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COMMENTARY

on the

Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)

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COMMENTARY ON THE CONVENTION OF 19 MAY 1956 ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD (CMR)

Note by the Secretariat

This commentary has been prepared by Professor R. Loewe (Austria), in his capacity as member of the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT), in accordance with a decision taken by the Inland Transport Committee at its thirty-second session (ECE/TRANS/1, para.95).

It is not intended to represent an official interpretation of the Convention, but rather to assist all interested parties in the application of the Convention by giving useful information on certain aspects of the background of its provisions.

I. General

A. Historical background to the Convention

1. Transport law, and particularly the rules of private law which form part of transport law, are among those areas in which the need for security and unification of the law is felt most strongly. The first convention for the unification of the law relating to the carriage of goods was the International Convention of 14 October 1890 concerning the Transport of Goods by Rail (CIM). This Convention was followed by the Convention of 25 August 1924 for the Unification of Certain Rules relating to Bills of Lading (Brussels Convention) and by the Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention).

2. A few years after its establishment, the United Nations Economic Commission for Europe (ECE) began, through a Working Party on Legal Questions which was a subsidiary body of the Inland Transport Committee, to consider problems of private law arising from contracts for the international carriage of goods by road. In this area, ECE was able to make use of the studies which had already been undertaken, pursuant to a suggestion made by the International Institute for the Unification of Private Law (UNIDROIT) on 29 March 1948, in a committee - at first tripartite (UNIDROIT, the International Chamber of Commerce (ICC), and the International Road Transport Union (IRU)), and later quadripartite (as a result of the participation of the International Union of Marine Insurance as well), - which worked under the chairmanship of the representative of Sweden, Mr. Bagge, and with the collaboration of many experts from different countries.

3. At its fifth session (4 to 7 February 1952), the ECE Working Party on Legal Questions established a small committee of legal experts (Mr. Hostie, Mr. de Sydow and Mr. Kopelmanas) which, on 21 December 1953, submitted a report to which a preliminary draft (TRANS/WP9/22) was annexed. This preliminary draft, together with the many comments on it received from Governments, constituted the basis for negotiations during the two sessions of an ECE Ad Hoc Working Party in which the final text of the Convention on the Contract for the International Carriage of Goods by Road (CMR) was established.

4. The first of the two sessions of the Ad Hoc Working Party was held from 12 to 28 April 1955, under the chairmanship of the representative of Sweden, Mr. G. de Sydow (TRANS/152 - TRANS/WP9/32). This session was attended by representatives of 11 States, as well as observers from UNIDROIT, ICC and IRU. The second session of the Ad Hoc Working Party was held from 12 to 19 May 1956, again under the chairmanship of Mr. G. de Sydow (TRANS/168 - TRANS/WP9/35). This second session was attended by representatives of 15 States, as well as observers from UNIDROIT, ICC, IRU, the Central Office for International Railway Transport (OCTIC) and the International Union of Railways (UIC). The Convention was opened for signature on 19 May 1956 at a special session of the ECE Inland Transport Committee under the chairmanship of Mr. Mátyássy (Hungary), and was signed on that day by representatives of Austria, the Federal Republic of Germany, France, Luxembourg, the Netherlands, Poland, Sweden, Switzerland and Yugoslavia (E/ECE/TRANS/490). The CMR entered into force on 2 July 1961, following the deposit of the first five instruments of ratification (Austria, France, Italy, Netherlands and Yugoslavia).

5. To date (15 November 1974), the following 21 States have acceded to CMR: Austria; Belgium; Czechoslovakia; Denmark; Finland; France; German Democratic Republic; Germany, Federal Republic of; Hungary; Italy; Luxembourg; Netherlands; Norway; Poland; Portugal; Romania; Spain; Sweden; Switzerland; United Kingdom; and Yugoslavia.

6. In the Protocol of Signature of CMR, the signatory Governments undertook to negotiate a convention governing contracts for furniture removals and a convention governing combined transport. As regards the negotiations on furniture removals, reference should be made to paragraph 36 below. The regulation of combined (or multimodal) transport, - in other words transport in which, on the basis of a single contract, two or more different modes of transport are involved, - became

increasingly urgent as a result of the rapid development of container technology. Attempts at unification in this area were made by a number of international organizations, - first by UNIDROIT, then by the International Maritime Committee (IMC), and also by two round table conferences of interested organizations held at UNIDROIT headquarters and by a committee of governmental experts concerned by the Inter-Governmental Maritime Consultative Organization (IMCO) and ECE. These studies led to the preparation of a draft convention on the international combined transport of goods. In November 1972, however, the United Nations/IMCO Conference on International Container Traffic refused to consider the substance of this draft. It expressed the wish that an inter-governmental preparatory group - working within the framework of the United Nations Conference on Trade and Development (UNCTAD) and with greater participation by the developing countries, which believe that consideration should be given primarily to the economic aspects of the question - should prepare a new draft which at a later date would also be submitted to a world conference.

7. As regards the transport of goods by rail, sea and air, the Conventions referred to in paragraph 1 above are still in force. CIM has been revised on a number of occasions and the present version dates from 7 February 1970. The Brussels Convention was also amended by a Protocol opened for signature at Brussels on 3 February 1968; and the United Nations Commission on International Trade Law (UNCITRAL) is in the process of elaborating a new convention which will probably govern all carriage of goods by sea, and not only carriage for which bills of lading are issued. The Warsaw Convention was amended by the Hague Protocol of 28 September 1955, and supplemented by the Convention of 18 September 1961 supplementary to the Warsaw Convention, relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara Convention). It has not yet been possible to conclude a convention on the contract for the carriage of goods by inland waterway. A draft prepared in ECE between 1955 and 1959 has not been opened for signature, since only two States have indicated their willingness to sign it. UNIDROIT has been asked to try to find new and more adequate bases for such an instrument. Lastly, mention should be made of the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR), which was drafted by ECE and opened for signature on 1 March 1973. This new Convention is, in many respects, modelled on CMR, as regards both its structure and the wording of its provisions.

8. With regard to proposals for a review of CMR, reference should be made to paragraph 299 below.

B. Questions covered by CMR

9. CMR does not by any means cover all the questions of private law which arise from a contract for the carriage of goods by road. The main points dealt with are the transport documents and the liability of the carrier for the loss of the goods and for damage thereto, as well as for any delay in delivery. Many provisions relate to secondary obligations of the carrier, the sender or the consignee. The most important questions which are not covered by CMR include the cost of carriage, the right to obtain from the carrier the service promised in the contract or compensation for breach of contract, and any lien or right of retention that the carrier may have in respect of the goods carried.

It was, of course, impossible to deal in CMR with general problems of the law of contracts, especially those relating to validity; and these questions are therefore still governed by the national law. In cases where CMR establishes an obligation for one of the parties to the contract but does not mention any penalty, the penalty, if any, still depends also on the national law.

10. Certain articles of CMR expressly provide for the application of a national law, but do not specify which national law (e.g. article 28, paragraph 1). The court or tribunal seized of the case will therefore have to determine the applicable national law on the basis of its own conflict-of-laws rules, and will have to apply that law. Other provisions (article 20, paragraph 4; article 29, paragraphs 1 and 2; article 33, paragraph 3) specify which national law is to be applied. In the case of these provisions, the question arises as to whether they refer to the whole of the national law concerned, including the conflict-of-laws rules contained therein, or only to the substantive provisions of the law specified. Some attempts will be made in this commentary to provide an answer to this question.

C. Method used

11. The considerations which lead to the drafting of an international instrument should preferably be set forth at the same time as the instrument itself is elaborated. Recollections of the course of the negotiations are then still fresh; scholars and practitioners have not yet tried to interpret the texts, and there have not yet been any court decisions which may supplement the texts but may also be misleading. To provide a commentary on CMR many years after the final drafting of this important instrument is not an easy task.

12. In selecting a method of work, the author of this commentary took the view that he was not required to write a chronicle or critique of all the court decisions which have been rendered since CMR came into force - a method which would have obliged him to quote all the relevant decisions (several hundred decisions have come to his knowledge, and at least as many have probably escaped his notice) and to decide whether or not they were well-founded.

13. Similarly, as regards published articles and monographs, the author of this commentary took the view that he was not required to analyse the opinions expressed by all the writers and to say whether and why his own opinions concurred with, or differed from, their opinions.

14. This was the only way of avoiding a situation in which the commentary might become out-of-date with each new decision and the appearance of each new learned publication.

15. Nevertheless, the writings published and court decisions rendered since the entry into force of CMR have been valuable, if not indispensable, for this commentary, because they have transformed CMR from a theoretical draft for discussion by experts, into an instrument which is used in everyday commercial life, and thus into living law. The literature and the court decisions have thus opened up new perspectives and have brought to light problems which had perhaps been overlooked during the preparatory work.

16. This commentary tries to provide, for old and new questions alike, answers which are based on the preparatory work, on personal notes and recollections of the negotiations, and on the logic and spirit of the Convention itself. The reader will have to refer simultaneously to the commentary and to the actual text of CMR. In order to limit the length of this commentary, the provisions of the Convention have not been reproduced either verbatim or in paraphrased form.

17. The author wishes to express his sincere thanks to Mr. André Hennebicq, Deputy Secretary-General of UNIDROIT, and to Mr. Marcel de Gottrau, Deputy Secretary-General of IRU, who have kindly provided him with material essential for the performance of his task.

II

Commentary on the articles

Article 1

18. This article defines in principle both the scope of application ratione materiae and the scope of application ratione loci. Article 2 relates only to a special situation.

19. CMR does not deal expressly with the nature and possible form of the contract. The fact that the contract may be concluded even before the goods have been handed over to the carrier leads one to conclude that the contract referred to here is not a real contract but a simple contract. In addition, since article 4 states that the absence of the consignment note - that is to say, the document which is intended to serve as proof of the conclusion of the contract and of the terms thereof - does not affect the existence or the validity of the contract, it would be contrary to the spirit of the Convention to require any other written form for the conclusion of the contract. Thus, the authors of the Convention took the view that the contract could be concluded without any requirement as to form, and that it could in particular be concluded orally, by telephone, telex, etc.

20. The contract of carriage is a contract whereby a person undertakes to carry goods from one place to another. The Convention does not say that the principal concluding the contract with the carrier must be the sender or the consignee or a person acting on behalf of the sender or the consignee.

21. The Convention does not apply to a contract whereby a person undertakes to arrange for goods to be carried from one place to another. It is irrelevant whether such a person - as is the case in most national laws - is distinguished from the carrier by the use of a different legal term such as "forwarding agent", "shipping agent", etc., or is considered to be the carrier; for the purposes of CMR, he is not so considered. CMR is not therefore directly applicable to relations between a principal and a forwarding agent even in cases where, in accordance with the law applicable to these relations, full responsibility for performance of the carriage rests with the forwarding agent. In such cases, when the contract of carriage concluded between the forwarding agent and the carrier is subject to CMR, the responsibility of the forwarding agent vis-à-vis his principal will be governed by the national law which will, however, have the same content as CMR. Nevertheless, when the forwarding agent does not conclude a contract of

carriage with a third party but performs the carriage himself, there is no contract of carriage, since it is impossible to conclude a contract with oneself. In this case, the forwarding agent will assume, vis-à-vis the principal, the same rights and obligations as those of the carrier under CMR. Thus, he will have to sign the consignment note only in his capacity as carrier and not in his capacity as sender.

22. The courts have examined in detail the difference between a contract of carriage and a contract to arrange for carriage, to be performed, in order to decide whether or not CMR is applicable in certain situations. For this purpose it is essential, in principle, to determine the intent of the parties. Circumstances such as the global remuneration requirement, or the fact that the party which has assumed responsibility for the carriage generally acts as forwarding agent and not as carrier, are never more than indications. It is obvious that the contract does not become a contract to arrange for carriage to be performed merely because the person who has undertaken to perform the carriage subsequently transfers that obligation to a third person.

23. There is no direct legal relationship subject to CMR, between the principal and the carrier with whom the forwarding agent has concluded a contract of carriage unless the forwarding agent has expressly concluded the contract on behalf of the principal; in that case, he will not, in fact, have acted as forwarding agent, but simply as the principal's representative.

24. It very often happens, in practice, that a carrier who has undertaken to carry goods will resort to the services of another carrier for the whole or part of the carriage. This does not in any way affect the application of CMR to relations between the principal and the first carrier. CMR is also applicable as between the first carrier and the sub-carrier, in the case of partial carriage which is itself subject to CMR by reason of its international nature (see paras. 38-48 below). When the sub-carriers in a transport operation which is the subject of a single contract accept the goods and the consignment note issued at the commencement of the complete operation, they become parties to this contract. In this case, the rules contained in articles 34 et seq. will be applicable.

25. The term "marchandises" in the French text should not be interpreted narrowly as meaning goods which are carried from one place to another for the purpose of sale. If that had been the author's intention, the exceptions provided for in article 1, paragraph 4, would not have been necessary, since the operations mentioned in that paragraph do not involve goods in the sense which has just been indicated. The term should rather be construed as meaning tangible movable goods in general. However, a passenger's luggage is not "marchandises".

26. Except in the case mentioned in article 2, it is essential for the application of CMR that, in conformity with the intention of the parties, the whole of the carriage should be performed by road. If, in fact, another means of transport is subsequently used over part of the journey, CMR governs the carriage up to the transhipment between the road vehicle and the other means of transport, and this operation terminates the carriage by road. If, later, the goods are again loaded onto a road vehicle, CMR will be applicable to this second journey by road only if it too is international within the meaning of the Convention. A situation of this kind may operate to the disadvantage of the person entitled to dispose of the goods, who will no longer be protected by CMR, either in respect of the entire period of the carriage subsequent to the first transhipment, or at least, in respect of the period between that transhipment and the time when the goods are again loaded onto a road vehicle. However, a carrier who, in using another means of transport, has not complied with the terms of the contract will be answerable therefor in accordance with the provisions of the applicable national law.

27. CMR applies only to carriage for reward, and this term should be interpreted broadly. For instance, the reward may not necessarily be a cash payment. It may derive from any other benefit granted to the carrier, provided that the value of the benefit is commensurate with that of the carriage. Unlike CVR, which was drafted much later, CMR does not stipulate that the carriage must be performed by a person who is a carrier by trade. Thus, carriage performed for reward by private individuals is also subject to CMR, even if the volume or value of the goods is small.

28. Also, where the carriage consists only of an additional service provided, for example, by a purchasing agent who has agreed, for reward, to obtain the goods for the principal at the latter's expense and to forward the goods to him, this too is carriage for reward subject to CMR.

29. CMR applies to carriage performed by motor vehicles, articulated vehicles, trailers and semi-trailers, as defined in article 4 of the Convention on Road Traffic of 19 September 1949. According to that text, the expression "motor vehicle" means any self-propelled vehicle normally used for the transport of persons or goods upon a road, other than a vehicle running on rails or connected to electric conductors. It would not seem to be very important that States which are bound by annex 1 to the 1949 Convention on Road Traffic exclude from this definition motor cycles having certain characteristics determined by the said annex, while States

which are not bound by this annex do not exclude them. This circumstance might, however, lead in extreme cases to different interpretations of article 1 paragraphs 1 and 2, of CMR. The expression "articulated vehicle" means any motor vehicle with a trailer having no front axle and so attached that part of the trailer is superimposed upon the motor vehicle and a substantial part of the weight of this trailer and of its load is borne by the motor vehicle. It is a trailer of this kind which is designated by the expression "semi-trailer". Lastly, the "trailer" is any vehicle designed to be drawn by a motor vehicle.

30. Article 48 of the Convention on Road Traffic of 8 November 1968 provides that this Convention shall replace, in relations between the Contracting Parties, the previous conventions on road traffic, and hence, in particular, that of 19 September 1949. The new Convention has not yet entered into force. The definitions of the expressions "motor vehicle", "trailer", "semi-trailer" and "articulated vehicle" are contained in subparagraphs (p), (q), (r) and (u) of article 1 of this Convention; the definitions contained in subparagraphs (p) and (q) contain reference to subparagraph (o), in which the expression "power-driven vehicle", which covers them both, is itself defined. These definitions are as follows:

> (o) "Power-driven vehicle" means any self-propelled road vehicle, other than a moped in the territories of Contracting Parties which do not treat mopeds as motor cycles, and other than a rail-borne vehicle;
>
> (p) "Motor vehicle" means any power-driven vehicle which is normally used for carrying persons or goods by road or for drawing, on the road, vehicles used for the carriage of persons or goods. This term embraces trolley-buses, that is to say, vehicles connected to an electric conductor and not rail-borne. It does not cover vehicles, such as agricultural tractors, which are only incidentally used for carrying persons or goods by road or for drawing, on the road, vehicles used for the carriage of persons or goods;
>
> (q) "Trailer" means any vehicle designed to be drawn by a power-driven vehicle and includes semi-trailers;

(r) "semi-trailer" means any trailer designed to be coupled to a motor vehicle in such a way that part of it rests on the motor vehicle and that a substantial part of its weight and of the weight of its load is borne by the motor vehicle.

31. One question which arises is whether the reference in article 1, paragraph 2, of CMR has the effect of perpetuating the definitions of the 1949 Convention or whether it should be assumed that those definitions are replaced by the new definitions contained in the 1968 Convention and, if so with effect, from what date. Two prior questions arise: the first is whether such replacement is technically possible, because the terms which appear in article 1, paragraph 2, of CMR and whose meaning is to be established by reference to the definitions in the administrative law convention, cannot be changed. This first prior question may be answered in the affirmative since the four terms listed in article 1, paragraph 2, of CMR are all also defined in the new Convention. The second prior questions relates to the intention of the authors of CMR: did they intend to provide CMR with its own definitions suited to certain requirements specific to it, or did they merely wish to establish a parallel between the concepts of civil law and those of administrative law? If their intention was to draft definitions specific to CMR, they should, in the negotiations which led to the conclusion of this convention, have examined, each of the words appearing in the definitions of the 1949 Convention and, they should, if necessary, have altered or supplemented them in order to achieve a result which met the specific requirements of CMR. But they did not do so. It may therefore be assumed that the main objective was to achieve unity with the administrative law convention in force, and that the replacement of the provisions of that convention by the definitions contained in a subsequent convention of the same nature would be consistent with the objective pursued.

32. The 1968 Convention on Road Traffic will not enter into force at the same time for all States parties to CMR. Is it acceptable that for some of these States the reference to the administrative law convention should retain its original meaning at a time when other States will be taking the view that the reference is to the relevant provisions of the 1968 Convention on Road Traffic? Such a consequence would be contrary to the unification efforts made with regard to the material scope of application of CMR. At what point in time, therefore, will the reference change its meaning? Obviously, the States parties to CMR which still incorporate the provisions of the 1949 Convention in their legal order cannot be

asked to read paragraph 2 as referring to the provisions of another convention which they have not yet accepted. On the other hand, the reference to the 1968 Convention would not create difficulties for States which are not bound by the 1949 Convention, even if they have not acceded to the 1968 Convention either. In addition, the authors of article 1, paragraph 2, of CMR did not give any thought to the question whether the future States parties to CMR would all be parties to the 1949 Convention on Road Traffic. In cases where States parties to CMR are not parties to that Convention, the relevant definitions contained in it become part of their law on the basis of the reference appearing in CMR. The same will apply in the case with the 1968 Convention; and the reference to the 1949 Convention will have to be considered as relating henceforward to the 1968 Convention from the moment when the latter Convention has already entered into force and when no State party to CMR is still a contracting party to the 1949 Convention.

33. For the contracting States and, a fortiori, for the private individuals subject to CMR, it will not be easy to determine this date. It will therefore be incumbent on the Secretary-General of the United Nations, as depositary of all the above-mentioned Conventions, to inform the States parties to CMR when the moment indicated in paragraph 32 above has arrived. The Governments of States parties to CMR will have to bring the change to the attention of interested circles and will also have to inform them of the date on which it takes effect. Since the information will in both cases merely be communicated and no legislation will be required, the freedom of decision of the courts - which may take a different opinion - will not be affected.

34. In accordance with article 1, paragraph 3, the Convention is applicable also where the carrier is a person of public law. During the negotiations, consideration was given to the possibility of making an exception in the case of carriage performed for military authorities; this idea was, however, abandoned, because measures intended for national defence would not seem to include carriage for reward.

35. Paragraph 4, subparagraph (a), does not exclude from the scope of application of CMR the carriage of any packages or letters sent by post, but only carriage which is subject to the international postal conventions. The exception provided for in paragraph 4, subparagraph (b), concerns transport operations which are directly

related to funerals - for example, the carriage of flowers and wreaths accompanying the coffin which contains the mortal remains. On the other hand, the exception does not cover the carriage of objects which are merely intended for funerals (coffins and wreaths).

36. The text submitted to the ECE Ad Hoc Working Party did not provide for the exclusion of furniture removals. On the contrary, it contained a series of special provisions applicable to transport operations of this type. However, it became apparent that the treatment of these questions would have required a great deal of time and would have unduly delayed the final drafting of the Convention. It was not even possible to find a satisfactory definition of the concept of "furniture removal". In the Protocol of Signature of 19 May 1956, which is annexed to the Convention, the signatories of the Convention nevertheless undertook to negotiate not only a convention governing combined transport, but also a convention governing contracts for furniture removals. Negotiations on those questions were held from 22 to 26 February 1960 in another ECE Ad Hoc Working Party, which reached the conclusion that it was preferable to abandon the idea of a convention governing contracts for furniture removals by road and merely to draft a set of general conditions which might be stipulated by the parties to a contract for furniture removal. At its second session, from 4 to 7 January 1961, the Working Party prepared such a text, which was entitled "General Conditions for International Furniture Removals" and was published in April 1962, after approval by the Inland Transport Committee.

37. The provisions of CMR may, by agreement between the parties, be made applicable to situations to which they are not automatically applicable under article 1 of the Convention; in this respect, the case which is probably of the greatest practical interest is that of relations between principals and forwarding agents (see, in particular, para. 21 above). Article 41 does not prohibit the application of CMR in such cases. However, this application can be effected only within the limits of the right of disposal of the parties and may not therefore be contrary to the peremptory rules of the national law which would apply in the absence of agreement between the parties.

38. With regard to the territorial scope of application of CMR, it should be noted first that:

Unification of private law is designed inter alia to avoid the need in cases which relate to more than one legal order, to conduct an examination based on national conflict-of-laws rules in order to determine whether, from the substantive

standpoint, the national law or a foreign law should be applied and, in the latter case, which foreign law. The disadvantages of such a procedure are obvious:

(1) It calls for a threefold legal examination (qualification, national rules of private international law, applicable substantive law);

(2) It results, on occasion, in the application of a foreign law which is not familiar to the court, or to the parties and their representatives;

(3) Consistency in the outcome of individual cases, which is one of the objects of private international law, is by no means guaranteed since there may be considerable differences between the national rules of private international law.

If, on the other hand, an actual situation falls within the territorial scope of application of internationally unified rules, the tasks are greatly simplified, since it is necessary only:

(a) to determine whether the unified rule applies to the situation in question; and

(b) if so, to apply this unified rule.

The disadvantages mentioned above, particularly those mentioned in subparagraphs (2) and (3), cease to exist.

39. The wider the limits fixed for the territorial scope of application of a convention aimed at the unification of the law, the easier it is to appreciate a legal situation with international implications; and the security of the law is also correspondingly the greater. This argument is, however, countered by the consideration that it is undesirable to cover too many situations in which, in the absence of unification, the substantive law of a non-contracting State would have been applicable in accordance with the principles of private international law, because such a broadening of the territorial scope of application of the unified rules might be considered as an infringement of the sovereign rights of the non-contracting State. Also, if the territorial scope of application is too wide, this might even jeopardize the security of the law, especially in cases in which a person who was counting on the application of the unified rule finds, to his dismay, that the courts of a non-contracting State seized with the case are not familiar with the unification convention and apply their own substantive law or another non-unified law designated by their conflict-of-laws rules. A compromise between these two extremes - and there is never an entirely satisfactory solution - will in some respects be closer to one extreme and in some respects closer to the other, depending on the legal, political and economic purposes which the convention in question is designed to service.

40. The territorial scope of application of CMR is relatively wide, since it is sufficient for the place of taking over of the goods and the place designated for delivery to be situated in two different States, of which at least one is a Contracting State. Thus purely domestic carriage is never subject to CMR. In selecting this solution to the problem of the territorial scope of application, much weight was given to the advantages, indicated in paragraph 39 above, of a unified law with fairly wide territorial limits, and it was also hoped that a large number of European States would become Parties to CMR in the comparatively near future. (For technical reasons, carriage by road to other continents is not of any great importance.) Once this hope has been realized, the disadvantages which are also mentioned in paragraph 39 above will be reduced to a minimum. The rules regarding the territorial scope of application, in conjunction with the so called "paramount" clause in article 6, paragraph 1 (k) (see paras. 81, 93 and 94 below), were indeed intended to encourage States to ratify the Convention or to accede to it as soon as possible. The actual course of events (see the list of States members in para. 5 above) has proved the authors of CMR to be right.

41. Any State which has signed and ratified CMR, or has acceded to it, is a Contracting State.

42. Provisions concerning the territorial scope of application of a convention are conflict-of-laws rules of private international law. When a State incorporates the convention in its legislation, the provisions thereof become rules of private international law of the State in question. It would thus be quite wrong to start by determining the law applicable to a contract of carriage on the basis of the conflict-of-laws rules of the State of the court seized with the case, to the exclusion of the provisions concerning the territorial scope of an international convention such as CMR, and then - and only then - to consider whether the law thus determined provides for the application of the Convention.

43. The qualifications provided for in CMR are the place of departure and that of destination. In expressly indicating that the place of residence and the nationality of the parties are to be disregarded, the last sentence of article 1, paragraph 1, merely states explicitly the two qualifications most commonly used in private international law. Other possible qualifications which are to be disregarded - in addition to the place of residence and nationality - are the domicile of a party, the place where a party exercises his profession or the place in which the contract is concluded.

44. CMR is applicable when the place of departure and the place of destination are situated in two different States, of which at least one is a Contracting State. The length of the journey between the place of departure and the frontier, or between the frontier and the place of destination, is of no importance. Paragraph 5 enables Contracting States to conclude special agreements between themselves with respect to frontier traffic, but no such agreements seem to have been concluded to date. On the other hand, it was stipulated in the Protocol of Signature, which has already been referred to, that the Convention would not apply to traffic between the United Kingdom of Great Britain and Northern Ireland and Ireland.

45. The term "countries" for the purposes of paragraph 1 means subjects of public international law, if only because one of these States must be a Party to the Convention, which is possible only for a subject of international law. Transport operations within one and the same State are thus never subject to CMR, even where the place of departure and the place of destination within a single State are situated in territories in which different legal systems are applicable.

46. Where the goods are actually taken over, or where they are actually delivered, is unimportant. What is important is the place of departure, and the place of destination, designated by the parties. In the case of the place of departure, this distinction is hardly significant, for it is extremely rare for a change to occur in this respect after the conclusion of the contract. Changes in the place of destination, or premature unloading of the goods before they have passed the first frontier, do not in any way affect the applicability of the Convention. Accordingly, a transport operation which should have taken place from the territory of a non-member State to that of a member State but which, for some reason or other, ends before the frontier is crossed, may still be subject to CMR despite the fact that the goods have never reached the territory of a Contracting State.

47. Where the place of departure and the place of destination indicated in the consignment note do not correspond to the real agreement of the parties, article 4 makes it plain that the real agreement shall prevail, even with respect to the question of the application of the Convention.

48. CMR is applicable not to a transport operation but to a given contract of carriage (although articles 31 and 32 are an exception to this principle). When carriage is performed on the basis of several contracts, each of which relates

to part of the journey, CMR is applicable only to those parts of the journey which, in themselves, satisfy the conditions of CMR with respect to the territorial scope of application. The question whether one or more contracts are involved may often be rather difficult to answer. Even the fact that several consignment notes have been issued does not necessarily mean that more than one contract has been concluded, although it is nevertheless a factor to be taken into consideration. On this point, as in the case of the material scope of application, the decisive criterion is always the intent of the parties.

49. The draft submitted to the ECE Ad Hoc Working Party contained detailed regulations for a consignment note representing a title to the goods, of a type more or less corresponding to the maritime bill of lading or to the "Ladeschein" in German and Austrian law. The Ad Hoc Working Party took the view that provisions of this kind could be dispensed with, since road transport was so rapid that it was superfluous to issue and use a consignment note representing a title to the goods. Nevertheless, article 1, paragraph 5, permits the Contracting Parties to authorize the use of such a document in their territory or, where necessary, to include additional details in the consignment note provided for in CMR, so that it can be used to represent a title to the goods. In this respect again, no cases are known of the conclusion of any such agreements between member States.

50. In all other respects, Contracting States are forbidden to vary the contents of the Convention by bilateral or multilateral agreement among themselves. The report on the second session of the Ad Hoc Working Party, dated 6 June 1956 (TRANS/168-TRANS/WP9/35 gave the impression (paragraph 18) that Contracting States might on the basis of paragraph 5, reach agreement with non-Contracting States on provisions derogating from CMR in the case of carriage on the territories of the States parties to such an agreement but either from a place of departure and/or to a destination not situated on the territory of a Contracting State; but this appears to be misunderstanding. The Convention cannot be cut up into bilateral slices. Any Contracting State is entitled to require full application of the Convention in any other Contracting State. The wording of article 1, paragraph 5, can be explained by the fact that the authors never doubted that the conclusion of agreements derogating from CMR with non-Contracting States would be contrary to the Convention. The only doubt arose with regard to cases in which the Contracting States might agree on derogations among themselves, and it is this which is prohibited by paragraph 5. It would, indeed, be illogical if two Contracting States were prevented from agreeing between themselves on rules derogating from CMR but were permitted to do so if they were joined in their agreement by a third State which had not accepted CMR and which might even be situated in another continent.

Article 2

51. In the opinion of the authors of the CMR, the situation described in this article does not constitute a combined transport operation, but a transport operation which is performed simultaneously at two different levels and may be described as "piggy-back" carriage. The object of the carriage by road is the goods carried, whereas the object of the carriage by the other means of transport is the road vehicle, including the goods located in or on this vehicle. This explains why transhipment is prohibited. However, the distinction in regard to the object of the carriage is merely a legal fiction in cases where, for the application of article 14 concerning circumstances which make it impossible to perform the carriage, it is necessary to resort to transhipment which will not, however, be taken into account legally.

52. Article 2 does not apply where a container is dispatched initially by road, then - without the motor vehicle - by another means of transport, and possibly at the end of the journey again by road, since the container is not a means of transport and it is even less a road vehicle.

53. The first sentence of paragraph 1 refers to carriage by sea, rail, inland waterways or air. At the time of the conclusion of CMR these were the only known means of transport and the intention was therefore to include all possible forms of "piggy-back" carriage. It would be in keeping with the spirit of the provision to apply it also to situations in which the road vehicle is transported by a means of transport which is not referred to in article 2 merely because it was unknown at the time of the conclusion of CMR - for example, a hovercraft.

54. The rule in article 2 applies equally where carriage by another means of transport is effected on the first or the last part of the journey, provided that the road vehicle is not loaded only when it is already on board the other means of transport, or provided that it has not then already been unloaded. A first or last part of the journey, carried out in this way by another means of transport may even, under certain conditions, transform a national contract of carriage into a contract of carriage under CMR.

55. For article 2 to be applicable, it is not necessary that carriage by the other means of transport should be accessory, from the standpoint of the length of the different parts of the journey. Carriers by different means of transport never become "successive carriers" within the meaning of article 34 et seq.

56. The purpose of the article is to ensure that the person entitled to dispose of the goods still has someone whom he can hold liable - namely, the carrier who has

concluded the contract of carriage by road. However, the person he holds liable must be able, by action for recovery, to recover the compensation paid by him in all cases where the damage is not of his doing. His right of recovery should extend to the limit of the amount he has paid himself. However, this latter condition applies only where the liability of the carrier by the other means of transport vis-à-vis the carrier by road is governed by provisions of peremptory law (this is a first move in the direction of a "network" system, such as that provided for in several draft conventions on combined transport) (see para. 6 above). It was not desirable to go further than this and to drop this restriction altogether since, in that case, the carrier by road might reach agreement with the carrier by the other means of transport on abusive relief from or limitation of liability, to the disadvantage of the person entitled to dispose of the goods.

57. Article 2 implies also that, in the intention of the two parties, no provision was made for transhipment. The carrier by road cannot himself evade his liability under article 2 by resorting to a transhipment which was not initially provided for. On the other hand, if he is obliged by unforeseen circumstances to tranship the goods, the application of article 2 will be ensured by the reference to such circumstances in article 14.

58. In certain legislations, the legal principle to the effect a person may be liable simultaneously on the basis of two different capacities in which he is acting is unknown. Paragraph 2, which expressly provides for such a possibility, was added merely to permit a better understanding of the situation in States where this double liability is not at present known.

59. After the conclusion of CMR, certain authorities wondered whether article 2 was compatible with the Convention of 18 September 1961, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara Convention) and in particular with article II of that Convention. The first point to be made in this connexion is that the question should have been put the other way round since the Guadalajara Convention came into force long after CMR. However that may be, the question seems to be based on a misunderstanding. A carrier by road who is at the same time the contracting or actual carrier by air is not relieved of his liability as the carrier by road. Where in this second capacity his liability is governed by air law, it is so governed only indirectly and on the basis of CMR, i.e. on the basis of the reference in article 2, paragraph 1. It is obvious that this carrier cannot seek recovery from himself. Also, CMR in no way prevents the person entitled

to dispose of the goods from directly invoking the liability of the carrier in his capacity as carrier by air; this is in fact one of the purposes underlying paragraph 2 of article 2. However, justified claims by the person entitled to dispose of the goods against the carrier, in one or other capacity, will in general be identical, and the result will be the same irrespective of whether the person entitled to dispose of the goods bases his claim on CMR or on air law.

60. The application of the law of the other means of transport is provided for only under three cumulative conditions - namely that the damage is not caused by an act or omission of the carrier by road, that the damage results from an event which could only have occurred during the carriage of the road vehicle by the other means of transport, and that the event actually occurred by reason of carriage by this other means of transport.

Article 3

61. Similar provisions are to be found in almost all conventions dealing with the liability of a contractor since, in enterprises of a certain size, damage is hardly ever caused by the contractor personally. In accordance with article 3 of CMR, therefore, the carrier cannot claim that his liability for certain acts or omissions is excluded - for example, by virtue of article 17, paragraph 2 - on the grounds that these acts or omissions were not his own but those of the persons referred to in article 3.

62. The French and English versions of article 3 are not identical. It may, however, be affirmed that the groups of persons referred to are as follows:

(a) the agents and servants of the carrier;

(b) persons who, though not agents or servants of the carrier, exercise a regular activity in his enterprise;

(c) persons who, though not conforming to the criteria stated in (a) and (b) above, are engaged at the request of the carrier in the performance of a particular transport operation. This category includes the sub-carrier and his agents and servants, but does not include persons from whom the carrier may have hired the vehicle or the agents and servants of the latter, except where they participate in the carriage in some other way, for example as drivers. This is clear from article 17, paragraph 3; a special rule stating that the carrier shall not be relieved of his liability by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle, or of the agents or servants of the latter, would be superfluous if those persons were included in the list in article 3.

63. The carrier is responsible even for certain persons whose assistance in performing the carriage was not initially provided for, but whose services have to be resorted to - for example, as a result of an accident - in order to make it possible to continue the carriage.

64. The persons listed in article 3 must have acted (or omitted to act), within the scope of their employment; acts and omissions which fail to satisfy this condition can give rise only to a personal extra-contractual liability of the said persons. This consideration leads one to draw certain distinctions between the different groups referred to in paragraph 62. Where for example a person who belongs to group (a) or (b), and is driving a truck which is not intended for the carriage of the goods of the claimant but for the carriage of other goods, damages the goods of the claimant, his act must be considered as having been committed by the carrier himself. The situation is different, however, in the case of a driver of a vehicle which has been hired by the carrier for the carriage of goods other than those of the claimant, and where the driver is an agent or servant of the person from whom the vehicle is hired.

Article 4

65. The consignment note is merely a document of proof; but there are certain exceptions to this principle. For example, the exercise of the right of disposal in accordance with article 12, paragraph 5(a), is dependent on the production of the consignment note, so that the value of the goods in excess of the liability limit (article 24) and the amount representing special interest in delivery (article 26) can be claimed only if they are declared in the consignment note. Also, the provisions of articles 34 to 40 relating to carriage by several successive carriers can be applied only if the second and each of the subsequent carriers have accepted the consignment note.

66. It may be asked whether certain other particulars mentioned in article 6, paragraph 2 - in addition to those relating to the value of the goods in excess of the limit (article 24) and the special interest in delivery (article 26) - also have a constitutive effect. This question will be dealt with in greater detail in connexion with article 6, paragraph 2 (see paras. 82-87 below).

67. One example of an irregularity might be the case where a sub-carrier is shown as the carrier in the consignment note. This error, whether intentional or not, does not transform the carrier - who has actually concluded the contract of carriage - into an agent; and it does not remove the contract from the scope of CMR.

Article 5

68. The CMR states that the issuing of the consignment note is compulsory, but it does not expressly say which of the two parties to the contract is obliged to issue it. It may be concluded that both parties, each within his own economic field, are obliged to take all necessary steps with a view to the issuing of the consignment note. This is not an omission in CMR which could be made good by the application of a national law obliging one of the two parties to issue the consignment note. The CMR appears to assume, however, that in practice the consignment note will usually be issued by the carrier. This is clear from the wording of the third sentence of paragraph 1, which states that the first copy shall be handed to the sender, while the third copy shall be retained by the carrier.

69. If one of the parties, after concluding the contract of carriage, refuses to co-operate in the issuing of the consignment note, such behaviour would probably constitute justifiable grounds for the other party to cancel the contract. The question whether the said other party could also claim damages, and if so to what extent, would have to be determined in accordance with the applicable national law. In theory, a party which insisted that a consignment note should be issued in accordance with the requirements of CMR could also take legal action to compel the other party to co-operate, provided that such legal action were permitted by the applicable law. In practice such legal action would be pointless, since it would involve too long a delay in the carriage of the goods.

70. Since, as has been explained above, the obligation to issue the consignment note rests with both parties, failure to do so based on an agreement between the parties cannot give rise, between them, to an obligation to pay compensation, but might, in some cases result in the imposition of administrative penalties. It may also happen that a consignment note has been issued, but contains incomplete or incorrect information: the question of liability in such cases is governed by article 7.

71. The issue of more than three original copies is not permitted, but CMR makes no provision for any penalties in this respect. Since both parties are required to sign the transport document, the liability of one party cannot be invoked by the other party on the basis of a national law except in cases where the issuing of more than three originals is the result of fraud by the second party. Certified true copies, uncertified copies or photocopies, which may be required for Customs or other administrative formalities, may be made without any restriction as to their number.

72. It is of no importance whether the consignment note is issued and signed before or after the taking over of the goods by the carrier.

73. The term "sender" which recurs several times in this article should not be interpreted as meaning that, if a consignment note is signed by a principal other than the sender, the contract of carriage is no longer subject to CMR: the provisions of this Convention, in particular those relating to liability, are still applicable to the contract. It may also be pointed out that signature of the document by a principal, in place of the sender, would merely constitute an irregularity within the meaning of article 4 and would not affect either the existence or validity of the contract of carriage, which would remain subject to CMR.

74. Numbering of the copies of the consignment note is not required. The text merely considers that the copy handed to the sender is the first, that which accompanies the goods is the second and that which is retained by the carrier is the third.

75. According to paragraph 2, a single contract of carriage may for practical reasons involve the issuing of a number of consignment notes (each in three original copies). Each party to the contract has the right to require the other party to co-operate as necessary in the issuing of the desired number of consignment notes. With regard to the legal possibility of one party compelling the other to co-operate in this respect, reference should be made to the observations in paragraph 69 above.

Article 6

76. The provisions of paragraph 1 and paragraph 2 are both obligatory for the parties - that is to say, the parties must include these particulars in the consignment note. The fact that one party has not complied with this obligation does not, according to article 4, affect either the existence or the validity of the contract of carriage or again the application of CMR, but may give rise to other penalties which are the subject in particular of article 7.

77. The "description in common use" of dangerous goods (paragraph 1(f)) may be any description which is generally known and understood in the country of departure. It may be doubted whether the terms used in the annexes to the European Agreement of 30 September 1957 concerning the International Carriage of Dangerous Goods by Road (ADR) will suffice in all cases since, especially in the case of return carriage, it is impossible to take the view that the agents and servants of the carrier should have up-to-date copies of these annexes with them in order to determine the nature of the goods.

78. The so-called "paramount" clause in paragraph 1(k) is intended in the first instance to notify the consignee that the carriage is subject to CMR. The principal aim of this clause, however, is to ensure that the Convention, or rather the private law provisions of the Convention, are applied in courts located outside the

contracting States, by conferring on these provisions the nature of conditions agreed upon between the parties.

79. Article 31, paragraph 1, of CMR mentions certain courts and tribunals in which the parties may enforce their rights arising out of carriage under this Convention. The designation of a jurisdiction by agreement between the parties can be validly made only if the parties are in agreement on the competence of courts of contracting States. Nevertheless, an action may still be brought in one of the States in whose territory (a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or (b) the place where the goods were taken over by the carrier or the place designated for delivery is situated.

No distinction is made in this case between the courts of contracting States and those of non-contracting States. Bringing an action before a court of a non-contracting country will therefore be permissible in accordance with article 31, paragraph 1, if one of the places referred to above is situated in the territory of this non-contracting State. Also, the courts of non-contracting States can always declare that they are competent, where their own legislation permits them to do so, since they are not bound either by article 31, paragraph 1, or by the other provisions of CMR.

80. It is therefore essential to envisage the possibility that legal proceedings which, according to the law of contracting States, are subject to CMR may be brought before courts of non-contracting States.

What then will be the effects of the CMR rules concerning the territorial field of application, in the case of actions brought before the courts of non-contracting States? These courts will in the first place apply the Convention if the rules of private international law in their own legislation refer to the substantive law of a contracting State. They may, however, exclude from this application certain provisions which they believe to be contrary to public policy in the State to which they belong. They may also apply the provisions of CMR, not as rules of law but as the content of the contract of carriage, if the parties have made their contractual relations subject to CMR. The application of CMR in this way will however be restricted not only by considerations of public policy, but also by the peremptory rules of law in the legislation of the State concerned - rules which do not allow for any derogation by agreement between the parties.

81. In order to guarantee the application of the provisions of CMR by non-contracting States, at least as conditions agreed upon between the parties (within the limits indicated above in paragraph 80), article 6, paragraph 1(k) provides that the

consignment note must contain a statement that the carriage is subject, notwithstanding any clause to the contrary, to the régime established by the Convention. It has not been possible as yet to determine whether the courts of non-contracting States do in fact regard this statement in the consignment note as a contractual provision freely agreed upon. It appears doubtful, moreover, whether they give preference to this clause in cases where, in addition to it, there is in fact a stipulation to the contrary between the parties. In certain cases, however, the paramount clause may lead the courts of non-contracting States to apply the Convention in circumstances in which it would not otherwise have been applied.

With regard to the problem of the penalties provided for in article 7, paragraph 3, reference should be made to paragraphs 93 and 94 below.

82. In the case of each of the particulars listed in article 6, paragraph 2, the question arises as to how one should interpret a situation in which, though the circumstances envisaged in paragraph 2 exist, no reference is made to them in the consignment note. On this point, it seems that there are two conflicting views; the first based on the rule in article 4, is that the absence of any reference in the consignment note is immaterial, while the second, based on article 7, paragraph 1(b), is that the sender or any other person entitled to dispose of the goods has no right to claim compensation from the carrier in cases where the latter fails to comply with an instruction which has been given to him but which is not mentioned in the consignment note. These two views have been expressed in particular in connexion with the collection of "cash on delivery" charges (sub-paragraph (c)) and the agreed time-limit within which the carriage is to be carried out (sub-paragraph (f)).

It is clear that the problem cannot be resolved in the same way in the case of all the particulars mentioned in paragraph 2.

83. In the first place, the question does not arise in the case of sub-paragraph (d), since articles 24 and 26 state expressly that a value for the goods in excess of the limit of liability, or a special interest in delivery, can be claimed only where the amounts concerned are entered in the consignment note. Stipulations of this nature which were not mentioned in the consignment note would therefore be null and void.

84. Among the other particulars, we must make a distinction between those which relate to a contractual obligation of the carrier and those which serve a different purpose. The first category includes the prohibition on transhipment (sub-paragraph (a)), the collection of "cash on delivery" charges (sub-paragraph (c)), instructions regarding insurance of the goods (sub-paragraph (e)) and the agreed time-limit for delivery (sub-paragraph (f)).

The entries in the consignment note as provided for in paragraph 2 must be based on conditions stipulated by the parties at the latest at the time of signature of the consignment note. However, the possibility of agreement on other stipulations at a later stage cannot be excluded. Thus the absence of a reference in the consignment note to a stipulation made at a later stage does not in any way constitute proof that the stipulation was never agreed upon; the claimant who wishes to invoke it - just as if he were invoking a stipulation which was made prior to the signature of the consignment note, but which for some reason, e.g. negligence, is not mentioned in the consignment note - will be able to prove its existence in some other way. But should he be able to derive any benefit from such proof?

85. The sender is responsible, under article 7, paragraph 1(b), for the loss and damage sustained by the carrier by reason of the inaccuracy or inadequacy of the particulars referred to in article 6, paragraph 2. It does not appear to be necessary to consider whether the terms "inaccuracy" and "inadequacy" cover also the absence of these particulars, since if inadequacy gives rise to responsibility the same consequence must follow a fortiori in the absence of the particulars in question.

One may ask whether the term "loss and damage", in this context, may include also the losses sustained by the carrier by reason of the fact that he, for his part, will have had to compensate the claimant (who in many cases will be the sender) for failure to comply with a secondary obligation. Such an interpretation, which would mean that the sender would have to pay compensation to himself, could be accepted only if there had been no wrongful act or neglect on the part of the carrier. The concept of liability for a wrongful act or neglect is in no way incompatible with the principle of objective liability stated in article 17, since this objective liability applies only in cases of loss of the goods or damage thereto or - though here the question becomes rather more complicated, since article 6, paragraph 2(f), deals with the same question - of delay in delivery; article 19 makes it clear when such delay shall be deemed to have occurred. The stipulations between the parties referred to in paragraph 2(a), (e), (e) and (f) may therefore give rise to liability on the part of the carrier, even if these stipulations have not been mentioned in the consignment note, but only on condition that the carrier has committed a wrongful act. The question as to the cases in which the conduct of the carrier shall be deemed to be wrongful must be decided in accordance with the national law. Where the latter contains no other rules on the burden of proof, the general principle applicable is that the burden of proof rests on the party who invokes a wrongful failure by another party to comply with an obligation.

86. This argument appears to be supported by the fact that, under article 21, the carrier is liable for failure to collect a "cash on delivery" charge which should have been collected under the terms of the contract of carriage. This article does not say that the instruction given to the carrier must be included in the consignment note. However, if one were t adhere strictly to the idea of an objective liability which exists even if the obligation to collect a "cash on delivery" charge is not mentioned in the consignment note, article 13 would create an intolerable situation for the carrier since, according to article 13, the consignee may demand delivery of the goods to be made but is required to pay only the charges shown to be due on the consignment note. Where the latter contains no details regarding payment, the carrier is therefore obliged to deliver the goods without being able to force the consignee to make any payment.

87. The absence of the particulars listed in sub-paragraphs (b) and (g) cannot create liability for the carrier who has failed to fulfil a secondary obligation. Where the carrier collects from the consignee the charges due from the sender in accordance with the contractual situation, this will give rise merely to reimbursement arrangements. On the other hand, under article 11, paragraph 3, the carrier is liable in the same way as an agent - i.e., in principle, in case of a wrongful act on his part - for the loss or incorrect use of the documents specified in and accompanying the consignment note or in any other way deposited with the carrier. Documents accompanying the consignment note but not specified therein must nevertheless be considered as having been deposited with the carrier; otherwise it would be impossible for the carrier to lose them or make incorrect use of them. Accordingly, the list referred to in sub-paragraph (g) serves merely as a means of proof.

88. In the light of article 7, paragraph 1(c), the above comments on article 6, paragraph 2, apply also to paragraph 3 of the same article, provided that the particulars referred to involve an obligation by the carrier. Article 12, paragraph 3, even confers effective force on an optional entry - namely, the entry concerning the consignee's right of disposal. There are other entries which, again, are used for purposes of proof, such as those relating to the dangerous nature of the goods and the precautions to be taken (article 22, paragraph 1), those which designate a jurisdiction (article 31, paragraph 1), or those which constitute an arbitration agreement (article 33). In the two last mentioned cases, entry in the consignment note is particularly important, since these stipulations are also binding on the consignee, whose rights derive from the contract of carriage; he should at least be informed of the procedures whereby he can enforce his rights.

Article 7

89. In cases where a consignment note has been issued but the particulars it contains, with the exception of the name and address of the carrier and the paramount clause (see paras. 78 to 81 above), are inaccurate or inadequate, the sender is in principle liable to the carrier for all resulting expenses, loss or damage. In paragraph 87 above, we considered the situation in which the losses sustained by the carrier are equal to his liability to the claimant, who is in most cases the sender. With regard to paragraph 1(a), a situation of this kind would rarely arise because the particulars in question relate to facts which the carrier is required to check or which cannot give rise to a presumption against him (articles 8 and 9). Article 6, paragraph 1(j), may possibly be considered as an exception, if the carrier has failed to comply with instructions which are not entered in the consignment note and if, in this connexion, he has committed a wrongful act.

90. The standard example of loss or damage sustained by the carrier as a result of an inaccurate entry in the consignment note is that which occurs when the weight of the goods indicated is less than the actual weight. This may lead to overloading of the vehicle and may thus result, for example, in damage to the vehicle.

91. Paragraph 2 presupposes that the sender has requested the carrier to make the required entries. On the other hand, this provision does not state that such a request must be presumed. It will therefore be necessary to provide proof either of an express request, or at least of a tacit request, in the form of a conclusive act such that this act cannot be interpreted as anything other than a request for the particulars to be entered.

92. The sender's liability is not limited in respect of the amount of compensation due.

93. The legal interpretation and the purpose of the paramount clause have been fully explained in paragraphs 78 to 81 above. Responsibility for entering this clause in the consignment note rests always and in all circumstances with the carrier. For this, he alone may be liable vis-à-vis the person entitled to dispose of the goods, and any liability in the reverse direction is excluded. What expenses, loss and damage may be caused by the absence of the paramount clause? In the first place, there may be some doubts in the minds of the parties - or even, during legal proceedings, on the part of a court of a contracting State - as to whether the conditions necessary for the application of CMR, i.e. those relating to its scope of application ratione materiae and ratione loci, have been fulfilled. The investigations necessary for this purpose may give rise to expenses, both outside and during the proceedings. In cases where

it is determined that the contract of carriage is in fact subject to CMR and that there would not have been any doubts in that respect if the paramount clause had appeared in the consignment note, the carrier is liable for the expense thus incurred.

94. The main case covered by this provision is, however, that in which a court of a non-contracting State has not applied CMR, but would have applied it if the consignment note had contained the paramount clause. It is also necessary that the person entitled to dispose of the goods should have sustained loss or damage as a result of the fact that CMR has not been applied, i.e. as a result of the decision of the court of the non-contracting State which has not applied the Convention. The system is logical in itself, but nevertheless raises one problem which is primarily of a practical nature, and another problem which is more theoretical. The practical problem is that of proof. How can a person who is entitled to dispose of the goods, and who in the non-contracting State has received less compensation or no compensation at all, prove that the court of the non-contracting State would have applied CMR if the consignment note had contained the paramount clause, and that the application of CMR would have led to a decision which was more favourable to him? It is mainly the first point which seems almost impossible to prove. At present, there are no known decisions by courts of non-contracting States which have or have not attributed a legal effect to a paramount clause contained in a contract of carriage. Even if any such decisions were known, however, it would not be possible to use them as a basis for determining the results of other proceedings and, in particular, of proceedings before a court of a non-contracting State other than one whose decisions were known. The theoretical difficulty arises from the need for a contracting State to deny legal effects to a decision rendered in a non-contracting State and to consider such a decision merely as a simple fact. Bilateral or multilateral conventions regarding the recognition and enforcement of legal decisions might, however, oblige the contracting State to ascribe to the decisions of courts of the non-contracting State - where necessary, after the completion of certain formalities - had the same effects as those of the decisions of its own courts. In such a dilemma, a contracting State would not be able, either, to give preference to CMR as lex posterior or lex specialis because, in the eyes of the non-contracting State, CMR is not law. Article 7, paragraph 3, might therefore give rise to a conflict between the obligations resulting from various conventions. As stated above, no case of this kind has thus far been noted.

Article 8

95. Certain members of the ECE Ad Hoc Working Party took the view that, in paragraph 1, the carrier should be obliged also to check the gross weight of the goods or their quantity otherwise expressed. However, the majority was of the opinion that such a

check would involve expenses and a loss of time which the carrier could not be required to sustain without compensation. Under paragraph 3, therefore, the sender is entitled to request the carrier to check the quantity - or even the contents of the packages - only against payment of the costs of checking. When no check is made, the entry in the consignment note relating to the gross weight of the goods or their quantity otherwise expressed does not give rise to a presumption under article 9. If, on the other hand, a check is made, the system chosen in paragraph 3 also rules out any presumption. This paragraph is based on the idea that the check will be duly made and that the result will be entered in the consignment note. Such an entry is more than a presumption. It constitutes proof which may nevertheless be the subject of proof a contrario establishing, for example, that the scale or any other device used to measure the quantity was defective.

96. Article 8, paragraph 1, does not enunciate a recommendation, but, rather, an obligation for the carrier. The only penalties provided for are, however, that the carrier who does not comply with the obligation will be bound by the presumption in article 9, paragraph 2, and that he might lose his right to compensation by the sender, in accordance with article 10. In some decisions, article 8, paragraph 1, has been interpreted to mean that the carrier who has not complied with the obligation to check the goods is liable for damage to them which might have been avoided if they had been checked; but this interpretation manifestly goes beyond the purpose of this provision.

97. For the purpose of paragraph 1(b), the term "apparent condition of the goods and their packaging" covers all aspects which may be checked by careful external inspection or, where necessary, by touching; but the use of apparatus of any kind of devices is not envisaged. If, for example, goods intended for carriage in refrigerated vehicles may be handed over for carriage only below a certain temperature, the carrier cannot be required, as part of the check which he is obliged to carry out under paragraph 1(b), to determine whether this temperature has been exceeded unless the difference is so great that it may be determined from outside by touching the goods and their packaging.

98. The wording of paragraphs 1 and 2 is not entirely satisfactory. The system is as follows:

When the carrier, in the course of the check he is obliged to carry out under paragraph 1, finds that the number of packages and their marks and numbers are not in conformity with the entries in the consignment note or when the apparent condition of the goods and their packaging leads him to note some defects, he must enter his reservations in the consignment note. No grounds have to be specified for reservations concerning the number of packages and their numbers, but grounds do have to be given for reservations concerning the apparent condition of the goods and their packaging. The

statement of the grounds may be brief and the carrier may merely indicate the defects noted and also the manner in which he carried out the check on which his findings are based. When the carrier has no reasonable means of checking the number of packages and their marks and numbers, he must enter reservations in the consignment note together with the grounds on which they are based. Means are reasonable when they are such that a diligent carrier may be required to have them at his disposal and make use of them. Thus, a carrier cannot be required to count several thousand small packages of identical appearance and to examine their marks and numbers, particularly when the loading is carried out by several persons simultaneously in order to save time.

99. When there is an obligation to specify the grounds for reservations, reservations for which no grounds have been given have no effect, unless the sender has agreed to them.

100. In the last sentence of paragraph 2, a distinction is made between reservations which have been expressly agreed to and those which have not been agreed to. All reservations must, of course, be entered before the first copy of the consignment note is finally handed to the sender. Any reservations which the carrier may subsequently enter in the two other copies of the consignment note will obviously have no effect. The legal consequences of reservations vary depending on whether they are reservations concerning inaccuracies (paragraph 1(a)), reservations concerning defects (paragraph 1(b)) or reservations stating that it was impossible to carry out a check in accordance with paragraph 1(a).

101. If reservations concerning inaccuracies or defects are not agreed to, the consequence - under the terms of article 9, paragraph 2 - will be that there is no presumption regarding accuracy or inaccuracy or regarding apparent condition or defect. If a reservation on grounds of the lack of reasonable means of checking is not agreed to, it will first have to be weighed by the court before which the case is brought. If the court comes to the conclusion that the check was impossible or could not reasonably have been required of the carrier, the situation is the same as that which has just been described above in the case where reservations concerning inaccuracies or defects are not agreed to; there is no presumption and the question of the existence of such inaccuracies or defects remains open and subject to determination by the court.

102. On the other hand, if reservations concerning inaccuracies or defects are agreed to, they constitute proof. Proof <u>a contrario</u> is, of course, allowed but is usually extremely difficult. If reservations concerning the lack of reasonable means of checking are agreed to, they merely prove that such means were lacking. The question as to whether there are any inaccuracies in the entries relating to the number of packages and their marks and numbers remains open, and cannot be the subject of a presumption.

103. One opinion which is occasionally expressed in this connexion is inacceptable. This is the opinion that reservations which are not agreed to have no legal effect and that, if the sender is unwilling to be bound by a reservation, the only course open to the carrier is to refuse to perform the carriage. But the last sentence of article 8, paragraph 2, does not state that reservations which are not agreed to have no effect, and article 9, paragraph 2, does not speak of reservations which are agreed to. Thus, the situation is rather that the sender, when he is unwilling not only to agree to the reservation but also to waive the presumption referred to in article 9, paragraph 2, has no other possibility than to break the contract. In such a case, it is for the national law to determine whether he is liable for damages. In this connexion, the question whether or not the reservation was justified may well be of decisive importance.

104. A reservation cannot be considered to be agreed to merely by reason of the fact that the sender has signed the consignment note, which he is in any case required to do by article 5, paragraph 1. Agreement must, on the contrary, be expressed in an additional entry.

Article 9

105. According to paragraph 1, the consignment note is prima facie evidence of the conditions of the contract, provided that they are stated in the consignment note, and of the receipt of the goods by the carrier. This paragraph does not refer to the gross weight of those goods or their quantity otherwise expressed; on this point, the rule stated in article 8, paragraph 3, does not need to be supplemented because the check which has been duly made, and whose results are entered in the consignment note, provides evidence of the quantity of the goods (see para. 95 above).

106. Unfortunately, as regards the burden of proof, CMR contains many different concepts. Thus, it refers to the need for proof (for example, in the second sentence of article 18, paragraph 2), to the need to establish a certain fact (for example, in the first sentence of article 18, paragraph 2), to prima facie evidence (in article 9, paragraph 1), and, in many places, to a presumption which is rebuttable (for example, in article 9, paragraph 2). All these concepts will inevitably be understood and interpreted in different ways in the national law of contracting States. Apparently, the intention of the Ad Hoc Working Party was as follows:

- that "proof" is to be understood in a formal sense, and particularly with reference to legal proceedings;
- that "establish" is to be understood to mean "make probable"; he who "Establishes" demonstrates convincingly the high degree of probability attaching to his assertions;

- that the term "prima facie evidence" ("faire foi") is to mean that a certain state of affairs must be deemed to be accepted unless the contrary is proved; there does not seem to be any substantive difference between prima facie evidence and the "presumption" which is rebuttable, since the choice of one or the other of these terms is dictated rather by linguistic considerations.

107. With regard to the legal consequences of reservations which are agreed to or not agreed to, reference should be made to paragraphs 100 to 104 above.

108. In the case of a claim made within the time-limits, the combined operation of article 9 and of article 30, paragraph 1, cannot have the result of creating a presumption to the contrary, i.e. a presumption that loss or damage occurred during carriage. It will be presumed only that the carrier received the goods in good apparent condition; in addition, any presumption of delivery in good apparent condition will be ruled out. In the case of apparent loss or damage, it will of course be most probable that the loss or damage occurred during carriage and not as a result of an act or an omission by the consignee at the time of unloading. With regard to loss or damage which is not apparent, and in cases where the contents of the packages have not been checked at the request of the sender in accordance with article 8, paragraph 3, and where the claim is made within the time limits, there is no presumption with regard to the existence or non-existence of loss or damage at the time when the goods were taken over by the carrier or with regard to the existence or non-existence of loss or damage upon delivery. In such cases, these questions are for the courts alone to determine as they think fit.

Article 10

109. This provision relates to compensation for damage caused by goods which have not been properly packed. By virtue of article 17, paragraph 4(b), the carrier is relieved of all liability to the person entitled to dispose of goods which have not been properly packed.

110. The sender is liable for damage caused to the carrier and, in particular, to his vehicle, but also, by extension, for damage caused to other persons or to the property of other claimants to whom the carrier may have to pay compensation either in accordance with CMR or in accordance with other rules of law. The costs which the sender is liable to pay may be those which were necessary to remedy the packaging defect, when such a defect was noted during carriage and damage could be avoided only by incurring such costs. In such a case, the liability of the sender, which according to CMR arises out of the contract of carriage, is not subject to any limitations as to amount. When the sender has committed a default equivalent to wilful misconduct

(see article 29), an action may be brought against him during the three-year period of limitation provided for in article 32, paragraph 1. An action not based on the contract may, also, where appropriate, be brought against the sender on the basis of a national law.

111. The relief from liability provided for at the end of the article is justified by the fact that the carrier is required by article 8, paragraphs 1 and 2, to check the apparent condition of the packaging and to enter the relevant reservations in the consignment note. When the packaging defect is not apparent, but is known to the carrier, his agreement to perform the carriage without reservations implies at least a wrongful act on the part of both parties and, in such a case, it would not be justifiable to entitle the carrier to claim damages from the sender.

Article 11

112. With regard to the concept of delivery, reference should be made to paragraph 149 below.

113. The "other formalities" are those which are required for any administrative reasons, for example, in respect of health checks, import or export restrictions and exchange control. These formalities must usually be completed when goods are carried across a frontier, but may, in general, also be required during the entire period of the performance of carriage in the territory of a given State, the carrier being required to produce certain documents or provide certain information to the authorities whenever he is requested to do so.

114. The carrier is not required to know which documents and information are necessary; this obligation rests with the sender only.

115. The wording of paragraph 2, which differs from that of article 10, demonstrates thereby that, in this case, the sender is also liable for damage caused by the loss, damage or late delivery of his own goods and this means that the carrier is relieved of such liability. The liability of the sender and, consequently, the relief of the carrier from liability cannot be invoked when the carrier himself has committed a wrongful act. In this connexion, the carrier may, for example, have expressly offered to the sender to indicate to him which documents and information are necessary, and it may then appear that the indications he has given are incorrect. Such an offer and the actual provision of information are not contrary to article 41, paragraph 1, read in connexion with article 8, paragraphs 1 and 2, because they do not involve any change in the rights and obligations arising out of the contract of carriage but, rather, an additional service for which special remuneration might be due. In such a

case, the sender would not be liable on the basis of article 11, paragraph 2. The question whether the carrier is, in such a case, liable to the person entitled to dispose of the goods for any delay in delivery must be determined according to the criteria of article 17. There might be some apportionment of liability under the terms of article 17, paragraph 5.

116. The word "commissionnaire", which is used in the French version of paragraph 3 ("agent" in the English version), is not very suitable and should undoubtedly be taken to mean a "commissionnaire de transport" ("forwarding agent"). The national law will then have to decide in which circumstances (objective liability, liability for a wrongful act, burden of proof) the carrier who is considered to be such a forwarding agent is to be declared liable. In any case, his liability is limited to the amount which would have been payable in the event of loss of the goods. The liability of the sender provided for in paragraph 2 is not, however, limited.

117. Paragraph 3 does not refer to incorrect use, or use in a manner contrary to the intentions of the sender of, the information provided by the sender to the carrier in accordance with paragraph 1. Again, it will be for the national to determine whether or not such use of the information makes the carrier liable and, if so, what the possible limits of such liability will be.

Article 12

118. In the light of the rules contained in article 1, paragraph 1, regarding scope of application, the exercise of the right to dispose of the goods cannot exclude a contract of carriage from the scope of CMR. Similarly, measures for the carriage of goods across frontiers in the course of a transport operation which, according to the original intention of the parties, was to have remained purely internal cannot make CMR applicable. These principles are obviously not valid when it is clear that the parties have acted in fraudem legis, either in order to make CMR applicable (in cases where the parties at no time intended to send the goods abroad) or to prevent the application of CMR (in cases where the parties knew from the outset that arrangements would subsequently be made to carry the goods abroad.)

119. For the consignee to avail himself of the right of disposal provided for in paragraph 3, it is necessary that an entry to this effect should be made in the consignment note (article 6, paragraph 3) and that the consignee, at the time when he wishes to exercise his right of disposal, should already have in his possession the copy of the consignment note originally handed to the sender (paragraph 5(a)). There

may thus be a break in continuity - in other words, a time when no one can dispose of the goods. During the negotiations in the Ad Hoc Working Party, certain delegations expressed the view that the consignee should be given a right of disposal as soon as he took possession of the first copy of the consignment note from the sender, even if the consignment note contained no entry to this effect. Such a rule would, however, have been contrary to the principle that the consignment note is not a negotiable instrument, but principally a document of proof.

120. In addition to the possibilities provided for in paragraphs 2 and 3, the consignee may exercise the rights arising out of the contract of carriage, and thus also the right of disposal, when the goods have not arrived at the place designated for delivery within the time-limit provided for or considered reasonable (article 13, paragraph 1, and article 19).

121. The last phrase in paragraph 5(a) does not mean that the carrier can always claim reimbursement for costs and compensation for damages before complying with the instructions. However, when the carrier has good reason to believe that the person who has given him the instructions will be insolvent or hesitant to pay, he may request that the amounts in question should be paid to him in advance or that adequate security should be provided.

122. For the purposes of paragraph 5(b), it is not enough that the carrying out of the instructions should not be in accordance with the intentions of the carrier. The right of refusal exists only if the carrying out of the instructions will seriously interfere with the normal activities of the carrier's enterprise.

123. The main purpose of paragraph 5(c) is to exclude any possibility of the division of goods which are carried under the cover of a single consignment note and, particularly, of their delivery to different consignees. If, in accordance with article 5, paragraph 2, several consignment notes have been issued for goods to be loaded in different vehicles or for goods of different kinds or goods divided into different lots, the prohibition contained in paragraph 5(c) will not apply.

124. In accordance with paragraph 7, the carrier's liability is not subject to limitation.

Article 13

125. The "place" designated for delivery must be understood as a geographical unit. Thus, the consignee may require the delivery of the second copy of the consignment note and the delivery of the goods when the vehicle has arrived at the carrier's agency located in the city where the delivery is to be made. For this purpose, it is not necessary for the consignee to hand to the carrier the first copy of the consignment note.

126. If the goods have not arrived by the agreed delivery date or within the time it would be reasonable to allow the carrier (article 19), the consignee may, when there is evidence that the goods have been lost, avail himself of the right provided for in article 17, paragraph 1. If there is no evidence that the goods have been lost, he may claim his rights after the expiry of the time limit provided for in article 20. The rights arising out of the contract of carriage include the right of disposal which, when there is no evidence that the goods have been lost, passes to the consignee irrespective of whether the place where the goods are located at the time of the transfer of this right is known or not. However, this is not the case if the sender has changed his instructions regarding the delivery or if he has given orders that the goods should be sent back to him. In such cases, the original consignee is no longer a consignee. The right does not pass to the consignee, either, in cases when the sender has given orders for the temporary suspension of the performance of carriage, because both the delivery date which may have been agreed upon and the time-limit reasonably allowed to the carrier (article 19) would be changed by such instructions.

127. Certain members of the ECE Ad Hoc Working Party considered that paragraph 2 was too severe on the consignee, but the majority was of the opinion that the carrier must be protected against a consignee who, in order to evade his obligation to pay the costs resulting from the consignment note, might claim that damage had occurred and might then wish to pay compensation in the amount of the difference between the sums due from him and the compensation to which he claimed to be entitled. When the goods have been lost, paragraph 2 is of little importance. If the carrier, in an action brought against him on grounds of damages which occurred during carriage, claims that the consignee is not the person entitled to dispose of the goods because he has not paid the sums due in accordance with the consignment note, the court may, in its decision, fix an amount of compensation equal to the difference between the sums and the total compensation payable. That would be even easier since, according to article 23, paragraph 4, the carrier is obliged to refund, to the person entitled to dispose of the goods, the carriage charges and other charges incurred in respect of the carriage. When the goods arrive at the place designated for delivery and the consignee alleges damage or delay in delivery which constitutes grounds for compensation, the carrier is not, however, bound to hand over the goods. On the contrary, he is entitled, in the event of a dispute, to demand an adequate guarantee from the consignee and the dispute may be brought before a court which will decide on the amount or value of this guarantee, taking into account all the circumstances of the case. It should be stressed that the word "caution" in the French text is not to be understood as having the same meaning as it usually has in French legal terminologiy. Here, this term applies to any kind of security, which may be a deposit of a sum of money as security according to the usual meaning in French terminology, or as safeguarding the rights of the carrier in any other manner.

Article 14

128. Paragraph 1 deals only with cases in which the carriage cannot be performed in accordance with the terms entered in the consignment note, which may, for instance, contain a statement that transhipment is not allowed (article 6, paragraph 2(a)), or an agreed time-limit for delivery (article 6, paragraph 2(f)), or instructions regarding the route to be taken (article 6, paragraph 3).

Article 14 does not apply to the difficulties which may arise during carriage but do not make it impossible to perform the carriage in accordance with the terms entered in the consignment note, even if the carriage becomes more costly for the carrier or interferes with the normal activities of his enterprise. If in such circumstances the carrier does not continue performance of the carriage, this would simply mean that he has failed to provide services he had promised in the contract for carriage. Such cases do not fall within the scope of CMR; any compensation that might be payable is a matter which is governed by the national law. If on the contrary the carrier accepts the difficulties of the situation and continues the carriage, he may - depending on the agreement between the parties - be entitled to additional remuneration. CMR makes no provision for this case either, which must be dealt with according to the national law.

129. Paragraph 1 of article 14 has to be read in conjunction with article 16, paragraph 2. Instead of asking for instructions from the person entitled to dispose of the goods, the carrier may unload the goods and deem the carriage to be at an end.

130. In the case provided for in article 12, paragraph 3, the consignee is already regarded as having the right of disposal and instructions must be sought from him. This is so even if the consignee is not yet in a position to produce the first copy of the consignment note (article 12, paragraph 5(a)). The sender has in any case lost his right of disposal completely.

131. Paragraph 2 contains two conditions which are very different in content. This paragraph also gives rise to difficulties of interpretation since it has, intentionally, been omitted from the reference at the beginning of article 16, paragraph 2. Let us imagine a situation in which the carrier was unwilling to consider the carriage to be at an end and had asked for instructions, and in which carriage seemed to be possible in conditions differing from those provided for in the consignment note. There is no provision here to cover the case in which the carrier does not receive instructions in reasonable time and the conditions just mentioned have in the meantime changed, so that it is no longer possible to perform the carriage, even under conditions differing from those laid down in the

consignment note. One solution would be to say that in such a case, since paragraph 2 is no longer applicable, it will be necessary to refer back to paragraph 1, which is worded in more general terms, that paragraph 1 is referred to in article 16, paragraph 2, and that the carrier is therefore free to consider the carriage to be at an end and to unload the goods, although he had asked for instructions.

132. The wording of the last phrase in paragraph 2 makes it clear that it would be wrong to expect too much of the carrier when he has to act in place of the person entitled to dispose of the goods; it is enough that he should make use of all the knowledge he has regarding the situation and the intentions of the person entitled to dispose of the goods, and that he should act in good faith.

Article 15

133. With regard to the concept of the "place designated for delivery", reference should be made to paragraph 125 above.

134. Circumstances preventing delivery may be of various kinds. The technical facilities needed for unloading the goods may not be available; the consignee may be impossible to find, or he may refuse the goods; or he may be prepared to accept the goods but not to pay the amounts shown in the consignment note. The last-mentioned case seems to be equivalent to a refusal of the goods, and the second sentence of paragraph 1 would in that case be applicable. In the first two cases, difficulties may arise if the sender, when asked for instructions by the carrier, is no longer able to produce the first copy of the consignment note because he has already sent it to the consignee. There would appear to be no other solution to this difficulty than that provided for in article 16, paragraph 2, which states that the carrier may unload the goods for account of the person entitled to dispose of them, whereupon the carriage is deemed to be at an end. This possibility is in any event open to the carrier, if he so desires, in the case of any circumstances preventing delivery.

135. Where, in accordance with paragraph 2, the consignee who has first refused the goods later requires delivery but his request is incompatible with the sender's instructions, the carrier must comply with the wishes of the party whose instructions he received first (in writing, by cable or telex, or even orally).

136. The reversal of roles provided for in paragraph 3 applies only in the context of article 15. It cannot be extended to cover the case in which the consignee has acquired his right of disposal not under article 12, paragraph 3, but under article 12, paragraph 2, or in accordance with the second sentence of article 13, paragraph 1. In these circumstances, the original sender remains the sender and

the original consignee remains the consignee. The carrier is neither required nor authorized to deliver the goods to the new consignee designated by the original consignee who has first refused the goods but later required delivery thereof.

Article 16

137. The word "ou" in the French text of paragraph 1 is not used in its precise sense; the carrier is entitled to recover both the cost of his request for instructions (usually very little) and any expenses entailed in carrying out such instructions (which may be considerably higher).

138. The exception referred to in the concluding phrase of paragraph 1 applies not only to any wrongful act or neglect of the carrier when asking for or carrying out instructions, but also and more particularly to any wrongful act or neglect which may have led to the circumstances preventing performance of the carriage or delivery, and may thus have made the request for instructions necessary. For this exception to apply, it is not enough that the circumstances preventing delivery should have arisen as the result of some act by the carrier (such as his choice of route) or of some occurrence in his enterprise (such as a vehicle breakdown necessitating transhipment of the goods, in spite of a statement in the consignment note that transhipment is not allowed); it is essential also to prove that the act of the carrier is wrongful. The example of a vehicle breakdown necessitating transhipment is of some interest: since the principles of liability set forth in article 17, and in particular the rule contained in paragraph 3 thereof, do not apply to the question of the recovery of the costs referred to in article 16, paragraph 1, the carrier will be entitled to recover the costs. If, however, the transhipment which becomes necessary as a result of a breakdown due to a defect in the vehicle leads to the loss of or damage to the goods, or if the time necessary for transhipment prevents delivery within the time-limit, then the carrier will be obliged to compensate the person entitled to dispose of the goods for the damage caused.

139. Reference has already been made to the carrier's option under paragraph 2 of this article (see paragraphs 131 and 134 above). When the goods have been unloaded, carriage is deemed to be at an end. Unloading in this case is therefore equivalent to delivery, especially in respect to the rules regarding liability contained in article 17. After unloading, a new legal relation is created between the carrier and the person entitled to dispose of the goods. The text refers merely to the holding of the goods on trust and states that the carrier, if he entrusts the goods to a third party, shall not be under any liability except for any wrongful act or neglect in the choice of such third party (culpa in eligendo).

All other questions are governed by the national law - particularly the question of the carrier's liability as depositary and the question of the amount of any compensation which may be payable, which is in any event not subject to the CMR limitations on liability. The national law applicable is determined by the conflict-of-laws rules of the court seized with the case. There is no particular reason for arguing that the applicable national law should be that to which the contract of carriage would have been subject if CMR had not been applicable.

140. The last sentence in paragraph 2 says that certain expenses shall remain chargeable against the goods; and the term used here is intentionally unspecific. CMR does not purport to regulate any right the carrier may have as creditor to detain the goods carried. Whether there is any lien or right of retention and if so whether it extends to retaining possession is a matter to be determined by the national law which the court decides is applicable. Nevertheless, if the applicable national law is the law of a Contracting State, it must, pursuant to CMR, make provision for such a guarantee of the carrier's rights as creditor. Where the applicable national law is that of a non-contracting State, a court of a Contracting State will not be able to apply it unless it provides for such a guarantee in one form or another.

141. Apart from the charges already specified in the consignment note, the expenses which may be chargeable against the goods are primarily the costs of any measures taken to safeguard the goods and also the cost of unloading. This provision is not intended to apply to any costs incurred only after performance of the contract of carriage proper has come to an end; this is clear from the use of the word "remain". Such costs and any guarantee for their recovery through a lien or depositary's right of retention may be taken into account only on the basis of the applicable national law.

142. Paragraph 3 assumes that carriage is at an end in accordance with paragraph 2, and that the carrier has become a depositary. The second sentence must be understood to mean - though this is not stated expressly - that, if the conditions referred to in the first sentence are not satisfied, the carrier who has become a depositary must first seek instructions from the person entitled to dispose of the goods if he wants to sell them.

143. The instructions which the carrier may reasonably be required to carry out are instructions which comply with the requirements of article 12, paragraph 5(b), provided that such instructions can be carried out. The carrier cannot be required to carry out instructions which are so unreasonable that they would

obviously involve the loss of or at any rate some serious deterioration in the value of the goods, since the carrier might in such a case suffer loss from the fact that he would no longer be able to consider the goods as sufficient security for his expenses.

144. The words "pursuant to this article" in paragraph 4 refer in fact only to paragraph 3, since there is no reference in the article to any sale of goods other than that to which the carrier may proceed as provided in paragraph 3.

145. Paragraph 5 is one of the few conflict-of-laws rules in the Convention which refer to a particular national law (see also article 32, paragraph 4). This rule must be understood to refer to the substantive law of the place where the goods are situated, to the exclusion therefore of the conflict-of-laws rules of that law, since the intention of the authors of the Convention was not to provide that any national law which might be designated by conflict-of-laws rules should be applicable, but to create an unambiguous situation. This interpretation would seem to be confirmed by the reference to "law or custom" on a footing of equality; customary law never includes any conflict-of-laws rules.

Article 17

146. It would be wrong to conclude from paragraph 1 that the carrier cannot be held liable for damages other than those arising from the loss of or damage to the goods or from any delay in delivery. Some other liabilities of the carrier derive from CMR itself (cf. article 7, paragraph 3, and article 21), and others from national laws.

147. The highly complicated question as to who may invoke the liability of the carrier is not expressly dealt with by CMR. This right must be attributed first to the person who has concluded the contract of carriage with the carrier, even if this person has not himself suffered any material damage - for instance, if he is a shipping agent and has not yet himself indemnified his principal. In most cases the other party to the contract of carriage will at the same time be the sender. Where the sender is not the other party to the contract of carriage but suffers material damage, he will nevertheless have the above-mentioned right, since the principal will have concluded the contract with the carrier for the benefit of a third party, who is of course precisely the sender. If, however, the sender is not the other party to the contract of carriage and has not suffered material damage either, he will not have the right to invoke the liability of the carrier.

The consignee will always have this right in a case of the kind referred to in article 13, paragraph 1. When the goods have arrived at the destination, he

is entitled to require delivery; in this context, delivery means complete delivery, without any damage and within the time-limit. The second sentence of article 13, paragraph 1, allows the consignee to enforce in his own name against the carrier any rights arising from the contract of carriage if the loss of the goods is established or if the goods have not arrived after the expiry of the time-limit for delivery.

With regard to persons other than the principal, the sender or the consignee, rights can be attributed to them only if such rights have been validly assigned to them by the person originally entitled to dispose of the goods, or if the applicable national law provides for statutory assignment of rights, as if often the case where an insurer has indemnified the injured party; it follows that the carrier may have to face legitimate claims from several parties for the same damage. In this case, the carrier will rely for his protection either on the provisions of national laws concerning cases where there are several creditors or on national procedural laws which allow for third party notice or litis denunciato ("Streitverkündung"). One may also envisage a system of guarantees to be given by one or other of the creditors, a system which will also have to be based on a national law.

148. The liability régime established by article 17 is not a system of liability for wrongful act or neglect, with reversal of the burden of proof but a system of objective liability. However, the principle of liability for damage occurring during a certain period, or as a result of failure to observe a time-limit, is subject to many exceptions in the form of relief from liability.

149. The opinion is often expressed that delivery takes place at the time when the carrier allows the consignee to unload goods which are at that moment still on the vehicle. This may be the case in certain national laws; but it is not the case for the purpose of CMR, as is clear from the use of the term "unloading" in paragraph 4(c). If unloading was always undertaken automatically at the consignee's risk, relief from liability in this case would be meaningless. The taking over of the goods occurs at the moment when they pass from the control of the sender to that of the carrier, irrespective of when the carriage actually begins. Similarly, delivery takes place at the moment when the goods leave the carrier's control and pass under the control of the consignee. The determination of the exact moment is a question of fact. The taking over of the goods may occur before, during or after loading and stowing of the goods; similarly, delivery, whereby the physical capacity to dispose of the goods passes from the carrier to the consignee, may take place before, during or after unloading.

150. Where a receptacle or package arrives without its contents, this can be described as a partial loss only if the receptacle or packaging is of some value to the person entitled to dispose of the goods.

151. For the carrier to be relieved of his liability in accordance with paragraph 2, it is not sufficient that the loss, damage or delay should have been caused by the claimant; the claimant must also have committed some wrongful act or neglect. One exception to this principle is the case where the damage has been caused by some instruction from the claimant, in which case the act or neglect need not be wrongful. With regard to the case where the claimant's instructions were the consequence of some wrongful act or neglect by the carrier, the text refers to the provisions in article 16, paragraph 1, on this point, therefore, reference should be made to the commentary on that provision (paragraph 138 above). The expression "claimant" must be understood, in this context, in the same sense as in paragraph 1 (see paragraph 147 above). Instead of using the expression "the wrongful act or neglect of the claimant", it would have been better to say "the wrongful act or neglect of a claimant", since the carrier cannot be liable to one claimant in cases where another claimant has caused the damage by his wrongful act or neglect.

152. An "inherent vice of the goods" must not be confused with the "nature of certain kinds of goods" which, in the words of paragraph 4(d), particularly exposes them to certain risks. For paragraph 2 to apply, there must be some definite defect in the goods, as compared with other goods of the same nature as normally carried.

153. The concluding words of paragraph 2 constitute one of the many definitions of the concept of circumstances which cannot be avoided, which is very close to the concept of force majeure. It is of course well known that the definition of the concept of force majeure differs considerably, not only between different legal orders but even, in many cases, within one and the same legal order. It is essential, when applying the formulation used in CMR, to try not to be influenced by national definitions of this kind or by the meaning which national courts or jurists attribute to them. A comparison of the CMR rule with national definitions of force majeure shows, first, that CMR does not mention the condition of unforeseeability, which is often required. It is indeed difficult to imagine many cases in which it would be possible to foresee particular circumstances (in time) but impossible to avoid them; but, in any event, the carrier could in such cases be relieved of liability.

The provision is often distorted by the introduction of ideas originating in certain legal systems which take into account only external circumstances or events. Such an interpretation is not in keeping with the text or with the intention of the authors. This is confirmed inter alia by the existence of paragraph 3, which would be superfluous if a restrictive interpretation of this kind had been intended. The carrier may thus, in accordance with paragraph 2, be relieved of liability if he provides proof of circumstances which he could not avoid, and the consequences of which he was unable to prevent, even if the circumstances in question occurred within his enterprise. Some examples of such circumstances might be: a strike which the carrier could not have avoided even by making financial promises to his employees; or an unforeseen breakdown of a vehicle which is not due to a defect in its condition. The carrier might also claim relief from liability on grounds of a traffic accident which was not caused by him or by any of the persons for whom he is responsible under article 3. He could not in general be relieved of liability for theft of the goods by a third party, unless the theft took place in circumstances so unusual that the carrier, even acting with the greatest possible diligence, could not have prevented it.

154. Some writers have come to a conclusion which is different from that set out above, and their line of reasoning has been as follows: the term "force majeure" was used in earlier versions of CIM; when CIM was revised in 1952, this term was replaced, in article 27, paragraph 2, by the formulation which now appears in CMR; these writers maintain that this amendment was not designed to change the substance of the provision, and that the same must be true in the case of CMR which - on this point as on many others - follows CIM. This argument is not convincing. In the first place, it is often difficult to ascertain the opinion of representatives who have drafted an international convention - and of course opinions may have been divided; but in any case their views could not have been contrary to the relatively clear wording of the convention itself, which has acquired the force of law as a result of its acceptance by national parliaments. It cannot be argued, by way of interpretation, that black should be white because that was what the negotiators meant it to be. Even if this conclusion were (wrongly) accepted in the case of CIM, it could not affect another international agreement, which was negotiated by different persons and to which different States are parties. In the negotiations which led to the drafting of CMR, there was no statement by a delegation - let alone unanimous agreement - to the effect that the terms used in article 17, paragraph 2, should exclude any circumstances occurring within the carrier's enterprise.

155. The words "defective condition of the vehicle" which appear in paragraph 3 should, in principle, be interpreted broadly. However, they do not cover the case in which the functioning of a vehicle proved to be in perfect order has been interrupted by exceptional circumstances (for instance, a tyre burst caused by nails scattered along the road or by sharp stones which the driver of the vehicle was not able to see in time although he was proceeding at a speed in keeping with the other conditions of traffic, and which he was therefore unable to avoid, or rock-falls).

156. Defects in such items of the vehicle's equipment as are designed to protect the goods from the weather are not dealt with in article 17, paragraph 3, but are the subject of special rules contained in article 18, paragraph 4.

157. If the vehicle is merely unsuitable for the carriage of certain types of goods, this constitutes a defective condition only in cases where the carrier is aware of the unsuitability (because, for instance, the sender has drawn his attention to some particular requirements arising from the nature of the goods to be carried), or where he should have been aware of it (for instance, where carriage of goods of that nature is so commonplace that the unsuitability should have been obvious to any carrier knowing his trade).

158. By argumentum a majori ad minus, it must be concluded from the last phrase in paragraph 3 that the carrier cannot be relieved of liability on grounds of unavoidable circumstances (paragraph 2) which were the consequence of acts or omissions - even if not wrongful - of the person from whom he has hired the vehicle or of the latter's agents or servants.

159. Among the six grounds listed in paragraph 4 for relief from liability, (a), (b), (e) and (f) do not hitherto appear to have caused any major difficulties. In the case envisaged in (a), the sender will have accepted a special risk in full knowledge of the facts and in order to reduce the cost of carriage. There is no difficulty regarding proof, since the agreement to use open unsheeted vehicles must have been specified in the consignment note (in accordance with article 6, paragraph 3). Where, for instance, it is found by expert appraisal that the goods have been damaged only by exposure to weather, the situation is unambiguous. The case envisaged in (b) will rarely give rise to any difficulty regarding proof, because the carrier is required to check the apparent condition of the packing (article 8, paragraph 1(b)). If he does not check the apparent condition and does not enter any reservations in the consignment note, it is presumed, in accordance with article 9, paragraph 2, that the packing was in good condition. It must not be assumed that an article without packing is necessarily exposed to risk;

experience shows that the carriage, for instance, of new motor vehicles without packing does not involve any special risk. The important point is whether goods of the type in question are normally capable of withstanding the risks usually occurring during carriage (shaking or impact).

160. The greatest difficulties have hitherto been caused by the provision contained in (c), which has been the subject of many legal decisions rendered on the provisions of CMR. Unfortunately, these decisions differ, mainly because they tend to introduce national legal concepts into the context of CMR. The decisions range from one extreme - to the effect that the sender is always responsible for loading and perhaps even for stowage and, if the carrier performs or collaborates in those operations, he is merely acting on behalf of the sender - to the other extreme - to the effect that the carrier is always responsible for correct stowing and that he will have committed a wrongful act or neglect, if the sender has loaded and stowed the goods and he, the carrier, has not checked that the stowage is satisfactory. Some decisions go so far as to say that failure to check the stowage amounts to a wrongful act equivalent to wilful misconduct, within the meaning of article 29; if the carrier has checked the stowage and found it to be unsatisfactory, he must - it is argued - require the sender to unload the goods in order to load and stow them again more satisfactorily. Lastly, some decisions make a subtle distinction between the notion of stowage and that of securing, and say that stowage may in certain circumstances still be the responsibility of the sender while securing the goods would always be the responsibility of the carrier.

161. Almost all these decisions distort the text and the intentions of its authors. The mere existence of the special provision in paragraph 4(c) shows clearly that under the CMR régime, the operations mentioned therein may be performed by either of the contracting parties and that the authors of the Convention carefully avoided attributing any obligation in that respect to either party, just as they did in the CMR rules which state that a consignment note must be made out. There is nowhere any suggestion of referring to the provisions of national laws concerning this matter. It may of course be acknowledged that in accordance with traffic safety regulations, the driver of the vehicle (and perhaps also the owner or licence-holder) are responsible for seeing that the goods loaded thereon are stowed and secured in such a manner that the vehicle does not constitute a danger to draffic. However, this is an obligation under public law and not under the contract of carriage. The possibility of applying paragraph 4(c) must, therefore, be weighed solely on the basis of the actual circumstances. It is essential to determine which of the contracting parties actually performed the operations. This may not always be easy, since the employees of one of the contracting parties may

often have co-operated with those of the other. In that case, the operation will be deemed to have been performed by the party which, either in person or through his servant or agent, took charge of the operation. If no proof is available, there can be no relief from liability since, under paragraph 4, the burden of proof lies on the carrier. It is also possible, for instance, that the loading has been performed by the sender and the stowage by the carrier. The damage may just as well have been caused by unsatisfactory loading as by unsatisfactory stowage; in this case, paragraph 5 would apply.

162. The carrier can no longer claim to be relieved of liability if he has unloaded and re-loaded the goods during carriage, or if he has changed the stowage effected by the sender, even in cases where these measures were necessitated by circumstances beyond his control (such as Customs inspection).

163. If the vehicle is over-loaded by the sender and a traffic accident results from the over-loading, the carrier is relieved of liability. He is also relieved of liability when such an accident results in damage to the vehicle which subsequently causes damage to the goods or delay in delivery. The carrier cannot, however, be relieved of liability if the vehicle is so loaded by the sender that it strikes a bridge under which it has to pass; the cause of this accident is not the loading, but the driver's failure to appreciate the dimensions of his loaded vehicle.

164. It is obvious that, although this provision is intended to cover cases where damage is caused during the operations referred to in paragraph 4(c), it is less important in these cases than in the case of damage which is caused during carriage but is the consequence of unsatisfactory loading or stowage.

165. There have been fewer decisions concerning paragraph 4(d). In theory at least, however, this provision does present some difficulties. The risks mentioned in subparagraph (d) arise to some extent in regard to nearly all types of goods, some of them being more liable to these risks and others less. Although CMR does not anywhere use the concept of "diligent carrier", it seems essential to resort to this concept in this particular case. The carrier can be relieved of liability only when the damage is not the result of a wrongful act or neglect on his part.

To what extent is the list in paragraph 4 a list of grounds on which the carrier may be relieved of liability, and not merely a statement of the basis for reversing the burden of proof referred to in article 18, paragraph 2? This is a question of appreciation. It is essential to determine, in each case, the efforts which are necessary to avert the dangers specified. When it is impossible to avoid them, or so difficult to avoid them that the carrier could not be expected to make

the effort required, there is no longer any need to take article 18, paragraph 2 into consideration. If, on the other hand, measures to prevent the damage could have been taken so easily that the carrier must be deemed to be negligent if he has not taken them, reversal of the burden of proof in accordance with article 18, paragraph 2, will be of little help to him. Cases in which paragraph 4 may be applied under the terms of article 18, paragraph 2, fall between these extremes.

166. With regard to subparagraph (e), the situation is similar to that mentioned in paragraph 159 above in the case of subparagraph (b). In this context too the carrier has an obligation to check (article 8, paragraph 1(a)). If he does not enter any reservations in the consignment note, the presumption follows, in accordance with article 9, paragraph 2, that the marks and numbers on the packages correspond with the statements in the consignment note. In order to claim relief from liability, the carrier must therefore first furnish proof to the contrary. Damage may result primarily from the fact that the carrier has made a mistake with inadequately marked packages and has delivered them to some person other than the consignee.

167. Livestock, as referred to in subparagraph (f), are subject to a régime which is closely similar to that provided for in the case of the goods mentioned in subparagraph (d). However, the carrier's duty to act as a diligent carrier is expressly mentioned and defined in article 18, paragraph 5. In this connexion, paragraphs 2 and 5 of article 18 give rise to some specially complicated rules concerning the burden of proof. In cases where the goods carried are livestock, the carrier must first prove that he has taken all the steps normally incumbent on him in the circumstances, and that he has complied with any special instructions issued to him (normally, by the sender). When he is able to furnish proof to this effect, the presumption under article 18, paragraph 2, is that the damage has been caused by special circumstances inherent in this type of carriage, since livestock are exposed to certain risks when transported. However, the claimant for his part may prove that those risks were not the cause of the damage; there might, for instance, have been a traffic accident for which the carrier cannot be relieved of liability on the basis of article 17, paragraph 2, or the duration of the carriage may have been excessively long, which can be a danger even for animals receiving normal care, whereas experience has shown that no such risk is incurred where the duration of the carriage is normal.

168. The wording of paragraph 5 shows fairly clearly that the carrier's liability for loss, damage or delay in delivery is regarded as an objective liability and not liability for a wrongful act or neglect.

There is no mention of a wrongful act or neglect attributable to one or other of the contracting parties; on the contrary, the liability of the carrier is presumed in the case of certain causes of damage, i.e. for all causes other than the grounds for relief from liability which are listed restrictively. Where circumstances which constitute grounds for relief from liability and circumstances which do not constitute grounds for relief contribute concurrently to the damage, liability is apportioned. It will often be difficult to determine the proportion of damage to be attributed to each factor, and the courts will therefore have a wide range for the exercise of their judgement.

Article 18

169. Paragraph 1 does not call for any comment.

170. The presumption referred to in paragraph 2 is to be taken as supplementing the list of grounds for relief contained in article 17, paragraph 4, and is intended to enable the carrier to avail himself more easily of these grounds for relief.

In the case of partial loss or damage discovered only after the arrival of the goods at the place designated for delivery, proof of the cause of the damage will often be difficult. If the carrier were required to produce formal proof that the special risks inherent in the circumstances listed in article 17, paragraph 4, subparagraphs (a) to (f), had been the cause of damage, he would be faced with an impossible task. Proof that the cause of the damage may have been one of those special risks must therefore be regarded as sufficient. However, it is not enough to provide proof, on the one hand, of the damage and, on the other hand, of the existence of one of the risks mentioned in article 17, paragraph 4. The carrier must also prove a connexion between them. For example, it is not enough to show that a piece of machinery carried had arrived in a damaged condition and that the loading and stowage had been carried out by the sender. It is essential also that the nature of the damage should be such that a connexion can be established between the loading or stowage and the damage. The carrier is not, however, required to prove that any other cause of the damage is excluded. When the proof required under article 18, paragraph 2, has been produced, it is usually decisive. It is only rarely that a claimant who has not taken any part in the carriage is able to produce the proof to the contrary referred to in the last sentence of paragraph 2.

171. Paragraph 3 refers only to subparagraph (a) of paragraph 4 of article 17, since even the use of an open unsheeted vehicle would not justify a substantial shortage or the loss of a complete package. Experience shows that damage of this kind is more often the result of theft, a circumstance for which the carrier,

even if an open unsheeted vehicle is used, cannot claim relief from liability except in very exceptional circumstances (see paragraph 153 above).

172. Paragraph 4 sets forth in detail the principle whose existence has already been implied by article 17, paragraph 4(d) (see paragraph 165, above), - namely, that the carrier must act with due diligence. The vehicles referred to in article 18, paragraph 4, are generally used by express agreement between the parties or chosen by the carrier when he is familiar with the nature of goods, which are sensitive to weather conditions. The use of such vehicles has an effect on the cost of carriage. Before the carrier can invoke the presumption referred to in paragraph 2, and thus claim relief from liability as provided for under article 17, paragraph 4(d), he must prove that he has taken the special steps mentioned in paragraph 4.

173. Reference has already been made to paragraph 5, in connexion with relief from liability under article 17, paragraph 4(f) (see paragraph 167 above). The legal interpretation of this provision is parallel to that of article 18, paragraph 4. The fact that paragraph 5 contains the word "normally", which does not appear in paragraph 4, does not seem to make any difference as to the substance.

Article 19

174. The time-limit for delivery may be determined relatively - i.e., it may be expressed in terms of a number of days reckoned from the taking over of the goods by the carrier - or absolutely - i.e., by reference to a date. CMR does not offer any special protection for a carrier who may have stipulated a time-limit for delivery which he could have known in advance he would not be able to respect. Such protection for the carrier hardly seems to be called for, since the consequences of late delivery (article 23, paragraph 5) are not very serious.

175. The most difficult question which arises in the context of article 19 is whether the time-limit can be considered to have been validly agreed upon in cases where no entry concerning the time-limit has been made in the consignment note, or in cases, even, where no consignment note has been issued. In this connexion, reference may be made to the comments on article 6, paragraph 2 (see paragraphs 84 to 86 above).

176. The reasonable time allowed to the carrier in cases where no lime-limit has been agreed upon is restricted by the effect of article 20, paragraph 1, to 60 days from the time when the carrier took over the goods; once that time-limit has been passed, the consequences for the carrier are far more serious than the mere obligation to refund the carriage charges, as provided for in article 23, paragraph 5.

Where the goods are lost, the last carrier to perform part of the carriage will also be the carrier on whose portion of the journey the damage occurred. It would be unjust and senseless to seek to bring an action in this case against the carrier who, according to the intention of the parties, should have effected delivery but who, in fact, never received the goods.

281. Article 31, paragraph 1, must be applied also in the case mentioned in article 36. However article 31, paragraph 1, subparagraph (a), designates different jurisdictions for each of the successive carriers, whereas subparagraph (b) continues to mention, even in the case of relations between successive carriers, the points of departure and destination of the entire carriage. An action may be brought against several carriers at the same time only where proceedings are instituted before a court or a tribunal to which all the defendants are subject.

282. The designation of a jurisdiction, in accordance with the first sentence of article 31, paragraph 1, by the parties who originally concluded the contract of carriage produces its effects with respect to the successive carriers even where such designation does not appear on the consignment note. In cases where the first carrier has not informed the following carriers of the designation of jurisdiction, and where the latter would not have agreed to become parties to the contract if they had known of the designation, they may, according to the applicable law, bring an action for damages against the first carrier.

Article 37

283. The term "caused" at the beginning of subparagraph (b) should be understood not in its literal sense but as referring to the obligation to assume liability for a particular damage. Such liability exists where the carrier has taken over the goods in a certain condition and where he has handed them over to the succeeding carrier or delivered them to the consignee in a worse condition or too late, or where a loss has occurred between the taking over of the goods and its handing over or delivery, and he is unable, in all these cases, to invoke one of the grounds for relief from liability mentioned in article 17.

284. In this context, it is much easier to apportion liability than it is in the case mentioned in article 17, paragraph 5. For the purposes of apportionment, account will be taken only of the payment due for the carriage proper, without regard to other charges.

Article 38

285. A carrier must be regarded as insolvent where enforcement has not had any effect or where it was obvious in advance that enforcement would not produce any results. In the case where the property of the carrier is the subject of bankruptcy proceedings or legal settlement, the apportionment may be demanded first of all only of that part of the amount due which exceeds the shares to be paid by the debtor in accordance with the decision of the bankruptcy court or in accordance with the conditions of the settlement approved by the court. If it subsequently appears that even these shares will not be paid, they will also have to be apportioned among the other carriers.

Article 39

286. Some institutions of procedural law (litis denunciatio, third party notice) enable a person to enforce his rights in legal proceedings instituted between two other persons. The carrier who disputes the validity of a payment made by another carrier cannot, where the other carrier brings an action to recover from him, claim that the court or tribunal before which he could have appeared was not competent to hear proceedings against himself; it is essential merely that he should have had the possibility of entering an appearance.

287. For the purposes of paragraph 1, it is irrelevant whether the court or tribunal which has taken the decision is a court or tribunal of a contracting or of a non-contracting State, and even whether it has or has not applied the CMR. On the other hand, the carrier against whom an action to recover is brought may challenge the effects of an arbitral award if the arbitration agreement was not in conformity with the conditions of article 33 and if, consequently, the person bringing the action has contravened CMR.

288. With regard to rights of recovery as between carriers, paragraph 2 contains a special rule which is different from the provisions of article 31, paragraph 1. In the light of article 40, it was unnecessary to draft a provision expressly permitting the designation of competent tribunals or courts. Similarly, the carriers may, by agreement among themselves, exclude the jurisdiction of the courts referred to in article 39, paragraph 2. Since in the case of an action for recovery, the carriers prosecuted are joint debtors, the competence of a court or tribunal to hear an action brought against one of them always includes the competence of the same court or tribunal to hear an action brought against the others. Unless otherwise stipulated, in accordance with article 40, they may therefore always be defendants in the same action.

289. Since paragraph 3 mentions only paragraphs 3 and 4 of article 31, it is clear that paragraphs 2 (actions pending) and 5 (security judicatum solvi) do not apply to actions for recovery among consecutive carriers.

290. With regard to the date from which the period of limitation begins to run, in accordance with paragraph 4, it is essential to know whether payment was made by the claimant in the action for recovery before or after the judgement against him had become final. In the first case, he loses the benefit of any advantages under paragraph 1. In the second case, he may lose his right of recovery if he does not make the payment to the creditor within the period of limitation, since article 37, paragraph 1, grants him this right only if he has himself paid compensation.

Article 40

291. The primary objective of CMR is to regulate the legal relations between the carriers and their clients. If other practices are developed, or if stipulations derogating from the provisions of articles 37 and 38 are agreed upon between carriers who are in the habit of collaborating, the objective of the CMR is in no way endangered. The CMR has therefore given preference to such practices or stipulations. However, the other articles, even those in chapter VI, are still peremptory law.

Article 41

292. Unlike other private transport law conventions which allow the carrier to offer to his clients better conditions than those provided for under the said conventions, the provisions of CMR are peremptory for all parties. The reasons for this are first, that there was no way of knowing which party to a contract for the carriage of goods would be the strongest economically and therefore in a position to exercise pressure on the person with whom he has contracted and, secondly, that it seemed advisable to avoid undue competition between individual transport enterprises which might wish to attract clients by offering them terms which were actually or allegedly better. Consequently, any guarantee of good performance offered by the carrier would also be null and void.

293. With the exception of articles 37 and 38 mentioned in article 40, CMR takes precedence not only over the national law but also over all stipulations between parties and all General Conditions.

294. In the absence of paragraph 2, it might have been claimed that the clauses referred to therein were not contrary to the Convention, which is incidentally correct in the case of the first of them if it is considered literally and not from the standpoint of intentions. The insurance coverage of the goods carried constitutes

the returns on the premium paid by the person entitled to dispose of the goods. If the rights in respect to the insurance company were assigned to the carrier, the latter would in fact be relieved of all liability, at the expense of the person entitled to dispose of the goods.

295. A clause in which the person entitled to dispose of the goods agreed with his insurer that the latter would not be able to bring a claim against the carrier would produce the same effects as the prohibited assignment of debt arising from the insurance. Therefore, such a clause is also null and void in the case of a contract of carriage under CMR, since article 41 is not limited to stipulations between the contracting parties. The question whether, in the case mentioned, the nullity of the clause should entail the nullity of the entire insurance contract or whether, if this is not so, the insured person should be entitled to reimbursement of part of his premium will have to be evaluated in accordance with the applicable national law.

296. With regard to stipulations relating to the burden of proof, it might be argued - with less chance of success than in the case of the clause concerning insurance coverage - that such a stipulation would not alter the substantive content of CMR. Any stipulation which established such a burden in an area which is governed by CMR, but in which CMR contains no provision regarding apportionment of the burden of proof, also constitutes a prohibited shifting of the burden of proof.

Final provisions (articles 42-51)

297. The final provisions are those which are normally used in the Economic Commission for Europe.

298. The jurisdiction of the International Court of Justice (article 47) is already mandatory among States which have made the declaration provided for in article 36, paragraph 2, of the Statute of the Court (which forms part of the Charter of the United Nations, dated 26 June 1945). The reservation provided for in article 48, paragraph 1, has to date been made by Hungary, Poland and Romania.

299. No Contracting State has yet requested the convening of a review conference (article 49). Professional organizations of carriers have, however, submitted some suggestions which, in their opinion, would improve the Convention. The International Chamber of Commerce has associated itself with this initiative. An ECE Ad Hoc Meeting examined these proposals in February 1972 and came to the conclusion that none of them was important or urgent enough to call for the convening of a review conference in the near future.

During the session of the Ad Hoc Meeting, members were unanimously of the opinion that if a review were to be undertaken at a later date, amendment of the following provisions would be desirable:

- article 1, paragraph 4 (a) (improvement of the wording);
- article 11, paragraph 3 (liability of the carrier for the documents; the carrier should no longer be treated as an agent and it should merely be said that the carrier is liable for a wrongful act on his part with regard to the documents and their use);
- article 12, paragraph 7; article 17, paragraph 2; article 18, paragraph 2; article 20, paragraphs 1, 2 and 3; article 23, paragraph 5; article 27, paragraph 1 (it would be useful to provide a more precise definition of the expression "ayant droit" (person entitled to dispose of the goods));
- article 22, paragraph 1 (minor change at the beginning of the English version);
- introduction of a provision to the effect that the carrier would not be liable for damage caused by nuclear accidents if such liability, according to the provisions in force, already rests with the operator of a nuclear installation (cf article 64 of CIM, 1961 and 1970; article 17, paragraph 2 of CVR).

In addition, in the opinion of the Ad Hoc Meeting, it would be necessary, in the event of a review, to consider proposals or problems relating to the following provisions:

- article 2 (an improved wording might bring out more clearly the impossibility of conflict with other conventions);
- article 6, paragraph 1 (possible inclusion of particulars indicating who has carried out or is to carry out the operations of loading and stowing and who is to unload the goods);
- article 6, paragraph 1 (k) (improved wording of the paramount clause);
- article 22, paragraph 2 (it should be expressly stated that the carrier may take the measures referred to only if they are strictly necessary);
- article 27, paragraph 1 (revision of the rate of interest);
- article 31, paragraph 3 (question of retaining the provisions concerning enforcement; consideration of the possibility of entering reservations);
- article 32 (examination of the wording of this paragraph and of the terminology used, possible taking into account of the United Nations Convention of 14 June 1974 on Prescription (Limitation) in the Field of International Sale of Goods);

- articles 42, 46 and 47 (examination of the provisions concerning States which may accede to the Convention, the extension of the territorial scope of application to certain territories and the competence of the International Court of Justice).

Lastly, a review conference should also examine the relations between CMR and other conventions containing rules of private law in regard to transport; reference was made primarily to the proposed convention on combined transport (see para. 6 above).

300. The ECE Ad Hoc Working Party expressed the view, at its second session, that the absence of any express provision concerning the requirement of a quorum meant that at a review conference, CMR would be amended only by a unanimous vote. That view cannot, however, be regarded as anything more than the expression of a wish, since any review conference would establish its own rules of procedure. It is, however, certain that such a conference would lead only to the conclusion of another convention. In view of the large number of States which would have to be invited to such a conference (article 49, paragraph 3), it is hardly likely that many amendments would be adopted unanimously. Nevertheless, if amendments were adopted by a simple majority or even a qualified majority, it is to be feared that CMR, which - as is evident from the large number of ratifications and accessions in recent years - has met with general approval, might be amended in some important aspects to the dissatisfaction of one or other of the Contracting States or of a State which was intending to accede in the near future. That might lead to the division of States into two groups. The new version would be applicable between the States of one of these groups, whereas the original version would be applicable in relations with States of the other group. Such a situation would certainly prevent additional States from signing or ratifying the Convention (original or revised) or from acceding to it.

These fears seem to be the main reason why, as yet, there have been no proposals to convene a review conference.

Article 20

177. How is one to assess the situation in which the goods have been recovered before the person entitled to make a claim has sued the carrier at law in order to obtain compensation for the loss of the goods, or before the carrier has actually compensated the person so entitled? When the carrier pays up voluntarily, the case is closed in the sense that there is no longer any cause for application of rules other than those contained in paragraphs 2-4, relating to goods which have been recovered. In addition, it would be contrary to the spirit of the provision to permit the claimant to base himself, in legal proceedings, on the fiction of the loss of the goods when the goods have in fact arrived in the meanwhile. The sole purpose of the rule contained in paragraph 1 is to enable the claimant to seek compensation for loss of the goods. If he is dilatory and the goods arrive before he has instituted legal proceedings, he may claim compensation only for delay. If the goods are recovered while the legal proceedings are in progress, the claim for compensation for loss of the goods should be rejected, but the court should admit a modified claim merely for compensation for delay. In all these instances, the carrier will have to reimburse to the claimant the costs of proceedings instituted by the latter. However, another interpretation will be required if the goods are recovered after the carrier has been ordered to pay compensation but before he has complied with this order. In this case, compelling the claimant to take back the goods would be tantamount to awarding a bonus to the carrier. When the judgement has become final and any period allowed for compliance by the defendant has elapsed, the claimant can refuse to accept the goods, just as in the case in which the carrier has paid up voluntarily.

178. The claimant may require the goods to be delivered to him even though he has already received compensation for loss. This leads to the conclusion that he may also require delivery of the goods in all cases in which he has not yet received such compensation.

179. The second sentence of paragraph 2 is a provision that does not carry any penalty, and it serves exclusively for the purposes of proof. When the carrier does not acknowledge the request made to him by the claimant, the latter is allowed to prove by any other means that his letter has reached the carrier.

180. If the claimant has been informed that the goods have been recovered, he may freely decide whether he wants the goods to be delivered to him or whether he prefers to settle for the compensation received for loss of the goods. In the first case, the compensation he received is refunded in accordance with paragraph 3. If the carrier does not comply with his obligation to give notification, the claimant may of

course still require restitution of the goods when the fact that the goods have been recovered is brought to his knowledge in some other way. CMR does not give any ruling on the question of whether failure to give notification entails any other damages to be paid by the carrier; this matter is left to the applicable national law.

181. If the claimant does not demand restitution of the recovered goods, he thus expresses a wish to relinquish them to the carrier. The carrier becomes the owner of them. The reference to the law of the place where the goods are situated seems to apply only to cases in which the carrier has failed to notify the claimant (see para. 180 above) or to cases in which the fact that the goods are not recovered until more than a year later is a result of fraud; this may occur in the case of goods of a value exceeding the limit which are not covered by one of the stipulations provided for in articles 24 and 26. The national law might in such a case provide for a right to restitution which can be enforced even after one year has elapsed.

Article 21

182. The term "cash on delivery" covers solely the sum which the carrier is to collect for the benefit of the sender or, where appropriate, a principal other than the sender. CMR has nothing to say on the question of who is to pay the carriage and other charges, any more than it does on the question of the calculation and the amount of the charges. In this respect, some outlines of a rule can be found in article 6, paragraph 2(b), which states that the charges which the sender undertakes to pay shall be specified in the consignment note, and in article 13, paragraph 2, which provides that the consignee must pay the carrier the charges shown to be due on the consignment note. These charges may consist of the cash to be collected on delivery and also the carriage charges, provided that the carriage charges are not, according to the consignment note, paid by the sender. The charges which the sender undertakes to pay are mentioned in the consignment note in order to protect the consignee and not the carrier. When the carrier fails to collect the charges payable by a consignee, he still retains his right to remuneration from the person who has instructed him to carry the goods.

183. The comments made on article 6, paragraph 2 (see paras. 82 to 86 above) hold good for the obligation to collect charges. Consequently, the sender may claim damages from the carrier - but only if the latter has committed a wrongful act - in cases where the carrier has not collected charges, even when such an obligation has not been specified in the consignment note.

184. The carrier does not incur any liability if he accepts a cheque from the consignee, unless he has specific reasons for suspecting that it is not covered. Again, article 21 is not applicable in cases in which the sender has ordered the carrier to deliver the goods only against acceptance of a bill of exchange or against a particular document. It is for the national law to establish the consequences of failure to comply with such an order.

185. The carrier's liability for failure to collect charges is not subject to the limit specified in article 23 or, where appropriate, in article 24.

Article 22

186. In the case provided for in paragraph 1, the information entered on the consignment note in accordance with article 6, paragraph 3 serves solely as proof. The carrier may - if the sender has not informed him at the time of the carriage in question - be aware of the danger of the goods and the precautions to be taken, for example, because he specializes in such carriage or because he has on several occasions in the past already carried goods of the same kind for the sender and has been given the necessary information. All goods are to be considered as dangerous, if, in normal road transport, they present an immediate risk.

187. Paragraph 2 confers on the carrier a right which, if exercised, may have serious economic consequences for the person entitled to dispose of the goods. The carrier is therefore obliged, although the obligation is not expressly stated in the text, to confine himself to steps which, in the circumstances, cause the person so entitled the least harm. Naturally, it would be wrong to expect too much of the carrier's knowledge and discernment in this regard. If he believes in good faith that the goods are more dangerous than they really are, no complaint can be laid against him: the rule, which does not allow any compensation to the person entitled to dispose of the goods but renders him liable to the carrier, will still have to be applied.

188. Damage for which the sender must, where appropriate, compensate the carrier also includes damage caused to other persons or to the goods of other persons to whom the carrier for his part is liable (see para. 110 above). Article 22, paragraph 2 does not establish, however, direct liability on the part of the sender to persons other than the carrier.

Article 23

189. The CMR system of compensation is not based on the value of the goods at the place designated for delivery and at the time they have or should have arrived there, but on the value at the place and time at which they have been accepted for carriage. In addition, all carriage charges are to be refunded. Loss of earnings cannot be claimed under article 23 or article 24 but it can under article 26.

190. Paragraph 2 sets out criteria for determining the value of the goods at the place and time of acceptance for carriage by the carrier: officially established prices will have to be taken into account. It may, however, occur that these various criteria cannot be applied because goods of the particular type and quality concerned are the subject of a commercial transaction only very rarely or perhaps even only in the case of the carriage in question. In such a situation, it will be necessary to take into account the value of similar goods or the price obtaining in other places for goods of the kind carried, preferably within one and the same economic system. It will also be possible to take into consideration the price asked by the vendor from the purchaser, less the carriage charges payable by the vendor and a sum corresponding to the amount which he could reasonably expect to obtain as profit.

191. Paragraph 3 refers to the "germinal" franc, which is used primarily for CIM and which, at the time when CMR was prepared and opened for signature, seemed a suitable basis for determining values, in view of the stable price of gold. The sum of 25 "germinal" francs was roughly equivalent to 34 deutschmarks, 37 Swiss francs, 4,200 French francs or 5,400 Lire. The sharp rise and subsequent fluctuations in the price of gold in recent years have made the actual value of the "germinal" franc highly uncertain. It is still an open question whether the unit of account used by CMR should be converted according to the free-market price of gold, according to the official price in a particular State, or on some other basis. Some institutions, such as UNIDROIT, are now trying to find a more stable unit of account, or at least to promote a uniform interpretation in this matter. The problem does not exist for CMR alone, but for all other conventions in which limits of liability are expressed in units of account based on the value of gold.

192. The charges referred to in paragraph 4 are charges which are incurred in respect of the carriage of the goods and not outlays for the purposes of carriage. Thus, packaging costs, although a total loss if the goods do not arrive at the place designated for delivery, are not recoverable.

193. In the event of partial damage, the portion of the charges to be refunded under paragraph 4 should be calculated in the light of the method initially adopted for calculating the charges concerned. With regard to carriage charges, the amount will generally have been calculated according to weight. If a valuable part of the load has been lost but a less valuable part has remained undamaged, the proportion of the carriage charges to be refunded will, in principle, still have to be based on the proportion between the weight of the full load and that of the part that is lost. On the other hand, the refunding of Customs duties, value-added tax or other charges may call for a different method of calculation. The charges incurred in respect of carriage also include the costs occasioned by an accident (reloading, valuation, etc.), provided that they have been incurred reasonably.

194. Just as loss and damage (article 25) do not automatically create an entitlement to compensation up to the maximum amount, but merely up to the amount of the damage proved provided that it does not exceed the maximum amount, so compensation for delay in delivery (whether or not there is an agreed time-limit - see article 19) is not automatic either. In this case also, compensation will have to be paid for the damage sustained and proved, provided that the damage does not exceed the carriage charges. For this purpose, carriage charges should be taken as exclusive of Customs duties and other charges mentioned in paragraph 4.

195. Paragraph 6 merely explains the legal significance of the limit of liability and serves as a pointer to articles 24 and 26.

Article 24

196. The declaration of a value for the goods exceeding the limit laid down in article 23, paragraph 3 is effective only when it is made on the consignment note. Otherwise, or if no consignment note has been issued, the person entitled to dispose of the goods cannot invoke any stipulation increasing the amount of the limit of liability.

197. The phrase "value for the goods exceeding the limit" may be misleading. In fact, what is involved here is not value but merely the limit of liability. Even under article 24, the value is calculated according to the rules contained in article 23, paragraphs 1 and 2. The said value exceeding the limit becomes a new limit and replaces the sum of 25 "germinal" francs specified in paragraph 3. Article 23, paragraph 4, is not affected; accordingly, the amounts mentioned therein will have to be added even when the goods lost give rise to compensation up to a higher amount.

198. The surcharge is not a prerequisite for the validity of a declaration made in accordance with article 24; still less is a statement in the consignment note to the effect that such a surcharge has been paid or agreed upon. The words "against payment of a surcharge to be agreed upon" are intended only to indicate that the carrier is providing a service over and above his normal services and that he is therefore entitled to additional remuneration. Since CMR contains no provision regarding the amount of the remuneration, it will often be difficult to determine whether a surcharge has been requested or paid or whether the charge would have been the same without such a declaration.

199. A declaration of a value exceeding the limit is distinct from the declaration of special interest in delivery covered by article 26 (see para. 204 below). The declaration provided for in article 24 may lead to higher compensation for loss or damage (article 25) of the goods, but it can never increase the compensation for delay in delivery provided for in article 23, paragraph 5.

Article 25

200. Compensation for damage is also calculated on the basis of the goods at the place and time they were accepted for carriage by the carrier. This compensation is limited to the maximum amounts specified for loss in article 23, paragraphs 3 and 4 and in article 24.

201. Where the whole consignment has diminished in value through damage to part of it, the maximum amount is that which would have been applicable in the case of the loss of the entire consignment. The notion of diminished value has to be viewed objectively and not subjectively. When, for example, part of a machine is damaged but the part can be replaced, the person entitled to dispose of the goods cannot seek compensation for the fact that, for a certain time, the complete machine cannot be used and that, in obtaining the spare part, he has suffered damage other than the cost of that part. He will be compensated only on the basis of the value of the spare part, calculated in accordance with article 23, paragraphs 1 and 2, or of the expense incurred for repair of the damaged part; in each case, the criterion used will be the value at the place and time of acceptance of the goods by the carrier. The compensation may never exceed the limits specified in article 23, paragraph 3, or in article 24.

202. It may be that the parts of the consignment which are damaged on arrival include some parts with a higher, and some with a lower, value. In this case, the carrier cannot in the case of the cheaper parts, pay compensation in the amount of their actual value which will be below the limit and, in the case of the dearer parts whose value is far in excess of the limit, pay compensation only up to the limit. The whole consignment must be regarded as a single unit. The total value of the damaged parts must be calculated by adding together the values of each of them; this total value will then serve as the basis for compensation, provided that the compensation does not exceed the limit calculated for all the damaged parts taken together. This method derives, by analogy, from article 23, paragraph 3, which requires the limit to be reckoned for the aggregate of the lost parts of a consignment.

Article 26

203. With regard to the need to declare in the consignment note a special interest in delivery, and also with regard to the significance of the payment of an agreed charge, reference should be made to paragraphs 196 to 198 above. Since this is a stipulation expressly permitted by CMR and since it enables the parties to derogate from the rules concerning the limit of liability, there was no reason to include in article 26 any restriction on the parties' right of disposal; accordingly, a special interest may be stipulated solely to cover loss, for damage, or for delay in delivery.

204. The special interest in delivery does not constitute simply an increase in the maximum amount provided for in article 23, paragraphs 3 and 4, as does the declaration of value referred to in article 24. On the contrary, compensation must be paid for the total damages, including loss of earnings, up to the amount of the interest declared. This legal situation raises the question of indirect and consequential damages. It was not the intention of the authors of CMR to allow compensation for damage, of all kinds, even indirect or consequential. However, the establishment of a clear-cut distinction between indirect or consequential damage giving rise to compensation and damage for which such consequences were not envisaged would have gone far beyond the scope of the Convention; furthermore, it would have been very difficult to reach agreement in this area. Consequently, the provision should be interpreted as meaning that, apart from material damage directly sustained (loss sustained and loss of earnings), other compensation may be payable provided that the national law applicable in situations of this kind so provides.

The wording of the provision is perhaps not altogether felicitous. Instead of saying in paragraph 2 "independently of the compensation provided for in articles 23, 24 and 25", it would have been better to refer to compensation (up to the amount of the interest declared and equal to the damage proved) "which may exceed the compensation provided for in articles 23, 24 and 25".

Article 27

205. Five per centum is neither a maximum nor a minimum rate of interest. This provision is a derogation from any rule of national law which provides for a different rate.

206. With regard to the rate from which the interest is to accrue, the provision refers first to the claim provided for in article 30, paragraph 1, and more particularly to the date on which the claim has been sent by the claimant. The question of the date to be considered as the date on which legal proceedings were instituted is, however, determined according to the procedural law of the State of the court seized with the case.

207. The wording does not seem to indicate the date from which interest is to accrue if the consignee, in accordance with article 30, paragraph 1, makes only an oral claim in connexion with apparent damage. If such a legal act is regarded as having no effect so far as interest is concerned, interest will therefore start to accrue, on the basis of a claim, only if the claim is made again in writing and if this repetition of the claim, in turn, has no legal effect in the context of article 30, paragraph 1.

208. Paragraph 2 relates both to the case of calculation of compensation based on amounts that are expressed in foreign currency (article 23, paragraphs 1, 2 and 5) and to the case of conversion of the "germinal" franc (article 23, paragraph 3). On the question of the value of the "germinal" franc, however, some comments have already been made in paragraph 191 above.

209. The substance of the rule is closely similar to the ideas expressed in the European Convention on the Place of Payment of Money Liabilities, which is, however, much more detailed. Article 27, paragraph 2, simplifies matters by assuming that payment will always be made in the currency of the country in which it is requested. In the case of voluntary payment at the place at which payment is required, paragraph 2 can be applied without any great difficulty, apart from the problems which arise from the existence of different rates, i.e. an official rate and a free-market rate; in this case, it would seem that payment must inevitably be based on the official exchange rate.

210. If the compensation is the subject of a court decision or arbitral award, and if in this decision or award the defendant is ordered to pay a sum expressed in the national currency of the country in which the proceedings have taken place (and not the equivalent of a sum expressed in foreign currency or in "germinal" francs - an equivalent to be calculated at the rate of the place and date of payment), certain changes in relationships between the currencies may still take place after the decision or award has been rendered and before the actual payment (voluntary or enforced) has been made. When the value of the currency used in the decision or award drops, the claimant may require an additional payment; the applicable procedural law will determine whether the claim is admissible under the enforcement proceedings or whether further proceedings on substance are required. If, on the other hand, the value of the currency used in the decision or award increases before the actual payment, the defendant cannot be allowed to benefit by paying less, because he is precluded from taking advantage of his own delay in making payment. If the defedant pays compensation in a third State, the currency of that third State must also be converted into the currency in which the compensation specified in the decision or award has been expressed.

Article 28

211. In some legal systems, extra-contractual liability is absorbed within contractual liability, while in other systems these two forms of liability are regarded as coexistent, so that the claimant can base his case on the form of liability which he believes to be most advantageous to him. Extra-contractual liability is usually a liability for a wrongful act, but it may also be objective liability deriving from the particular capacity or activity of a person (for example, the owner or licence-holder in the case of a vehicle).

212. Article 28 covers two possibilities: it applies first to claims by a person who may base his rights on CMR, but whose claim, under the applicable law, may also take an extra-contractual form. When such a person invokes extra-contractual liability, he must not be allowed to bypass the provisions of CMR, which were prepared for the purpose of protecting the carrier. Article 28 also applies to claims by persons who are not able to enforce the rights established by CMR against the carrier (see paragraph 147 above) - for example, to claims by a principal who has used the services of a forwarding agent in cases where the latter's rights have not been assigned to him and the applicable law does not provide for legal assignment.

213. Article 28 permits the carrier to avail himself, against all such persons, of the provisions of CMR which exclude his liability, or which fix or limit the compensation due. This article does not refer to the provisions concerning the period of limitation, and indeed a reference to those provisions was unnecessary, since article 32 applies in general to any legal proceedings arising out of carriage under CMR and, therefore, to proceedings concerning extra-contractual liability.

214. Paragraph 2 serves not only to protect the servants or agents of the carrier and other persons for whose acts or omissions he is responsible but also, in the final analysis, to protect the carrier himself, since he may, particularly for economic reasons, be obliged ultimately to pay compensation for damage for which his servants are liable.

215. Article 28 is not applicable to claims other than those brought against the carrier and the persons for whom he is responsible under article 3 and which are based on loss, damage or delay.

Article 29

216. The list of provisions of which the carrier or, in the case of paragraph 2, the persons referred to in article 3 cannot avail themselves, is intentionally different from the list in article 28. On the one hand, there is no reference to the rules concerning determination of damage, though these rules are also applicable when the carrier or the persons for whom he is responsible have committed a default of the type referred to in article 29; on the other hand, the rules concerning the burden of proof which are contained in chapter IV and more precisely in article 18, paragraph 2, are included. The inclusion of these latter provisions will only rarely have any practical effect. When it is found that the

damage has been caused by a default of the type referred to in article 29, there is seldom any possibility for a presumption that the damage has been caused by one of the circumstances listed in article 17, paragraph 4. But the wording of the provision will in any case prevent the carrier from availing himself of such a presumption that there is an additional cause of damage which may lead to an apportionment of liability (article 17, paragraph 5).

217. Provisions of this kind are to be found in almost all conventions on private law in the field of transport. Unfortunately, the formulation precisely describing the default which, in addition to wilful misconduct (dol), makes it impossible for the carrier to avail himself of relief from, or limitations on, liability differs from convention to convention and from draft to draft. The existence of article 37 of CIM, 1952, which speaks of wilful misconduct or gross negligence, (dol ou faute lourde) did not prevent CMR from following article 25 of the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, despite the fact that the wording of article 25 had already been amended by the Hague Protocol of 28 September 1955, before CMR was opened for signature. The main reason for choosing the formulation "equivalent to wilful misconduct" was that some representatives in the Ad hoc Working Party had stated that, in their law, the division of the concept of "faute" into "faute légère" and "faute lourde" was unknown; and it was therefore feared that some countries might find it difficult to accept CMR if it followed CIM and included the notion of gross negligence (faute lourde).

218. Even in the context of national laws, it is very difficult to say when default (faute) is "equivalent to wilful misconduct". The principle culpa lata dolo aequiparatur is already found in Roman law, although some writers believe that it was introduced only by the Romanists of the Middle Ages, for the reason that wilful misconduct could rarely be proved. In respect of liability, some legal systems nowadays link the evaluation of the circumstances of an act with the question whether the act has been committed by wilful misconduct (dol) or gross negligence (faute lourde) or simply by minor negligence (faute légère). In other sytems, "faute" does not seem to include the notion of wilful misconduct, or wilful misconduct appears to be assimilated only to "faute intentionnelle". The term "faute intentionnelle" is used in cases where somebody acts recklessly or acts deliberately without taking the requisite care, but without at the same time directly intending to cause damage either. Without researching the matter in depth, it would seem from the decisions hitherto rendered on article 29 that the notion of default equivalent to wilful misconduct is generally regarded as designating gross negligence (faute lourde).

219. With regard to the reference to the law of the court or tribunal seized of the case, the question arises once again as to whether this reference is to the entire law of the court or tribunal concerned or merely to the substantive rules. There are several pointers in favour of the second answer - for example, the difference between the wording of this provision and that of article 28, paragraph 1 ("under the law applicable"), the parallel with article 32, paragraph 3 (see para. 267 below), and the intention of the authors, which was not to ensure that a particular law was actually applied but to designate a criterion which could help in establishing and measuring the gravity of a "faute".

220. Article 29 does not mention the provisions concerning the period of limitation, since article 32, paragraph 1, contains special rules for cases of wilful misconduct or default equivalent to wilful misconduct.

221. The protection afforded to the agents or servants of the carrier under paragraph 2 must not exceed the protection afforded to the carrier himself. This may give rise to some difficulties for the carrier (see para. 214 above), which should however be accepted on grounds of equity.

Article 30

222. The reservations referred to in this article should not be confused with the claims mentioned in article 32, paragraph 2 (see paras. 262-263 below). In the reservations referred to here, it is not yet necessary to make specific claims for compensation; it is necessary only to indicate the damage found. The description of the damage need not be extremely detailed; however, it cannot, for example, be validly confined to a mere statement of "loss" or "damage".

223. The reservations must be sent to the carrier or his agents or servants, and the person who has delivered the goods should be regarded as authorized to receive the reservations. On the other hand, a reservation addressed, for example, to the sender will have no legal effect.

224. The time of delivery is the time at which the goods pass from the custody of the carrier to that of the consignee and at which the latter has an opportunity to carry out a summary examination of their apparent condition. At that time both the carrier and the consignee or their respective agents or servants are usually present; and oral reservations may thus be made. Paragraph 4 does not refer to reservations concerning apparent loss or damage, since these do not have to be made within a time-limit but at a particular time.

225. The public holidays which are not included in the seven day time-limit for reservations concerning loss or damage which is not apparent are determined according to the law of the place of delivery.

226. As already stated (see para. 222 above), the reservation must contain at least a brief indication of the damage referred to. A reservation addressed to the carrier without such particulars, and with the intention solely of entering a reservation before the expiry of the time-limit, is not admissible and will therefore have no effect.

227. The consignee has seven days in which to make a reservation in the case of loss or damage which is not apparent. Reservations made by telex or cable must be assimilated to reservations made in writing. A reservation in writing must be posted within the time-limit, but it need not arrive before the expiry of the time-limit; it is for the claimant to prove the date of posting.

228. It is perfectly in order for the consignee to make a reservation immediately at the time of delivery, only orally, for loss or damage which could not be revealed by a summary inspection and which may therefore be considered as loss or damage which is not apparent. Since an oral reservation calls for an immediate act, it is more onerous for the consignee than reservations sent to the carrier in writing within seven days. Also, it may be said, in this case, that the consignee - for example because he had special equipment, - was in a position to make the reservations at the time of delivery itself and that, for him the damage was therefore apparent. Reservations made orally must in this case suffice.

Taking delivery without making any reservations within the meaning of paragraph 1 leads merely to the presumption that the goods have been delivered in the condition described in the consignment note. The consignee or any other persons entitled to the goods do not thereby lose their rights, since the presumption may be rebutted by proof to the contrary.

229. This last rule does not apply if, in the case provided for in paragraph 2, the condition of the goods has been duly checked by the consignee and the carrier, the loss or damage is not apparent and reservations have not been sent in writing within seven days; in that case, the right would lapse.

230. When no consignment note has been issued (which does not make CMR inapplicable), taking delivery of the goods without reservations leads to the presumption that the carrier has delivered the goods in the condition they were in when he took them over. Both the condition of the goods when he took them over and their condition on delivery will then need to be proved by the party wishing to establish any legal consequences.

231. The purpose of the checking by the consignee and the carrier, as provided for in paragraph 2, is to establish the nature and scope of the damage that has actually occurred but not the cause of the damage. The checking can be done in any form, but the party availing himself of it must be able to prove that the checking has taken place and that it produced the result alleged by that party.

232. Oral reservations are not admissible in the case of delay in delivery. Unlike the seven day time-limit mentioned in paragraphs 1 and 2, Sundays and public holidays have to be included in calculating the time-limit of 21 days.

233. The dies a quo is not counted, but the dies ad quem is; none of the time-limits referred to in article 30 are exclusive of both of these days.

234. Paragraph 5 enunciates a principle but does not impose any penalty on parties who do not observe it.

Article 31

235. The jurisdiction listed in paragraph 1 (a) and (b) replace those specified in national legislations; resort to the latter jurisdictions is therefore excluded.

236. The literature and court decisions show some surprising misunderstanding regarding the significance of the CMR rules on jurisdiction. It would seem to be advisable, therefore, to explain the system in greater detail. With regard to the scope of application of CMR, article 1, paragraph 1, sets aside any rule of private international law of the contracting States (see paragraph 42 above); and, just in the same way, in the case of legal proceedings concerning carriage subject to CMR, article 31, paragraph 1 replaces any rule of contracting States regarding international jurisdiction. Hence, it would be completely wrong to believe that, in the case of such legal proceedings, the internal (procedural) rules of private international law could attribute competence to the courts or tribunals either of the State whose private international law one may wish to apply or of another State, and that article 31, paragraph 1 should apply only when the State in question is a contracting State.

237. Nationality and domicile do not in any way affect the application of paragraph 1. The same is true of any other ties, with the exception of those expressly mentioned in sub-paragraphs (a) and (b).

238. Paragraph 1, like the whole of article 31, applies not only to actions based on the CMR rules of substantive law but to any legal proceedings arising from carriage of goods under the Convention. This is true, for example, of the extra-contractual claims discussed in connexion with article 28 and of claims by the carrier with regard to freightage.

239. The article does not apply, however, to actions brought against the carrier to secure performance of a contract of carriage or the payment of damages when carriage has not yet commenced. Article 31 does not apply, either, to claims by third parties against the carrier arising from traffic accidents or damage caused to their vehicles

or goods, even when such damage has been caused by goods carried by the carrier's vehicle and when carriage of the said goods is subject to CMR. When the carrier has incurred expenses on behalf of the person entitled to dispose of the goods and those expenses are not directly related to the carriage - for example, if he has paid Customs duties on the goods - article 31 is not applicable to the legal proceedings which might arise, therefrom, since these proceedings will not be based on the transport operation.

240. Paragraph 1 provides for two categories of jurisdiction - namely, jurisdiction established by stipulations between the parties and jurisdiction based on other criteria. The parties are still free to use the latter jurisdictions, which may never be eliminated by a stipulation or by the designation of another jurisdiction. Such a stipulation would, moreover, be null and void under article 41, as would a stipulation designating jurisdiction in a non-contracting State.

241. CMR contains no provision regarding the form required for an agreement designating jurisdiction. Appreciation of the form is therefore left to the national law. It will be noted that the question as to whether, in this context, reference should be made to the law of the State whose jurisdiction has been specified by the parties, or to the law of the place where the agreement of the parties has been concluded, is controversial.

242. Entry, in the consignment note, of the designation of jurisdiction (by virtue of article 6, paragraph 3) - or the absence of such an entry - has no consequences in law, but merely value as evidence. The jurisdiction agreed upon between the principal and the carrier is binding on all parties whose rights derive from the contract of carriage, for example the consignee.

243. Very often, paragraph 1 (a) is wrongly interpreted. It is taken to mean that any agency through which the contract of carriage was made can serve as the basis for the jurisdiction specified. However, it is essential to take into consideration the word "was", which relates both to the branch and to the agency; and the branches and agencies must therefore be branches or agencies of the carrier. The provision does not settle the question whether "principal place of business" means the statutory or actual place of business; and the absence of an answer to this question may lead to differing interpretations in contracting States.

244. Since the article applies only in the case of carriage which has at least commenced (see para. 239 above), "the place where the goods were taken over", as mentioned in paragraph 1 (b), means the place where the goods were actually taken over and not the place at which the parties had intended to hand over the goods to the carrier.

245. It was not the intention of the authors of the Convention to permit actions to be brought before the courts or tribunals mentioned in paragraph 1 (a) and (b) only in cases where the national law - apart from CMR - itself provided that they were competent. The situation, on the contrary is that CMR compels contracting States to place their courts or tribuanls at the disposal of the parties in cases covered by sub-paragraphs (a) and (b), on the understanding that it is for the national law to determine which court or tribunal will be competent ratione materiae and ratione loci.

246. Paragraph 2 contains rules governing both actions pending and the effects of judgments already entered, even if they have not yet become final. The scope of application is the same as for paragraph 1. The action must be the same action, i.e. it must relate to the same claim; but it is not necessary that in the fresh proceedings the same parties should appear as plaintiff and defendant respectively. Thus, where payment is required of the defendant in one State, the defendant cannot refer to the court or tribunal of another State for the purpose of having that court or tribunal establish that payment is not due to the plaintiff of the earlier proceedings.

247. Despite the allusion to the possibilities of enforcement in the State in which the fresh proceedings are brought, paragraph 2 must also be applied to judgments of nonsuit. There are two reasons for this: first, paragraph 4, provides, although indirectly, for the enforcement of orders of payment of costs by the nonsuited plaintiff and, in this context, it would be illogical if no effect was given to the decision on the substance. Again, the entire system of paragraph 2 would be meaningless if a nonsuited plaintiff could indefintitely go on bringing his action before other courts or tribunals in the hope of finding one which would, in the end, decide in his favour.

248. The exception whereby fresh proceedings are admissible when the judgment entered by the court or tribunal of the first State cannot be enforced in the State in which the fresh proceedings are brought is important - in the light of paragraph 3 - particularly in cases where the State of the first proceedings was a non-contracting State. But it might also happen that, in one contracting State, grounds for refusal based on public policy could also be advanced against judgments entered in another contracting State: in this connexion, see paragraph 252 below. It will be necessary to consider, in the second State and on the basis of its law,

whether the first judgment - or, if no judgment has yet been entered, the judgment that can be expected from the court or tribunal of the non-contracting State - can be enforced (or recognized, see para. 247 above). In considering this question, due account must be taken of any conventions in force between the two States, and also of the relevant provisions of the law of the State in which the fresh proceedings are brought. Particularly in cases where the proceedings have not yet been completed in the State of the first court or tribunal seized, consideration of this question will often be difficult since it is impossible to foresee whether the proceedings in the first State will - from the point of view of the second State - have any defects which preclude recognition or enforcement. The spirit of the provision is that the second action should be dismissed unless it seems extremely probable that the proceedings in the first State will have defects of this kind.

249. The broad framework of paragraph 1 also covers reciprocal enforcement of judgments. These judgments need not, from the standpoint of substantive law, be based on CMR, but may also be founded on the provisions of the national law. The judgment need not be final, but it must be enforceable. This brings us back again to the difficulties mentioned in connexion with paragraph 2 concerning judgments of nonsuit (see para. 247 above) - judgments which, in some legal systems, are not regarded as enforceable. Such judgments will nonetheless have to be recognized, but instead of requiring that they should be enforceable, it will be necessary to require that they are final.

250. The formalities referred to in paragraph 3 may, depending on the national law, consist of a complex exequatur procedure, or of a fairly simple formulation to be appended to the judgment in response to a request. It may also be that no formality is prescribed in a contracting State in which foreign judgments are ipso jure assimilated as judgments by the national courts in cases where the requirements of an international convention are complied with.

251. Re-opening the merits of the case is prohibited, so that the only questions which can be examined are whether the legal proceedings genuinely related to carriage subject to CMR, whether the provisions of paragraph 1 concerning jurisdiction were respected, and whether the judgment is enforceable in the State of origin. In the case of a judgment of nonsuit, proof that the judgment is final may be substituted for proof that it is enforceable (see para. 249 above).

252. It may be asked whether the express provisions of paragraph 3 still leave open the possibility of recognition or enforcement of a judgment on grounds of public (international) policy. It may also be asked whether this possibility of refusal can

be completely excluded by a treaty. Even if one takes the view that exclusion of this possibility would be incompatible with the sovereign rights of contracting States it will nevertheless be necessary to bear in mind the spirit of the Convention and to restrict the application of this clause to the minimum; it is, in any case, seldom invoked in the field of trade law.

253. The term "judgment" in paragraphs 2, 3 and 4 should certainly not be taken literally. The designation given to decisions to which the obligation of recognition and enforcement applies is immaterial, provided that the decisions are rendered on the substance of the case. It may therefore be concluded that it is also necessary to recognize and enforce decisions rendered in the form of a "summons to pay", an "order to pay", etc., which are more closely akin to "judgments by default" than to decisions of the two strictly defined categories of judgments which, as the article itself states, paragraph 3 does not apply. Needless to say, settlements confirmed by order of a court will have to be recognized and enforced only if, in the State on whose territory they have been concluded, they constitute enforceable acts.

254. The absence of a rule requiring that judgments which are to be recognized and enforced must be final is only of minor importance in the light of the exception provided for in the case of interim judgments because, in some legal systems at least, interim enforcement applies in principle precisely in the case of judgments which have not yet become final. On the other hand, the exception concerning awards of damages in addition to costs makes it clear that awards of costs must, as such, be recognized and enforced.

255. Paragraph 5 follows, in simpler form, article 18 of the Hague Convention relating to Civil Procedure, dated 1 March 1954. It is precisely this simplification which has broadened its scope, since nationals of other contracting States cannot be compelled to furnish security, even in cases where such security may under the domestic procedural law, be required of nationals of the State of the court or tribunal seized, if they are resident or have their place of business in that State. However, it cannot be inferred from the provision that it exempts nationals of the State of the court or tribunal who are resident in that State from the obligation to furnish security; it is not the task of CMR to deal with the procedural rights of individuals before the courts or tribunals of their own State.

256. The obligation not to exercise jurisdiction in certain cases (paragraph 2), to recognize and enforce foreign judgments (paragraphs 3 and 4) and to exempt some persons from the obligation to furnish security judicatum solvi exist alongside those which the contracting States have, in procedural matters, agreed to assume on the basis of other international treaties. Similarly, such obligations do not affect any more liberal rules of national laws on those matters.

Article 32

257. The scope of application of this article is identical to that of article 31 (see paras. 238 and 239 above), with the exception of paragraph 2 which applies only to claims against the carrier (claims of all kinds, provided that they relate to carriage under CMR).

258. Paragraph 1 does not prejudge the question whether the period of limitation should be taken into account only at the request of one party, as is the case in most European legal systems, or whether it may have effect automatically. Paragraph 4 may not be used as an argument that the time-limits specified in paragraph 1 are final time-limits, since the contrary has been demonstrated with at least the same force by paragraphs 2 and 3.

259. With regard to wilful misconduct and default considered as equivalent to wilful misconduct according to the law of the court or tribunal seized of the case, reference should be made to paragraphs 217 to 219 above.

260. Paragraph 1(c) applies to all cases in which the claim is not based on the total loss of the goods, or on the partial loss of or damage to the goods delivered, or delay in delivery. The time-limit - namely, one year plus three months or three years plus three months - applies, for example, not only to all claims by the carrier concerning the carriage charges but also to all actions brought for partial loss or damage where delivery has not taken place but where the goods have been returned to the sender. The period of three months is not equal to ninety days but should be calculated as three calendar months.

261. In cases where the goods have first been refused by the consignee and then accepted by him, the wording of paragraph 1(a) indicates clearly that the period of limitation begins to run from the date of actual delivery.

262. The suspension of the period of limitation provided for in paragraph 2 applies solely as between the claimant and the carrier and cannot be invoked by third parties. In the case of a claim by a person who is not entitled to dispose of the goods either on the basis of CMR or on the basis of the law applicable to the claim which arises from the contract but which is not governed by CMR, the person in question must prove to the carrier that he is acting on behalf of a person entitled to dispose of the goods; otherwise, the carrier is not obliged to take the claim into consideration. The fact that the rights in question relating to the carriage are assigned to the claimant after he has entered his claim does not have the effect of suspension.

263. The thirty days mentioned in paragraph 1(b) and the three months mentioned in paragraph 1(c) relate to the period before the time at which the period of limitation begins to run; these periods are not therefore periods of limitation and can not be suspended or interrupted. If a claimant submits a claim before the actual period of limitation begins to run, it would however be unfair to deny him the effects provided for in paragraph 2; however, these effects must then be regarded as occurring from the moment when the actual period of limitation has begun to run.

According to the last sentence of paragraph 1, which relates to the entire paragraph and not only to sub-paragraph (c), the dies a quo does not count, but the dies a quem does; the time-limits are not exclusive of both these days.

264. The third sentence of paragraph 2 indicates that the decisive moment from which the period of limitation is suspended is the time when the claim arrives at the carrier's address and that the decisive moment for the end of the suspension is the time when the reply and the returned documents arrive at the claimant's address.

265. Unlike the reservations referred to in article 30, the claim must contain a specific request. It need not necessarily be accompanied by the consignment note.

266. For the suspension to be terminated, the carrier must have rejected the claim (wholly or in part) and returned the documents attached to it. However, the carrier will be obliged to return only the documents which he assumes the claimant wishes to have returned; such a wish is not to be presumed in the case of simple copies or photocopies (uncertified copies) of documents of which the originals are retained by the claimant. The fact that the carrier has not returned such documents does not prolong the suspension.

267. The terms "suspension" and "interruption" cover all situations in which the period of limitation is either prolonged by a certain time, or is prevented from running or ceases to run. During the negotiations in the Ad Hoc Working Party, the question whether the reference to the law of the court or tribunal seized of the case should be taken to include the conflict-of-laws rules, or only the substantive rules, was never discussed. It was only during subsequent negotiations on a similar draft convention (draft Convention on the Carriage of Goods by Inland Waterway), in a Working Party consisting for the most part of the same representatives, that a large majority was in favour of referring only to the substantive rules of law of the court or tribunal seized of the case. The representatives in question then declared that they interpreted article 32, paragraph 3, of CMR in the same way.

268. Paragraph 4 is rather severe on a person who has lost his rights because of the period of limitation. However, this provision is designed to ensure that the respective rights deriving from the carriage of goods are determined as soon as possible. After the period of limitation has elapsed, these rights may no longer be exercised by way of counter-claim or set-off even though they may have been set off, before the period of limitation, against the rights which are the subject of the action; in States where the period of limitation is taken into consideration only at the request of a party, this provision leads to a legal curiosity, in that it makes it possible or even necessary to counter one set-off by another set-off.

Article 33

269. This provision should not be read literally in the sense that a valid arbitration agreement can be stipulated only at the actual moment of the conclusion of the contract of carriage. An arbitration agreement may certainly also be the subject of a separate agreement between the parties, but where the arbitration agreement is stipulated before the occurrence of the event giving rise to the rights submitted to arbitration, it must be in conformity with the conditions of article 33. However, the principle of the free disposal by the parties of the rights they have already acquired implies that, after the damage has occurred, arbitration agreements may be concluded without any restriction whatever.

270. The scope of application of article 33 is not as broad as that of articles 31 and 32; it deals only with legal relations arising out of the contract of carriage and not with legal proceedings concerning extra-contractual liability. Article 33 governs all rights arising out of the contract, but is still nevertheless applicable to claims concerning carriage charges and - unlike articles 31 and 32 - to claims brought against a party who has not fulfilled other obligations arising from the contract (for example, against the carrier who has not even appeared to take over the goods).

271. An arbitration agreement which did not comply with the requirements of article 33 would be null and void under the terms of article 41, paragraph 1. In cases where the arbitration agreement is in conformity with article 31 but where, instead of the provisions of the CMR, the court or tribunal subsequently applies those of a particular national legislation or acts ex aequo et bono, any party may request that the judgement should be set aside on the grounds - probably admitted under all national legislations on arbitral procedure - that the arbitrators have exceeded their powers.

272. It would be senseless to stipulate that CMR applies to questions which are not governed by it. Thus, an arbitration agreement is not subject to the conditions of article 33 where it is restricted to certain disputes that might arise from the contract of carriage in areas not governed by CMR.

273. With regard to the form of arbitration agreements, reference should be made to the comments in paragraph 241 above on the subject of the form of an agreement designating the jurisdiction of a State.

Article 34

274. On the basis of experience hitherto acquired, the provisions of chapter VI are not of any great practical importance. It seems that, where contracts of carriage are concluded between a carrier who has assumed responsibility for the entire carriage and a sub-carrier employed for part of the carriage, the usual practice is to issue separate transport documents in which the main carrier is referred to as the sender or consignee. For the application of article 34 and the following provisions of chapter VI, it is however necessary that a single consignment note should be issued, i.e. a consignment note which is accepted by each successive carrier and is handed over, as appropriate, to the following carrier. In this regard, the issuance of a consignment note has a constitutive effect (see para. 65 above).

275. It was proposed in the ECE Ad Hoc Working Party that the provision should state that successive carriers are responsible only in cases where they enter their names and addresses on the second copy of the consignment note which accompanies the goods. The reason for this proposal was that at the time of the conclusion of the contract of carriage, the use of other carriers was perhaps not yet envisaged and that the other carriers who perform the carriage only over part of the journey, and possibly even within national frontiers, may not have known that, by the mere fact of accepting the consignment note, they were subject to CMR. The majority of the members were, however, of the view that acceptance of the CMR consignment note at the same time as the goods should be sufficient to make the carriers aware that the Convention was applicable, if only because the consignment note in accordance with article 6, paragraph 1(k), must contain the statement that carriage is subject to the provisions of CMR. However, the first carrier alone will remain liable, to the person entitled to dispose of the goods, for the absence of the paramount clause (article 7, paragraph 3).

276. Where a person concludes a contract of carriage as a carrier but does not himself perform any part of the carriage, the provisions of articles 34 et seq. cannot be

applied. In such a case, relations between the principal (the sender) and the main carrier are nevertheless subject to CMR. The same is true with regard to relations between the main carrier and the sub-carrier, provided that the partial carriage is international carriage coming within the scope of application of CMR. In such a situation, where the entire carriage is performed by one or more sub-contractors, articles 34 et seq. cannot even be applied where the consignment note is transmitted by each carrier to the next carrier.

277. The consequences of the situation described in article 34 are dealt with in articles 35 to 40.

Article 35

278. The formalities provided for in paragraph 1 (handing over of a receipt to the previous carrier and entry of the name and address of the new carrier on the consignment note) do not establish the rights and obligations which the succeeding carrier acquires by becoming a party to the contract, through the acceptance of the goods and the consignment note from the previous carrier, in accordance with article 34. It is, however, possible that the succeeding carrier who has not completed the said formalities might be the subject of penalties where difficulties of proof arise as a result. Such penalties are not, however, provided for by CMR and may arise only from a national law.

279. Application of article 8, paragraph 2, presupposes the application of paragraph 1 of the same article. According to article 35, paragraph 2, article 9 is also applicable to relations between successive carriers. On the other hand, article 8, paragraph 3, is not mentioned; thus, the previous carrier cannot require the succeeding carrier to check the weight of the goods or their quantity otherwise expressed or the contents of the packages. Any possible reservations by one of the successive carriers will have effect only with respect to the previous carrier and not with respect to the person entitled to dispose of the goods.

Article 36

280. Article 34 makes all successive carriers responsible; nevertheless, the person entitled to dispose of the goods cannot bring an action against these successive carriers. The first carrier has assumed responsibility for the entire carriage; it must therefore be possible for the person entitled to dispose of the goods to bring an action against him. On the other hand it would be unfair to deny to a consignee, who is perhaps acquainted only with the last carrier, the right to bring an action against him. Lastly, it is clear that it was also necessary to permit an action to be brought against the successive carrier on whose portion of the carriage the damage occurred.