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Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]

Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its thirteenth session (A/CN.9/552)

Note by the Secretariat

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* The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.

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Introduction

1. During its thirteenth session, Working Group III considered a number of provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] as contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.32). The Secretariat was requested to prepare a revised draft of those provisions considered, based on the deliberations and conclusions of the Working Group during its thirteenth session as contained in the report of that session (A/CN.9/552). The provisional redraft of those articles appears in sections I to IV below.

I. Chapter 5: Liability of the carrier (continued)

A. Liability of performing parties (draft article 15, continued)

2. The Working Group considered draft paragraphs 15(5) and (6) at paragraphs 10 to 17 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft paragraphs 15(5) and (6) would read as follows:

Article 15 bis[1]

"1.[2] If the carrier and one or more maritime performing party(ies) are liable[3] for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several [, such that each such party shall be liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may take against other liable parties,][4] but only up to the limits provided for in articles 16, 24 and 18.

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[1] As decided at para. 17 of A/CN.9/552, draft paras. 5 and 6 were moved out of draft article 15 into a provision of their own and are now in draft article 15 bis.

[2] This provision, formerly draft para. 15(6) (in A/CN.9/WG.III/WP.32), was renumbered as draft para. 15(5) (see para. 12, A/CN.9/WG.III/WP.36) and has now been renumbered as draft para. 15 bis (1).

[3] In footnote 82 of A/CN.9/WG.III/WP.36, it was noted that the scope of this para. should be limited to maritime performing parties. Since this draft para. has now been moved to a separate draft article, for greater clarity, the phrase "If more than one maritime performing party is liable" as it appears in A/CN.9/WG.III/WP.36, has been changed to "If the carrier and one or more maritime performing party(ies) are liable". The Working Group may also wish to consider whether this clarification alleviates the concerns raised at para. 14 of A/CN.9/552, but for the concern regarding set-off, which is considered in draft para. 15 bis (3) below.

[4] As decided at paras. 12 and 17 of A/CN.9/552, the phrase in square brackets has been added for clarification of the meaning of "joint and several liability". However, the Working Group may wish to consider the use of "joint and several liability" in numerous international instruments, including: para. 10(4) of the Hamburg Rules; para. 27(4) of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, as amended by the Protocol of Modification of 1999 ("CIM-COTIF 1999"); para. 4(5) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 ("CMNI"); para. 30(3) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by protocols in 1955 and 1975 ("Warsaw Convention"); and para. 36(3) of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 ("Montreal Convention").

"2.[5] Without prejudice to article 19, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument.[6]

["3. Where a claimant has made a successful claim against a non-maritime performing party for the loss of, damage to, or delay in delivery of the goods, the amount received by the claimant shall be set off against any subsequent claim for that loss, damage or delay that the claimant makes against a carrier or a maritime performing party.]"[7]

B. Delay (draft article 16)

3. The Working Group considered draft article 16 at paragraphs 18 to 31 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 16 would read as follows:

"Article 16. Delay

"1. Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon[8] or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage.[9]

"2. [Unless otherwise agreed,][10] If delay in delivery causes [consequential][11] loss not resulting from loss of or damage to the goods carried and hence not covered by article 17, the amount payable as compensation for such loss shall be limited to an amount equivalent to [one times][12] the freight payable on the

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[5] This provision, formerly draft para. 15(7) (in A/CN.9/WG.III/WP.32), was renumbered as draft para. 15(6) (see para. 12, A/CN.9/WG.III/WP.36) and has now been renumbered as draft para. 15 bis (2).

[6] As noted at paras. 13 and 17 of A/CN.9/552, the general principle on aggregate claims expressed in para. 6, now para. 15 bis (2), was considered appropriate.

[7] As decided at paras. 14 and 17 of A/CN.9/552, a revised draft has been prepared, pending further discussion regarding the preparation of a uniform rule on set-off, or of leaving the issue to domestic law. See also *supra*, note 3.

[8] As suggested at para. 20 of A/CN.9/552, the phrase "the time expressly agreed upon" in para. 5(2) of the Hamburg Rules may be more accurate than "any time expressly agreed upon".

[9] As decided at paras. 22 and 24 of A/CN.9/552, the carrier should be liable for delay in delivery based on fault, and the default rule at the end of the para. was retained without square brackets.

[10] As decided at paras. 28 and 31 of A/CN.9/552, the words "[Unless otherwise agreed]" were inserted at the beginning of para. 2, but the issue should be reassessed in the context of draft article 19 and chapter 19.

[11] As suggested at para. 25 of A/CN.9/552, clarification of the wording regarding consequential damages has been suggested. The Working Group may also wish to consider the following alternative to the first sentence of draft para. 16(2):

"Compensation for physical loss of or damage to the goods caused by delay shall be calculated in accordance with article 17 and, unless otherwise agreed, compensation for economic loss caused by delay shall be limited to an amount equivalent to [one times] the freight payable on the goods delayed."

[12] As decided at paras. 26, 27 and 31 of A/CN.9/552, the words "[one times] the freight payable on the goods delayed" were inserted in para. 2 for continuation of the discussion at a future session.

goods delayed. The total amount payable under this provision and article 18(1) shall not exceed the limit that would be established under article 18(1) in respect of the total loss of the goods concerned."

C. Interpretation of the instrument (draft article 2 bis)

4. As noted at paragraph 31 of A/CN.9/552, the Working Group decided that a provision along the lines of paragraph 7(1) of the United Nations Sales Convention should be introduced into the text to promote uniformity in the interpretation of the draft instrument. Such a provision might appropriately be placed in chapter 1 of the draft instrument on "General provisions", provisionally numbered article 2 bis, and could read as follows:

"Article 2 bis. Interpretation of the instrument

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

D. Calculation of compensation (draft article 17)

5. The Working Group considered draft article 17 at paragraphs 32 to 37 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 17 would read as follows:

"Article 17. Calculation of compensation

"1. Subject to article 18, the compensation payable by the carrier for loss of or damage to the goods shall be calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 7.[13]

"2. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.[14]

"3. In case of loss of or damage to the goods, the carrier shall not be liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except where the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of article 88."

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[13] As decided at paras. 33 and 34 of A/CN.9/552, improved consistency with draft article 7 was sought by replacing the phrase "according to the contract of carriage" with the phrase "established in accordance with article 7".

[14] As noted at paras. 35 to 37 of A/CN.9/552, the Working Group approved the substance of paras. 2 and 3.

E. Limits of liability (draft article 18)

6. The Working Group considered draft article 18 at paragraphs 38 to 51 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 18 would read as follows:

"Article 18. Limits of liability

"1. Subject to article 16(2) the carrier's liability for loss of or damage to [or in connection with][15] the goods is limited to […] units of account per package or other shipping unit, or […] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

"[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused][16] during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.]

"3. When goods are carried in or on a container,[17] the packages or shipping units enumerated in the contract particulars as packed in or on such container are deemed packages or shipping units. If not so enumerated, the goods in or on such container are deemed one shipping unit.

"4. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State."[18]

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[15] As decided at paras. 41, 42 and 44 of A/CN.9/552, the phrase "or in connection with" has been placed in square brackets in this and other draft articles for further examination and discussion.

[16] As decided at para. 47 of A/CN.9/552, draft para. 2 was maintained in square brackets, and reference to delay in delivery was introduced in square brackets, for future discussion.

[17] As noted at para. 49 of A/CN.9/552, the definition of "container" in draft article 1 might need to be further considered to ensure that it covered pallets.

[18] As noted at para. 51 of A/CN.9/552, the Working Group approved the substance of para. 4.

F. Amendment of limitation amounts (draft article 18 bis)

7. As noted at paragraphs 40 and 44 of A/CN.9/552, the Working Group requested that the Secretariat prepare draft provisions for a rapid amendment procedure for the limitation on liability, using existing models and proposals. Article 18 bis, proposes such a provision, but the Working Group may wish to note that the placement of similar provisions in other instruments has been in the "Final Clauses" chapter at the end of those instruments:

"Article 18 bis. Amendment of limitation amounts[19]

"1. Without prejudice to the provisions of article **[20], the special procedure in this article shall apply solely for the purposes of amending the limitation amount set out in paragraph 18(1) of this instrument.

"2. Upon the request of at least one quarter[21] of the States Parties to this instrument[22], the depositary[23] shall circulate any proposal to amend the limitation amount specified in paragraph 18(1) of this instrument to all of the States Parties[24] and shall convene a meeting of a Committee composed of a representative from each of the States Parties to consider the proposed amendment.

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

"4. Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.[25]

"5. When acting on a proposal to amend the limits, the Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.[26]

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[19] The proposal is based upon the amendment procedure set out at article 23 of the 2002 Protocol to the Athens Convention ("Athens Convention") and at article 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade ("OTT Convention").

[20] This reference would be to an article on "Revision and amendment", which would appear in the "Final Clauses" chapter of the instrument, but which has not yet been drafted or discussed. See, e.g., article 32 of the Hamburg Rules or article 16 of the Hague Rules.

[21] Para. 23(2) of the Athens Convention refers to "one half" rather than "one quarter" of the States Parties.

[22] Para. 23(2) of the Athens Convention includes the phrase "but in no case less than six" of the States Parties.

[23] The Secretary-General of the United Nations would be named as the depositary in an article entitled "Depositary" in the "final Clauses" chapter of the instrument.

[24] Para. 23(2) of the Athens Convention also includes reference to Members of the International Maritime Organization.

[25] Para. 23(5) of the Athens Convention is as follows: "Amendments shall be adopted by a two-thirds majority of the States Parties to the Convention as revised by this Protocol present and voting in the Legal Committee … on condition that at least one half of the States Parties to the Convention as revised by this Protocol shall be present at the time of voting."

[26] This provision has been taken from para. 23(6) of the Athens Convention. See, also, para. 24(4) of the OTT Convention.

"6. (a) No amendment of the limit under this article may be considered less than five[27] years from the date on which this instrument was opened for signature nor less than five years from the date of entry into force of a previous amendment under this article.

"(b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this instrument increased by six per cent per year calculated on a compound basis from the date on which this instrument was opened for signature.[28]

"(c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this instrument multiplied by three.[29]

"7. Any amendment adopted in accordance with paragraph 4 shall be notified by the depositary to all States Parties. The amendment shall be deemed to have been accepted at the end of a period of eighteen[30] months after the date of notification, unless within that period not less than one fourth[31] of the States that were States Parties at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and shall have no effect.

"8. An amendment deemed to have been accepted in accordance with paragraph 7 shall enter into force eighteen months after its acceptance.

"9. All States Parties shall be bound by the amendment, unless they denounce this convention in accordance with article **[32] at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

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

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[27] Paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in this draft para. should be seven years rather than five years.

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

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

[30] Paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

[31] The OTT Convention specifies at para. 24(7) "not less than one third of the States that were States Parties".

[32] This reference would be to an article on "Denunciation" of the draft instrument, which would appear in the "Final Clauses" chapter of the instrument, but which has not yet been drafted or discussed. See, e.g., article 34 of the Hamburg Rules or article 15 of the Hague Rules.

G. Loss of the right to limit liability (draft article 19)

8. The Working Group considered draft article 19 at paragraphs 52 to 62 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 19 would read as follows:

"Article 19. Loss of the right to limit liability

"Neither the carrier nor any of the persons mentioned in article 14 bis[33] shall be entitled to limit their liability as provided in articles [16(2),] 24(4), and 18[34] of this instrument, [or as provided in the contract of carriage,][35] if the claimant proves that [the delay in delivery of,][36] the loss of, or the damage to [or in connection with][37] the goods resulted from a personal[38] act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result."

H. Notice of loss, damage or delay (draft article 20)

9. The Working Group considered draft article 20 at paragraphs 63 to 87 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 20 would read as follows:

"Article 20. Notice of loss, damage, or delay

"[Variant A of paragraph 1[39]

"1. The carrier shall be presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice[40] of loss of or damage to [or in connection with][41] the goods, indicating the general nature of such loss or damage, shall have been given [by or on behalf of the consignee] to the carrier or the performing party who delivered the goods before or at the time of the

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[33] As noted at para. 62 of A/CN.9/552, the reference to "article 15 (3) and (4)" was updated to read "article 14 bis".

[34] As decided at paras. 55 and 62 of A/CN.9/552, the suggestion to add a reference to article 17 might need to be further discussed in the context of chapter 19.

[35] As decided at paras. 56, 57 and 62 of A/CN.9/552, the words "[or as provided in the contract of carriage,]" were maintained in square brackets pending further discussion on chapter 19.

[36] As decided at paras. 54 and 62 of A/CN.9/552, the issue of delay should be further discussed on the basis of a revised draft to be prepared by the Secretariat to reflect the proposals with respect to draft paragraph 16(1) at paras. 20 to 24 of A/CN.9/552, and at para. 3, *supra*.

[37] See *supra*, note 15.

[38] As decided at paras. 59, 60 and 62 of A/CN.9/552, the word "personal" was retained without square brackets.

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

[40] Draft article 5 of the draft instrument states that the notice in, *inter alia*, draft para. 1 may be made using electronic communication; otherwise, it must be made in writing.

[41] See *supra*, note 15.

delivery, or, if the loss or damage is not apparent, within [three working days][seven days][seven working days at the place of delivery][seven consecutive days][42] after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection[43] of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.]

"[Variant B of paragraph 1[44]

"1. Notice of loss of or damage to [or in connection with] the goods, indicating the general nature of such loss or damage, shall be given [by or on behalf of the consignee] to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days] [a reasonable time] [___working days at the place of delivery] [___consecutive days] after the delivery of the goods. [A court [may] [shall] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 14 (1).] Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.]

"2. No compensation shall be payable under article 16 unless notice of loss due to delay[45] was given to the carrier[46] within 21 consecutive days following delivery of the goods.

"3. When the notice referred to in this article[47] is given to the performing party that delivered the goods, it shall have the same effect as if that notice was given to the carrier, and notice given to the carrier shall have the same effect as a notice given to a maritime performing party.[48]

"4. In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for

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[42] As decided at para. 75 of A/CN.9/552, the words "a reasonable time" were deleted from the original version of paragraph 1, and "seven days" was inserted into that para., with the words "seven consecutive days" and "seven working days" appearing as alternatives in square brackets.

[43] It was suggested in para. 95 of A/CN.9/525 that "concurrent inspection" or "*inspection contradictoire*" might be more appropriated phrases in a civil law context.

[44] As decided at para. 75 of A/CN.9/552, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant B of para. 1 is the text at para. 66 of A/CN.9/552.

[45] As decided at paras. 77 and 81 of A/CN.9/552, the phrase "loss due to delay" was substituted for the phrase "such loss".

[46] As decided at paras. 78 and 81 of A/CN.9/552, the phrase "the person against whom liability is being asserted" was replaced by "the carrier".

[47] As noted at para. 82 of A/CN.9/552, "in this chapter" was corrected to "in this article".

[48] As decided at paras. 83 and 84 of A/CN.9/552, a revised draft of this paragraph has been prepared and the phrase "the performing party that delivered the goods" has been changed to "a maritime performing party."

inspecting and tallying the goods and must provide access to records and documents relevant to the carriage of the goods."[49]

I. Non-contractual claims (draft article 21)

10. The Working Group considered draft article 21 at paragraphs 88 to 91 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 21 would read as follows:

"Article 21 Non-contractual claims

"The defences and limits of liability provided for in this instrument and the responsibilities imposed by this instrument apply in any action against the carrier or a maritime[50] performing party for loss of, for damage to, [or in connection with][51] the goods covered by a contract of carriage and delay in delivery of such goods, whether the action is founded in contract, in tort, or otherwise."[52]

II. Chapter 6: Additional provisions relating to carriage by sea

A. Liability of the carrier (draft article 22)

11. The Working Group considered draft article 22 at paragraphs 92 to 99 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised versions of the subparagraphs of draft article 22 would be subsumed back into article 14 and would read as follows:

"Article 22[53]

"1. Notwithstanding the provisions of article 14(1) the carrier shall not be liable for loss, damage or delay arising or resulting from fire on the ship, unless caused by the fault or privity of the carrier.[54]

"2. Article 14 shall also apply in the case of the following events:

"(a) Saving or attempting to save life or reasonable measures to save or attempt to save property at sea;[55]

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[49] As decided at para. 87 of A/CN.9/552, para. 4 has been maintained, with the word "[for]" deleted and the phrase "must provide" maintained, without square brackets.

[50] As decided at paras. 89 and 91 of A/CN.9/552, the word "maritime" was added.

[51] See *supra*, note 15.

[52] As decided at paras. 90 and 91 of A/CN.9/552, the potentially repetitious nature of para. 15(4) and draft article 21 will be further considered in the next iteration of the draft instrument.

[53] As decided at paras. 93 and 99 of A/CN.9/552, a revised draft merging draft article 22 with draft article 14 will be prepared following further discussion of draft article 14 anticipated during the fourteenth session of the Working Group.

[54] As decided at paras. 94, 95 and 99 of A/CN.9/552, the fire exception has been maintained and will be further considered in the context of draft article 14.

[55] As decided at paras. 96 and 99 of A/CN.9/552, the words "saving or attempting to save property at sea" were replaced by the words "reasonable measures to save or attempt to save property at

"(b) Reasonable attempts to avoid damage to the environment;[56]

"(c) Perils, dangers and accidents of the sea or other navigable waters."[57]

B. Deviation (draft article 23)

12. The Working Group considered draft article 23 at paragraphs 100 to 102 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 23 would read as follows:

"Article 23. Deviation[58]

"[Variant A[59]

"1. The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life [or property] at sea[, or by any other [reasonable] deviation].

"2. Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this instrument.[60]]"

"[Variant B[61]

"1. The carrier is not liable for loss, damage, or delay in delivery caused by any deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.

"2. To the extent that a deviation constitutes a breach of the carrier's obligations under a legal doctrine recognized by national law or in this instrument, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of an ocean-going vessel.

"3. To the extent that a deviation constitutes a breach of the carrier's obligations, the breach has effect only under the terms of this instrument. In

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sea".

[56] As decided at paras. 97 and 99 of A/CN.9/552, the phrase, "reasonable attempt to avoid damage to the environment" has been introduced.

[57] As noted at para. 98 of A/CN.9/552, there was general agreement with the rule on "perils, dangers and accidents of the sea or other navigable waters".

[58] As decided at para. 102 of A/CN.9/552, the text of draft article 23 as set out at A/CN.9/WG.III/WP.32 has been placed together with the alternative text proposed at para. 38 of A/CN.9/WG.III/WP.34 in square brackets for future discussion.

[59] Variant A is the draft article as set out at A/CN.9/WG.III/WP.32.

[60] As noted at footnote 112 of A/CN.9/WG.III/WP.32, alternative language for this para. could read: "Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument." If such language is adopted, the Working Group may wish to consider whether para. 1 is necessary.

[61] Variant B is the draft article as proposed at para. 38 of A/CN.9/WG.III/WP.34.

particular, a deviation does not deprive the carrier of its rights under this instrument except to the extent provided in article 19.]"

C. Deck cargo (draft article 24)

13. The Working Group considered draft article 24 at paragraphs 103 to 117 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 24 would read as follows:

"Article 24. Deck cargo

"1. Goods may be carried on or above deck only if

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

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

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

"2. If the goods have been shipped in accordance with paragraphs 1(a) or[62] (c), the carrier shall not be liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to paragraph 1(b), the carrier shall be liable for loss of or damage to such goods, or for delay in delivery, under the terms of this instrument without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under paragraph 1, the carrier shall be liable, irrespective of article 14, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.[63]

"3. If the goods have been shipped in accordance with paragraph 1(c), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier shall have the burden of proving that carriage on deck complies with paragraph 1(c) and, if a negotiable transport document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.[64]

"[4. If the carrier under this article 24 is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in articles 16 and 18; however, if the carrier and shipper

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[62] As decided at paras. 107 and 109 of A/CN.9/552, "or" has replaced "and".

[63] As decided at paras. 108 and 109 of A/CN.9/552, para. 2 will be discussed in greater detail in conjunction with draft para. 14 (4).

[64] As decided at paras. 110 and 111 of A/CN.9/552, discussion of para. 3 and whether it should cover third-party reliance on non-negotiable transport documents and electronic records would continue after discussion of third-party rights and freedom of contract.

[expressly][65] have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods [that [exclusively][66] resulted from their carriage on deck][67].]"[68]

III. Chapter 7: Obligations of the shipper[69]

A. Delivery ready for carriage (draft article 25)

14. The Working Group considered draft article 25 at paragraphs 118 to 123 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 25 would read as follows:

"Article 25. Delivery ready for carriage

"The shipper shall deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and[70] in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage."[71]

B. Carrier's obligation to provide information and instructions (draft article 26)

15. The Working Group considered draft article 26 at paragraphs 124 to 129 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 26 would read as follows:

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[65] As decided at paras. 112 and 117 of A/CN.9/552, "expressly" was retained in square brackets.

[66] As decided at paras. 115 and 117 of A/CN.9/552, square brackets were placed around "exclusively".

[67] As decided at paras. 113-114 and 117 of A/CN.9/552, square brackets were placed around "that exclusively resulted from their carriage on deck".

[68] As decided at paras. 116 and 117 of A/CN.9/552, square brackets were placed around para. 4, for discussion at a future session, with further study of its relationship with draft article 19.

[69] As decided at para. 129 of A/CN.9/552, titles have been proposed for the draft articles in chapter 7.

[70] As decided at paras. 119, 120 and 123 of A/CN.9/552, draft article 25 was retained, and the principle that the obligations of the shipper should be subject to the contract of carriage was maintained, but the brackets deleted. To clarify as suggested in para. 119 of A/CN.9/552, the opening phrase, "[Subject to the provisions of the contract of carriage,]" has been deleted, and the phrase ", unless otherwise agreed in the contract of carriage, and" has been added.

[71] To improve the wording as suggested at paras. 122 and 123 of A/CN.9/552, the Working Group may wish to consider alternative language for the second sentence of draft article 25: "In the event the goods are delivered in or on a container or trailer packed by the shipper, this obligation extends to the stowage, lashing and securing of the goods in or on the container or trailer."

"Article 26. Carrier's obligation to provide information and instructions

"The carrier shall provide to the shipper, on its request [and in a timely manner][72], such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 25.[73] [The information and instructions so provided shall be accurate and complete.]"[74]

C. Shipper's obligation to provide information, instructions and documents (draft article 27)

16. The Working Group considered draft article 27 at paragraphs 130 to 133 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 27 would read as follows:

"Article 27. Shipper's obligation to provide information, instructions and documents

"The shipper shall provide to the carrier [in a timely manner, such accurate and complete][75] information, instructions, and documents as are reasonably necessary for:

"(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, unless the shipper may reasonably assume that such information is already known to the carrier[76];

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

"(c) The compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 34(1)(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier."

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[72] As decided at paras. 135 to 137 of A/CN.9/552, draft article 28 was deleted and replaced by a mention in draft article 26 that the shipper should provide "[in a timely manner]" the information and instructions required, for continuation of the discussion after draft articles 29 and 30 had been considered.

[73] As decided at paras. 127 to 129 of A/CN.9/552, further consideration might need to be given to the alternative wording at para. 128 of A/CN.9/552, "unless the carrier may reasonably assume that such information is already known to the shipper".

[74] As decided at paras. 135 to 137 of A/CN.9/552, "[the information and instructions given must be accurate and complete]" has been added for future discussion. See *supra* note 72.

[75] As decided at paras. 135 to 137 of A/CN.9/552, "[in a timely manner, such accurate and complete information, instructions and documents …]" has been added for future discussion. See *supra* note 72.

[76] As decided at paras. 132 and 133 of A/CN.9/552, the current text was maintained for future discussion, but "unless the shipper may reasonably assume that such information is already known to the carrier" was added to the end of subpara. (a).

D. Draft article 28

17. The Working Group considered draft article 28 at paragraphs 134 to 137 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, it was agreed that draft article 28 would be deleted and the phrases noted in draft articles 26 and 27 in paragraph 16 above would be added in lieu of retaining draft article 28.

E. Basis of shipper's liability (draft article 29 and 30) and Carrier's liability for failure to provide information and instructions (draft article 13 bis)

18. The Working Group considered draft articles 29 and 30 at paragraphs 138 to 148 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, including consideration of the proposal to replace draft articles 29 and 30 with a single draft article as set out at paragraph 139 of A/CN.9/552, the provisional revised version of the draft articles 29 and 30 could read as follows:

"Article 29. Basis of shipper's liability

"1. The shipper shall be liable[77] for loss resulting from loss, damage [, delay][78] or injury caused by the goods, and from a breach of its obligations under article 25 and paragraph 27(a)[79], unless [and to the extent] the shipper proves that neither its fault nor the fault of any person mentioned in article 32 caused [or contributed to] the loss, damage [, delay] or injury.

[Variant A of paragraph 2[80]

"2. The shipper shall be liable[81] for loss or damage caused by a breach of its obligations under paragraphs 27(b) and (c).]

[Variant B of paragraph 2[82]

"2. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of receipt by the carrier of the marks, number, quantity and weight, as furnished by him, and the shipper shall

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[77] As decided at para. 144 of A/CN.9/552, para. 29(1) has been redrafted to mirror the provision on carrier's liability at draft para. 14(1) of A/CN.9/WG.III/WP.36. The parties to whom the shipper is liable have been deleted in keeping with draft article 14 and, as noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party as originally expressed in draft article 29 in A/CN.9/WG.III/WP.32 might need to be reconsidered later.

[78] "Delay" arises by virtue of creating a mirror provision of draft article 14, but it has been placed in square brackets since it has not been specifically discussed in the context of draft article 29.

[79] Reference to article 28 has been deleted, in keeping with the deletion of article 28 at para. 17, *supra*.

[80] As decided at paras. 142 and 148 of A/CN.9/552, a rule of strict liability was retained in square brackets in cases where the shipper failed to meet the requirements of subparas. (b) and (c) of draft article 27.

[81] See *supra* note 77.

[82] As decided at paras. 142 and 148 of A/CN.9/552, a provision similar to article III.5 of the Hague Rules should has been introduced in square brackets.

indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility under the contract of carriage to any person other than the shipper.]

"3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier shall be jointly liable to the consignee or the controlling party[83] for any such loss or damage [or injury].[84]

"Article 13 bis. Carrier's liability for failure to provide information and instructions[85]

"The carrier shall be liable[86] for loss, damage [, delay][87] or injury caused by a breach of its obligations under article 26, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person mentioned in article 14 bis caused [or contributed to] the loss, damage [, delay] or injury."

F. Special rules on dangerous goods (new draft article 30)

19. The Working Group considered the issue of dangerous goods at paragraphs 146 to 148 of A/CN.9/552, and decided that a specific provision should be inserted in the draft instrument to deal with the issue of dangerous goods based on the principle of strict liability of the shipper for insufficient or defective information regarding the nature of the goods. A provisional draft article on dangerous goods could read as follows:

"Article 30. Special rules on dangerous goods[88]

"1. 'Dangerous goods'[89] means:

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[83] As noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party might need to be reconsidered later.

[84] As decided at paras. 145 and 148 of A/CN.9/552, para. 3 of Variant B of draft article 29 (A/CN.9/WG.III/WP.32) was retained for future discussion. The Working Group may wish to consider whether this provision on concurrent causes should also mirror the corresponding para. in draft article 14.

[85] As decided at paras. 140 and 148 of A/CN.9/552, aspects of draft articles 29 and 30 dealing with the liability of the carrier have been called "article 13 bis", for possible placement after draft article 13, at the end of draft "Chapter 4. Obligations of the carrier".

[86] See *supra* note 77.

[87] See *supra* note 78, but in the context of draft article 26.

[88] The Working Group may wish to note that draft paras. 30(2) to (5), taken from article 13 of the Hamburg Rules, overlap and may not be consistent with draft articles 27 and 29 regarding the shipper's obligations and liability with respect to the provision of information regarding the handling and carriage of goods, and with draft articles 12 and 14 regarding the carrier's rights and liabilities in respect of goods which may become a danger.

[89] This definition is that of "hazardous and noxious substances" taken from the International Convention On Liability And Compensation For Damage In Connection With The Carriage Of Hazardous And Noxious Substances By Sea, 1996, ("HNS Convention"). The Working Group may wish to consider whether this is an appropriate definition of 'dangerous goods', and, if so, whether subpara. 1(b) with respect to residues is relevant. For the further information of the Working Group, amendments made in May 2002 to the International Convention for the Safety

"(a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:

"(i) oils carried in bulk listed in appendix I of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;

"(ii) noxious liquid substances carried in bulk referred to in appendix II of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category A, B, C or D in accordance with regulation 3(4) of the said Annex II;

"(iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.3 of the Code;

"(iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;

"(v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;

"(vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed cup test);

"(vii)solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form;

and

"(b) Residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

"2. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

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of Life at Sea (SOLAS), 1974 Chapter VII on the Carriage of Dangerous Goods made the International Maritime Dangerous Goods Code referred to in subpara 1(iv) mandatory from 1 January 2004 (a few non-relevant provisions remained recommendatory). Also, the Working Group may wish to consider the placement of this definition, and whether it should be moved under draft article 1 "Definitions".

"3. Where the shipper hands over dangerous goods to the carrier or performing party, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or performing party does not otherwise have knowledge of their dangerous character:

"(a) The shipper is liable to the carrier and any performing party for the loss resulting from the shipment of such goods, and

"(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

"4. The provisions of paragraph 3 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

"5. If, in cases where the provisions of paragraph 3, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 14."

G. Material misstatement by shipper (draft article 29 bis)

20. The Working Group considered the inclusion of a draft article 29 bis in the draft instrument (A/CN.9/WG.III/WP.34, para. 43) at paragraphs 149 to 153 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional version of draft article 29 bis would read as follows:

["Article 29 bis. Material misstatement by shipper

"A carrier is not liable for delay in the delivery of, the loss of, or damage to or in connection with the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document."][90]

H. Assumption of shipper's rights and obligations (draft article 31)

21. The Working Group considered draft article 31 at paragraphs 154 to 158 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 31 would read as follows:

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[90] As decided at paras. 150 to 153 of A/CN.9/552, draft article 29 bis has been included in square brackets, and issues of causation and inclusion of damages for delay would be discussed at a future session. Further, draft article 29 bis could be placed in chapter 5 on the liability of the carrier.

"Article 31. Assumption of shipper's rights and obligations[91]

"If a person identified as "shipper" in the contract particulars, although not the shipper as defined in article 1(d), [accepts] [receives][92] the transport document or electronic record, then such person is (a) [subject to the responsibilities and liabilities][93] imposed on the shipper under this chapter and under article 57, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13."

I. Responsibility for subcontractors, employees and agents (draft article 32)

22. The Working Group considered draft article 32 at paragraphs 159 to 161 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 32 would read as follows:

"Article 32. Responsibility for sub-contractors, employees and agents

"The shipper shall be responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency."[94]

IV. Chapter 9: Freight

23. The Working Group considered draft chapter 9 at paragraphs 162 to 164 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft chapter 9,[95] for placement at an appropriate location in the next iteration of the draft instrument, and subject to renumbering, would read as follows:

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[91] As decided at paras. 155 and 158 of A/CN.9/552, further thought should be given to the scope of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known.

[92] As decided at paras. 157 and 158 of A/CN.9/552, "accepts" has been placed in square brackets for future discussion, together with "receives".

[93] As decided at paras. 156 and 158 of A/CN.9/552, "subject to the responsibilities and liabilities" has been placed in square brackets.

[94] As decided at paras. 160 to 161 of A/CN.9/552, the current text was maintained for future discussion, and questions regarding the interaction of this provision with paragraph 11 (2) and draft article 29 bis should be considered at a future session.

[95] As decided at para. 164 of A/CN.9/552, chapter 9 was deleted, except for draft para. 43(2) and the first two sentences of draft para. 44(1) in A/CN.9/WG.III/WP.32.

"[Article 43.

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

"(a) With respect to any liability under chapter 7 of the shipper or a person mentioned in article 31; or

"(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 45 or otherwise for the payment of such amounts.

"(c) To the extent that it conflicts with article 62.]"

["Article 44.

"1. If the contract particulars in a negotiable transport document or a[n] negotiable electronic record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee, shall be liable for the payment of the freight. This provision shall not apply if the holder or the consignee is also the shipper."]