agreement to the contrary.

Views have been expressed that this article should be deleted and that claims under the Instrument should be directed solely to the carrier with which the shipper contracted. The majority view, however, is that the performing party should be separately defined under the Instrument but that its liability should be limited to the part of the carriage that it performed.

The principal debate on this provision is reflected in the “performing party” definition. Those who argue for a broader liability regime favour a more inclusive definition of “performing party,” while those who argue for a narrower liability regime favour a more restrictive definition. The basic hypothetical example in the commentary to article 1.17 once again provides a useful illustration. Those who argue for a broader liability regime contend that the trucking company that sub-contracts its obligations to an independent owner-driver should be liable directly to the cargo claimant if the truck’s owner-driver negligently damages the cargo. The trucking company would be liable to the carrier under its contract, and thus the cargo claimant could reach the trucking company indirectly (unless the carrier could not be sued for some reason). In many jurisdictions, the trucking company would also be liable to the cargo claimant directly in tort. Providing a direct action under this Instrument would simplify the process, better protect the cargo claimant’s interests, and achieve greater uniformity. Those who argue for a narrower liability regime contend that the trucking company that sub-contracts its obligations to an independent owner-driver should not be liable under this Instrument. A consignee that seeks to recover for damage negligently caused by the truck’s owner-driver should be able to recover only from the NVOC that entered into the contract of carriage or from the negligent owner-driver.

Protecting the trucking company that entrusted the cargo to the negligent owner-driver protects the independence of its sub-contract with the carrier.

6.3.2

(a) Subject to article 6.3.3, the carrier shall be responsible for the acts and omissions of

(i) any performing party, and

(ii) any other person, including a performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control,

as if such acts or omissions were its own. A carrier is responsible under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency, as the case may be.

(b) Subject to article 6.3.3, a performing party shall be responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency, as the case may be.

Article 6.3.2 confirms that the carrier is responsible for the acts and omissions of all those who work under it (when they act within the scope of their contract, employment, or agency, as the case may be). A performing party is similarly responsible for the acts and omissions of all those who work under it.

6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Instrument if it proves that it acted within the scope of its contract, employment, or agency, as the case may be.

6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 6.4, 6.6 and 6.7.

6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Instrument

6.4 Delay

6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon [or, in the absence of such agreement, within the

time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage].

The first part of the above provision has widespread support; the second part in brackets is more controversial. The phrase “the terms of the contract” provides for situations where the carrier expressly does not guarantee arrival times.

6.4.2 If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 6.2, the amount payable as compensation for such loss shall be limited to an amount equivalent to [...times the freight payable on the goods delayed]. In addition, the total amount payable under this provision and article 6.7.1 shall not exceed the limit that would be established under article 6.7.1 in respect of the total loss of the goods concerned.

Where delay causes loss of or damages to the goods a limit on damage is contained in the general limitation of article 6.7.1. The present provision creates a special limit for other loss caused by delay. This can be called “economic” or “non-physical” loss, and is sometimes referred to as “consequential” loss. But none of these terms has agreed meanings: all loss is economic, the loss in itself is not non-physical, and the meaning of the English phrase “consequential loss” is not agreed between legal systems. It has been thought best therefore to put forward the formulation above.

As to the amount, an example of a limitation for this type of loss exists in Australia where the amount payable is the lowest of the actual amount of the loss, or 2^{1/2} times the sea freight payable for the goods delayed; or the total amount payable as sea freight for all of the goods shipped by the shipper concerned under the contract of carriage concerned.

The second sentence ensures that the overall limitation on amount contained in article 6.7.1 is not exceeded by any operation of this provision.

6.5 Deviation

- (a) The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.**
- (b) Where under national law a deviation of itself constitutes a breach of the carrier’s obligations, such breach only has effect consistently with the provisions of this Instrument.**

The intention of this provision is that the Instrument is not displaced by deviation, whether geographical or otherwise. Under some legal systems a misperformance by the carrier which can be described as a deviation has been held to displace the exceptions, especially the package or unit limitation of the Hague and (possibly) Hague-Visby Rules. It is intended that this should no longer be possible: like the Hague-Visby Rules, this Instrument contains (in article 6.8) its own provisions for loss of the right to limit.

6.6 Deck cargo

6.6.1 Goods may be carried on or above deck only if

- (i) such carriage is required by applicable laws or administrative rules or regulations, or
- (ii) they are carried in or on containers on decks that are specially fitted to carry such containers, or
- (iii) in cases not covered by paragraphs (i) or (ii) of this article, the carriage on deck is in accordance with the contract of carriage, or complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.

6.6.2 If the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier shall not be liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to article 6.6.1(ii), the carrier shall be liable for loss of or damage to such goods, or for delay in delivery, under the terms of this Instrument without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under article 6.6.1, the carrier shall be liable, irrespective of the provisions of article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

6.6.3 If the goods have been shipped in accordance with article 6.6.1(iii), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier shall have the burden of proving that carriage on deck complies with article 6.6.1(iii) and, if a negotiable transport document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.

6.6.4 If the carrier under this article 6.6 is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in articles 6.4 and 6.7; however, if the carrier and shipper expressly have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods that exclusively resulted from their carriage on deck.

6.7 Limits of liability

6.7.1 Subject to article 6.4.2 the carrier's liability for loss of or damage to or in connection with the goods is limited to [...] units of account per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, [or where a higher amount than the amount of limitation of liability set out in

this article had been agreed upon between the carrier and the shipper.]

6.7.2 When goods are carried in or on a container, the packages or shipping units enumerated in the contract particulars as packed in or on such container are deemed packages or shipping units. If not so enumerated, the goods in or on such container are deemed one shipping unit.

6.7.3 The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

It is considered that it would not be appropriate to insert any figures for units of account in the Instrument at this stage. However there is support for the view that the Hague-Visby limits should be the starting point for future discussion.

In the final provisions of this Instrument it would be appropriate to include an article providing for an accelerated amendment procedure to adjust the amounts of limitation, such as article 8 of the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims. However the level of the limits ultimately agreed to be inserted in article 6.7.1 would have a bearing on support for an accelerated amendment procedure.

The last part of article 6.7.1 is bracketed because it has to be decided whether any mandatory provision should be one-sided or two-sided mandatory, that is whether or not it should be permissible for either party to increase its respective liabilities.

6.8 Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 6.3.2 shall be entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this Instrument, [or as provided in the contract of carriage,] if the claimant proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

The provision for "breaking" the overall limitation is of a type common in international conventions and corresponds to article IV.5(e) of the Hague-Visby Rules. The necessity for personal fault would require some form of

management failure in a corporate carrier, but it is not thought appropriate to seek to specify this in any greater detail. The square brackets indicate that it is for consideration whether the limit should be breakable in cases of delay. It seems likely that it would rarely be appropriate to do so, and the point can be made that the possibility of its being done might create insurance difficulties.

6.9 Notice of loss, damage, or delay

6.9.1 The carrier shall be presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to or in connection with the goods, indicating the general nature of such loss or damage, shall have been given to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within three working days after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

6.9.2 No compensation shall be payable under article 6.4 unless notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

6.9.3 When the notice referred to in this chapter is given to the performing party that delivered the goods, it shall have the same effect as if that notice had been given to the carrier, and notice given to the carrier shall have the same effect as notice given to the performing party that delivered the goods.

6.9.4 In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.

The giving of prompt notice is of practical importance. It enables the parties immediately to carry out a survey of the goods (preferably jointly) and to take necessary measures in order to prevent further damage to the goods. As such, giving prompt notice is part of the general obligation of the parties to act reasonably towards each other and to limit the damage as much as possible. If the damage is not apparent, the consignee must have a certain period for inspection. In view of the purpose of the notice, such period may reasonably be restricted to three days.

Under air transportation law, the sanction on not giving proper notice is the loss of the right to claim damages. In maritime transport this is considered too harsh a sanction for physical damage to the goods. Under the Hague Rules, taken over in this provision, only the assumption will apply that the goods are properly delivered in accordance with their description in the transport document.

This does not apply to not giving due notice in case of economic loss. Any notice of a claim for delay in delivery can and, consequently, must be given within a short period. Normally, such a claim is a matter of calculation only.

The second paragraph, including the period to be fixed at 21 days, corresponds with a similar provision in the Budapest Convention.

For practical purposes it is provided in the third paragraph that valid notice may be given to a performing carrier when it is the person which delivers the goods to the consignee. Obviously, in that case notice may be properly given to the contracting carrier as well.

6.10 Non-contractual claims

The defences and limits of liability provided for in this Instrument and the responsibilities imposed by this Instrument apply in any action against the carrier or a performing party for loss of, for damage to, or in connection with the goods covered by a contract of carriage, whether the action is founded in contract, in tort, or otherwise.

7 OBLIGATIONS OF THE SHIPPER

7.1 Subject to the provisions of the contract of carriage, the shipper shall deliver the goods ready for carriage and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.

The basic obligation of the shipper is to deliver the goods to the carrier in accordance with the contract of carriage, i.e. the goods as agreed and at the agreed place and time. Further, the goods must be brought by the shipper in the proper condition for the intended voyage, e.g. packing must be sound, dangerous goods must be properly marked and labelled, temperature controlled goods must be delivered at the right temperature for carriage, etc. For reasons of accident prevention, this is of particular importance in respect of shipper packed containers and trailers, because in the normal course of events carriers do not check their contents.

7.2 The carrier shall provide to the shipper, on its request, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 7.1.

It should be a two-way street. Anything that a shipper does not know, he should ask for, whereupon the carrier should assist the shipper in meeting its responsibilities. A minority view criticises this provision as being superfluous.

7.3 The shipper shall provide to the carrier the information, instructions, and documents that are reasonably necessary for:

- (a) **the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;**

- (b) **compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;**
- (c) **the compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 8.2.1(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.**

7.4 The information, instructions, and documents that the shipper and the carrier provide to each other under articles 7.2 and 7.3 must be given in a timely manner, and be accurate and complete.

A safe and successful carriage of the goods may depend to a large extent on the co-operation between the parties. It is of primary importance that the information etc. which the parties reasonably require for the voyage is accurate and complete. Each party must be able to rely on the information given by the other party without first having to examine whether it is accurate and complete. It is also a matter of safety that the information not only is correct in the objective sense, but also appropriate in relation to the known intended purpose. As an example: an otherwise correct description of the goods to be carried is not accurate and complete if the goods qualify as dangerous goods and their dangerous character cannot be detected from the description as given by the shipper. In an information society, time and money is often not available to make checks on the accuracy or completeness of information

7.5 The shipper and the carrier are liable to each other, the consignee, and the controlling party for any loss or damage caused by either party's failure to comply with its respective obligations under articles 7.2, 7.3, and 7.4.

The liability of the parties for wrong or incomplete information is a strict one. In principle, no excuses are available to either party for not adhering to this obligation.

7.6 The shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.

The majority view is that the shipper's liability for damage caused by the goods (and for non fulfilment of its obligations under article 7.1) should be based on fault with reversed burden of proof. There is however a minority view that the strict liability for damage caused by dangerous goods, as in the Hague-Visby Rules article IV.6, and Hamburg Rules article 13, should be maintained. The majority view is that the distinction between ordinary goods and dangerous or polluting goods is out of date. Whether certain goods are dangerous depends on the circumstances. Harmless goods may become dangerous under certain circumstances and dangerous goods (in the sense of

poisonous or explosive) may be harmless when they are properly packed, handled and carried in an appropriate vessel. The notion 'dangerous' is relative. The majority feel that the essence of a shippers' liability regime should be that the risk of any damage attributable to the nature of the cargo should be on the shipper and any damage caused by improper handling or carriage should fall under the rules for the carrier's liability.

Another matter is how to deal with goods that may become a danger to human life, property or the environment during the voyage. It may be considered that a master (or another person actually responsible for the goods) must have a wide discretion to deal with such goods under the circumstances without regard to liabilities. This matter is dealt with in articles 5.3 and 6.1.3(ix). Whether the goods are carried with or without the carriers' consent (see Article IV rule 6 of the Hague-Visby Rules) has become irrelevant under these articles. Article 13.4 of the Hamburg Rules does not make this distinction either.

7.7 If a person identified as "shipper" in the contract particulars, although not the shipper as defined in article 1.19, accepts the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 11.5, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13.

This article should be read in relation to the definitions of carrier, shipper, consignor and to the provisions of article 8.1.

The shipper and the carrier are defined as the persons who are the parties to the contract of carriage. In that capacity they have certain rights and assume certain liabilities. Such definition of shipper leaves the question of how to deal with the position of (1) the fob seller, (2) the agent, not being the shipper, who nevertheless is mentioned as the shipper in the transport document, and (3) the person who actually delivers the goods to the carrier in cases where such person is a person other than those mentioned under (1) and (2).

As to (3) the definition of "consignor" includes this person. He has no liabilities under this article 7.7 or under article 11.5. His only right is to obtain a receipt pursuant to article 8.1 from the carrier or performing carrier to whom he actually delivers the goods.

The fob seller usually complies with the requirements of this article 7.7 in that he is mentioned as shipper in the document and has accepted the document. Such an fob seller, therefore, will be subject to the provisions of this article. In addition, if a negotiable document is issued, he becomes the first holder and has all the rights and liabilities of a holder, including the right of control. If a non-negotiable document is issued, such an fob seller has the right of suit as per article 13 and has the right of control if the fob buyer (being the consignee as well as the shipper) so notifies the carrier.

The situation of the agent, not being the shipper (as defined), but mentioned as the shipper in the document, can only arise when such agent, expressly or impliedly, is authorised by the shipper (as defined) to be such 'documentary shipper'. If such agent accepts the document, his position is the

same as outlined above with respect to the fob seller. His alternative course is not to accept the document.

7.8 The shipper shall be responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency, as the case may be.

The substance of this provision is based on article 8.2 of the Budapest Convention, but the drafting has been conformed to article 6.3.2(b).

8 TRANSPORT DOCUMENTS AND ELECTRONIC RECORDS

8.1 Issuance of the Transport Document or the Electronic Record

Upon delivery of the goods to a carrier or performing party

- (i) the consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic record evidencing the carrier's or performing party's receipt of the goods;**
- (ii) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 7.7, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If pursuant to article 2.1 the carrier and the shipper have agreed to the use of an electronic record, the shipper is entitled to obtain from the carrier a negotiable electronic record unless they have agreed not to use a negotiable electronic record or it is the custom, usage or practice in the trade not to use one.**

The first paragraph specifies that the consignor, as defined in article 1.3, is entitled to a receipt confirming the actual delivery of the goods to the carrier or to the performing party. If the consignor is not the shipper or the person referred in article 7.7, it may need such a receipt in its relations with any of these persons.

The second paragraph follows the Hague Rules and the Hamburg Rules, which require the carrier to issue a negotiable bill of lading to the shipper on demand. Differing views were expressed as to whether the "shipper" (the carrier's contractual counterpart) or the "consignor" (the person actually delivering the goods to the carrier) should be entitled to the transport document or electronic record issued under this paragraph. In many cases, of course, the two will be the same, and the current issue will not arise. But in the case of an fob shipment in which the consignor pays the freight on the consignee-

shipper's account, the two would be different. If the relationship between the consignor and the shipper breaks down, both may demand a transport document or electronic record issued under paragraph (ii). On the one hand, it seems logical to give the contracting shipper the right to control entitlements under the contract of carriage. On the other hand, giving a negotiable transport document to the shipper may undermine the consignor's ability to receive payment for the shipment. The current text adopts the former argument, but it may be appropriate to give further thought to this issue. Some have suggested, for example, that the carrier should not issue a negotiable transport document or electronic record under paragraph (ii) except on surrender of the receipt issued under paragraph (i). Others have observed that this solution would not solve the underlying problem; it would simply shift it forward (and elevate the importance of the receipt issued under paragraph (i)).

The second paragraph also provides that the shipper and carrier may agree not to use a negotiable transport document or electronic record. In addition, it clarifies that such an agreement may be implied, thus enabling a carrier to offer a service in which the shipper may not require a negotiable transport document. Furthermore, in some trades it is highly unusual for shippers to request a negotiable document, or a negotiable document would be useless, *e.g.*, on short ferry voyages. Therefore, if there is a custom, usage, or practice in the trade not to use negotiable documents, the carrier is not required to do so (even if the shipper demands such a document).

The reference is deliberately to a custom, usage, or practice "in the trade" rather than "at the place where the transport document or electronic record is issued." It is often difficult to know where a transport document or electronic record has been issued, and it is easy to manipulate the place of issuance. Transport documents or electronic records could be issued in a distant office at a place having no other connection with the contract simply to take advantage of favourable customs, usages, or practices.

8.2 Contract Particulars

8.2.1 contract particulars in the document or electronic record referred to in article 8.1 must include

- (a) a description of the goods;**
- (b) the leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;**
- (c)**
 - (i) the number of packages, the number of pieces, or the quantity, and**
 - (ii) the weight**
 - as furnished by the shipper before the carrier or a performing party receives the goods;**

- (d) a statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;**
- (e) the name and address of the carrier; and**
- (f) the date**
 - (i) on which the carrier or a performing party received the goods, or**
 - (ii) on which the goods were loaded on board the vessel, or**
 - (iii) on which the transport document or electronic record was issued.**

Article 8.2.1(a) introduces a requirement that does not explicitly appear in current international conventions, but it conforms to virtually universal practice in the industry. As a practical matter, it is in both parties' interest to include a description of the goods in the contract particulars.

Article 8.2.1(b) and (c) generally correspond to existing law and practice in most countries, and to the current international regimes. The provisions do alter the existing law in one respect: The carrier's obligation to include the information furnished by the shipper is not qualified by any exception when the carrier has no reasonable means of checking the information. Under current law, the carrier may (in theory) simply omit this information from the contract particulars if it has no reasonable means of checking its accuracy. Under article 8.2.1(b) and (c), the carrier must include the information furnished by the shipper in the contract particulars even if it has no reasonable means of checking its accuracy (but the carrier may protect its interests with a qualifying clause under article 8.3).

Article 8.2.1(b) also omits the requirement that "the marks must be stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which the goods are contained, in a manner that would ordinarily remain legible until the end of the voyage." In view of the alteration noted above (which means that the carrier must include information furnished by the shipper even if it has no reasonable means of checking the accuracy), it seems inappropriate to permit the carrier to omit information furnished by the shipper concerning the marks if the carrier believes that the marks might not remain legible until the end of the voyage. Once again, the carrier's remedy should be to protect its interests with a qualifying clause under article 8.3. This change is unlikely to make any difference in practice.

With respect to article 8.2.1(b) and (c), the shipper must furnish the necessary information in writing *before* the carrier receives the goods; it is not sufficient to furnish the information before the carrier issues the transport document or electronic record. With respect to 8.2.1(c), the contract particulars must include all of the listed information furnished by the shipper (*e.g.* the number of pieces and the weight); it is not sufficient to include only one of the items on the list (*e.g.* the number of pieces or the weight) when the shipper desires fuller information.

Article 8.2.1(d) confirms the understanding that is clearly expressed in

the *travaux préparatoires* of the Hague Rules and carried forward in subsequent international conventions. The courts in some countries have departed from this principle.

Article 8.2.1(e) gives effect to the view that the carrier should be identified in the transport document.

Article 8.2.1(f) gives the carrier three choices of date that may be included in the contract particulars.

8.2.2 The phrase “apparent order and condition of the goods” in article 8.2.1 refers to the order and condition of the goods based on (a) a reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and (b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record.

Article 8.2.2 provides both an objective and a subjective component to the phrase “apparent order and condition of the goods.” Under article 8.2.2(a), the carrier has no duty to inspect the goods beyond what would be revealed by a reasonable external inspection of the goods as packaged at the time the consignor delivers them to the carrier or a performing party. If the goods are unpackaged, the contract particulars will need to describe the order and condition of the goods themselves. But if the goods are packaged, the contract particulars’ statement of order and condition will relate primarily to the packaging (unless the order and condition of the goods themselves can be determined through the packaging). For containerised goods, in particular, the contract particulars’ statement of order and condition is highly unlikely to relate to the goods themselves if the shipper delivered a closed container that the carrier did not open before issuing the transport document.

Under article 8.2.2(b), however, if the carrier or a performing party actually carries out a more thorough inspection (*e.g.* inspecting the contents of packages or opening a closed container), then the carrier is responsible for whatever such an inspection should have revealed.

8.2.3 Signature

- (a) A transport document shall be signed by or for the carrier or a person having authority from the carrier.**
- (b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier’s authorisation of the electronic record.**

Article 8.2.3 gives effect to the non-controversial view that a transport document should be signed, and that an electronic record should be comparably authenticated. The definition of electronic signature is taken from the UNCITRAL Model Law on Electronic Signatures 2001, as specifically adjusted to bring its intended meaning within the scope of this provision.

8.2.4 Omission of Required Contents from the Contract Particulars

The absence of one or more of the contract particulars referred to in article 8.2.1, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic record.

Article 8.2.4 gives effect to the non-controversial view that the validity of the transport document or electronic record does not depend on the inclusion of the particulars that should be included. For example, an undated bill of lading will still be valid, even though a bill of lading *should* be dated. Article 8.2.4 also extends the rationale behind that non-controversial view to hold that the validity of the transport document or electronic record does not depend on the *accuracy* of the contract particulars that should be included. Under this extension, for example, a misdated bill of lading would still be valid, even though a bill of lading should be accurately dated.

Article 8.4.3 deals with the consequences of failing to comply with article 8.2.1(d).

8.3 Qualifying the Description of the Goods in the Contract Particulars

8.3.1 Circumstances Under Which the Carrier May Qualify the Description of the Goods in the Contract Particulars.

Under the following circumstances, the carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 8.2.1(b) or 8.2.1(c) with an appropriate clause therein to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

- (a) **For non-containerised goods—**
 - (i) **if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may include an appropriate qualifying clause in the contract particulars, or**
 - (ii) **if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.**
- (b) **For goods delivered to the carrier in a closed container, the carrier may include an appropriate qualifying clause in the contract particulars with respect to**
 - (i) **the leading marks on the goods inside the container, or**
 - (ii) **the number of packages, the number of pieces, or the quantity of the goods inside the container,**

unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container.

- (c) **For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the**

weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if (i) the carrier can show that neither the carrier nor a performing party weighed the container, and (ii) the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars.

Article 8.3.1 generally corresponds to existing law and practice in most countries. Although current law generally permits the carrier to protect itself by omitting from the contract particulars a description of the goods that it is unable to verify, this protection is essentially meaningless in practice. Even if the carrier is unable to verify the description, the typical shipper still requires a transport document or electronic record describing the goods in order to receive payment under the sales contract. Commercial pressures therefore deny the carrier the one form of protection that is clearly recognised under current law. Qualifying clauses represent the carrier's attempt to regain its protection. Common examples of qualifying clauses include "said to contain" and "shipper's weight and count." Other qualifying clauses may also be effective, depending on the particular needs of the case.

The standards for including a qualifying clause under article 8.3.1(a) and (b) are generally similar to those under the proviso to article III.3 of the Hague and Hague-Visby Rules and to article 16.1 of the Hamburg Rules, except that this article eliminates the Hague Rules and Hamburg Rules language excusing the carrier from including the otherwise required information if there are reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods. If the carrier has reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods, the carrier is obligated to check the information if it has a reasonable means of doing so. Thus the carrier would be excused from including the otherwise required information only if there is no reasonable means of checking it. The reasonable suspicion exception is accordingly redundant.

Clauses regarding the weight of containerised goods create special problems. In some ports, facilities for weighing loaded containers simply do not exist. In such cases, it is an easy matter for the carrier to prove that it had no reasonable means of checking the weight information furnished by the shipper. But even in ports where weighing facilities exist, and could be used, it is often customary to load containers without weighing them. Sometimes this is because the time spent weighing containers would delay the ship's departure (particularly when the shipper delivers the container to the carrier shortly before sailing). Often it is because the weight is of no commercial importance, and the time and expense of weighing a container is unjustified in the absence of any commercial benefit. In some cases, however, the weight is of commercial importance, and the consignee should be permitted to rely on the statement of weight in the transport document unless it is clear that the carrier has in fact not weighed the container.

In view of these special problems with qualifying clauses regarding the

weight of containerised goods, article 8.3.1(c) specifically addresses the issue in unique fashion. It requires a clear statement that the carrier has in fact not weighed the container. The carrier can include such a statement only if it is true (*i.e.*, if the carrier did not weigh the container) and if the carrier and the shipper did not agree in writing prior to the shipment that the container would be weighed and the weight would be included in the contract particulars. Article 8.3.1(c)(ii) recognises that in some cases the container's weight is of commercial importance, and that in such cases the shipper may legitimately insist on having a weight listed in the transport document without a qualifying clause. A shipper may protect this legitimate interest with an explicit agreement prior to shipment (*e.g.*, in the booking note). In the absence of such a prior agreement, however, the carrier may assume that the container's weight is of no commercial importance. A carrier may then load the container without weighing it, and any weight listed on the transport document may be qualified—without proof that the carrier had no reasonable means of checking the weight furnished by the shipper.

Article 8.3.1(a)(ii) and article 8.3.1(b) also recognise that the carrier may also provide accurate information if it considers the information furnished by the shipper to be inaccurate.

8.3.2 Reasonable Means of Checking

For purposes of article 8.3.1:

- (a) a “reasonable means of checking” must be not only physically practicable but also commercially reasonable.**
- (b) a carrier acts in “good faith” when issuing a transport document or an electronic record if**
 - (i) the carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and**
 - (ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic record is materially false or misleading because it believes that the statement is likely to be false or misleading.**

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

Article 8.3.2(a) clarifies the meaning of “reasonable means of checking.” Opening a sealed container or unloading a container to inspect the contents, for example, would not be commercially reasonable, even if it might be physically practical in some circumstances. Thus a carrier issuing a transport document or electronic record would always be permitted to qualify the description of goods delivered by the shipper inside a sealed container—unless the carrier had some physically practical and commercially reasonable means of checking the information furnished by the shipper (which would have to be something other than opening the container). For example, if the carrier had an agent present when the shipper stuffed the container, and that agent verified the

accuracy of the shipper's information during loading, then the carrier would not be permitted to qualify the description of the goods.

Article 8.3.2(b) clarifies the meaning of "good faith," and imposes the burden of proving a lack of good faith on the party claiming that the carrier did not act in good faith.

8.3.3 Prima Facie and Conclusive Evidence

Except as otherwise provided in article 8.3.4, a transport document or an electronic record that evidences receipt of the goods is

- (a) prima facie evidence of the carrier's receipt of the goods as described in the contract particulars; and**
- (b) conclusive evidence of the carrier's receipt of the goods as described in the contract particulars [(i) if a negotiable transport document or a negotiable electronic record has been transferred to a third party acting in good faith [or (ii) if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars].**

Article 8.3.3(a) simply confirms the widely recognised rule that, as a general matter, a transport document or electronic record that evidences a carrier's receipt of the goods is prima facie evidence that the goods were as described in the contract particulars.

Article 8.3.3(b) recognises that, in order to protect innocent third parties who rely on the descriptions in transport documents and electronic records, a transport document or electronic record is in some circumstances not simply prima facie evidence but conclusive evidence. There is broad support for article 8.3.3(b)(i), which protects the holder of a negotiable transport document or electronic record.

There is weaker support for article 8.3.3(b)(ii), which protects any person acting in good faith that pays value or otherwise alters its position in reliance on the description of the goods in the contract particulars, whether or not the transport document or electronic record is negotiable. For example, if an fob seller arranges carriage for the account of the fob buyer, the buyer is the shipper. The carrier, however, may issue a non-negotiable transport document to the seller, and the buyer may pay the purchase price to the seller in reliance on the description of the goods in the transport document.

8.3.4 Effect of Qualifying Clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 8.3.1, then the transport document will not constitute prima facie or conclusive evidence under article 8.3.3 to the extent that the description of the goods is qualified by the clause.

Article 8.3.4 simply describes the effect of a qualifying clause that complies with the requirements of article 8.3.1. A qualifying clause does not necessarily defeat the prima facie or conclusive evidence of the description of the goods in full. A qualifying clause such as "shipper's weight," for example,

would not affect the evidentiary value of a description of the goods to the extent that it listed the number of packages in the shipment or described the leading marks.

Under this provision, every qualifying clause is effective according to its terms if it complies with the requirements of article 8.3.1. This conclusion is generally accepted with respect to non-containerised goods, but views are divided on whether the carrier should have such extensive rights with respect to containerised goods.

Some take the view that sharp distinctions exist between commercial expectations with respect to containerised and non-containerised goods. The carrier's classic rationale for relying on a qualifying clause and escaping liability in a containerised goods case is that the carrier delivered to the consignee exactly what it received from the shipper: a closed container (the contents of which could not be verified). It is arguable that as soon as the carrier delivers something different (*e.g.*, a container that is damaged in a way that may have caused the loss of or damage to the goods, or a container that has been improperly opened during the voyage), the equities shift. At this point the carrier can no longer establish the same chain of custody. Moreover, it appears that something wrong was done while the container was in the carrier's custody. The consignee's entitlement to rely on the description of the goods in the contract particulars accordingly becomes much stronger. A draft reflecting these views might revise the current article to provide:

"If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under article 8.3.3, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under article 8.3.5."

It would then be necessary to add a new article 8.3.5, which might provide:

"A qualifying clause in the contract particulars is effective for the purposes of article 8.3.4 under the following circumstances:

- (a) For non-containerised goods, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms.
- (b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms if
 - (i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and
 - (ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that (1) a container was opened for the purpose of inspection, (2) the inspection was properly witnessed, and (3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection."

8.4 Deficiencies in the Contract Particulars

8.4.1 Date

If the contract particulars include the date but fail to indicate the significance thereof, then the date will be considered to be:

- (a) if the contract particulars indicate that the goods have been loaded on board a vessel, the date on which all of the goods indicated in the transport document or electronic record were loaded on board the vessel; or**
- (b) if the contract particulars do not indicate that the goods have been loaded on board a vessel, the date on which the carrier or a performing party received the goods.**

Article 8.4.1 specifies the consequences of including a date in the contract particulars without indicating its significance. For an “on board” bill of lading or a similar document or electronic record indicating that the goods have been loaded on board a vessel, the ambiguous date is considered to be the date on which the goods were loaded on board the vessel. In contrast, for a “received for shipment” bill of lading or other document or electronic record that does not indicate that the goods have been loaded on board a vessel, the ambiguous date is considered to be the date on which the carrier or a performing party received the goods.

8.4.2 [Failure to Identify the Carrier

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

This provision attempts to deal with the problem facing a person seeking to exercise rights of suit against the carrier under chapter 13 if the name and address of the carrier is not stated in the contract particulars as required by article 8.2.1(a). Although it has been the subject of considerable discussion, the issue remains controversial. Views are very much divided on the desirability of any presumption affecting the registered owner. Even some supporters of the current provision consider it a problematic solution but the best that can be accomplished under the circumstances.

The article permits the registered owner to defeat the presumption by proving that the ship was under a bareboat charter at the time of the carriage and adequately identifying the bareboat charterer. The limitation period for an action against the bareboat charterer is addressed in article 14.5

Under the final sentence of this article, the bareboat charterer is presumed to be the carrier “in the same manner that the registered owner was presumed

to be the carrier.” This means, among other things, that the bareboat charterer would have the option of proving that there was a further bareboat charter at the time of the carriage. This second presumption may not be universally acceptable to the extent that it is irrebuttable save in respect of a subsequent bareboat charterer.

When door-to-door transport is involved, this provision could make the owner of the vessel performing the sea leg the “carrier” for the entire journey. Because the bill of lading may have been issued by a person owning no means of transport, this could subject that vessel owner to unexpected liability. The suggestion was made that this result should be avoided by exempting the vessel owner in respect of damage occurring before loading on or after discharge from the vessel. To draft such protection would not be easy. If the owner of each means of carriage were made the carrier for the part of the carriage performed by it, there would be scope for considerable problems if loss or damage occurred while the goods were being moved from one mode of transportation to another. If only some of the means of carriage were adequately specified, then no one would qualify as the carrier for parts of the carriage.

8.4.3 Apparent Order and Condition

If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document or electronic record is either prima facie or conclusive evidence under article 8.3.3, as the case may be, that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party.

9 FREIGHT

- 9.1 (a) Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 4.1.3, unless the parties have agreed that the freight shall be earned, wholly or partly, at an earlier point in time.**
- (b) Unless otherwise agreed, no freight will become due for any goods that are lost before the freight for those goods is earned.**
- 9.2 (a) Freight is payable when it is earned, unless the parties have agreed that the freight is payable, wholly or partly, at an earlier or later point in time.**
- (b) If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery.**
- (c) Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim**

that the shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not yet been agreed or established].

- 9.3 (a)** Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods.
- (b)** If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:
- (i)** with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7.7; or
 - (ii)** with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.5 or otherwise for the payment of such amounts.
 - (iii)** to the extent that it conflicts with the provisions of article 12.4.
- 9.4 (a)** If the contract particulars in a transport document or an electronic record contain the statement “freight prepaid” or a statement of a similar nature, then neither the holder, nor the consignee, shall be liable for the payment of the freight. This provision shall not apply if the holder or the consignee is also the shipper.
- (b)** If the contract particulars in a transport document or an electronic record contain the statement “freight collect” or a statement of similar nature, such a statement puts the consignee on notice that it may be liable for the payment of the freight.
- 9.5 (a)** [Notwithstanding any agreement to the contrary,] if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payments referred to below, the carrier is entitled to retain the goods until payment of
- (i)** freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,
 - (ii)** any damages due to the carrier under the contract of carriage,
 - (iii)** any contribution in general average due to the carrier relating to the goods
- has been effected, or adequate security for such payment has been provided.
- (b)** If the payment as referred to in paragraph (a) of this article is not, or is not fully, effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to it

(including the costs of such recourse) from the proceeds of such sale. Any balance remaining from the proceeds of such sale shall be made available to the consignee.

10 DELIVERY TO THE CONSIGNEE

The subject of delivery is only to a limited extent dealt with in the existing maritime transport conventions. This article only makes limited provisions on this subject. It does not pretend to solve all the problems in connection with the subject of delivery.

The main problem is that often the goods arrive at their place of destination without someone there to receive them. In particular, problems arise if a negotiable transport document or negotiable electronic record has been issued. The proper functioning of the bill of lading system is based on the assumption that the holder of the document presents it to the carrier when the goods arrive at their destination and that subsequently the carrier delivers the goods to such holder against surrender of the document. However, frequently the negotiable document is not available when the goods arrive at their destination. This may be caused by all kinds of business reasons, such as the credit term of the financing arrangements in respect of the goods being longer than the voyage, or it may be the result of remoteness of the place of destination or bureaucratic obstacles. Despite this, a carrier must be able to dispose of the goods at the end of the voyage. He cannot be compelled to bear the additional costs and risks connected with continued custody of the goods. Also, it may be the case that no suitable storage facilities are available at the place of destination. If in these cases the carrier delivers the goods to someone who is not (yet) the holder of the negotiable document, he is at risk, because his promise made by the bill of lading is to deliver the goods to the holder of that document. On the other hand, a holder must be able to count on the security that a negotiable document provides. He may have paid for the goods or may have provided finance for the goods in exchange for a pledge on the document. He rightfully may regard the negotiable transport document as the 'key to the goods'.

This article tries to strike a balance between these two legitimate interests. The article does not impose a duty on the holder to receive the goods. Nor does it impose a duty on the carrier to deliver the goods only against surrender of the document. The current practice deviates too much from either of these two duties to make them obligatory.

Instead, the article takes into account the double function of a negotiable transport document: it is both a contract of carriage in the true sense and it is a document of title. Both functions have to be respected by either party. Which function should prevail may depend on the circumstances of the case. This article provides only some general rules.

10.1 When the goods have arrived at their destination, the consignee that exercises any of its rights under the contract of carriage shall accept delivery of the goods at the time and location mentioned in article 4.1.3. If the consignee, in breach of this obligation, leaves the goods in the custody

of the carrier or the performing party, such carrier or performing party will act in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.

Pursuant to article 5.1 the carrier is obliged to deliver the goods to the consignee. A corresponding provision that the consignee is obliged to take delivery is not included, because under current practice it is accepted that a consignee need not take delivery. Only if a consignee exercises any rights under the contract of carriage, is he obliged to do so. If the consignee does not do anything, he has no obligation to take delivery. See also article 12.2.

The consequence of not taking delivery, when there is a duty on the consignee to do so, is that a carrier in practice is no longer liable for loss or damage to the goods. The consequence of not taking delivery, while there is no obligation to do so, is worked out in the articles 10.3 and 10.4.

10.2 On request of the carrier or the performing party that delivers the goods, the consignee shall confirm delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.

In practice, many carriers request some form of written evidence from the consignee that the carrier has delivered the goods to him. This provision provides a legal basis for this usage.

In the event that a negotiable transport document has been issued, often the accomplishment of the document is evidenced by the signature of the latest holder of the document on its reverse side

10.3.1 If no negotiable transport document or no negotiable electronic record has been issued:

- (i) The controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee.**
- (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee's production of proper identification.**

This provision applies when no negotiable document or electronic record is issued and when no document at all, whether under a paper communication system or an electronic one, is used. In these cases, there is no 'double function' of the contract of carriage. In principle, it is up to the party with whom the carrier made his contract, or up to the controlling party if he is a different person from the contracting party, to take care that the goods can be delivered.

10.3.2 If a negotiable transport document or a negotiable electronic record has been issued, the following provisions shall apply:

- (i) (a) Without prejudice to the provisions of article 10.1 the holder**

of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals will cease to have any effect or validity.

(b) Without prejudice to the provisions of article 10.1 the holder of a negotiable electronic record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 2.4 that it is the holder of the electronic record. Upon such delivery, the electronic record will cease to have any effect or validity.

- (ii) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise the controlling party or, if it, after reasonable effort, is unable to identify or find the controlling party, the shipper, accordingly. In such event such controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this paragraph.
- (iii) Notwithstanding the provision of paragraph (iv) of this article, a carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (ii) of this article, shall be discharged from its obligation to deliver the goods under the contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in article 2.4, that he is the holder.
- (iv) If the delivery of the goods by the carrier at the place of destination takes place without the negotiable transport document being surrendered to the carrier or without the demonstration referred to in paragraph (i) (b) above, a holder who becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage will only acquire rights under the contract of carriage if

the passing of the negotiable transport document or negotiable electronic record was effected in pursuance of contractual or other arrangements made before such delivery of the goods, unless such holder at the time it became holder did not have or could not reasonably have had knowledge of such delivery.

- (v) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled, without prejudice to any other remedies that a carrier may have against such controlling party or shipper, to use its rights under article 10.4.**

The problems referred to in the introductory commentary arise particularly if a negotiable document or electronic record has been issued. This article works out the balance of interest.

The first sentence of article 10.3.2(i)(a) has limited scope. According to current practice, a holder, that did not exercise any right under the contract of carriage, is entitled but not obliged to claim delivery. Further, this paragraph does not exclude the possibility that a person other than the holder is entitled to claim delivery. It only provides that *if* a holder claims delivery, the carrier is *obliged* to deliver and, consequently must be held discharged from his obligation under the contract of carriage to deliver the goods at the place of their destination. The provision does not solve the problem of goods having a negative value at the place of destination.

Further, paragraph (a) follows the normal practice that the negotiable document has to be surrendered by the holder to the carrier. This practice also protects the carrier, because the document identifies the person entitled to take delivery. Contrary to the case of early delivery, to which article 11.2 (b) (iii) refers, the surrender of one original suffices. At that point any other becomes void.

Article 10.3.2(i)(b) mirrors (a) for the negotiable electronic record. Under an electronic communication system, some of the reasons that a negotiable record is not available at delivery may be taken away. But in cases, e.g. where the credit terms are extended beyond the duration of the voyage, the problems are the same under any e-commerce system as under a paper bill of lading system.

In article 2.4 it is provided that the contractual rules applicable to the use of negotiable electronic records must provide for the manner in which the holder should be able to identify itself to the carrier. If these rules did not make such provision, an essential feature of any negotiable document, whether in electronic or in paper form, is missing. The consequence must be that the record is not negotiable.

Paragraphs (ii) to (v) deal with the situation where a holder does not make use of its right to obtain delivery of the goods. Here the proper functioning of the bill of lading system is at stake. Parties may elect to follow a more risky course.

Because it is the cargo side that decides not to pay due regard to the contract function of the negotiable document, it is provided in paragraph (ii)

that, if a holder does not appear, the carrier must first seek instructions from any of the persons mentioned in this paragraph. These persons are obliged to give the carrier proper instructions, unless a valid cesser clause has released any of them from this obligation. Without such cesser clause, these persons might be held liable for not giving the carrier proper instructions to dispose of the goods. It is not provided that any of such persons should take delivery themselves. Here, without any proper instruction, a carrier has no option but to make use of its rights under article 10.4: storing and selling the goods. In fact, paragraph (ii) follows the widespread practice that a charterer is contractually entitled to instruct a carrier in respect of delivery of the goods.

Paragraph (iii) provides for the consequences when a carrier has complied with instructions given under the previous paragraph. In such a case, he is discharged from his general obligation to deliver the goods to the consignee. To avoid any doubts, he may not be discharged from *all* of his obligations under the contract of carriage, such as that to pay compensation where the goods are delivered in damaged condition.

The alternative would be that the carrier would not be discharged but should be entitled to obtain a proper indemnity from the shipper or the controlling party. However, such alternative would remain open ended if no proper indemnity could be obtained by the carrier.

Under all circumstances it is desirable that the holder of a negotiable document be vigilant and, in principle, should take steps on the arrival of the ship in order to protect its security.

Paragraph (iv) gives a rule for cases where no negotiable document has been surrendered when the carrier has delivered the goods, such as under paragraphs (ii) and (iii). First, it should be noted that in such a case the main rule of paragraph (i) prevails: the 'innocent' third party bill of lading holder may still be held entitled to claim delivery. The last part of paragraph (iv) confirms this rule again. This remains a carrier's risk and forms an essential part of the balance that this whole article 10.3.2 tries to strike.

Frequently, however, a holder knows or should reasonably have known of the delivery without production of a negotiable document. In that event, and if he becomes holder after such a delivery, there is no longer any reason for protecting him. In such a case he only acquires rights under the bill of lading (such as the right to claim for damages to the goods) if he had become holder pursuant to a contractual or other arrangement that already existed before the delivery. Otherwise, the bill of lading must be regarded as exhausted. Consequently, this rule covers the bona fide cases where the passing of the bill of lading within the string of sellers and buyers is delayed. It does not exclude the possibility that after delivery certain rights under the exhausted bill of lading may be transferred to a third party, but this has to be effected by specific agreement and not by mere endorsement of the bill.

It has nevertheless been argued that provisions such as those of paragraphs (ii) and (iii) are likely to facilitate fraud. If the carrier is unable to locate the holder and takes instructions from the shipper, the shipper may (for instance) be able to destroy the security of a bank holding the documents by directing delivery elsewhere. And in general the bank's security is much

reduced in effect if the goods can easily be delivered other than against the document or documents they hold.

On the other hand it can be said that in many parts of the world it is simply impossible for the carrier always to insist on surrender of a bill of lading against delivery, and that to put the carrier who parts with the goods otherwise always (or usually) in the wrong simply does not reflect the realities of delivery in many places and circumstances. Rather, a consignee or indorsee must be vigilant to seek delivery on arrival of the ship; and a bank holding a bill of lading as security must act positively in its own interests and be vigilant to watch for and takes steps on the arrival of the ship whose bill of lading represents its security. It is then argued that provisions such as (ii) and (iii) facilitate modern trade.

Paragraph (v) refers to the general fall back position under article 10.4

10.4.1 (a) If the goods have arrived at the place of destination and

(1) the goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage; or

(2) the carrier is not allowed under applicable law or regulations to deliver the goods to the consignee,

then the carrier is entitled to exercise the rights and remedies mentioned in paragraph (b).

(b) Under the circumstances specified in paragraph (a), the carrier is entitled, at the risk and account of the person entitled to the goods, to exercise some or all of the following rights and remedies:

(1) to store the goods at any suitable place;

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

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

(c) If the goods are sold under paragraph (b)(3), the carrier may deduct from the proceeds of the sale the amount necessary to

(1) pay or reimburse any costs incurred in respect of the goods; and

(2) pay or reimburse the carrier any other amounts that are referred to in article 9.5(a) and that are due to the carrier.

Subject to these deductions, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods.

10.4.2 The carrier is only allowed to exercise the right referred to in article 10.4.1 after it has given notice to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper that the goods have arrived at the place of destination.

10.4.3 When exercising its rights referred to in article 10.4.1, the carrier or performing party acts as an agent of the person entitled to the goods, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.

Occasionally, it happens that at the place of destination the carrier is not able or entitled to deliver the goods. The consignee may not appear or declines delivery of the goods while the shipper is not interested either, or the goods may be attached or delivery of them may otherwise be legally prevented. In this type of cases, the carrier often has to do something in order to dispose of the goods.

Generally, this provision follows the provisions in the various national laws on this issue. The carrier should be given a reasonable freedom to act, but always within the limits of reasonableness. If he decides to sell the goods, applicable national law may provide for some form of court supervision. The net proceeds of such sale must be kept available to the person entitled to the goods on whose behalf the carrier has acted. Such person need not necessarily be a party to the contract of carriage, but may be an owner of the goods or an insurer.

11 RIGHT OF CONTROL

Unlike under other transport conventions, the subject of the right of control is not dealt with in maritime conventions. Practices that have developed under the bill of lading system may have been the reason that in the past no urgent need was felt. Today, the situation in maritime transport is different. In many trades the use of negotiable transport documents is rapidly decreasing or has entirely disappeared. Furthermore, a well defined and transferable right of control may play a useful role in the development of e-commerce systems, where no electronic record as defined in this Instrument is used.

11.1 The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1.1. Such right to give the carrier instructions comprises rights to:

- (i) give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;**
- (ii) demand delivery of the goods before their arrival at the place of destination;**

(iii) replace the consignee by any other person including the controlling party;

(iv) agree with the carrier to a variation of the contract of carriage.

This provision defines the right of control. It makes a distinction between instructions that constitute a variation of the contract of carriage and instructions that do not. Paragraph (i) relates to 'normal' instructions within the scope of a contract of carriage, such as to carry the goods at a certain temperature. Paragraphs (ii) and (iii) are important for an unpaid seller that may have retained title to the goods or may wish to exercise a right of stoppage under its contract of sale. Paragraph (ii) may enable the seller to prevent the goods from arriving in the jurisdiction of the consignee, while paragraph (iii) enables the controlling party to have the goods delivered to itself, its agent, or to a new buyer. Paragraph (iv) underlines that, for all practical purposes, the controlling party is the carrier's counterpart during the carriage. This article gives the controlling party full control over the goods.

11.2 (a) When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:

(i) The shipper is the controlling party unless the shipper and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party.

(ii) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor or the transferee shall notify the carrier of such transfer.

(iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification.

(b) When a negotiable transport document is issued, the following rules apply:

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

(ii) The holder is entitled to transfer the right of control by passing that negotiable transport document to another person in accordance with article 12.1, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(iii) In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of that document was issued, all originals shall be produced.

(iv) Any instructions as referred to in article 11.1(ii), (iii), and (iv)

given by the holder upon becoming effective in accordance with article 11.3 shall be stated on the negotiable transport document.

(c) When a negotiable electronic record is issued:

- (i) The holder is the sole controlling party and is entitled to transfer the right of control to another person by passing the negotiable electronic record in accordance with the rules of procedure referred to in article 2.4, upon which transfer the transferor loses its right of control.**
- (ii) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the rules of procedure referred to in article 2.4, that it is the holder.**
- (iii) Any instructions as referred to in article 11.1, (ii), (iii), and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated in the electronic record.**

(d) Notwithstanding the provisions of article 12.4, a person, not being the shipper or the person referred to in article 7.7, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Instrument.

Paragraph (a) applies in all cases except when a negotiable document has been issued. The principle is that the shipper is the controlling party, but that he may agree with the consignee that it should be otherwise. The second principle included in this paragraph is that the controlling party is entitled to transfer its right to any third party.

Unlike the position under, for instance, the CMR Convention, where a certain copy of the non-negotiable road consignment note has to be transferred in order to transfer the right of control, under paragraph (a) the document does not play any role. The controlling party remains in control of the goods until their final delivery. Also, there is no automatic transfer of the right of control from the shipper to the consignee as soon as the goods have arrived at their place of delivery, as is the case under the CMI Uniform Rules for Sea Waybills. If there were such automatic transfer, the most common shipper's instruction to the carrier, namely not to deliver the goods before he has received the confirmation from the shipper that payment of the goods has been effected, could be frustrated. This, obviously, would raise serious practical concern.

When a negotiable transport document has been issued, paragraph (b) applies. Here, it is provided that the holder of such document is the sole controlling party. If through endorsement the negotiable document is passed to another party, the right of control automatically is transferred as well. Further, the presentation rule applies if the holder wants to exercise its right of control. In order to protect third party holders, any variation of the contract of carriage has to be stated on the negotiable document.

A complication may arise if the negotiable document has been issued in

more than one original. The provision follows the current practice that only holding the full set of originals entitles the holder to exercise the right of control. The consequence is that, if a person has parted with one (or more) originals and has kept one or more other originals, nobody is in control of the goods.

Paragraph (d) follows the principle laid down in article 12.1.2.

11.3 (a) Subject to the provisions of paragraphs (b) and (c) of this article, if any instruction mentioned in article 11.1(i), (ii), or (iii)

- (i) can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;**
- (ii) will not interfere with the normal operations of the carrier or a performing party; and**
- (iii) would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage,**

then the carrier shall execute the instruction. If it is reasonably expected that one or more of the conditions mentioned in subparagraphs (i), (ii), and (iii) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.

- (b) In any event, the controlling party shall indemnify the carrier, performing parties, and any persons interested in other goods carried on the same voyage against any additional expense, loss, or damage that may occur as a result of executing any instruction under this article.**

(c) If a carrier

- (i) reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and**
 - (ii) is nevertheless willing to execute the instruction,**
- then the carrier is entitled to obtain security from the controlling party for the amount of the reasonably expected additional expense, loss, or damage.**

In article 11.1 the distinction is made between instructions that constitute variations of the contract of carriage and instructions that do not. In this article, the distinction is between instructions that a carrier, in principle, has to execute and instructions that are subject to agreement between the carrier and the controlling party. The line of distinction is not the same in both articles. It is obvious that variations of the contract of carriage are fully subject to agreement between the carrier and the controlling party. However, that does not apply to the two variations mentioned under article 11.1 (ii), and (iii). These two, in principle, have to be executed by the carrier, because either may be needed for a seller to resume control over the goods under its contract of sale, e.g. when the goods are not paid for by the buyer.

For the carrier to be under an obligation to execute the instructions, it needs the protection of certain conditions precedent. These are also

addressed in this article. Other transport conventions include similar protections. A carrier is entitled to decline the execution of an instruction, *inter alia*, if the execution interferes with its normal operations. That means that it may never be forced to call at other ports than the ports in its normal itinerary, or to discharge cargo that is overstowed with other cargo. Also, the carrier may decline the instruction if it would incur additional costs.

The view has been expressed that these provisions, insofar as they give a right to a controlling party in situations where the carrier does not agree to the instruction, i.e. a right to vary what would otherwise be contract terms, are likely to create extensive uncertainties in return for very small advantage. It is also argued that, in respect of the right of control, maritime carriage cannot be compared with other transportation modes. The contrary view is that similar safeguards under other transport conventions do not create any difficulty. Further, the point has been made that the right of control should not be diluted too far, because of its potential role in the development of e-commerce in maritime transport.

11.4 Goods that are delivered pursuant to an instruction in accordance with article 11.1(ii) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.

11.5 If during the period that the carrier holds the goods in its custody, the carrier reasonably requires information, instructions, or documents in addition to those referred to in article 7.3(a), it shall seek such information, instructions, or documents from the controlling party. If the carrier, after reasonable effort, is unable to identify and find the controlling party, or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the obligation to do so shall be on the shipper or the person referred to in article 7.7.

The provision addresses the issue that a carrier needs instructions from the party interested in the goods during the carriage. Examples are: the goods cannot be delivered as envisaged, additional instructions are needed for the care of the goods, etc. The principal person to give the carrier instructions is the controlling party, because it may be assumed to have the interest in the goods. The obligation to provide instructions also applies to an intermediate holder if it is the controlling party. In article 11.2 (c) it is provided that such intermediate holder is discharged from this obligation as soon as he is no longer holder.

However, a controlling party may not always exist or is not always known to the carrier. Then, the obligation is on the shipper or on the person referred to in article 7.7. If the controlling party elects not to give (appropriate) instructions, it may become liable to the carrier for not giving them.

11.6 The provisions of articles 11.1 (ii) and (iii), and 11.3 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article

11.2 (a) (ii). If a transport document or an electronic record is issued, any agreement referred to in this paragraph must be stated in the contract particulars.

This provision underlines that these essential elements of the right of control are not part of mandatory law. A controlling party may have reasons for insisting that its right of control should not be transferable. Carriers may wish to exclude the possibility that delivery of the goods might be claimed during the voyage. However, see also the commentary to article 12.3.

12 TRANSFER OF RIGHTS

12.1.1 If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person,

- (i) if an order document, duly endorsed either to such other person or in blank, or,
- (ii) if a bearer document or a blank endorsed document, without endorsement, or,
- (iii) if a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement.

This provision follows current law and practice.

12.1.2 If a negotiable electronic record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by passing the electronic record in accordance with the rules of procedure referred to in article 2.4.

12.2.1 Without prejudice to the provisions of article 11.5, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.

The only obligation that an intermediate holder may incur, is to give a carrier instructions relating to the goods during the carriage when such intermediate holder is a controlling party. Giving instructions may be regarded to be in the interest of such intermediate holder. According to article 11.3.(c) such intermediate holder is discharged from this obligation as soon as it is no longer holder.

12.2.2 Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.

A later holder is not allowed to pick and choose. If it exercises any of its

rights, it automatically also assumes all of a later holder's liabilities. However, such liabilities must, first, be "imposed on it under the contract of carriage". This means that not necessarily *all* liabilities under the contract of carriage are assumed by a later holder. There may be certain liabilities that are only the shipper's liabilities, such as liabilities under the articles 7.1 and 7.3. Further, the carrier and the shipper may have expressly or impliedly agreed that certain liabilities should be shipper's liabilities only, such as demurrage incurred in the loading port. Second a later holder must be able to ascertain from the negotiable document itself that such liabilities exist. This may be particularly important if the carrier and shipper have agreed that certain liabilities, which otherwise would have been the shipper's liabilities, shall (also) be assumed by a later holder.

It may be that under this article the later holder assumes liabilities which also remain liabilities of the shipper. Whether in such a case these liabilities are joint and several is not provided for in this article, but is left to the terms of the contract of carriage, as evidenced by the negotiable transport document.

12.2.3 Any holder that is not the shipper and that (i) under article 2.2 agrees with the carrier to replace a negotiable transport document by a negotiable electronic record or to replace a negotiable electronic record by a negotiable transport document, or (ii) under article 12.1 transfers its rights, does not exercise any right under the contract of carriage for the purpose of the articles 12.2.1 and 12.2.2.

12.3 The transfer of rights under a contract of carriage, pursuant to which no negotiable transport document or no negotiable electronic record is issued, cannot be effected by passing a transport document or electronic record, but shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights. Such transfer of rights may be effected by means of electronic communication. A transfer of the right of control cannot be completed without a notification of such transfer to the carrier by the transferor or the transferee.

It is appreciated that, generally, an express referral to national law is not necessary in any international instrument. The purpose of doing so in this provision is to make clear that a transfer of rights under a contract of carriage is possible without the use of a document, or, if a non negotiable document has been issued, without such a document becoming a negotiable one. Further, this provision includes two obligations for states parties to this Instrument. The first is to provide in their national law that any transfer of rights under a contract of carriage can be done electronically. This is regarded as beneficial to the development of e-commerce in transport. Commercial parties may wish to develop e-commerce systems without the use of an electronic record as defined in this Instrument, but based on a simple electronic transfer of a right of control only. The second requirement is to provide that such (electronic) transfer of the right of control cannot be completed without a notification of such transfer to the carrier. Then, a situation *may* (*eventually*) arise that national law may attach to an (electronic) transfer of a right of control proprietary rights, comparable

with those that national law attaches to the transfer of a paper negotiable transport document.

12.4 If the transfer of rights under a contract of carriage, pursuant to which no negotiable transport document or no negotiable electronic record has been issued, includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.

Article 12.3 does not deal with the transfer of liabilities under a contract of carriage (for which no negotiable document has been issued). However, it may be that national law relating to transfer of rights provides that such transfer includes (or may include) liabilities associated with the right transferred. It is fair to provide that the liability of the transferor and transferee in such cases is joint and several, because normally a carrier is only able to judge the solvency of the shipper, as the original party to the contract of carriage, and not the solvency of other parties.

13 RIGHTS OF SUIT

13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

- (i) the shipper,**
- (ii) the consignee,**
- (iii) any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,**
- (iv) any third party that has acquired rights under the contract of carriage by legal subrogation under the applicable national law, such as an insurer.**

In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Instrument.

This provision applies to any contract of carriage, whether or not a document or electronic record may have been issued and, if so, irrespective of its nature. A contracting shipper and a consignee can only assert those rights that belong to it and if it has a sufficient interest to claim. This means that in the case of loss of or damage to the goods the claimant must have suffered the loss or damage itself. If another person, e.g. the owner of the goods or an insurer is the interested party, such other person must either acquire the right of suit from the contracting shipper or from the consignee, or, if possible, assert a claim against the carrier outside the contract of carriage.

13.2 In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. If such holder did not suffer the loss or damage itself, it shall be deemed to act on behalf of the party that suffered such loss or damage.

It seems that under many legal systems claimants under a bill of lading are not confined to claiming for their own loss. This article does not provide that *only* such holder has the right of suit. Therefore, the second sentence is needed in order to avoid the possibility that a carrier might have to pay twice.

13.3 In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.

A person mentioned in article 13.1 should not be dependent on the cooperation of the holder of a negotiable document if it and not the holder is the person who has suffered the damage. It might be that the holder, being a seller/shipper, has already received the full purchase price of the goods and is no longer interested in lodging a claim. Or it might be that the holder, being a purchaser/consignee, rejects the (damaged) goods and does not pay for them, in which case the seller/shipper must be entitled to claim the damage from the carrier. In order to protect the position of the holder against the loss of the right of suit, it seems fair that in this type of case the claimant proves that the holder did not suffer the damage.

14 TIME FOR SUIT

14.1 The carrier shall in any event be discharged from all liability whatsoever in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper shall in any event be discharged from all liability under chapter 7 of this Instrument if judicial or arbitral proceedings have not been instituted within a period of one year.

The first sentence of this provision is loosely based on article 20.1 of the Hamburg Rules and the fourth paragraph of article III.6 of the Hague and Hague-Visby Rules. The second sentence reflects the view expressed at the Singapore Conference that actions against the shipper under chapter 7 should also be subject to a time-for-suit provision.

The limitation period specified here follows the Hague and Hague-Visby Rules. Under the Hamburg Rules, the limitation period is two years. Those delegates who addressed the issue at the Singapore Conference appeared to believe that a one-year limitation period would be adequate.

To avoid ambiguity, the article clarifies that the carrier or the shipper, as

the case may be, is discharged from all liability on the expiration of the limitation period. On the expiration of the limitation period the potential claimant loses the right, not simply the remedy.

14.2 The limitation period mentioned in article 14.1 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 4.1.3 or 4.1.4 or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered. The day on which the limitation period commences is not included in the period.

This provision is generally based on article 20.2 and 20.3 of the Hamburg Rules and the fourth paragraph of article III.6 of the Hague and Hague-Visby Rules. Although defining “delivery” has caused problems in some national legal systems, the clarifications in chapters 4 and 10 of the present Instrument should provide greater clarity and predictability than exists under current law.

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

This provision is based on article 20.4 of the Hamburg Rules and the fourth paragraph of article III.6 of the Hague-Visby Rules.

14.4 An action for indemnity by a person held liable under this Instrument may be instituted even after the expiration of the limitation period mentioned in article 14.1 if the indemnity action is instituted within the later of

- (a) the time allowed by the law of the State where proceedings are instituted; or
- (b) 90 days commencing from the day when the person instituting the action for indemnity has either
 - (i) settled the claim; or
 - (ii) been served with process in the action against itself.

This provision is substantially based on article 20.5 of the Hamburg Rules and the sixth paragraph of article III.6 of the Hague-Visby Rules. It clarifies that the limitation period may be extended for indemnity actions in either of two ways, and that the person instituting the indemnity action may rely on whichever alternative provides the longer extension.

14.5 [If the registered owner of a vessel defeats the presumption that it is the carrier under article 8.4.2, an action against the bareboat charterer may be instituted even after the expiration of the limitation period mentioned in article 14.1 if the action is instituted within the later of

- (a) the time allowed by the law of the State where proceedings are instituted; or
- (b) 90 days commencing from the day when the registered owner both

- (i) proves that the ship was under a bareboat charter at the time of the carriage; and**
- (ii) adequately identifies the bareboat charterer.]**

This provision addresses the concern that the limitation period may have expired before a claimant has identified the bareboat charterer that is responsible as “carrier” under article 8.4.2. It was felt that the claimant should have an extension comparable to the extension under article 14.4 for bringing an indemnity action.

15 GENERAL AVERAGE

15.1 Nothing in this Instrument shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

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

The wording is identical to article 24 of the Hamburg Rules. It reflects the principle that first the general average adjustment has to be made and the general average award has to be established, whereafter liability matters may be considered.

16 OTHER CONVENTIONS

16.1 This Instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [seagoing] ships.

16.2 No liability shall arise under the provisions of this Instrument for any loss or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage by sea.

16.3 No liability shall arise under the provisions of this Instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

- (a) under either the Paris Convention of July 29, 1960, on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of Jan. 28, 1964, or the Vienna Convention of May 21, 1963, on Civil Liability for Nuclear Damage, or**
- (b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.**

These provisions are based on article 25(1), (3), and (4) of the Hamburg Rules. They will need to be updated at a later stage.

17 LIMITS OF CONTRACTUAL FREEDOM

17.1

- (a) **Unless otherwise specified in this Instrument, any contractual stipulation that derogates from the provisions of this Instrument shall be null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under the provisions of this Instrument.**
- (b) **[Notwithstanding paragraph (a), the carrier or a performing party may increase its responsibilities and its obligations under this Instrument.]**
- (c) **Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.**

The Hague Rules adopted the one-sided policy of prohibiting the carrier from reducing its liability, although a carrier may increase its liability. There are no explicit restrictions with respect to the shipper's liability. The Hamburg Rules do not permit any derogation from its provisions, and this may include a prohibition on increasing the shipper's liability. But increasing the carrier's liability is explicitly permitted.

The basic thrust of this article prohibits any reduction of liability below what is prescribed by the Instrument, but it should be noted that this general rule applies to the liability not only of the carrier but also of performing parties, the shipper, the controlling party, and the consignee.

The variants in square brackets deal with the possible prohibition of increasing liabilities and responsibilities. It would be possible to render unenforceable any increase of liabilities outside the Instrument (on either side or on one side). The present Instrument contains detailed rules about the responsibilities of the various parties, and the effect of preventing any reduction of them, or any increase of them, requires careful analysis.

The resolution of the issues identified in the commentary to articles 3.3 and 3.4 will affect at least the practical impact of this article. To the extent that modern equivalents of a traditional charter party (such as a slot or space charter), volume contracts, and towage contracts are excluded from the Instrument's scope of application, there will be a greater scope for freedom of contract. The resolution of these issues may also require a revision of the text of this article. For example, if the suggestion is accepted to subject volume contracts to the terms of this Instrument (at least as a default rule) but to permit the parties to a volume contract to derogate from the terms of this Instrument (at least as between the immediate parties to the volume contract), then this article will need to be revised to reflect this conclusion.

17.2 Notwithstanding the provisions of chapters 5 and 6 of this Instrument, both the carrier and any performing party may by the terms of the contract of carriage exclude or limit their liability for loss or damage to the goods if

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

In the Hague and Hague-Visby Rules live animals are excluded in the definition of goods. It is felt, however, that the exclusion of live animals is only justified for carriers' liability purposes. Other provisions, such as those dealt with in chapters 7 and 11, are relevant to the carriage of live animals. Accordingly, the better place to deal with live animals is in this provision.

Paragraph (b) covers in simplified wording the seldom-applied escape possibility of article VI of the Hague and Hague-Visby Rules.

Dated 10th December 2001