Vedlegg 8

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Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Proposal by Finland

Scope of Application, Freedom of Contract and Related Provisions

1. Previous discussions

Scope of application, freedom of contract and related provisions have been discussed in previous sessions of the working group, particularly in the fourteenth session (Vienna 2004) and the fifteenth session (New York 2005). In the sixteenth session (Vienna 2005) no discussion took place in view of the fact that pending matters would be properly prepared and channelled through the UNCITRAL secretariat for the seventeenth session (New York 2006). However, during the sixteenth session the importance of understanding the implications of the volume contracts regime on small or unsophisticated volume shippers was noted, as further specified in that particular session.

Due to the above-mentioned starting points, reference can be made to the following UNCITRAL documentation:
- A/CN.9/572, Report of Working Group III on the work of its fourteenth session (Vienna 2004), paragraphs 81- 109
- A/CN.9/576, Report of Working Group III on the work of its fifteenth session (New York 2005), paragraphs 10 - 109
- A/CN.9/591, Report of Working Group III on the work of its sixteenth session (Vienna 2005), paragraph 244.

The working group reached several conclusions in the fourteenth session (Vienna 2004) as further specified in the respective report, among them the following:
- The draft convention (instrument) should be mandatorily applicable to traditional shipments

- Traditional charter parties, volume contracts in the non-liner trade, slot charters in the liner trade, and towage and heavy lift contracts should be excluded from the application of the draft instrument
- Third parties (where the contract of carriage between the shipper and the carrier is not within the scope of application of the convention) should be protected where the identification of such parties should be made by reference to a transport document, considering, however, that the third parties deserving protection should be established clearly not yet closing the categories
- The working group was not opposed to the inclusion of a provision of ocean liner service agreements on a non-mandatory basis where particular care should be dedicated to, for example, the protection of the interests of small shippers and of third parties
- An optimum placement of an ocean liner service agreement provision within the draft convention (instrument) should also be considered.

As to the question of scope of application, in the discussions in the fourteenth session three alternative approaches were introduced: the documentary approach, the contractual approach and the trade approach. It was also noted that another aspect relevant to the scope issue was whether a given contract of carriage had been freely negotiated between the parties or not. The conclusion reached by the working group was that a compromise could be achieved by using a combination of the documentary approach, the contractual approach and the trade approach. The drafting proposals made after this conclusion have been compromises on those alternative grounds. Nevertheless, drafting has proved to be difficult in spite of broad consensus as such in this respect.

An informal drafting group prepared a redraft reproduced in the report (A/CN.9/572) under paragraph 105. It was noticed that the same informal drafting group had not had sufficient time to consider the matters of ocean liner service agreements and the mandatory coverage of the draft instrument.

When having pursued discussions on the questions of structure, substance and drafting between the sessions of the working group, it emerged that further clarifications were necessary on all the above-mentioned matters. Ocean liner service agreements were now

understood to be volume contracts. Nevertheless, the non-mandatory position of volume contracts was still to be clarified. These outlines were taken up in the fifteenth session (New York 2005).

The working group reached several conclusions in the fifteenth session (New York 2005) as further specified in the respective report, among them the following:

- Ocean liner service agreements should be included within the scope of application of the convention as volume contracts, the inclusion of which would be determined by the character of the individual shipments thereunder
- Certain conditions concerning volume contracts in liner transportation were laid down for derogation from the mandatory provisions to take place, and the derogation scheme could form the basis for further discussions, however, taking into consideration the specific requirements of clarity, sufficient differentiation and non-abuse
- In view of volume contracts in liner transportation, the seaworthiness obligation, and liability arising from unseaworthiness could nevertheless not be derogated from as would also possibly be the case in view of some of the provisions concerning shipper's obligations and liability
- The above-mentioned derogation possibilities would cover third parties also, but only under specific conditions; this point was to be raised in connection with the discussions on jurisdiction and arbitration
- As to the mandatory protection of third parties, the requirement of documents was established, however, making efforts to reconcile such an approach and an approach where the third parties were specified; should this fail, both alternatives should be kept for the time being for further discussions
- A one-way mandatory system concerning the carrier should be maintained and the system should include maritime performing parties.

There were several other matters that needed to be decided upon in the fifteenth session as shown in the report.

The discussions in the fifteenth session (New York 2005) were based on a draft prepared by an informal drafting group. The end result after the fifteenth session is reflected, with

minor technical adjustments, in WP.56. The conclusions of the working group are, however, found in the report of the fifteenth session.

It was pointed out that further work was needed in order to establish an acceptable text. After the fifteenth session it has also become clear that the drafting has to many parts been found complex. It has been observed that contracts of carriage which are within the draft convention and contracts of carriage which are outside the draft convention according to article 9 of WP.56 are difficult to understand. This is specifically the case with volume contracts. Further, the protection of third parties in article 10 of WP.56 is difficult to understand, particularly in relation to article 9 of WP.56. The non-mandatory approach in article 95 of WP.56 to volume contracts used in liner transportation also needs further drafting and debate.

In view of this background it has been felt necessary to develop the provisions of scope of application and freedom of contract as well as related matters.

Several changes compared with WP.56 are proposed as follows. The numbers of the articles are the same (but a new definition increases the lettering in article 1).

2. Multimodality

It is at this point intended or a possibility that the convention will cover certain aspects of multimodal transport. The basis is found in articles 1 (a) and 27 of WP.56. According to article 27, the multimodal regulation only covers loss of or damage to the goods or delay in their delivery.

The multimodal approach may affect different parts of the convention. This connection has been noted also, but only to some points, in discussing scope of application, freedom of contract and related provisions. The particular points are found in the report of the fourteenth session (Vienna 2004) paragraph 103 and the fifteenth session (New York 2005) paragraph 108.

The proposal does not seem to create particular problems in view of the partially multimodal nature of the new convention. No additional provisions are included due to multimodal aspects. Should the necessity arise based on arguments not taken into consideration, additional drafting might then become necessary.

3. Proposed text with commentaries

Article 1. Definitions

For the purposes of this Convention:
(a) "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
(b) "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
(c) "Liner transportation" means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
(cc) "Non-liner transportation" means any transportation that is not liner transportation.

There are some adjustments. The term "volume contract" (b) is a contract of carriage and this is now included in the definition. In this definition the word "goods" has been substituted for the word "cargo" in order to coordinate with the language of the convention. According to the Report of the sixteenth session (Vienna 2005) paragraph 244, an explanatory document would be prepared on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications. The CMI has expressed its willingness to assist in the preparation of such document. For this reason

there is no detailed information of volume contracts in this document. Reference is made to the document prepared by the CMI as presented to the working group.

Efforts to clarify the basic provisions on scope of application have resulted in the need not only to define non-liner transportation, but also liner transportation. This will be self-explanatory once dealing with article 9.

Article 8. General scope of application

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

(a) The place of receipt or port of loading is located in a Contracting State; or

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

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

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

The bracketed language in the chapeau of paragraph 1 of WP.56 "[of a sea carriage]" and "[of the same sea carriage]" is proposed to be deleted. The bracketed language was included in order to avoid the concerns of some delegations. The concern consisted of the possibility that there would, for example, be two separate domestic sea carriages within two separate states in which case the port of loading for the first carriage would be in a different state than the port of discharge of the second sea carriage. Such a carriage should not fall under the draft convention. Instead of including the bracketed language in the convention, it is proposed that this particular clarification would rather be made in the commentaries to be written on the basis of the adopted text.

In the Chapter on jurisdiction it has been proposed that the port of loading and the port of discharge would be added as connecting factors as basis for jurisdiction in claims against the carrier. This connecting factor is included in the Report of the sixteenth session (Vienna 2005) paragraph 73, as further specified in the proposed article 75 (c) under that paragraph. Once such connecting factors are adopted, it seems appropriate to include the port of loading and the port of discharge as factors that also decide the application of the convention. It is also coordinated with the text in the chapeau of paragraph 1 above. Consequently, it is proposed that the brackets for port of loading and port of discharge in paragraph 1(a) and (b) of article 8 of WP.56 should be removed.

The bracketed language in paragraph 1 (c) of article 8 of WP.56 ("The contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract") is proposed to be deleted due to particular difficulties in deciding the relevance of such a reference. These difficulties have been noted in the Report of the fifteenth session (New York 2005) paragraphs 61 and 62. Even without such a particular reference, parties are naturally always entitled to incorporate the text of the convention as part of their contract, as has been customary by the use of Paramount clauses. Problems of interpreting such references and the convention text as contractual stipulations may arise, but those problems might be outside the discussions of the working group.

Article 9. Specific exclusions and inclusions

1. This Convention does not apply to the following contracts of carriage in liner transportation:

(a) charterparties, and

(b) contracts for the use of a ship or of any space thereon, whether or not they are charterparties.

2. (a) Subject to paragraph (b), this Convention does not apply to contracts of carriage in non-liner transportation.

(b) This Convention applies in non-liner transportation if:

(i) there is no charterparty or contract for the use of a ship or any space thereon, whether or not such contract is a charterparty, between the parties, and

(ii) the evidence of the contract of carriage is a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods.

Background

Article 9 of WP.56 includes problematic drafting. There is first an exclusion in paragraph 1, but then, nevertheless, an inclusion in paragraph 2 and a "conditional" inclusion in paragraph 3. There is the addition of "on-demand carriage" included in paragraph 2 to show that such carriage is included in the scope of application of the convention even if it is not a question of liner transportation, as is the case when applying the Hague and the Hague-Visby Rules. Volume contracts are specified in paragraph 3. Volume contracts are framework contracts whereby a series of shipments has been contemplated. Individual shipments shall be arranged separately and they can be either in liner or similar trade, or in tramp trade. Paragraph 3 of article 9 of WP.56 aims to make the convention apply to framework volume contracts through what is applicable on the basis of each individual shipment.

The starting point for understanding proposed article 9 above is found in, as before, article 8 where reference is made to the convention being applicable to contracts of carriage, as defined in article 1 (a).

The proposed text now puts emphasis on liner transportation and non-liner transportation in order to provide a clearer understanding than before on what is excluded from the scope of application. The definition of non-liner transportation (including the definition of liner transportation) has already been discussed by the working group, and there seems to be a good possibility to rely on the trade approach. The new drafting approach in article 9 makes it necessary to define both liner transportation and non-liner transportation in article 1.

Paragraph 1

Paragraph 1 excludes certain situations in liner transportation, such as charterparties used in liner transportation. This is a drafting matter. The substance does not seem to have caused dissent in the previous discussions in the working group.

Paragraph 2

Proposed paragraph 2 (a) above excludes all contracts in non-liner transportation. There is no particular reference to charterparties, but it has been considered totally natural that all charterparties in non-liner trade fall under the reference in proposed paragraph 2 (a) above.

In order not to decrease the scope of application from what is applied according to the Hague and the Hague-Visby Rules, there is a need to include a certain part of non-liner transportation in the scope of application of the new convention. This is the so-called "on-demand" carriage which has been discussed in the working group before. Also on this point there seems to be no dissent in the working group, except on the drafting. The approach in proposed paragraph 2 (b) above is intended to create a better understanding of when the convention is applicable than the wording found in paragraph 2 of article 9 of WP.56 without there being an intention to change the substance. The proposal above dictates two comments. First, there must not be a charter party or similar contract between the parties, as specified in proposed paragraph 2 (b)(i) above. Second, in proposed paragraph 2 (b)(ii) above it is required that there is a transport document or an electronic transport record that is both evidence of the contract of carriage and of the carrier's or a performing party's receipt of the goods. There are thus two requirements in paragraph 2(b)(ii).

There is further discussion under the next heading on volume contracts concerning proposed paragraph 2.

Volume contracts

The proposed text does not repeat paragraph 3 of article 9 of WP.56. As (framework) volume contracts by definition are contracts of carriage, as specified in proposed article 1 (b) above, the application of the convention to such contracts can be decided on the basis

of the proposed new wording of article 9 as such. If one looks at the proposed text above, it is possible to conclude that the list of exclusions of certain contracts in liner transportation in paragraph 1 does not cover volume contracts. Thus, volume contracts are contracts of carriage and if they are contracts of carriage in liner transportation they are covered by the convention. On the other hand, according to proposed paragraph 2 (a) above, contracts of carriage in non-liner transportation are excluded from the scope of application of the convention. Volume contracts that are used for the purposes of non-liner transportation would thus be excluded.

A contract for the use of the ship or of any space thereon referred to in proposed paragraph 1 (b) does not cover volume contracts in liner transportation and there should be no risk of misunderstandings due to the new proposed text.

The fact that the convention does apply to those volume contracts specified above and shipments under it does not mean that the provisions of the convention automatically would be mandatory. The mandatory or non-mandatory nature of the convention is decided according to articles 94, 95 and 96, as proposed below.

The issue of mixed volume contracts (both liner or "on-demand" and non-liner for the individual shipments under the volume contract) has not been considered commercially an essential point of departure. Should such a situation arise there would be a possibility to understand the new proposed text in a way that the convention applies to a mixed volume contract where the individual shipment is in liner transportation (or based on "on-demand" carriage), while it does not apply to a mixed volume contract where the individual shipment is in non-liner transportation otherwise than on the basis of "on-demand carriage".

Certain further issues of interpretation may arise.

Article 10. Application to certain parties

Notwithstanding article 9, if there is a charterparty or other contract of carriage excluded from the application of this Convention pursuant to article 9, then the following paragraphs apply:

(a) This Convention applies as between the carrier and the consignor, consignee, controlling party, holder, or [person referred to in article 34] that is not [Variation A: an original party to the excluded contract of carriage] [Variation B: a shipper to the excluded contract of carriage],

(b) This Convention does not apply as between the [Variation A: original parties] [Variation B: carrier and the shipper] to the excluded contract of carriage.

Article 10 of WP.56 has been considered unclear. The aim of article 10 is to provide protection to certain third parties on a mandatory basis where, nevertheless, the contract, such as a charterparty in non-liner transportation, between the carrier and the shipper is not covered by the convention. The basic approach is the same as in the Hague and the Hague-Visby Rules, but in the convention it is not possible to tie the protection of a third party to a bill of lading or similar document of title.

As mentioned above under the heading "*1. Previous discussions*", the working group has discussed the protection of third parties not only as to the proper drafting, but also on the basis of two main alternatives. One alternative is based on combining the protection with the possession of a transport document or an electronic transport record as shown in article 10 of WP.56. The other alternative is based on the notion that the protected third party is directly specified without there being a necessity to require a transport document or an electronic transport record.

In making this new proposal, further efforts have been made to clarify article 10 as it stands in WP.56. Those efforts have been experienced not to be sufficiently successful. As the conclusions reached so far by the working group provide a possibility to go back to the specification of third parties should the approach including a document or an electronic transport record not be satisfactory (Cited from heading 1. "Previous discussions": "...the requirement of documents was established, however, making efforts to reconcile such an approach and an approach where the third parties were specified;

should this fail, both alternatives should be kept for the time being for further discussions"), this new proposal does include the other alternative which is based on specifying the third parties that should be protected. It has been found to be a better alternative to go forward than the alternative now found in article 10 of WP.56.

Should the working group, nevertheless, establish that a transport document or an electronic transport record must be referred to, the only proposed alternative at this stage is the one now found in article 10 of WP.56. It is not, however, the priority given in this new proposal.

In proposed article 10 (a) above the protected third parties have been specified. These specifications have been put forward to the working group before when discussing the two main alternatives mentioned. However, there are brackets concerning the person referred to in article 34. This is the documentary shipper. His position might be comparable with that of the shipper rather than a third party to be protected. A documentary shipper's position might nevertheless not be the same as that of a shipper and it might be necessary to maintain the language now within brackets, pending further discussions.

In proposed article 10 (b) above it is stated for clarity's sake that the convention does not apply as between the original parties to the excluded contract of carriage. The original parties are in general terms the "shipper" and the "carrier", or in chartering terms "charterer" and "owner", the latter possibly specified. Two variations are proposed, one (A) referring to the original parties, the other (B) referring to the carrier and the shipper. In view of the terminology just mentioned it might be preferable to choose variation A.

Both variation A and B in proposed article 10 (b) might be unclear in a particular situation: A charterparty between X (carrier) and Y has been concluded. A bill of lading has been issued by X to Y. The latter circulates the bill of lading to Z and then Y repurchases the bill of lading from Z. Y's position as third party or not might be unclear in some jurisdictions. The question is whether the convention should provide solutions to all legal problems. Perhaps this particular situation could be left for interpretation. The

working group might nevertheless want to discuss the matter further. The two variations suggested above might have at least some implications in this respect, even if they do not explicitly resolve the issue.

Article 20. Liability of maritime performing parties

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5. This article does not apply unless the place where the goods are initially received by the maritime performing party or the place where the goods are finally delivered by the maritime performing party is situated in a Contracting State.

In article 8 above , there are requirements in geographic terms for the convention to apply. Article 8 functions in relation to the carrier, but the application of the convention to a maritime performing party cannot follow exactly the same basis due to the fact that under article 8 the maritime performing party may perform totally outside contracting states. It has been thought that for the convention to apply to maritime performing parties there should be a particular connecting factor geographically to a contracting state as well. This is a new proposal and paragraph 5 of article 20 has been thought to be the proper place for the provision.

Article 94. General provisions

1. Unless otherwise specified in this Convention, any stipulation in a contract of carriage is void to the extent that it:

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

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

(c) assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.

[2. Unless otherwise specified in this Convention, any stipulation in a contract of carriage is void to the extent that it:

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

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

Paragraph 1

In the chapeau of paragraph 1 the word "stipulation" has been substituted for the word "provision" as it refers to contract. In paragraph 1 the word "it" has been removed to the chapeau in order to avoid repeating it under (a), (b) and (c). The reference in the chapeau to a stipulation being void is clarified so that the stipulation is void to the extent that it is in conflict with the mandatory provisions of the convention.

Paragraph 2

The mandatory nature of the convention in view of the shipper's obligations and liability is still undecided. Another option might, for example, be to make a reference in each provision concerning its mandatory or non-mandatory nature. The brackets are maintained at this point. As the shipper's position is affected by other provisions than those found in chapter 8, the wording "under this Convention" has been substituted for the wording "chapter 8" in the proposed paragraphs 2 (a) and (b) above. However, the placing of that reference might still have to be clarified.

Article 95. Special rules for volume contracts

1. Notwithstanding article 94, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those set forth in the Convention provided that the volume contract contains a prominent statement that it derogates from this Convention, and

(a) is individually negotiated, or

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

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

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

4. Paragraph 1 is not applicable to [rights and]obligations stipulated in articles 16(1)(a) and (b), [30]and [33] and liability arising from the breach thereof, nor is paragraph 1 applicable to article [66][on the loss of the right to limit liability].

5. (a) Paragraph 1 applies between the carrier and the shipper;

(b) Paragraph 1 applies between the carrier and any other party that has expressly consented to be bound by the terms of the volume contract that derogate from this Convention. The express consent must demonstrate that the consenting party received information that prominently states that the volume contract derogates from this Convention and the consent shall not be set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

(c) The burden is on the party claiming the benefit of derogation to prove that the conditions for derogation have been fulfilled.

Background

Due to the new approach to volume contracts in article 9 above, drafting changes are necessary in article 95, but these changes do not reflect any changes in substance, except for what is stated below. There are two major drafting proposals. First, it has been possible to simplify the wording in paragraph 1. Second, it has been possible to delete paragraph 4 of article 95 as it stands in WP.56. Consequently, the new proposed text above has a different numbering of paragraphs from paragraph 4 onwards.

There is a substantive change in proposed paragraph 4 above, but pending further discussions. There is also a substantive change in proposed paragraph 5 (c) above. Both of these changes are further explained below.

Paragraph 1

The bracketed language in WP.56 "[is agreed to in writing or electronically]" has been deleted in proposed paragraph 1 above as that requirement is already included in articles 3 and 5.

The word "duties" as found in WP.56 is proposed to be deleted as it has been deemed to be synonymous with "obligations" which is also included in the text.

The drafting may need adjustments in view of coordinating the language in proposed paragraph 1 with the language in paragraph 2 of article 76 on jurisdiction as expressed in the report of the sixteenth session (Vienna 2005) paragraph 73.

Paragraph 2

The word "contract" has been changed to the words "volume contract".

Paragraph 3

There has been some discussion whether paragraph 3 of article 95 of WP.56 is necessary. Some sources have maintained that it adds no value to regulating the status of volume contracts in article 95. On the other hand, there are sources strongly wanting to maintain paragraph 3 as it stands in WP.56. The reason is that it is considered very important to ensure that there is full disclosure to shippers about derogation and that the derogation is not hidden. Particularly in view of U.S. law it has been maintained that this law permits what are called time-volume rates in a carrier's public schedule of prices, which rates might be construed as volume contracts under the general definition of volume contracts that the working group has developed. All references in paragraph 3 are necessary.

In view of the fact that the sources considering paragraph 3 unnecessary have based their opinion on the fact that the provision does not add anything, while the sources wanting to

maintain paragraph 3 have provided arguments of substance, it has been considered proper to propose that paragraph 3 as it stands in WP.56 should be maintained. This is also true for the bracketed language within paragraph 3. It is proposed that the brackets should be removed and the text maintained. Maintaining proposed paragraph 3 above seems to create no negative effect, but the paragraph obviously clarifies the position in some jurisdictions.

Paragraph 4 (ex: 5)

This paragraph includes the super-mandatory provision according to which derogation is not possible under any circumstances. It is proposed that technically paragraph 5 (a) and (b) of WP.56 should be combined, and the word "rights" has been put within brackets. Reference to rights might be unnecessary, as there is separate wording for article 66.

Compared with paragraph 5 of article 95 of WP.56, the super-mandatory provisions concerning the shipper are proposed to be decreased to articles 30 and 33, but these provisions are bracketed pending further discussions. The articles are partly connected with strict liability for the shipper. The final solution depends partly on the decisions of the working group concerning chapter 8. Article 66 is also bracketed pending further discussions.

Paragraph 5 (ex: 6)

The drafting of this paragraph has been improved, but no change in substance is intended, except for (c) (ex: last sentence in paragraph 6 (b) of WP.56). It is simultaneously proposed that the text in the first brackets in paragraph 6 (b) of WP.56, now proposed paragraph 5 (b), should be deleted for reasons explained under paragraph 1 above. The second brackets in paragraph 6 (b) of WP.56, now proposed paragraph 5 (b), should be removed and the text maintained to ensure that a third party has proper possibilities to understand the derogations and provide a proper consent. The word "information" has been substituted for the words "a notice".

Proposed paragraph 5 (c) is new. The last sentence in paragraph 6 (b) of WP.56 should not only cover burden of proof as between the carrier and any other party than the shipper, but also as between the carrier and the shipper. The proposal above corrects this. It is also

proposed that the brackets as found in paragraph 6 (b) should be removed in this respect. As it is possible that derogations take place either way (for the benefit of the carrier or the shipper) it is not correct to place the burden of proof merely on the carrier, but rather on the party claiming the benefit of derogation. This is reflected in proposed paragraph 5 above.

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

Notwithstanding [Variation A: chapters 5 and 6 of this Convention and the obligations of the carrier][Variation B: articles 94 and 95], the terms of the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) the goods are live animals except when the claimant proves that the loss of or damage to the goods or delay in delivery resulted from an act or omission of the carrier or of a person referred to in article 19 or of a maritime performing party done recklessly and with knowledge that such loss or damage would probably occur or recklessly and with knowledge that the loss due to the delay would probably result, or

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

In the chapeau of article 96 of WP.56 there is a reference in accordance with proposed variation A above. This reference is partly unclear and partly unnecessary. In view of the reference made in paragraph 1 of article 95, similar language could be used resulting in proposed variation B above in the chapeau of article 96. Variation B also includes a reference to article 95 as it is commercially viable that there are volume contracts in the live animal trade.

In the chapeau, a second word "obligation" has been added as compared with the wording in WP.56.

In article 96 (a) the language is clarified by now proposing that the "claimant" shall prove intentional or particular reckless causing of loss.

The bracketed language in article 96 (a) of WP.56 should be maintained and the brackets removed. The protection of the carrier against unfair liability for live animals is necessary, but it has been thought fair that intentional or particular reckless causing of loss is not only limited to the carrier himself, but that it also covers any person referred to in article 19. In these cases the carrier would be liable.

In article 96 (a), it is further proposed that, instead of referring to intentional or particular reckless causing of delay as in WP.56, there would be a reference to intentional or particular reckless causing of loss due to delay. This proposal is thought to better be in line with the references to loss of or damage to the goods than the text found in WP.56.