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Transport Law

Preliminary Draft Instrument on the Carriage of Goods by Sea

Note by the Secretariat

On 30 January and 5 February 2002 the Secretariat received comments by the United Nations Economic Commission for Europe and the United Nations Conference on Trade and Development respectively. Those comments are reproduced in the annexes in the form in which they were received by the Secretariat.

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Annex I

United Nations Economic Commission for Europe (UNECE)

Comments to the UNCITRAL draft Instrument on Transport Law[1]

Prepared by the UNECE secretariat

I. Introduction

1. This paper includes three parts. The introductory remarks briefly explain UNECE involvement in the field of multimodal transport, part II summarizes the comments of the UNECE secretariat to the draft instrument on transport law presented by the UNCITRAL secretariat and part III presents some general conclusions.

2. The comments were prepared at the invitation of the UNCITRAL secretariat to be included in the background paper that will be submitted by the secretariat to the UNCITRAL Working Group on Transport Law, at its next meeting (15-26 April 2002) in New York.

3. The UNECE administers some fifty international conventions and agreements in the field of transportation, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR), the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail, etc. The UNECE is also co-author of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) together with the Central Commission for the Navigation of the Rhine and the Danube Commission. In 1998, UNECE was mandated by its member Governments (all European and Central Asian States, Canada, Israel and the United States of America) to study the possibilities for reconciliation and harmonization of civil liability regimes governing multimodal transport. Two expert groups hearings were convened in 2000, at which a large number of Governmental experts and representatives of shippers, freight forwarders, insurers, multinational companies, manufacturers, maritime, road, rail and combined transport interests participated. As a result of these hearings two trends could be clearly identified: there was a large consensus on the principle of working towards achieving more transparent, harmonized and cost-effective rules to regulate multimodal transport, but there was no agreement on the approach to be adopted towards achieving this objective and, first of all, on whether this could and should be achieved through a new Convention or through other alternative means. Experts representing mainly maritime interests as well as freight forwarders and insurance companies generally did not favour the preparation of an international mandatory legal regime on civil liability covering multimodal transport operations. However, experts representing road and rail transport industries, combined transport operators, transport customers and shippers felt that work towards harmonization of the existing modal liability regimes should be pursued urgently and that a single

[1] Annex to the document “Transport Law – Preliminary draft instrument on the carriage of goods by sea—Note by the Secretariat”, A/CN.9/WG.III/WP.21, 8 January 2002, pp. 9 ff. The draft instrument has been prepared by the Comité Maritime International (CMI).

international civil liability regime governing multimodal transport operations was required.

4. During recent discussions between the UNECE, UNCTAD and UNCITRAL secretariats, it was agreed that possible work on the desirability and feasibility of a new international legal instrument covering door-to-door issues should be undertaken with the active involvement and substantive contributions of the three United Nations Governmental organizations as well as in cooperation with other interested United Nations organizations and with the participation of all competent non-governmental organizations and industry groups.

II. Comments

(a) Mandate of work

5. The starting point for UNCITRAL's work on the draft instrument on transport law[2] can be found during the discussions on future work in the area of electronic commerce, following the adoption of the UNCITRAL Model Law on Electronic Commerce at UNCITRAL's twenty-ninth session, in 1996. The session considered a proposal to include in UNCITRAL's work programme "a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving uniformity of laws".[3]

6. It was stated during that session that "the review of the *liability regime* was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that either were not adequately dealt with or were not dealt with at all in treaties".[4]

7. The Commission decided that the UNCITRAL secretariat "should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing *the commercial sectors involved in the carriage of goods by sea*".[5] The CMI stated at the Commission's thirty-first session in 1998 that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.[6]

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[2] Also referred to hereinafter as the Instrument.

[3] UNCITRAL document A/CN.9/497 "Possible future work on transport law"—Report of the Secretary-General, para. 1 and 2.

[4] Ibid., para. 5, emphasis added.

[5] Ibid., para. 6, emphasis added.

[6] Ibid., para. 7. CMI set up a Working Group (May 1998) and an International Sub-Committee (ISC) (November 1999) to consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability. In September 2000, the CMI Executive Committee confirmed that the ISC's terms of reference should extend to considering how the instrument might accommodate other forms of carriage associated with the carriage by sea. The CMI Singapore Conference, held in

8. At its 34th session the Commission decided to establish a working group to consider issues of future work on transport law. With regard to the mandate of the working group, the Commission decided that considerations should cover initially port-to-port transport operations (including liability issues). However the working group could study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations. Depending on the results of those studies, the working group could recommend to the Commission an appropriate extension of its mandate. The Commission also agreed that the work would be carried out in close cooperation with interested intergovernmental as well as international non-governmental organisations.[7]

9. In conclusion, the mandate given concerns the revision of maritime law and is limited to port-to-port transport operations. That explains the fact that the parties invited to contribute by the secretariat were sea transport related interests.

10. The UNECE secretariat welcomes UNCITRAL's initiative to harmonise and modernise maritime transport law. With regard to the study of the desirability and feasibility of dealing with door-to-door transport operations, the UNECE secretariat supports the Commission's recommendation that this work should be carried out in close cooperation with all interested parties and is willing to actively participate in it.

(b) Scope of application of the Instrument

11. The Instrument is called draft instrument on transport law. According to the title, it does not deal with maritime transport issues in particular. According to the definition of its scope of application (Chapter 3) combined with the definition of the contract of carriage (Article 1.5) the Instrument will apply whenever a sea leg is involved. There was some discussion about the relative importance of the other modes of transport compared to the sea leg, but it was finally decided that the Instrument "should contain provisions applying to the full scope of the carriage *irrespective of whether or not the movement on land may be deemed subsidiary* to that by sea, providing carriage by sea is contemplated at some stage".[8]

12. The Instrument goes beyond maritime transport and port-to-port issues; it expands to door-to-door issues.

(c) Door-to-door transport and the network system

13. The extension of the liability coverage from the tackle-to-tackle carriage under the Hague-Visby Rules or port-to-port carriage under the Hamburg Rules to door-to-door carriage is said to respond to the reality of containerised transport of goods. According to Article 4.2.1 of the Instrument, the liability limits which, according to the explanatory notes to Article 6.7, will be drafted along the lines of the Hague-Visby Rules, shall apply in all cases of non-located damage. This means that the liability rules drafted with a view to a mere maritime transportation may extend to

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February 2001, discussed the Outline Instrument and concluded that multimodalism should be dealt with in the Instrument.

[7] UNCITRAL document A/CN.9/WG.III/WP.21 of 8 January 2002 "Transport Law—Preliminary draft instrument on the carriage of goods by sea", para. 23, pg. 8.

[8] CMI document "Singapore I—Door-to-door transport", para. 3.2, at http://www.comitemaritime.org/singapore/issue-door.html, emphasis added.

other modes of transport such as a transport by road, rail and inland waterways. Such an approach seems, however, to be questionable when the Instrument has not taken into account the views of the parties involved in other modes of transport than sea, as well as the point of view of the shippers, which finally create the transport demand. Rather the Instrument only reflects the view of the maritime transport related interests.

14. According to the comments to Article 4.2.1 of the Instrument, it is necessary to make provisions for the relationship between this Instrument and conventions governing inland transport which may apply. This Article provides for an as minimal as possible network system. The draft Instrument is only displaced where a convention, which constitutes mandatory law for inland carriage, is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of inland carriage.[9]

15. The broad scope of the Instrument may create conflict of conventions in cases where other unimodal conventions address the issue of multimodal/combined transport as well as in some narrowly defined instances. An example may be the case when a lorry transporting the goods by road is carried over part of the journey by sea (for example, from France to the United Kingdom), and the goods have not been unloaded from the vehicle and the damage has not been localised. In such a situation both CMR and the Instrument are likely to apply. Article 2 of CMR says that CMR applies to the whole carriage in this situation and Chapter 4 of the Instrument requires the Instrument to be mandatorily applicable as long as it cannot be proved where the loss or damage occurred.[10] This conflict of conventions should, however, be avoided.

16. There is certainly a need to further explore the possibilities of harmonization of the liability rules relating to a maritime transport on one hand and to an inland transport on the other hand. If rules governing the applicable law in a multimodal transport shall still be needed, further consideration should also be given to the different national solutions which exist today. Thus, the Netherlands provide in cases of non-localized damage in a multimodal transport for the applicability of the regime most favourable to the consignor. In contrast, Germany provides in cases of non-localized damage in a multimodal transport for the applicability of a single set of rules that follows mainly the CMR. However, special rules are provided for notice of loss, damage or delay and the limitation period.

17. Multimodal transport and containerised multimodal transport (intermodal transport) often involve a sea leg, but at the same time, and especially in Europe, multimodal transport involves to a major extent only inland transport modes (often referred to as combined transport). The CMI subcommittee found that although bills of lading were still used, especially where a negotiable document was required, the actual carriage of goods by sea sometimes represents only a relatively short leg of an international transport of goods.[11] Consideration should be also given to the relative economic importance of the sea leg in intermodal transport. In the view of the UNECE secretariat, if and when a clear mandate is obtained on the elaboration

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[9] UNCITRAL document A/CN.9/WG.III/WP.21 of 8 January 2002 “Transport Law—Preliminary draft instrument on the carriage of goods by sea”, para. 49, page 21.

[10] See comments to Chapter 4 of the Instrument.

[11] UNCITRAL document A/CN.9/497, para. 13.

of a multimodal transport convention, it is necessary, given the increasing integration of all modes of transport into the international logistic chain, that the new regime applies to all possible combinations of modes of transport and should not be restricted to the presence of a sea leg. It is also indispensable that representatives from all modes involved in multimodal transport, as well as from the shippers and from other interested parties be consulted and participate in the elaboration of such an instrument.

18. According to Article 6.3.1 of the Instrument liability is imposed on "performing parties"—those that perform the—contractual—carrier's "core obligations" under the contract of carriage. Where a performing party's liability is questioned directly by the cargo claimant's interests, it means that the claimant has been able to localise the loss or damage. In cases where the performing party performs the carriage preceding or subsequent to sea carriage, according to Article 4.2.1 of the Instrument, he will be subject, by virtue of the network system, to another legal mandatory regime. Quid in this case of the application of the defences provided for in Article 6.3.3 (also incorporated in 6.3.1 (a))?

(d) Carrier's liability

19. If a future instrument shall cover other modes of transport than transport by sea, a comparative analysis is needed as to the liability provisions. In most unimodal conventions, such as the CMR, the liability provisions are mandatory. The Instrument provides, however, for several opting-out possibilities. One is found in Article 4.3 (Mixed contracts of carriage and forwarding), which gives the carrier the possibility to act as an agent in respect of a specified part of the transport of goods and thereby to limit his liability to due diligence in selecting and instructing the other carrier. Another one can be found in Article 4.1.2, which gives the carrier, by contractually defining the period of responsibility, the right to restrict his liability (Articles 5.2.1 and 6.1.1). Similar provisions cannot be found in conventions such as the CMR or COTIF.

20. Moreover the carrier's exceptions are drafted merely with the view to a pure maritime transport. This can especially be seen in Articles 6.1.2 and 6.1.3 of the Instrument. The UNECE secretariat supports the view that when work begins on the elaboration of an instrument covering door-to-door transport, consideration should be given to exceptions granted under other unimodal transport law conventions as well.

III. Conclusions

21. When it comes to finding solutions for the issue of civil liability in multimodal transport, the UNECE secretariat strongly feels that further work to be undertaken in this field should not be based on the specific requirements of any particular mode of transport. Instead, it is necessary that all relevant interested parties be consulted and participate in the elaboration of such an instrument.

22. The UNECE secretariat considers it important to reconcile, in the longer term, civil liability rules for multimodal transport in a single regulation, thereby doing away with the present situation of legal uncertainty and forum shopping. Consequently it is necessary to avoid the creation of a number of multimodal

transport regulations which may even overlap. Given the special situation in maritime law regulations, the UNECE secretariat believes that UNCITRAL has taken an important step towards the revision and modernization of the law governing international carriage of goods by sea. In this context, the contributions made by CMI are significant.

23. The UNECE secretariat believes that, at this stage, the Commission should concentrate its efforts on port-to-port solutions. Coverage of door-to-door transport necessitates more studies and consultations. The Instrument as it stands does not seem appropriate for covering multimodal transport, as it does not take into consideration all necessary factors, some of which have been developed above.

24. The UNECE secretariat proposes therefore that the discussion of port-to-port issues during the forthcoming UNCITRAL Working Group on Transport Law meeting (15-26 April 2002) be separated from the discussion on door-to-door transport.

25. The UNECE secretariat has proposed to organize a joint UNCITRAL-UNCTAD-UNECE global hearing of all relevant industries and other parties interested in multimodal transport, which would assist in determining the desirability and feasibility of a new international instrument on multimodal transport contracts, including liability issues.

Annex II

Draft instrument on transport law
Comments submitted by the UNCTAD secretariat

Introduction

1. The Commission at its 34th Session in determining the mandate of the Working Group specifically provided that … "the considerations in the working group should initially cover port-to-port transport operators; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the working group's mandate … It was also agreed that the work would be carried out in close co-operation with interested intergovernmental organizations involved in work on transport law (such as UNCTAD, ECE …)".[1]

2. The involvement of UNCTAD with transport law, including both maritime and multimodal transport, goes as far back as early 1970s. The relevant areas of work include: the initial preparatory work in relation to the Hamburg Rules;[2] the preparation and adoption (under the auspices of UNCTAD) of the United Nations Convention on International Multimodal Transport of Goods 1980; the preparation jointly with the International Chamber of Commerce, of the UNCTAD/ICC Rules for Multimodal Transport documents; analysis of the implementation of multimodal transport rules[3] following a request from the UNCTAD Ministerial Conference (held in Bangkok in February 2000). More recently an Ad hoc Expert Meeting on Multimodal Transport was convened (November 2001), and following its recommendations, the secretariat intends to study the feasibility of establishing a widely acceptable new international convention on multimodal transport. The results of the study will be made available to the Working Group and we hope it would assist the Working Group in its decision.

3. In view of this background the commentary on the Draft Instrument is provided for consideration of the Working Group. It includes some general observations highlighting areas of particular concern as well as specific comments on individual provisions. Due to restrictions of time and space, the comments presented are of a preliminary nature.

General observations

4. The Draft Instrument reproduced as Annex to UNCITRAL document A/CN.9/WG.III/WP.21 is entitled "Draft Instrument on Transport Law". To a large extent, it covers matters which are dealt with in existing mandatory liability regimes in the field of carriage of goods by sea, namely the Hague-Visby Rules[4] and the

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[1] *Official Records of the General Assembly*; supplement No. 17, A/56/17, para. 345.
[2] United Nations Convention on the Carriage of Goods by Sea 1978.
[3] See document UNCTAD/SDTE/TLB/2 and Add.1.
[4] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924 (Hague Rules), as amended in 1968 and 1979.

Hamburg Rules. In addition, the Draft Instrument also contains several chapters to deal with matters currently not subject to international uniform law, such as freight and the transfer of the right of control and of rights of suit. Special attention would need to be paid to some aspects of the Draft Instrument which present particular concerns:

Substantive scope of application

5. Despite the fact that the present mandate of the Working Group does not extend beyond consideration of port-to-port transportation, the Draft Instrument contains provisions which would extend its application to door-to-door transport (see also the title: "Draft Instrument on Transport Law"). According to the definition in Article 1.5 of the Draft Instrument, contracts for multimodal transportation involving a sea-leg would be covered by the proposed regime. This gives rise to concern, as the Draft Instrument has been drawn up by representatives of only maritime interests, the Comité Maritime International (CMI), without broad consultation of parties involved with and experienced in the other modes of transportation. As a result, the proposed regime is, in substance, based on maritime concepts and existing maritime liability regimes which puts into question its suitability as a modern legislative framework to regulate liability where contracts involve several modes of transportation (e.g. air, road, rail or inland waterway carriage as well as sea-carriage).

6. The current regulatory framework in the field of international multimodal transportation is notoriously complex and no uniform liability regime is in force internationally. As a result, liability is fragmented and cannot be assessed in advance.[5] While the development of uniform international regulation in the field may be desirable, any new international liability regime would have to offer clear advantages as compared with the existing legal framework in order to succeed. Any new, but poorly designed or otherwise unsuccessful regime would only add to the current complexity without providing any benefits. The Draft Instrument does not appear to propose a solution which takes these considerations into account. It should be noted that, irrespective of the substantive merit of its provisions, the Draft Instrument does not provide for uniform levels of liability throughout all stages of a transport. Instead, it gives precedence to mandatory rules in unimodal Transport Conventions in cases where a loss or damage can be attributed to a particular stage of a multimodal transport (Art. 4.2.1). As a result of this "network" approach to liability regulation, the determination of liability issues in door-to-door transactions would continue to involve the question of which particular regime may be applicable in a given jurisdiction and in a particular case. It is difficult to see in which way this approach would provide an improvement to the present regulatory framework. The analytical commentary in this document includes considerations relevant to the text of the Draft Instrument as presented. However, it is proposed to remove from the draft the provisions extending the scope of application of the regime beyond port-to-port transportation and to restrict the considerations of the Working Group, in accordance with its mandate, to maritime transport.

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[5] For an overview over existing regulation see the Report and comparative table on *Implementation of Multimodal Transport Rules*, prepared by the UNCTAD secretariat (UNCTAD/SDTE/TLB/2, UNCTAD/SDTE/TLB/2 /Add.1).

Substantive liability rules

7. The set of substantive liability rules proposed in the Draft Instrument appears to consist of a rather complex amalgamation of provisions in the Hague-Visby and Hamburg Rules, but with substantial modifications in terms of substance, structure and text. To a considerable extent, therefore, the benefits of certainty associated with the established meaning of provisions in existing regimes have been sacrificed. This should be borne in mind when considering the desirability of including in the Draft Instrument individual provisions which have been modelled on those in existing regimes, but where the context or wording has been modified significantly. Overall, the Draft Instrument appears to adopt a new approach to risk distribution between carrier and cargo interests, with a shift in balance favourable to carriers. In contrast to the Hague-Visby and Hamburg Rules, there is little evidence of any underlying intention to protect the interests of third parties to the contract of carriage.

Regulation of matters currently not subject to uniform international law

8. Chapters 9 (Freight), 11 (Right of control), 12 (Transfer of rights), and 13 (Rights of suit) in particular deal with matters of some complexity, which are not currently regulated in any International Convention. The relevant national laws which are presently applicable in these areas are diverse and it can be assumed that there is no consensus at the international level. Against this background, any attempt at developing successful regulation needs to be made with a clear and carefully considered purpose and great attention to detail. As presented, the proposed provisions contained in the Draft Instrument do not appear to be sufficiently clear and uncontroversial to make their inclusion in a new international regime desirable. The Working Group may therefore wish to consider more generally, whether it is advisable at this stage to attempt to deal with these matters.

Structure and drafting

9. Both in text and structure the Draft Instrument is unnecessarily complex and confusing. Unfortunately, little consideration appears to have been given to the need to ensure that internationally uniform rules are easy to understand and to apply. Many of the provisions are complicated, with extensive cross-referencing. Their understanding requires considerable legal expertise and often the proposed wording leaves much scope for interpretation. In many instances, lengthy and costly litigation may be required to clarify the meaning and application of provisions. There is obvious potential for considerable national differences in the interpretation of the proposed regulation; an outcome which would clearly be undesirable. The complexity of the Draft Instrument, as currently structured and drafted, makes assessment of its potential impact as a whole difficult. Unfortunately, there is thus the likelihood that efforts to amend the text of individual provisions may in turn create new problems which may not always be apparent. In fact, it is doubtful whether a text suitable for uniform regulation and workable in practice can be agreed on the basis of the Draft Instrument as presented.

Commentary on individual provisions

NB: The commentary should be read together with the text of the relevant provisions which is reproduced in UNCITRAL document A/CN.9/WG.III/WP.21.

1. Definitions

10. The chapter providing definitions for use throughout the Draft Instrument is not coherently structured. For the sake of clarity, the parties covered by the Draft Instrument and any reference to them should be dealt with in sequence. Similarly, all definitions relating to Transport Documents and Electronic Records should appear in sequence at a suitable point. Many of the provisions are complicated and give rise to uncertainty. This is unfortunate, as the purpose of a definition is to clarify the meaning of terms. It is not clear why none of the definitions adopts the wording established in existing Conventions.

11. **Art. 1.1, Carrier**: The definition of carrier is narrow and does not make reference to parties on whose behalf a contract of carriage is made. The position of freight forwarders under the Draft Instrument is not entirely clear, as these parties are arguably covered by the definition of carrier.

12. **Art. 1.2, Consignee**: The definition is supplemented by the definition of a holder (Art. 1.12) in cases where a so-called “negotiable” transport document or electronic record has been used. The definition makes reference to a transport document/electronic record in addition to the contract of carriage. It should be noted that several transport documents as defined in Art. 1.20 may have been issued, e.g. by the contracting carrier and by different performing parties (see comment to Art. 1.20) and naming different consignees.

13. **Art. 1.3, Consignor**: The definition is restricted to a “person” that delivers goods to a carrier. No reference is made to delivery to a performing party or delivery by anyone acting on behalf of the shipper or consignee. The substantive provisions of the Draft Instrument refer to the consignor expressly only in Art. 8.1, where this party is given a right to demand a receipt upon delivery of goods to a carrier or performing party. If a consignor is identified as shipper in the transport document, the provision of Art. 7.7 becomes relevant and a number of the contracting shipper’s responsibilities may fall on the consignor.

14. **Art. 1.4, Container**: The definition of container is extremely wide and as such apt to include any unit load used to consolidate goods. The wide definition needs to be borne in mind when considering the carrier’s general right to load containers on deck (Art. 6.6.1 (ii)) which is coupled with much limited responsibility for loss of such cargo and in connection with the carrier’s right to qualify the description of the goods (Art. 8.3)

15. **Art. 1.5, Contract of Carriage**: This is one of the most central, controversial and problematic provisions of the Draft Instrument. The definition is apt to include any contract for the carriage of goods by different modes (see also the title of the Draft Instrument: “Draft Instrument on Transport Law”). Typically, a contract for door-to-door transport will not specify the different modes of transport which may be used. Whether part of the contract is carried out by sea is often a commercial

decision made by the carrier and not known to the cargo interests. Under the definition, any multimodal transport contract would be subject to the regime if part of the transport were in fact carried out by sea. As a result, most international transport contracts would potentially become subject to a regime which is essentially based on existing maritime concepts and liability regimes and has been drafted by representatives of largely maritime interests (Comité Maritime International), without consultation with representatives of the other modes of transport. The proposed wide substantive scope of application of the Draft Instrument exceeds the initial mandate of the UNCITRAL Working Group as adopted by the Commission.[6] Moreover, the Draft Instrument does not appear to provide coherent and suitable regulation for multimodal transportation (see General Observations, above). The substantive scope of application of any regime now under discussion should therefore be restricted to maritime transport and the provision in Art. 1.5 should be amended to cover only contracts for the carriage of goods by sea.

16. **Art. 1.6, Contract Particulars**: The definition needs to be considered together with Art. 8.2 which sets out the contract particulars required for inclusion in a Transport Document or Electronic Record issued by the carrier or performing party. In Art. 7.7, the Draft Instrument refers to the person identified as "shipper" in the contract particulars, although it is not clear that the definition in Art. 1.6 ("information relating to the contract of carriage or to the goods") is apt to include such information.

17. **Art. 1.7, Controlling Party**: It is not clear why the right of control is separately defined in Art. 1.18 by reference to Art. 11.2 and why the controlling party and right of control are not dealt with in sequence. For the sake of clarity, any substantive definition of the right of control and of the controlling party should be made in close sequence or be included in one provision.

18. **Art. 1.9, Electronic Record**: All definitions relating to transport documents and electronic records should, for the sake of clarity, appear in logical sequence, after the relevant parties have been defined (see comment to Art. 1.20). It should be noted that according to the second part of Art. 1.9, as drafted, any information added by the carrier or performing party subsequent to the issue of the electronic record would be considered part of the electronic record, as defined. This appears problematic, as the wide terminology used may arguably allow the carrier to include additional contractual terms after the electronic record has been issued.

19. **Art. 1.11, Goods**: The provision makes reference to goods that a carrier or a performing party "received for carriage" rather than "undertakes to carry". As a result, the definition arguably does not cover cases where there is a failure by the carrier to receive goods or, as the case may be, load cargo on board a vessel. This is undesirable and the provision should be amended accordingly. In contrast to the Hague-Visby Rules (Art. I (c)), but similar to the Hamburg Rules (Art. 1(5)) the definition of goods includes live animals and deck cargo, but special complex provisions in Art. 6.6 and Art. 17.2(a) provide for the carrier's liability (see comments there).

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[6] *Official Records of the General Assembly, Fifty-sixth session*, supplement No. 17, A/56/17, para. 345.

20. **Art. 1.12, Holder**: The concept of holder is particularly important in relation to the right of control and the transfer of rights (ch. 11 and 12), as well as the right to delivery (ch. 10). However, references to the holder are also included in other parts of the Draft Instrument (ch. 2, 9, 13).

21. **Art. 1.14, Negotiable Transport Document**: The definition should succeed any definition of the term "transport document" (Art. 1.20). As has already been pointed out by various parties during the consultation process within the CMI, the use of the term "negotiable" is problematic. The definition here proposed does not make clear what effect "consignment" of the goods "to the order of the shipper, consignee or bearer" actually has. In some legal systems, a document as defined here is truly negotiable in the sense of conferring good title (i.e. property free from any defects) to the consignee/endorsee. In other systems, such a document may not transfer more than the exclusive right to demand delivery from the carrier. In some legal systems, the notation "to order" may not be the relevant criterion for the transferability of the right

22. **Art. 1.17, Performing Party**: This complex provision is very important as it defines the parties which are subject to some of the carrier's liabilities (Art. 6.3.1) and may be sued directly by cargo interests. Covered by the definition are only parties who carry out certain of the carrier's contractual functions, namely those of carriage, handling, custody or storage of the goods and who have not been retained by the shipper or consignee or one of its agents/employees/subcontractors. There is no provision in the Draft Instrument for liability of performing parties for other aspects of the performance of the contract of carriage. This means that parties performing other functions of the carrier under the contract of carriage are not covered by the definition and thus are not subject to the liability rules in any legal action against them by cargo interests. At the same time, these parties remain entitled to the benefit of the defences and limitations of liability available to the carrier under the Draft Instrument (Art. 6.3.3). An example referred to in the explanatory note to the Draft Instrument[7] (at para. 17) is that of a security company guarding a container yard or a ship yard involved in ensuring the seaworthiness of the vessel. A cargo claimant would, thus have different remedies under different regimes, depending on which party entrusted with the performance of the contract of carriage may have been responsible for loss, damage or delay. This is a complicating factor, which may adversely affect cargo interests and may also increase costs (re: localisation of loss and legal advice on applicable regime).

23. Importantly, the provision has been drafted so as to exclude from the definition any intermediate sub-contracting carriers. Performing parties are only those actually involved in the performance, but not those who have undertaken to carry out or to procure the performance of parts of the contractual obligations of the carrier. This narrowing down of the provisions appears both arbitrary and potentially problematic. The example referred to in the explanatory note to the Draft Instrument (at para. 18) serves to illustrate this: a sub-contracting sea-carrier who has further sub-contracted the performance of its obligations would not be covered by the definition of "performing party". Whether this party would, in a recourse action by the main (head-) carrier, be subject to the regime, depends on whether (a) the subcontracted carriage was international or (b) the regime incorporated into the

[7] A/CN.9/WG.III/WP21. Hereafter referred to as "explanatory notes".

contract (see Art. 3). Its sub-contractors, however, e.g. a sea-carrier and/or a stevedore company would be performing parties under the regime and a cargo claimant would potentially have rights against these parties directly. However, the cargo claimant may not know who for instance the stevedore company engaged by a sub-contracting carrier is and/or whether this party may have been responsible for loss, damage or delay. Furthermore, the performing party may, in an action against it, be able to rely on protective provisions in its contract with another party (e.g. a sub-contracting sea-carrier) who is not under any obligation directly to the cargo claimant. A cargo claimant would not have rights under the regime against the intermediate sub-contractor who may be in a much better position to satisfy a claim (e.g. a shipowner whose ship could be arrested as security for any claim). Read in conjunction with the provisions in the Draft Instrument on carriage preceding or subsequent to sea carriage (Art. 4.2.1), mixed contracts of carriage and forwarding (Art. 4.3) and contracting out (Art. 5.2.2), it becomes clear that in many instances, it would be extremely difficult to determine who may be liable under the regime. In fact, no party may qualify as performing party.

24. The provision as drafted is extremely complicated and may create a great deal of uncertainty. If parties who have been subcontracted to carry out the carrier's contractual obligations are to be subject to the liability regime, there should be no distinction as to which functions have been sub-contracted and who actually carries out any of the sub-contracted obligations (compare e.g. Art. 1(2) Hamburg Rules, where the term "Actual Carrier" is defined). It should also be noted that due to the complexity and restrictive nature of the definition in Art. 1.17, it would often be difficult to correctly identify a responsible "performing party" within the one-year time limit for the institution of legal or arbitral proceedings (Art. 14.1). In effect, the liability of anyone as performing carrier would depend on whether a claim was brought against the right party in the right jurisdiction within the short one-year limit.

25. **Art. 1.18, Right of control**: Any reference to the right of control should preferably be included with the definition of "controlling party" (Art. 1.7). The provision in Art. 1.18, as drafted, does not contain a definition.

26. **Art. 1.19, Shipper**: Similarly to the definition of carrier, the definition of the shipper does not expressly include a party on whose behalf a contract of carriage is made.

27. **Art. 1.20, Transport Document**: It is not clear why the definition of transport document includes (a) a mere receipt, (b) a mere contract and (c) a traditional transport document functioning both as a receipt and as a contract of carriage. The provision needs to be considered particularly in connection with chapter 8. Chapter 8 deals substantively with transport documents, but does not seem to have any meaningful application in respect of documents as defined under (b), above. The definition in Art. 1.20 makes reference to a "document issued pursuant to a contract of carriage by a carrier or a performing party". It should be noted that this definition may subject different transport documents issued by various sub-contracted parties to the documentary requirements in Chapter 8. This could lead to some confusion, in particular as the Draft Instrument as currently drafted may apply to multimodal transportation (see Art. 1.5). An example could be the following scenario. A NVOC sub-contracts with a sea-carrier and two different land carriers to carry out separate segments of a door-to-door transport. The subcontracted sea-

carrier further subcontracts carriage from an intermediate port. The first sub-contracting sea-carrier (who does not qualify as a performing party under Art. 1.17) issues a transport document on behalf of the contracting carrier (NVOC). Equally, all parties falling within the definition of performing party (Art. 1.17), i.e. the sub-sub contracted sea carrier and both land carriers issue a transport document upon receipt of the goods for carriage. The definition here proposed would seem to cover all these documents, and provisions of the regime applicable to transport documents (ch. 8) would seem to be relevant in any action by a cargo claimant against any of the performing parties, although the transport documents would not be in the hands of the cargo claimant and even though the cargo claimant may not be the consignee under these documents (see Art. 1.2).

2. Electronic communication

28. **Art. 2.1**: Given that the practice of trading by means of an "electronic record" is not yet fully developed, any proposed regulation in this field needs to be looked at carefully and with a view to whether it (a) facilitates transactions and (b) takes into account security consideration which may arise. Art. 2.1 provides that the issuance and use of an electronic record may be made with "implied consent". This gives rise to some concern, in particular as evidentiary problems may arise. It would appear preferable to admit only express agreement on the issue and use of an electronic record.

29. **Art. 2.2.1**: Art. 2.2.1 provides for the substitution of a transport document with an electronic record. As drafted, the provision appears problematic, as difficulties may arise in the course of making a substitution as described. In particular, it is not clear what should happen if the holder failed to surrender a complete set of transport documents which had initially been issued.

30. **Art. 2.2.2**: Art. 2.2.2, as drafted, does not make clear what type of information needs to be included in a substitute transport document. The provisions of chapter 8, as drafted, would not seem to have any direct application to a document issued as a substitute for an electronic record. It is not clear whether, for instance where the condition of goods had deteriorated after the issue of an electronic record (and before issue of a substitute transport document) a carrier would be entitled to include a statement to qualify the condition of the goods. Also, it is not clear which date would need to be included in the substitute transport document.

31. **Art. 2.3**: Writing is not defined anywhere in the Draft Instrument (cf. Art. 1(8) Hamburg Rules).

32. **Art. 2.4**: There are concerns whether sufficient protection is afforded to third parties, who may not be familiar with the protocol (rules of procedure), which has been agreed on by the original parties, but the contents of which would not be apparent from the electronic record itself. It is not clear, why the full details of any agreed rules of procedure should not be included in or attached to an electronic record.

3. Scope of application

33. **Art. 3.1**: According to Art. 3.1, the Draft Instrument applies to all international contracts where the contractual place of receipt or delivery is in a contracting state, (a) and (b), or where the contract incorporates the regime or national legislation giving effect to its provisions (e). In (a) and (b), it is not clear why reference is made not only to the place specified in the contract, but also the place specified in the contract particulars. Where a transport document or electronic record has been issued, the contract particulars should tally with the contract (Art. 1.6) and the reference appears therefore unnecessary. The text in brackets refers to a number of additional connecting factors to trigger the application of the regime:

34. **Art. 3.1 (a), (b), Contractual ports of loading or discharge**: The application of the regime should be restricted to maritime transport only, i.e. to carriage port-to-port. However, as drafted, the provision would, together with Art. 1.5 not only provide for application of the regime to door-to-door transports, but introduce a rather arbitrary connecting factor, namely an intermediate port of loading or discharge. In multimodal transportation, the choice of mode by the carrier for individual segments of the transport should have no relevance for the application of substantive liability rules. The inclusion of this proposed connecting factor would therefore appear arbitrary and its application would increase uncertainty about the applicability of the regime.

35. **Art. 3.1 (c), Actual place of delivery**: This connecting factor gives rise to uncertainty, as it would not be clear when the carrier receives goods for carriage whether or not the regime would apply. The Hamburg Rules make reference to a similar connecting factor in Art. 2(1)(c). (N.B. outside maritime transport on board a chartered vessel, there is no room for such a connecting factor, as optional places of delivery are not normally agreed in door-to-door transactions). In current practice, optional places of discharge may be agreed in maritime contracts where goods are transported on a chartered vessel. The bill of lading may incorporate all terms of the charterparty, including the different optional ports of discharge agreed therein. Once the bill of lading has been transferred to a third party its terms, including the choice of discharge ports, are relevant to a potential cargo claimant. However, it should be noted that under the law of International Trade a seller c.i.f. or f.o.b extended services must tender a bill of lading for contract destination, therefore, a bill of lading giving as destination a choice of additional ports would usually not be acceptable e.g. under INCOTERMS or where payment is to be made by letter of credit under the UCP 500.

36. **Art. 3.1 (d), Place of conclusion of contract or issue of transport document/electronic record**: In the light of modern practices, there appears little justification for attaching significance to the place where a contract has been concluded. Moreover, both the place where a contract is made and where an electronic record has been issued may be difficult to determine in practice.

37. **Art. 3.2**: The wording used in Art. 3.2 corresponds to the wording in other Transport Conventions, such as the Hague-Visby and Hamburg Rules. In the interests of uniformity and for the avoidance of doubt, it would be desirable to also include a reference to the applicable law. This would ensure that any new Instrument applied irrespective of the law applicable to the contract or the transport document.

38. **Art. 3.3.1**: Existing mandatory liability Conventions do not apply to charterparty contracts, primarily because these contracts are, in contrast to bill of lading contracts, individually negotiated by parties of potentially equal bargaining power. Charterparties may therefore justifiably be excluded from the scope of the Draft Instrument. However, other types of contract where standard terms, issued by the carrier and not subject to individual negotiation, are used should be included.

39. **Art 3.3.2**: Despite the attempted comprehensiveness of the Draft Instrument in dealing with the right of control, transfer of rights and rights of suit, there is no indication as to the point at which a document or electronic record issued pursuant to a charterparty governs the contractual relations between carrier and holder. In the interests of certainty, this should be made clear, at any rate if the provisions in chapters 11-13 are retained. Concerning the text in brackets, see comment to Art. 3.3.1.

40. **Art. 3.4**: See comment to Art. 3.3.1.

4. Period of responsibility

41. **Art. 4.1**: The provisions on the relevant period of responsibility are of great significance, but require further consideration and should be redrafted. A clear provision defining a carrier's period of responsibility is contained in Art. 4 of the Hamburg Rules. Art. 4.1.1 of the Draft Instrument seems, at first sight to provide for a similar period of responsibility, namely "from the time when a carrier or a performing party has received the goods … until the goods are delivered …". "Delivery" is a well known legal concept (e.g. in sale contracts), which denotes voluntary transfer of possession. Although a contract may define the obligation to take receipt or to make delivery, it is evident that it is a matter of fact not contract when performance of any such obligation is completed, i.e. when receipt or delivery actually take place. However, while Art. 4.1.1 appears to state that the relevant period of responsibility covers the period from (actual) receipt to delivery, Art. 4.1.2 and Art. 4.1.3 indicate otherwise. Primarily contractual agreement, failing this customs, practices or trade usages and only as a fall-back situation actual receipt and delivery are to be relevant in determining the period of the carrier's contractual responsibility. In Art. 4.1.3, the time/location of delivery, in the absence of contractual agreement or any customs practices or usage, is defined as "discharge or unloading from the final vessel or vehicle…".

42. If, as proposed, contractual agreement on the time of receipt and delivery is permitted without any statutory guidance or limits, there is a likelihood that sea carriers would find it attractive to contract on tackle-to-tackle terms, so as to minimise their period of contractual responsibility. There is thus the potential for abuse, as sea carriers would be able to reduce their period of contractual responsibility by including a provision in their standard terms to the effect that receipt and delivery are "agreed" to coincide with loading and discharge using the ship's tackle. This potential for abuse is even greater in connection with Art. 5.2.2, which allows contractual agreement that e.g. loading and discharge of the cargo shall be the responsibility of the shipper/controlling party or consignee (see comment to Art. 5.2.2). Existing standard bill of lading forms already often contain detailed provisions defining the carrier's delivery obligation under the contract.

However, due to current international regulation (Hague, Hague-Visby and Hamburg Rules), by no means all of these clauses are effective in all jurisdictions.

43. In cases where no time/place of receipt or delivery is contractually agreed, there may be much debate and uncertainty about any applicable customs or usage and a carrier's responsibility would, under Art. 4.1.3, often end at the point of discharge from a vessel. In the context of maritime container transport, this would be a most unsatisfactory result. It is important to note that Art. 4.1.3 is also the time and location at which delivery is to be made under chapter 10 of the Draft Instrument.

44. **Art. 4.2.1, Carriage preceding or subsequent to sea carriage**: As drafted, Art. 1.5, together with Art. 4.2.1 provides for a multimodal liability regime with a network system (for localised loss or damage). The provision in Art. 4.2.1 does not appear to have any useful application if the substantive scope of coverage of the regime is restricted to maritime transport. The declared intent of this provision is to ensure compatibility of the Draft Instrument with existing Transport Conventions containing mandatory provisions. The proposed mechanism is the introduction of a network system for localised losses whereby certain provisions of any mandatory international Convention applicable to the relevant segment where loss damage or delay occur is given precedence. Both the perceived need for this provision and the problems which may arise in its operation show why the successful regulation of international door-to-door (multimodal) transport is difficult and requires great care. The proposed approach is to give some provisions of applicable international mandatory regimes precedence if a loss or damage can be localised. This approach may, however, give rise to considerable uncertainty. Whether any mandatory international liability regime applies depends on (i) identifying the stage where the loss, damage or delay occurs and (ii) identifying whether in a given jurisdiction any possibly applicable regime applies mandatorily. Once the court or arbitral tribunal where a claim is brought has identified a relevant applicable regime, only some of its provisions, as interpreted by that court or tribunal would apply to the exclusion of the Draft Instrument. In other respects, the provisions of the Draft Instrument would continue to apply. As a result, in instances where the provision is triggered, an obscure patchwork of different regimes which were not designed to complement each other would apply. There is much scope for confusion and it is likely that national courts would take radically different approaches to the question of which provisions of one or other regime are applicable and to which parties. The result may be highly unpredictable jurisprudence. The provision should be deleted.

45. **Art. 4.3, Mixed contracts of carriage and forwarding**: Art. 4.3 is of central significance, as it allows "contracting out" of the regime by way of limiting the scope of the contract. In principle, there is no objection against the freedom of parties of equal bargaining power to determine the scope of their agreement. However, in the context of contracts which are concluded on standard terms, typically issued by one party, without scope for negotiation, there is the potential for abusive practice. The provision as drafted allows "express agreement" by the parties without providing any clear mechanism to ensure that the shipper and consignee are protected against abusive practice. Much would depend on judicial interpretation of the terms "express agreement" and "specified part[s] … of the transport" in a given forum for the resolution of a dispute. In legal terminology, the expression "express agreement" denotes explicit mention of a term in the contract and thus covers all of

the small printed clauses commonly found on the reverse of a bill of lading. Even if a somewhat more restrictive approach were to be applied here, a pre-printed clause or box on the face of a document stating "it is expressly agreed that in respect of any segment of the transport not carried out on a vessel under the carrier's management and control the carrier shall act as freight forwarding agent only" may arguably be sufficient for an agreement as defined in Art. 4.3.1.

46. It would seem to be in the natural interests of a carrier to seek to restrict its responsibility in cases where a third party carries out parts of an agreed transport and there is thus considerable concern that the proposed provision would invite abusive practice. Moreover, even where a shipper were to freely enter a freight forwarding agreement with a carrier, the provision in Art. 4.3.2, as drafted, does not satisfactorily protect cargo interests:

(1) The obligation of the carrier acting as agent would be to exercise due diligence in selecting another carrier. What this means is not clear and there is no statement as to the qualities (diligent? reasonable? reputable?) another carrier would need to have. What type of behaviour would qualify as negligence in selection of a carrier? As there is no express allocation of the burden of proof, the carrier would not be responsible for breach of its obligation, unless the shipper/consignee were able to prove negligence.

(2) The carrier would be obliged to conclude a contract on "usual and normal terms" with the other carrier. What does "normal" mean beyond "usual"? At the very least, there should be an obligation to contract on "reasonable" terms (see e.g. the obligation on the c.i.f seller under INCOTERMS), which would ensure some consideration of the type of cargo carried and special needs pertaining to its transportation. However, there seems to be no reason why a carrier should not be required to contract on the terms of internationally mandatory regulation, i.e. in the case of sea carriage on the terms of the Draft Instrument.

(3) A consignee would be faced with a number of potential problems, such as the task of identifying the carrier (and the relevant jurisdiction), which is of particular concern in connection with the strict time-bar for the institution of legal or arbitral proceedings (Art. 14.1). It should be remembered that the second carrier may be a shipowner or a time or voyage charterer of another vessel (or, under the Draft Instrument as presented, even a land or air carrier). Under Art. 4.3.2, there is no obligation on the carrier, acting as agent, to obtain from another carrier a particular transport document (e.g. negotiable (transferable)) which shows certain features (receipt function), or to hand over any such document(s) to the shipper/consignee. Where goods were damaged during transhipment to another carrier, litigation would in any event often be required to resolve the question as to who was liable, under which contract and under which regime.

(4) Attention should be given to the needs arising from the use of certain transport documents in international trade e.g. the c.i.f. seller's obligation to provide the buyer with "continuous documentary cover". A transport document under which the carrier does not assume responsibility for the whole voyage may for instance not be acceptable under the UCP 500, the set of Rules currently governing most letter of credit transactions.

5. Obligations of the carrier

47. **Art. 5.1**: Art. 5.1, which sets out the carrier's obligation to carry the goods and deliver them to the consignee does not establish any particular requirements regarding the carrier's delivery obligation. This is important, as the carrier would be able to (effectively unilaterally) determine its delivery obligation. The provision should be considered in context with Art. 4.1.3 and chapter 10.

48. **Art. 5.2.1**: As noted in relation to Art. 4.1. and Art. 4.3 above, the provisions of the Draft Instrument as currently drafted allow a carrier to effectively minimise the period of its responsibility significantly. This has to be borne in mind when considering this provision. Within the period of responsibility, the carrier is, according to Art. 5.2.1, under obligations similar to those in Art. III r. 2 of the Hague-Visby Rules. Although the Draft Instrument is intended to apply to port-to-port (and, as currently drafted even to door-to-door) transportation, and the period of the carrier's responsibility should normally cover the period from receipt to delivery, the present provision makes no reference to "proper … delivery".

49. **Art. 5.2.2**: This provision is central, as it allows the carrier to contract out of certain of its obligations under the Draft Instrument. The provision raises similar concerns as the provision in 4.3, which allows the carrier to contract out of responsibility for certain parts of the transport. Currently charterparties, but not normally bills of lading sometimes allocate responsibility for loading and unloading of the cargo to the charterer who ships such cargo (FIOS or similar clauses). When considering clauses of this nature,, in particular where incorporated into a bill of lading contract on "liner terms", a distinction has to be made between contractual allocation of the responsibility for payment of the performance of certain duties and responsibility for the performance of the duty itself. FIOS clauses are not commonly used in bills of lading, and even where charterparty terms are incorporated into bills of lading it remains doubtful whether under current international regulation (Hague-Visby Rules) a third party bill of lading holder (consignee) would be bound by such incorporated term. In English law for instance, there is no clear authority to this effect and an argument can be made that any such agreement would reduce the carrier's liability under the Rules and thus be null and void under Art. III r. 8 Hague-Visby Rules (see e.g. the South African decision The MV Sea Joy 1998 (1) S.A. 487).

50. In contrast to Art. 4.3, the provision as drafted does not even require an "express agreement" (whatever this may mean, see comment to Art. 4.3 above), but would clearly allow a carrier to include a general standard term to this effect in the small print of any transport document, binding the shipper, consignee and controlling party. As has already been pointed out by some commentators during consultations within the CMI, in practical terms, the provisions in Articles 4.3 and 5.2.2 of the Draft Instrument effectively allow a carrier to contract out of all liability except the actual ocean voyage after loading and before discharge. A transport document may, for instance state that the carrier acts as agent only for the shipper and consignee as regards (i) carriage from an inland point to the ocean terminal and carriage from the ocean terminal to the point of destination, (ii) arranging stevedoring services upon loading and discharge, (iii) arranging for terminal services upon loading and discharge. Moreover, in these circumstances, even a carrier who in fact carried out these functions himself would appear to be exempt from liability under the provision in Art. 6.1.3 (ix) unless a cargo claimant were able to prove negligence on the part of the carrier (note the reversed burden of proof).

The approach of "laisser faire", which is apparent throughout the Draft Instrument neither aids international uniformity, nor appears to take into account the legitimate interests of shippers and consignees, particularly in developing countries (see also comment to Art. 6.3.2(a)).

51. **Art. 5.3**: This provision purports to allow the carrier to refuse to carry and, if necessary, destroy the cargo. It needs to be read in conjunction with Art. 6.1.3.(x), which exempts the carrier from liability unless the cargo claimant is able to prove negligence of the carrier or a performing party. Note that Art. 5.3 as drafted makes no reference to rights of a performing party, but Art. 6.3.1 (a) extends the rights of a carrier generally to performing parties during the period in which they have custody of the goods. See also Art. 7.1 and 7.6 which deals with the shipper's liability for loss, damage or injury caused by the goods.

52. In the Hague-Visby and Hamburg Rules, an equivalent (though not identical) right of the carrier is restricted to instances where (a) dangerous goods have been shipped without the carrier's knowledge or consent or (b) dangerous goods shipped with the carrier's knowledge become an actual danger. The provision as drafted makes no distinction between instances where a carrier does or does not have knowledge of the dangerous nature of the cargo. Dangerous cargo, which is defined in Hague-Visby Rules (Art. IV r. 6), but is more generally referred to in the Hamburg Rules (Art. 13), here encompasses any type of cargo, not only inherently dangerous goods. Under the draft provision, the carrier is given a rather broad discretion as to whether goods "are or appear reasonably likely to become dangerous" and may decide upon the appropriate course of action to take. As drafted, the provision does not appear to contain any safeguards against unjustified claims or behaviour by the carrier, particularly in situations where a carrier has agreed to carry potentially dangerous cargo against an appropriate price and then finds that his vessel is not in a position to carry the cargo safely. The relationship between Articles 5.3. and 5.4. is not clear and, as drafted, Art. 5.3 ("Notwithstanding the provisions of articles 5.1, 5.2, and 5.4 …") arguably allows a carrier to refuse to load or to discharge cargo which "appears reasonably likely to become dangerous", without compensation, although the carrying vessel was unseaworthy.

53. **Art. 5.4**: This provision resembles the provision in Art. III r. 1 of the Hague and Hague-Visby Rules. It imposes an obligation on the carrier to exercise due diligence in providing a seaworthy vessel. The text in brackets would extend the duty beyond the commencement of the voyage and thus make the obligation a continuous one. However, unlike existing liability regimes, the text as drafted does not expressly impose on the carrier the burden of proving the exercise of due diligence (cf. Art. IV r. 1 Hague and Hague-Visby Rules, Art. 5(1) Hamburg Rules). Under Art. 6.1.1, the carrier generally bears the burden of disproving negligence whenever an occurrence causing loss, damage or delay takes place during the relevant period of responsibility (as defined in Art. 4). However, this general rule is subject to Art. 6.1.3, which lists a number of events for which the carrier is presumed not to be at fault and imposes the burden of rebutting this presumption on the cargo claimant. See also Art. 6.1.2, which lists two apparently absolute exemptions from liability. It is not clear how the burden of proof is allocated in cases where both unseaworthiness and one of the events in Art. 6.1.2 and 3 have contributed to a loss (see also comment to Art. 6.1.3). Due to the differences in

drafting of the Draft Instrument as compared with the Hague-Visby Rules, existing jurisprudence on the seaworthiness obligation and its complex relationship to the list of exceptions (Art. IV r. 2 Hague-Visby Rules) would only be relevant to a limited extent.

54. **Art. 5.5**: Art. 5.5 gives the carrier a very broad new right to "sacrifice" goods, not contained in the Hague, Hague-Visby or Hamburg Rules, but apparently based on concepts contained in the York Antwerp Rules, a set of rules on general average distribution, which applies only if contractually agreed. Art. 6.1.3. (x) contain a corresponding presumption excluding the carrier's liability for loss, damage or delay. According to the draft text, neither the right itself nor the application of the presumption of the absence of fault are subject to the carrier exercising due diligence in providing a seaworthy vessel. It is not clear what the justification is for the inclusion of this provision, which benefits only carriers.

6. Liability of the carrier

55. **Art. 6.1.1 (Basis of liability)**: The provision in Art. 6.1.1 resembles Art. 5(1) of the Hamburg Rules. However, it should be noted that the definition of the period of responsibility differs significantly (see comment to Art. 4.1). Moreover, the wording of the provision differs in that Art. 5(1) of the Hamburg Rules states "… unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences". It may be that the difference in drafting substantively affects the required standard of care and accordingly the burden of proof a carrier would have to discharge. For instance, the corresponding provision in Art. 17(2) CMR states that the carrier is relieved from liability in cases where loss damage or delay was caused by "circumstances which the carrier could not avoid and the consequences of which it was unable to prevent". This has been interpreted as setting a standard of utmost care, which is higher than the standard of care required under the Hague or Hague-Visby Rules. It should be noted that this substantively high standard of 'utmost' care applies under Art. 7.6 of the Draft Instrument, in relation to the shipper's responsibility to the carrier for breach of any of its obligations under Art. 7(1).

56. The general liability rule in Art 6.1.1 has to be considered together with the list of exceptions in Art. 6.1.2 and presumptions of the absence of fault in Art. 6.1.3, which does not exist in the Hamburg Rules. Taken together, the provisions in Art. 5 and Art. 6 of the Draft Instrument consist of a complicated amalgamation of the corresponding Hague-Visby and Hamburg Rules provisions and some significant new elements. As a result, the benefit of legal certainty created by longstanding jurisprudence on and analysis of the Hague-Visby and (to a lesser extent) the Hamburg Rules is lost. This needs to be borne in mind when considering the merit of including individual provisions as proposed in the Draft Instrument. It may be considered advisable to delete the provisions in Art. 6.1.2 and 6.1.3 and to retain only a general rule in Art. 6.1.1, modelled on Art. 5(1) of the Hamburg Rules.

57. **Art. 6.1.2**: The text of Art. 6.1.2 (in brackets) represents two very controversial exceptions to the carrier's liability. In particular the exception under (a), which in the Hague and Hague-Visby Rules has come to be known as the nautical fault exception is unsustainable, as it exempts a carrier from liability in

cases of clear negligence on the part of his employees. This approach is without parallel in any existing Transport Convention and no justification exists for it continued availability in any new international regime. In the explanatory note to the Draft Instrument (at para. 70), the view is expressed that the exception remains justified in cases of negligence on the part of a pilot. This, however, is difficult to justify. As a matter of commercial risk allocation, one of the two parties to any contract of carriage (including charterparties) has to take responsibility for actions of the pilot. The carrier is clearly in a much better position than a shipper or consignee to take on this responsibility and to protect its interests. Traditionally, and contractually, under most standard charterparty forms, the carrier is responsible to the charterer for any actions of the pilot. There also appears to be little justification for maintaining a separate exception for fire on board a ship, with a reversed burden of proof. The carrier would be exempt from liability for losses due to a negligently caused fire, unless fault or privity at company management level could be proven by the cargo claimant. The relationship of Art. 6.1.2 to Art. 5.4 is not sufficiently clear (see comment to Art. 5.4 and 6.1.3).

58. **Art. 6.1.3**: As stated in the explanatory notes (at para. 74), the list contained in Art. 6.1.3 "represents a much modified (but in some respects extended) version of the remaining excepted perils of the Hague and Hague-Visby Rules". A matter which arises for initial consideration is whether in the light of the general rule set out in Art. 6.1.1, it is advisable to retain such a list. It should be noted that the text of the provision differs significantly from the text of Art. IV r. 2 Hague-Visby Rules. That provision contains a list of exemptions from liability, with no express indication of the relevant burden of proof in relation to the events listed in Art. IV r. 2 (c) to (p). As a result, different views have developed on whether a carrier would still be exempt from liability, if he failed to disprove negligence as giving rise to an exempting event. The provision in Art. 6.1.3 makes it clear that under the Draft Instrument, once the carrier has raised a defence, the burden of proving any negligence of the carrier would be on the cargo claimant. The relationship of this provision with the carrier's obligation regarding seaworthiness of the vessel (Art. 5.4) is not sufficiently clear, particularly as Art. 6.1.3 is expressly drafted as an exception to the general presumption of fault in Art. 6.1.1. The provision, as drafted states: "Notwithstanding … article 6.1.1, … it shall be presumed, in the absence of proof to the contrary, that neither [the carrier's] fault nor that of a performing party has caused or contributed to cause that loss, damage or delay". It is arguable that a cargo-claimant, in order to rebut the presumption, would not only need to establish unseaworthiness of the vessel as a contributory cause, but would also need to prove the absence of due diligence (i.e. negligence) on the part of the carrier/performing party. This would be in contrast to Art. IV r.1 Hague-Visby Rules, which expressly imposes upon the carrier the burden of proving the exercise of due diligence. Moreover, the general rule in Art. 6.1.1 would be deprived of much of its intended effect and its text would have to be considered to be misleading.

59. **Art. 6.1.3 (ii)**: The provision in Art. 6.1.3 (ii) is less specific than Art. IV r. 2 (g) and (h) Hague-Visby Rules. The meaning of the text in brackets is not sufficiently clear.

60. **Art. 6.1.3 (iii)**:The corresponding provision in the Hague-Visby Rules, Art. IV r.2 (i) refers to "act or omission of the shipper or owner of the goods …". The Draft

Instrument does not contain any general clause corresponding to Art. IV r. 3, under which the shipper's liability is normally dependent on fault (though there are special rules in Art. III r. 5 and IV r. 6).

61. **Art. 6.1.3 (ix)**:This important new exception/presumption needs to be considered in context with Art. 5.2.2 (see comment there). Under Art. 6.1.3 (ix), a carrier who, as "agent" of the shipper, carried out any of the carrier's functions contractually imposed on the shipper (possibly by way of a standard clause), would be exempt from liability, unless the shipper were able to prove negligence. This would, in many instances, be impossible, as the shipper does not have full access to the facts.

62. **Art. 6.1.3 (x)**: See comment to Art. 5.3 and 5.5. The second line of the text appears to contain a typographical error ("have been become") It is not clear whether the presumption is to be applicable only where the goods actually have become a danger (cf. Art. 5.3, which allows certain actions also where goods "reasonably appear likely to become" a danger). If so, the carrier's right to be exempt from liability would be similar to the position under the Hague-Visby Rules.

63. **Art. 6.1.4**: It is sensible to include a clear provision on the allocation of liability in cases where loss is due to a combination of causes. However, neither of the proposed alternatives in Art. 6.1.4 appears appropriate. The first alternative is said to be intended to have much the same effect as Art. 5(7) of the Hamburg Rules (see explanatory notes, at para. 89), but is poorly drafted. There is inconsistent use of the term "liable" ("If loss … is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable …") and it is not clear what exactly needs to be established for the provision to become relevant. The terminology "an event for which the carrier is (not) liable" does not sit well with the fact that in Art. 6.1.3 certain events are drafted as "presumptions of the absence of negligence". For instance, where a cargo was lost due to an explosion, the carrier would raise the presumption of the absence of fault in Art. 6.1.3 (iii) or (vi) and the cargo claimant would need to prove that the carrier was at fault, i.e. that the underlying cause of the loss was the unseaworthiness of the vessel and, presumably, that this was due to the carrier's negligence (cf. Art. 5.4). If this is correct, Art. 6.1.4 would be without any relevance and the *de facto* result would be contrary to the stated intention of the provision. Another example would be a case where a carrier disposes of cargo which becomes dangerous (Art. 5.3) and invokes Art. 6.1.3 (x). What exactly would a cargo claimant who thinks the vessel was unfit to carry the cargo (i.e. was unseaworthy) have to prove, given that the right in Art. 5.3 attaches "[n]othwithstanding the provisions of articles 5.1, 5.2, and 5.4", i.e. apparently irrespective of the carrier's performance of its seaworthiness obligation. If the intention of the provision is to hold the carrier liable unless it can prove the extent to which a breach was not contributed to by its negligence, the drafting of all provisions in Articles 5 and 6 needs to be carefully reconsidered.

64. The second alternative set out in the draft text of Art. 6.1.4 gives rise to particular concern. This provision appears to have been modelled after the 1999 US Senate-Bill for a new US Carriage of Goods by Sea Act and has no parallel in any existing international or national regime for the carriage of goods by sea. If adopted, the provision would change materially the established risk-allocation between carrier and cargo interests. Under all existing regimes, including the Hague, Hague-Visby and Hamburg Rules (as well as US COGSA 1936), a carrier

will only be discharged from liability if - and to the extent that - it can establish that a loss is due to an excepted peril. In the absence of sufficient evidence, the carrier will be responsible for the whole loss. As a result, the carrier is thus always responsible in cases of unexplained losses. The rationale for this and indeed for the mandatory nature of existing regimes lies in the inherent inequality of the parties contracting on bill of lading terms. Inequality exists in relation to the bargaining power of the parties; this makes the terms of the contract—usually drafted by and for the benefit of the carrier and not individually negotiated—prone to abuse. Inequality also exists in relation to access to the facts surrounding a loss and thus the available evidence in respect of a cargo-claim. In practice, it is often impossible to prove the extent to which identified causes contribute to a loss. It is in these cases, that the allocation of the relevant legal burden of proof becomes crucial: whoever bears the legal burden of proof will bear the loss in the absence of sufficient or conclusive evidence. The result of providing in cases of insufficient evidence for a 50/50 apportionment between carrier and cargo interests would be to shift the benefit of uncertainty from consignee to carrier. As evidence about the causes of a loss will, in many cases, be almost exclusively confined to the carrier's sphere of influence, a departure from established principles might also lead to a change in attitudes. Carriers might be less inclined to investigate the causes for any given loss or damage. More cynical carriers might even consciously decide that it makes commercial sense to be more casual in the exercise of their contractual obligations, if their maximum exposure, in the absence of evidence, would be limited to liability for 50% of a loss, subject to a monetary maximum. This would not seem to be desirable as a matter of policy, particularly for cargo-oriented states.

65. **Art. 6.2.1 (Calculation of compensation)**: This provision resembles part of Art. IV r. 5(b) of the Hague-Visby Rules. However, a different wording is used. Reference is made to the time and place of delivery according to the contract of carriage. This does not fully correspond to the provision in Art. 4.1.3 (see also comment there).

66. **Art. 6.2.2**: This corresponds to the approach in Art. IV r. 5(b) of the Hague-Visby Rules. An alternative solution would be to stipulate that the market value of goods is only *prima facie* relevant for the calculation, so that proof of a higher actual loss remains possible.

67. **Art. 6.2.3**: The Hague-Visby Rules do not contain a clear statement that the amount calculated as stated shall be the absolute maximum recoverable (cf. Art. IV r. 5(b)). Under the provision as drafted, there does not appear to be any scope for the recovery of any actual loss exceeding the market value of the goods (e.g. sale price, transhipment costs, additional costs for substitute purchase).

68. **Art. 6.3.1 (Liability of performing parties)**: Article 6.3 deals with the "liability of performing parties". Art. 6.3.1 is the central provision defining the rights and obligations of anyone falling within the definition of performing party in Art. 1.17. It makes clear that performing parties are treated as carriers during the period of their responsibility. However, the provision appears problematic in a number of respects:

69. Under **Art. 6.3.1 (a)**, the relevant period of responsibility is defined not by receipt and delivery of the goods, as in the case of the contracting carrier, but by the performing party's "custody" of the goods. The use of different terminology should

be avoided. A cargo claimant wishing to pursue a claim against a performing party would need to establish that a loss, damage or delay occurred while a performing party had the goods in its custody. As currently drafted, the Draft Instrument would also apply to contracts for door-to-door transportation (see Art. 1.5). Where in this context evidence of loss, damage or delay pointed to the responsibility of a land or air carrier, the "network provision" in Art. 4.2.1 might be triggered (depending on a number of factors, see comment to Art. 4.2.1). In the absence of a great deal of legal expertise, there clearly would be considerable scope for confusion as to who might be responsible under which regime. As stated earlier, the scope of application of the Draft Instrument should be restricted to maritime transport and Art. 4.2.1 should be deleted.

70. Although performing parties are engaged directly (as sub-contractors) or indirectly (e.g. as sub-contractor of a sub-contractor) by the carrier, they may not be bound by any agreement as referred to in **Art. 6.3.1 (b)** made by the carrier. As a result, a cargo claimant, who was party to such agreement with the carrier, might not be able to invoke the agreement against any performing party. This is of some concern, particularly as the Draft Instrument does not contain any provision which obliges a contracting carrier to sub-contract on certain terms. Moreover, in the light of the complex and restrictive definition of "performing party", a number of questions arise, such as with whom e.g. a sub-sub-contracting performing party would "expressly agree" any increase in responsibilities/liability, where such agreement would be recorded and who would be entitled to its enforcement.

71. **Art. 6.3.2 (a)**: Although Art. 6.3 is entitled "Liability of Performing Parties", Art. 6.3.2 deals with the responsibilities of the carrier. Under the provision, the carrier is liable for negligence on the part of performing parties (as defined in Art. 1.17) and others who perform or undertake to perform part of the contract. It is not clear why the carrier's responsibility is made "subject to Art. 6.3.3", a provision which deals with the rights of other parties.

72. The concept of "any other person" in **Art. 6.3.2 (a)(ii)** has to be considered in context with the restrictive definition of the term "performing party" in Art. 1.17. A sub-contractor, who further sub-contracts performance of part of the transport would not fall within the definition of performing party, but would be considered as "any other person" under this provision.

73. Importantly, it has to be noted that under Art. 1.17, no one retained by the shipper or consignee qualifies as "performing party". This is of particular relevance in connection with the rights currently included in draft Articles 4.3.1 and 5.2.2, which enable the carrier to contract out of certain parts of the contract or some of a carrier's obligations. In these cases, the carrier and all its sub-contractors, employees or agents would not be subject to the obligations of a "carrier" or "performing party" under the Draft Instrument. This appears to be the case even where a contracting carrier were *de facto* to carry out or supervise the performance of some functions (such as stowage), which contractually have been allocated to the shipper/consignee under Art. 5.2.2. This situation would clearly prejudice cargo interests.

74. Art. 6.3.2 (b): Article 6.3.2 (b) sets out for whose acts and omissions a performing party shall be responsible. Only those entities falling within the definition of performing party in Art. 1.17 are affected by this provision. This would

not seem to include (a) a sub-contractor of the carrier who further sub-contracts the performance of its obligations to another party, (b) the carrier if carrying out any of the functions of a carrier as "agent" of the shipper/consignee under Art. 5.2.2, (c) a party performing other functions under the contract of carriage than those referred to in Art. 1.17. The provision restricts responsibility to acts or omissions within the scope of a person's contract, employment or agency. This does not normally include illegal behaviour.

75. **Art. 6.3.3**: Art. 6.3.3 provides to whom the carrier's defences and limitations of liability are available. Importantly, parties who do not fall within the definition of performing party (see comment to Art. 1.17) and are thus not responsible under the Draft Instrument are entitled to avail themselves of any of the carrier's defences and limitations of liability. The protective provisions include particularly the one year time bar for a claim, as well as the financial liability limits and the presumptions of the absence of fault in Art. 6. 1. Apart from the carrier's servants or agents (as in the Hague-Visby Rules, Art. IVbis, r. 2), and sub-contracting performing parties, the following parties would appear to benefit from this provision: (a) a sub-contractor of the carrier who further sub-contracts the performance of its obligations to another party, (b) the carrier if carrying out any of the functions of a carrier as "agent" of the shipper/consignee under Art. 5.2.2, (c) a party performing other functions under the contract of carriage than those referred to in Art. 1.17. It is not clear why, under the Draft Instrument these parties benefit without bearing any responsibility.

76. **Art. 6.3.4**: The inclusion of a provision for joint and several liability is sensible.

77. **Art. 6.4.1 (Delay)**: The provision in Art. 6.4.1, including the text in brackets, appears sensible, as timely delivery is clearly a matter of commercial significance and the introduction of uniform liability rules in this context is as desirable as in cases of loss or damage.

78. It should be noted that Art. 4.1.3, the provision defining the time and location of delivery, makes reference to the "time … agreed in the contract". The time of delivery is one of the relevant parameters defining the carrier's period of responsibility under the Draft Instrument (see also chapter 10). Art. 6.4.1 deals with the carrier's obligation to make timely delivery in cases where a "time" for delivery has been "expressly agreed" upon. As Art. 4.1.3 and Art. 6.4.1 deal with different issues, it would appear to be advisable to revise the wording of the two provisions in order to avoid confusion about the time of/for delivery.

79. **Art. 6.4.2**: The rather complicated wording of Art. 6.4.2 establishes a separate limitation amount for losses caused by delayed delivery and "not resulting from loss of or damage to the goods and hence not covered by article 6.2". It is not entirely clear what the effect of this provision would be in a case where e.g. perishable goods have been spoilt (i.e. damaged) as a result of delayed delivery. The wording seems to imply that in these instances the cost of e.g. a lost sub-contract or alternative goods would be covered by article 6.2 (as a loss "resulting from loss of or damage to the goods"). However, the wording of Art. 6.2.3 suggests otherwise, namely that the maximum recoverable under Art. 6.2 would be the value of the goods themselves (see comment to Art. 6.2.3). The question is of some importance, due to the fact that the limitation amount for losses covered by Art. 6.4.2 is

proposed to be calculated by reference to the freight. There may be differing views as to whether this is in fact desirable.

80. **Art. 6.5, Deviation**: Article 6.5 contains a separate exemption from liability (similar to Art. IV r. 4 Hague-Visby Rules), which is additional to the list of presumptive events in Art. 6.1.3. It would be a matter of construction of the Draft Instrument whether a carrier would still be exempt from liability in cases where a deviation was made necessary by the carrier's negligence.

81. **Art. 6.6, Deck cargo**: This is an extremely complex provision which may lead to considerable confusion. While the provision is in some respects similar to Art. 9 of the Hamburg Rules, it differs significantly, both in wording and content. It appears important to juxtapose the draft provision with the situation under the Hague-Visby and Hamburg Rules.

82. The Hague-Visby Rules do not apply to cargo which "by the contract of carriage is stated as being carried on deck and is so carried", (Art. 1(c)). It should be noted that in the absence of a positive statement in the bill of lading that goods are in fact carried on deck, the Hague-Visby Rules apply and determine the carrier's liability. Under the Hamburg Rules (Art. 9), deck carriage is permitted if legally required or in accordance with trade usage or a contractual agreement, which must be referred to in the transport document. The absence of a statement to this effect is prima facie evidence of the absence of an agreement on deck carriage vis-à-vis a shipper and conclusive evidence vis-à-vis a third party who has acquired a bill of lading in good faith. Where deck carriage is permitted, the carrier is liable in accordance with the Hamburg Rules (i.e. fault-based, subject to a financial limit). Where deck carriage is not permitted, the carrier is strictly liable (i.e. even in the absence of fault) for any losses arising solely from carriage on deck. If goods are carried on deck contrary to an express contractual agreement, the carrier loses its right to limitation of liability.

83. Under Art. 6.6.4 of the Draft Instrument, deck carriage is permitted in a number of instances and different consequences attach, depending on whether cargo is carried on deck in accordance with these different "headings" or in breach of these:

(a) Deck carriage is admissible where legally required and the carrier is not liable for loss, damage or delay caused by the special risks of deck carriage. It would seem that such "special risks" would include seawater damage or loss of a container carried on deck. The Hamburg Rules do not provide a similar exemption from liability.

(b) Deck carriage is permitted where containerised goods are carried on specially fitted container decks and the carrier is liable under the provisions of the Draft Instrument. It should be noted that there is no obligation on the carrier to state in the contract particulars that the goods will be carried on deck. Moreover deck carriage of containerised cargo appears to be permitted, even if there is an express contractual agreement that the goods are to be carried under deck. Such agreement may be made in cases where the nature of the cargo requires protection from the elements, such as in the case of sensitive electronic equipment. Arguably, the carrier would be permitted to carry containerised cargo on deck despite an express contractual agreement to the contrary, but would lose the right to limit its liability in accordance with the Draft Instrument for loss or damage to the goods resulting

exclusively from deck carriage (Art. 6.6.4). There appears to be no legitimate reason for allowing deck carriage in cases of contrary agreement. A cargo claimant would bear the additional risks of such deck carriage and would only be entitled to compensation in excess of the limitation amounts if he was able to prove that a loss or damage was "resulting exclusively" from the carriage of the goods on deck. Any such compensation would, however, be calculated in accordance with Art. 6.2, which may or may not amount to full compensation for a given loss (see comment to Art. 6.2).

(c) Deck carriage is permitted where contractually agreed or in accordance with customs, usages or practices of the trade or where it "follows from other usages or practices in the trade in question". The meaning and purpose of the last category (here reproduced in quotes) is not at all clear. In cases where deck carriage is in accordance with (c), the contract particulars must state that the goods are carried on deck, otherwise the carrier bears the burden of proving compliance with (c) and, if a negotiable transport document/electronic record has been transferred to a third party acting in good faith, cannot rely on the provision. However, in view of the general liberty to carry containerised cargo on deck (see (b)), the carrier would normally not need to rely on (c) for the carriage of containerised cargo. Where (c) is relevant, i.e. where non-containerised cargo is shipped on deck in accordance with contractual agreement or trade customs/usage/practice or "following from other usages or practices in the trade", the carrier is not liable for loss, damage or delay caused by the special risks of deck carriage (see also comment to (a), above).

(d) In cases not covered by (a), (b) or (c), the carrier is strictly liable for loss damage or delay that are exclusively the consequence of their carriage on deck (see Art. 6.6.2). Again, the cargo claimant would bear the burden of proving that a loss resulted exclusively from the carriage of goods on deck. As can be seen, the provision in Art. 6.6 is extremely difficult to understand and to apply and differs from existing regulation. It should be completely redrafted, possibly using the text of Art. 9 of the Hamburg Rules as a model.

84. **Art. 6.7, Limits of liability**: The limitation amounts in Art. 6.7.1 should clearly be in excess of those established in the Hague-Visby Rules, as these were already considered to be out of date in 1978, when the Hamburg Rules were adopted. The limitation amounts in the Hamburg Rules, representing an increase of about 25% to the limitation amounts in the Hague-Visby Rules, were adopted as part of a compromise and may accordingly still be considered somewhat modest. Some consideration might be given to the limitation amounts used in other modern Transport Conventions, which are higher . It should always be possible for a carrier to agree on an increase of its liability, but, given that the text otherwise adopts the relevant wording of the Hague-Visby Rules (Art. IV r. 5(a)), it is not clear why the text here included in brackets differs from the corresponding wording in the Hague-Visby Rules (Art. IV r. 5(g)). Curiously, the right to limit under Art. 6.7.1 applies to the carrier's liability "for loss of or damage to or in connection with the goods …", while the provision on the calculation of compensation in Art. 6.2 is more restrictively worded ("loss of or damage to the goods").

85. **Art. 6.8, Loss of the right to limit liability**: Under Art. 6.8, the right to limit liability is lost in circumstances, which are expressed in more restrictive terms than in Art. IV r. 5(e) of the Hague-Visby Rules and Art. 8 of the Hamburg Rules. The relevant circumstances are described as "personal act or omission … done with the

intent to cause such loss … or recklessly and with knowledge that such loss … would probably arise". In practice, "breaking the limit" would be virtually impossible as each party (carrier, performing party, "any other person") would (a) only be responsible for personal acts of recklessness/intent, i.e. actions at company management level, and (b) only if the particular loss or damage occurring was intended or foreseeable. Moreover, relevant circumstances set out in Art. 6.8 would have to be established by the cargo claimant.

86. There is no provision equivalent to Art. 19 (7) of the Hamburg Rules, which requires the carrier to give notice of loss or damage if it wishes to make a claim against the shipper. Such a provision should be included.

87. **Art. 6.9, Notice of loss, damage or delay**: The notice period in Art. 6.9.1 corresponds to that in the Hague-Visby Rules, but is shorter than in the Hamburg Rules (Art. 19) and in other Transport Conventions, including the most recently adopted Budapest Convention on Contracts for the Carriage of Goods by Inland Waterway 2000 (Art. 23). In particular the reference to "before … the time of delivery" appears problematic. The wording in the last sentence of Art. 6.9.1 may give rise to confusion, as it is not made clear whether a notice shall be dispensable where a joint inspection has been made by a consignee and a performing party, but the claim is made against the contracting carrier. The notice period in Art. 6.9.2 is shorter than under Art. 19 (5) of the Hamburg Rules (60 consecutive days after the day when goods were handed over to consignee).

88. **Art. 6.10, Non-contractual claims**: This provision omits mention of "any other person" who may, under Art. 6.3.3 rely on the same defences as a carrier or performing party. Art. 6.10 does not refer to these persons, as, under the Instrument, they do not bear any responsibility (see Art. 6.3 and the narrow definition of "performing party" in Art. 1.17).

7. Obligations of the shipper

89. The detail of the obligations of the shipper under chapter 7 of the Draft Instrument has no parallel in existing maritime liability Conventions. Consideration may be given to adopting the relevant provisions in the Hamburg Rules instead (see Articles 12, 13 and 17 Hamburg Rules).

90. **Art. 7.1**: Art. 7.1 requires the shipper to deliver the goods ready for carriage "in accordance with the provisions of the contract of carriage". Reference to the "contract of carriage" leaves open the possibility of a carrier including onerous provisions of delivery in the contract. As drafted, the obligation relating to the condition and packing of the goods is much more detailed than the carrier's obligation of care in Art. 5.2.1. The detail of the obligation may give rise to some confusion and also to evidentiary problems.

91. **Art. 7.2**: This provision imposes an obligation on the carrier, but is contained in the Article entitled "obligations of the shipper".

92. **Art. 7.3**: The obligation set out in Art. 7.3(a) and (b) would seem to be particularly relevant in connection with the transportation of dangerous cargo. In Art. 7.3(c), it is not clear why the particulars referred to in Art. 8.2.1(a)

(i.e. description of the goods) are not mentioned. Art. 7.3 needs to be considered in context with Art. 7.5, which provides for strict liability of the shipper.

93. **Art. 7.5**: The provision establishes strict liability, irrespective of fault. This may be inappropriate, for instance where a shipper failed to provide relevant particulars under Art. 8.2.1(b), (c) for inclusion in the transport document before receipt of the goods by the carrier (as is required under Art. 8.2.1). The shipper would be strictly liable for breach of its obligation under Art. 7.4, to provide the information "in a timely manner". It is not entirely clear what the effect of the provision may be as regards liability to a consignee or controlling party. Would a shipper be liable to the consignee for providing inaccurate particulars to the carrier (e.g. because these particulars were then qualified by the carrier, thus depriving the consignee of evidence in a cargo-claim)? Would a carrier be responsible to a consignee for a shipper's failure to provide accurate particulars? The drafting of the provision leaves scope for some interpretation.

94. **Art. 7.6**: In the Hague-Visby Rules, the carrier is entitled to claim an indemnity from the shipper for losses arising (a) from the shipment of dangerous goods without the carrier's knowledge or consent (Art. IV r.6) and (b) from inaccurate particulars furnished by the shipper (Art. III r.5). The shipper's liability is in both cases commonly understood to be strict (i.e. not dependent on fault), although this is not expressly stated in the Hague-Visby Rules and there is a general rule that the shipper is normally only liable in case of fault (Art. IV r.3). There may be differing views on this matter in different jurisdictions. Under draft Article 7.6, the shipper would be liable in similar circumstances as (a), above, but also where dangerous goods had been shipped with the carrier's knowledge and consent.

95. It is not entirely clear what a breach of the shipper's obligations under Art. 7.1 triggering Art. 7.6, may consist of, other than "loss, damage, or injury caused by the goods". Normally, the carrier would not be liable to a consignee for damage to the consignee's cargo due to inherent vice, wastage, defective condition of packing or other acts or omissions of the shipper/consignee (see Art. 6.1.3 and Art. 6.1.1). Liability of the carrier towards other consignees, whose goods may have been damaged by dangerous cargo, would be a "loss [of the carrier] … caused by the goods". The same would be true for direct loss to the carrier consisting of e.g. damage to the vessel or the like. It is therefore no clear what type of loss a carrier may suffer as a result of a shipper's breach of Art. 7.1, other than the type of breach already referred to as "loss, damage or injury caused by the goods". Further clarification of this issue is required, as the shipper's liability under Art. 7.6 is fault-based, but with a reversed burden of proof and a particularly high standard of care required (similar to the standard of care in Art. 17(2) CMR, for an explanation, see comment to Art. 6.1.1). In practice, it would be extremely difficult for a shipper to discharge the burden of proof, as it would not normally have access to the full facts.

96. **Art. 7.7**: This provision extends certain obligations and rights of a contracting shipper to a party identified as shipper in the contract particulars who "accepts" a transport document/electronic record. In particular, this party would become strictly liable for a failure by the contracting shipper to provide timely and accurate particulars (see Arts. 7.5, 7.4, 7.3, 8.2.1(b) and (c)) and be subject to the very high burden of proof under Art. 7.6 for failure of the contracting shipper to comply with Art. 7.1. The person referred to in Article 7.7 is also mentioned in Art. 10.3.2

(delivery instructions where holder does not claim delivery) and may additionally be affected by the provisions of Art. 9.3.

97. There appear to be several problems with Art. 7.7. First, it is not clear what would amount to "acceptance" of the document/record and thus trigger application of the provision. Would taking receipt of or otherwise handling a transport document as agent, on behalf of the contracting shipper, be sufficient for acceptance? If so, the application of the provision would appear arbitrary. Secondly, the provision refers to "a person identified as shipper in the contract particulars". Standard clauses could be drafted which define and therefore "identify" the shipper in the contract particulars as including the consignee. See e.g. bill of lading clauses currently used, which define the "Merchant", as including, among others, the shipper, consignor, holder, consignee etc. and state that the "Merchant" bears the responsibilities of a shipper under the contract. It appears that Art. 7.7 would, to an extent, give statutory effect to standard clauses such as those mentioned. Most importantly, however, the purpose of the provision is not clear. Under Art. 7.7, a party who is not the contracting shipper would effectively be held responsible for failure by the contracting shipper to comply with its obligations. This responsibility would be in addition to that of the contracting shipper. Why this should be so is not obvious. Both the purpose and drafting of the provision may need to be reconsidered.

98. **Art. 7.8**: Under this provision, a shipper would be responsible to the carrier for acts and omissions of the shipper's "sub-contractors, employees, agents and any other person who act, … directly or indirectly, at its request or under its supervision or control …". It is important to note that under Art. 5.2.2, as currently drafted, a shipper may bear contractual responsibility for certain of the carrier's functions. In practice, the carrier may, of course, either perform these functions "as agent of the shipper" or arrange for the performance by other parties, such as stevedores etc. It is in this context, that Art. 7.8 appears problematic, as the shipper would arguably be considered responsible for acts or omissions of the carrier itself or of parties under the carrier's supervision and control. Moreover, it is not clear how the provision would work where, under Art. 7.7, a person other than the contracting shipper is stated to be responsible. This party would not have "delegated the performance of any of its responsibilities …", but may arguably be held responsible for the acts of parties to whom the contracting shipper had delegated its duties.

8. Transport documents and electronic records

99. The central purpose of any provision requiring the inclusion of certain particulars in a transport document/electronic record is to ensure there is recorded evidence of these particulars. This is of special importance where documents are negotiated in international trade and a cargo claim may be brought by a third party, who needs to prove evidence of loss, damage or delay during transport. This needs to be borne in mind, when considering the provisions in chapter 8. Unfortunately, the draft of this chapter is particularly complex and several of the provisions are difficult to understand and to apply. Although elements of the Hague-Visby and Hamburg Rules have been adopted, the wording and content of the provisions differs from existing rules. Considered in context, the draft rules appear to severely prejudice the interests of cargo claimants.

100. **Art. 8.1, Issuance of the Transport Document or the Electronic Record**: This provision requires reference to the extensive and confusing definitions in chapter 1, and appears to be in need of some further attention. Under Art. 8.1 the consignor is entitled to a transport document/electronic record upon delivery of the goods for carriage. The shipper or the party named as shipper in the transport document is entitled to a negotiable transport document/electronic record, unless this is not required according to trade practice/usage/custom or the parties agree otherwise. Importantly, an agreement that (a) no negotiable document be issued or (b) an electronic record be issued may be made "impliedly". As implied agreements may give rise to evidentiary problems, it may be preferable to permit only express agreements on both matters. It appears that it was the intention of the draftsmen of this provision that only the shipper should have a right to a "negotiable" document or electronic record, but the wording of Art. 8.1 (i), if read against the background of the definitions in Art. 1, also allows a different interpretation (note that the terms 'transport document' and 'electronic record' as defined in Art. 1.20 and 1.9 are not necessarily restricted to non-negotiable documents/records).

101. **Art. 8.2, Contract Particulars**: Art. 8.2 list a number of contract particulars to be included in the transport document/electronic record issued by the carrier. Unlike under Art. 15 (1) of the Hamburg Rules, there is no requirement to include any agreement on deck carriage (but see Art. 6.6.3) or indicate if any freight is payable by the consignee. Moreover, there is no requirement to state any agreed delivery date. For purposes of clarity, it would seem to be advisable to mention in one provision all particulars which are under the Draft Instrument required for inclusion in the "contract particulars". It should be noted that the party referred to in Art. 7.7 could indirectly be affected by Art. 8.2, which imposes an obligation on the contracting shipper. This party may be able to demand issue of a transport document under Art. 8.1 and may become liable to the carrier for inaccuracies of particulars contained in the transport document, under Art. 7.7, 7.5 and 7.3 (c).

102. It is difficult to understand why the shipper should provide the information relating to the goods under **Art. 8.2.1 (b) and (c)** before the goods are delivered for carriage. It should be satisfactory if the information is available before the document/electronic record is issued. It is also not clear why, under Art. 8.2.1 (c), the shipper needs to provide details on the weight, in addition to the number of packages/pieces or the quantity. As the shipper would be liable strictly for failure to provide the details required under Art. 8.2.1 (b) (c) accurately and timely (Art. 7.4), a shipper would be obliged to weigh the cargo, including containerised goods, in each case. Conversely, a carrier would be under no obligation to weigh containerised goods, (except where agreed prior to shipment and in writing) and could therefore always include in the transport document a qualifying clause (Art. 8.3.1 (c)), which would destroy the evidentiary value of any statement regarding the weight of a container (Art. 8.3.3). It is difficult to see why the shipper/consignee should be burdened with the cost of weighing containerised cargo, without obtaining any benefit at all. It must be noted that the carrier would normally also be entitled to qualify the statement on the contents of a sealed container (Art. 8.3.1 (b)). In the case of containerised transport, the transport document would, therefore, be often irrelevant as evidence of a loss or short delivery during the transport. In the case of non-containerised cargo, a carrier would also be entitled to include a qualifying clause, whenever it would be "commercially unreasonable" to verify the quantity or weight of the cargo (see Art. 8.3.1.(a) and

8.3.2.(a)). There may, of course be much debate about what is or is not commercially reasonable. In the bulk trade, too, the transport document would therefore be of limited value as a receipt providing evidence.

103. A provision like that in **Art. 8.2.1 (e)**, requiring the inclusion of the carrier's name and address in the contract particulars would clearly be of some help to cargo interests in identifying the contracting carrier within the short time limit for claims (Art. 14.1). However, it may be advisable to require information on the carrier's principal place of business, as this would provide the most reliable indication of where a carrier may be found.

104. **Art. 8.2.1 (f)** requires the inclusion of a date in the contract particulars. The date of shipment included in a transport document is of particular commercial significance, for instance where goods are sold on shipment terms (c.i.f, f.o.b.) in a string of contracts. In this context, it is of concern that the last alternative in Art. 8.2.1 (f) (iii) permits the inclusion of the date of issue of the transport document/electronic record, instead of the date of receipt or shipment of the goods. By itself, the date of issue is of only limited relevance. Any transport document/electronic record should include the date of (a) shipment of the goods or, as the case may be (b) receipt of the goods (with a possibility of converting the document into a "shipped" record upon loading of the goods onto a vessel, should this information be required).

105. **Art. 8.2.3, Signature**: Art. 8.2.3 (b) states the relevant signature requirements in cases where an electronic record has been issued. It is not clear, why the definition of "electronic signature" differs from the definition in Art. 2(a) of the UNCITRAL Model Law on Electronic Signatures, which was adopted in 2001. It should be noted that in Art. 8.2.3 (b) electronic signature is said to indicate "authorisation of the electronic record", rather than "approval of the information contained in" the electronic record (as under the definition in the UNCITRAL Model Law on Electronic Signatures). Whether any substantive difference in regulation was intended is, however, not clear.

106. **Art. 8.3.1, Circumstances under which the carrier may qualify …:** There appears to be a particular problem with the drafting of Art. 8.3.1 (a). Under (ii) of the provision, the carrier is given the right to substitute any information provided by the shipper which it considers inaccurate. The structure of the provision suggests that in these circumstances too, the introductory sentence of Art. 8.3.1 would apply and allow the carrier to include a qualifying clause. This is, however, evidently unjustified and cannot be the intention of the provision. As regards the operation of the provision in Art. 8.3.1 (c), please note the concerns expressed in the comments to Art. 8.2.1.

107. **Art. 8.3.2, Reasonable means of checking**: Under Art. 8.3.2 (b), the carrier is presumed to have acted in good faith when issuing a transport document/electronic record containing qualifying clauses. In practice, it would be clearly very difficult for a (third party) cargo claimant to prove that a carrier had not acted in good faith. The reversed burden of proof may arguably invite abuse, as an irresponsible carrier would effectively be free to ignore the Instrument's conditions for including a qualifying statement in the transport document/electronic record.

108. **Art. 8.3.3, Prima facie and conclusive evidence**: The purpose of this provision, which is based loosely on Art. III r. 4 of the Hague-Visby Rules, is to

preserve the evidentiary value of the issued document/record in a cargo claim. This is of particular importance where a third party consignee, with no connection to the initial shipper, may have no other evidence available of what was delivered to the carrier for transport. The practical effect of this provision, however, would be minimal, in view of the other provisions in this chapter, considered in context.

109. **Art. 8.4.2, Failure to identify the carrier**: Art. 8.4.2 contains an important provision safeguarding the ability of a cargo claimant to identify the carrier and thus to commence a claim in the correct jurisdiction within the short and strict time limit (Art. 14.1). The provision establishes a presumption that the registered owner of a vessel carrying the goods is the carrier. The provision is necessary, in particular where a carrying vessel operates under a charterparty and a charterer may be the contracting carrier. However, it is not clear why the registered owner should be able to defeat the presumption if the ship was under a bareboat charter. It is correct that under a bareboat charter, the registered owner is not involved in the management of the vessel and therefore would not wish to be regarded as carrier. However, in the interests of effective protection of the consignee's legal rights to pursue a cargo claim, it would seem to be vital to ensure that one party may be held to account if the contracting carrier cannot be identified. If the presumption in Art. 8.4.2 can be defeated, the rights of the cargo claimant depend effectively on whether the bareboat charterer has any assets. Moreover, the bareboat charterer may itself dispute being the contracting carrier and the claimant would be left in the same position as if no presumption applied at all. Even worse, by that time, any claim against the true contracting carrier (e.g. a time-charterer) would very likely be time-barred (see Art. 14). The provision is only applicable in cases where a "shipped" transport document has been issued. There is no equivalent presumption applicable in cases where goods are delivered for shipment to a container terminal and are lost or damaged before shipment. The short and strict time-bar applies, however, equally in these cases.

9. Freight

110. The chapter dealing with freight seeks to address matters currently not covered in any international regime. The law relating to freight depends on relevant national laws and it may be assumed that a considerable variety of rules exists in different jurisdictions. For this reason, any attempt at drawing up uniform rules in this area needs to made with special care. In particular the content of provisions which benefit carriers rather than cargo interests should be scrutinised as to their desirability for inclusion in an international regime. Overall, the rules contained in this chapter appear to considerably favour carrier interests. It may therefore be open to discussion whether the chapter should be included.

111. **Art. 9.1 and 9.2**: The rules set out in these provisions determine when freight is earned and becomes payable. They appear to correspond with standard bills of lading clauses which are currently in use. In the absence of mandatory law on the subject, matters relating to the payment of freight are, generally, subject to contractual agreement. However, it is questionable whether the rules set out in Art. 9.1 and 9.2 should be adopted internationally. The provisions fail to address concerns which have arisen in current practice, for instance, in cases where bills of lading have been issued to a charterer who has shipped goods under a charterparty.

In these cases, the bill of lading may incorporate all provisions of the charterparty, including those on freight, but a consignee to whom this bill of lading has been transferred by the charterer may not have any knowledge of their content. The consignee may thus be subject to an agreement that freight has been earned on shipment without any clear indication to this effect in the contract particulars. The provisions set out in Art. 9.1 and 9.2 (a) are subject to contractual agreement, and would therefore not provide the consignee with any indication of whether or not it would be liable for the payment of freight. Of particular concern is Art. 9.2 (b). This provision stipulates that once freight has been earned, it remains payable if goods have been lost, damaged "or otherwise not been delivered to the consignee in accordance with the contract", "… irrespective of the causes of such loss, damage or failure in delivery". As drafted, the provision appears not to be subject to contractual agreement. There is no reason why this should be so (even if it may be unlikely that a carrier would wish to depart contractually from the provision). More importantly, however, under Art. 9.2 (b), the right to freight would not be affected even by gross misconduct of the carrier, such as theft of the cargo. It is doubtful whether this corresponds to the present law in all jurisdictions and whether this provision can be justified.

112. **Art. 9.3**: There is no indication anywhere in the Draft Instrument of what is meant by "charges incidental to the carriage of the goods" (see **Art. 9.3 (a)**), in particular, whether this may include demurrage incurred at the port of loading or discharge.

113. It is not clear why **Art. 9.3 (b)** introduces an apparently mandatory provision for the exclusive benefit of carriers, although the regulation of freight is generally subject to contractual agreement. The parties should be able to agree freely on the matters set out in Art. 9.3 (b). A carrier is in a position to protect its position by drafting appropriate contractual clauses for inclusion in a transport document, if it so wishes. As drafted, the provision would ensure that the shipper or the party named as shipper remains liable, although the contract indicates otherwise. Moreover, the drafting of Art. 9.3 (b)(ii) (together with the introductory sentence of Art. 9.3 (b)) appears to suggests that the party identified as shipper in the contract particulars would "remain" liable for the payment of any amounts under the contract of carriage which this party had never agreed to pay. This would clearly be difficult to justify. As concerns the text of the provision in Art. 9.3 (b)(ii), it is not clear what exactly is meant by "amounts payable to the carrier under the contract" and why a reference to "security pursuant to Art. 9.5" has been included. In Art. 9.3 (b) (iii), the reference to Art. 12.4 is very unfortunate. Article 12.4 states that both assignee and assignor shall be jointly and severally liable if the transfer of rights by assignment "includes the transfer of liabilities". It is not clear whether this is to be determined by the law applicable to the contract of carriage or the assignment or by the contract of carriage itself. Accordingly it is unclear what exactly the effect of Art. 9.3 (b) may be in any given case.

114. **Art. 9.4, (freight prepaid and freight collect statements)**: This provision is of particular relevance to a third party consignee who may have bought goods under a c.i.f., c.&f., or f.o.b extended services contract, but is faced with a freight claim by a carrier who has not been paid. It is sensible to provide clearly in the Draft Instrument that a party who is not the original contracting shipper may rely conclusively against the carrier on a statement in the transport document/electronic

record that freight has been prepaid. This will also correspond to the legal position in most jurisdictions. However, the provision as drafted does not provide any protection to an f.o.b extended services buyer (=shipper) who obtains from his seller (the consignor) a "freight prepaid" document/record. It is not clear why the carrier should be able to state incorrectly that freight has been paid when this is not the case and why a party who places reliance on the document should bear the risk associated with this practice. Art. 9.4 (b) provides appropriately that a "freight collect" statement in the contract particulars puts a consignee or holder on notice that it may be liable for the payment of freight. The provision fails, however, to address the question of what should happen if the contract particulars simply state "freight payable as per charterparty". A consignee or holder may find itself liable for the payment of charterparty freight, although, under its contract with the shipper (as seller), freight should have been paid by that party. It may be desirable to include a provision along the lines of Art. 15 (1)(k) and Art. 16 (4) of the Hamburg Rules, which seek to protect a third party consignee in cases where the transport document does not indicate that freight is payable by a third party consignee or holder.

115. **Art. 9.5**: Art. 9.5 (a) provides the carrier with a lien on the cargo and a right to sell the goods in the absence of payment or provision of "adequate security". These rights are made dependent on existing liability for certain types of payment obligations under the national law applicable to the contract of carriage. The provision causes a number of serious concerns which may make deletion of the provision advisable:

(1) By making reference to national law, a great deal of uncertainty is introduced, as identifying the applicable national law depends on the conflict of law rules of any given forum in which a dispute is litigated or arbitrated. In some jurisdictions, these rules may differ according to whether the claim is brought under the contract of carriage or under a "negotiable" document. The provision introduces a "network" approach rather than a "uniform" approach. As a result, the benefits of uniform regulation are lost and a great deal of uncertainty is produced.

(2) By giving precedence to national law over a contrary contractual agreement (see the text in brackets in Art. 9.5 (a)), the provision increases the uncertainty referred to under 1 to an unacceptable degree: not only would the parties have to identify the relevant applicable law and its substantive rules, but any contractual agreement which they have made would be irrelevant and thus misleading. It does not appear justified to afford a carrier the benefit of national law in its favour, despite the fact that it had contractually agreed otherwise. It needs to be emphasised, again, that carriers should be perfectly able to protect their interests by the inclusion of terms in their standard form contracts.

(3) The drafting of the types of situations in which a carrier should be able to be entitled to a lien and to sell off any goods is not satisfactory. Art. 9.5 (a) (i)-(iii) refer to diverse heads of liability which are expressed in very vague terms. Whether any liability on the part of the consignee exists under the law applicable to the contract requires a considerable degree of legal expertise and is not a question which a carrier can or should decide quickly and act upon by exercising a 'right' to sell the goods. In particular in respect of "damages due to the carrier under the contract of carriage" (see Art. 9.5 (a) (ii)) it becomes apparent how inappropriate the proposed approach would be. The carrier would be placed in the position of judge,

jury and enforcer of any right to damages it may claim to have. Clearly, this is not really in the interests of carriers either, as a misjudgement on the part of a carrier could set off a chain of litigation, exposing the carrier to significant legal costs and to substantive liability.

(4) Art. 9.5 (b) gives the carrier the right to sell goods if payment as referred to in paragraph (a) is not (fully) effected. The provision does not mention security other than payment and it does not state any time frame or notice requirement for the exercise of this drastic remedy. Moreover, it states rather vaguely that the balance of any proceeds of sale (after deduction of "the amounts payable to it" (presumably under Art. 9.5 (a)?) "shall be made available to the consignee". As drafted, the provision would clearly invite legal dispute.

10. Delivery of the consignee

116. Art. 10.1 establishes a new obligation of the consignee to "accept delivery of the goods at the time and location mentioned in Article 4.1.3". There is no obligation on the carrier to inform the consignee of the arrival of the goods. If the consignee fails to "accept delivery", the carrier will not be responsible for the goods except in cases of personal recklessness or where damage or loss are caused intentionally by the carrier. Although the obligation to take delivery arises only when the consignee exercises any of its rights under the contract of carriage, this would be a matter of interpretation. Any consignee who, as shipper, demands issue of a bill of lading under Art. 8.1 (ii) or exercises any right it may have as controlling party under Art. 11.1 would arguably be affected. The obligation is strict (independent of fault) and the consignee would appear to be in breach even in cases of delay in taking delivery. It is not clear why a carrier, who remains in custody of the goods after their arrival at the destination, should not remain under at least a residual obligation to exercise reasonable care.

117. Art. 10.3 contains detailed and complicated rules on the carrier's delivery obligation and Art. 10.4 contains equally detailed and complicated rules on the carrier's rights if the consignee fails to take delivery. The drafting of the provisions is far too complex to provide any reliable and clear guidance to carriers faced with a decision on which course of action may be required or permitted under the Instrument. The content and effect of the provisions may be broadly summarised as follows. Where no negotiable transport document/electronic record has been issued, the controlling party shall advise the carrier of the name of the consignee and the carrier shall make delivery to that person upon proof of identity (Art. 10.3.1). Where a negotiable transport document/electronic record has been issued, the holder has a right to claim delivery of the goods against surrender of the original document(s) (or in accordance with the relevant procedure under Art. 2.4) (Art. 10.3.2 (i)). However, if the holder does not claim delivery of the goods after their arrival at the place of destination, the carrier is entitled to demand delivery instructions from the controlling party or, if that party cannot be found, the shipper, or the person named as shipper in the contract particulars (cf. Art. 7.7). Delivery in accordance with such instructions discharges the carrier from its obligation, even if the negotiable transport document has not been surrendered (or the electronic record is still valid). If no delivery instructions are forthcoming, the carrier is entitled to exercise its rights under Art. 10.4, which include storing and unpacking the goods,

as well as other actions which "in the opinion of the carrier, circumstances reasonably may require" and, finally, selling the goods (Art. 10.4.1 (b)). If the carrier sells the goods, it is entitled to deduct amounts necessary to "pay or reimburse any costs incurred in respect of the goods" and "pay and reimburse any amounts referred to in Art. 9.5 (a) […] that are due to the carrier". Before exercising these rights, the carrier must give notice of the arrival of the goods to the notify party stated in the contract, or to the consignee or the controlling party or the shipper. A carrier exercising any rights under Art. 10.4.1 is only liable for loss of or damage to the goods if caused intentionally and with knowledge that such loss would probably result, or if caused by personal recklessness.

118. As drafted, the provisions in Article 10.3 and 10.4 do not appear to be reasonable. The carrier is given extremely broad rights to dispose of the goods, if the consignee or holder, for whatever reason, does not take delivery of the goods upon their arrival at destination (in accordance with Art. 4.1.3). The carrier may ultimately sell the cargo and satisfy any claims it may have from the proceeds. Whether any monies are in fact due to the carrier at that time, may however, be a matter open to much controversy and possibly requiring lengthy litigation (note that Article 9.5 is itself a very problematic provision, see comments there). A cargo claimant would be left with a claim against the carrier, while the carrier would effectively be given a statutory right of set-off for potentially disputed claims. Moreover, the carrier would practically never be liable for any loss or damage to the goods if the goods were left in its custody after their arrival at destination. Finally, the carrier would not be liable for failure to deliver against surrender of a negotiable transport document if it acted in accordance with delivery instructions of the controlling party or the shipper.

119. In effect, the provisions appear to sanction a carrier's right to self-help in all cases where the consignee is late in taking delivery upon arrival of the goods. While there may be understandable concerns in situations when goods are not collected at destination, it would seem that any attempt at addressing these should strike a balance between carriers' and consignees' legitimate interests. As drafted, however, the provisions in Art. 10.3 and 10.4 provide the carrier with extensive rights, without any consideration of the position of the consignee. In particular, it should be noted that any change to established principles, as proposed, would adversely affect the rights of third party holders of a "negotiable transport document". Traditionally, a "negotiable" bill of lading provides the holder with the exclusive right to demand delivery of the goods against surrender of the document. Possession of the document thus provides the holder with constructive possession of the goods. It is on this basis that international trade on shipment terms (c.i.f, c.&f., f.o.b.) has developed and is conducted. Article 10.3.2 (iii) provides that the carrier may, in certain circumstances, not be responsible to a bill of lading holder for failure to deliver against surrender of the document. It is not clear why this should be so, given that a carrier who wishes to avoid the problems associated with the delay of paper bills of lading would be able to contract on electronic terms.

11. Right of control

120. Chapters 11, 12 and 13 deal with issues of great complexity, which are not currently governed by any international Convention but are subject to very diverse

national laws. The provisions of these chapters, as drafted, do not sufficiently appear to represent international consensus on the concepts used and the rights described. Moreover, the structure of the chapters, as well as the drafting of individual provisions is problematic and may give rise to considerable confusion. In this context, it should be remembered that clarity and ease of application is required for any international regulation to be successful. It would seem to be advisable to remove chapters 11-13 as drafted from the Draft Outline Instrument and to reconsider whether regulation at this time is required. If it is decided to retain these chapters as part of the Instrument, more detailed comment on the effects of the complex individual provisions will be provided at a later stage.

121. Chapter 11 deals with the right of control, a matter which has never been subject to uniform international regulation. The rules set out in this chapter require close consideration of a number of definitions (chapter 1). Unfortunately, the text of the provisions is poorly drafted and the chapter lacks coherence. Much cross-referencing of provisions makes the rules difficult to understand and apply. **Art. 11.1** defines the right of control, **Art. 11.2** provides detailed rules on the controlling parties, and, to an extent, the transfer and exercise of the right to control. **Art. 11.3** sets out the conditions under which a carrier needs to comply with any instructions received under Art. 11.1 (i)-(iii). The relationship of these provisions to each other and to the provisions of chapter 12 is complex. In order to comment, one needs to consider some provisions in context

122. Under Art. 11.1, the controlling party is stated to have the right to give instructions in respect of the goods. This would include the right to give instructions regarding delivery of the goods at destination. More specifically, Art. 11.1 states that this includes (i) the right to give or modify instructions in respect of the goods, (ii) the right to demand delivery before arrival of the goods at destination, (iii) the right to replace the consignee and (iv) the right to agree with the carrier on a variation of the contract. However, except for the right to agree on any variation of the contract, the exercise of all other rights referred to in Art. 11.1 (i)-(iii) is subject to Art. 11.3. That provision states (in some detail) that the carrier shall execute instructions mentioned in Art. 11 (i)-(iii) only if this can reasonably be done and would not cause interference, expense etc. to the carrier. Otherwise, the carrier is under no obligation to execute the instruction. If the carrier nevertheless chooses to comply, it can demand security from the controlling party. The parties may “vary” by agreement the provisions of Art. 11.1 (ii), (iii) and 11.3. According to Art. 11.4, goods delivered short of destination in accordance with instructions received by the controlling party under Art. 11.1 (ii) are deemed to be delivered at the place of destination and chapter 10 applies to the delivery obligation. Art. 11.5 provides the carrier with a right to demand instructions, documents and/or information from the controlling party or, if that party cannot be found, from the shipper or the “named shipper” (see Art. 7.7).

123. Effectively, the list of rights in Art. 11.1 corresponds to the rights of a contracting shipper under a contract of carriage, namely to give certain instructions and to agree on a variation of the contract. The right to demand delivery of the goods at destination is not expressly referred to, but would seem to be included as part of the general right to give instructions. Instead of simply stating in Art. 11.1 that there is a right to give only reasonable instructions, very complicated and lengthy requirements have been set out separately, in Art. 11. 3. The rights to give

instructions under Art. 11.1 (i)-(iii) are limited rights, which may also be excluded contractually. The purpose and aim of any regulation of the right of control should be to set out clear and simple rules to determine which types of instructions and whose instructions a carrier is required to comply with. Overall, it appears that the provisions in Art. 11 are not at all helpful.

124. Art. 11.2 deals with the controlling party and, to an extent, the transfer of the right of control. It distinguishes according to the type of documentation/record used and needs to be considered in context with the rules in Art. 12. It is most unfortunate that the matters dealt with in Art. 11.2 and Art. 12 are not provided for in context. This causes a great deal of confusion. In overview, Art. 11.2 provides as follows:

(1) Where no negotiable transport document/electronic record has been issued: This includes both the situation where a non-negotiable document/record has been issued (e.g. a seawaybill) or where no transport document has been issued. Under Art. 11.2 (a), the shipper is the controlling party, unless the shipper and consignee agree on a different party and the shipper notifies the carrier accordingly. The controlling party may transfer the right of control (the transferor or transferee need to notify the carrier accordingly), but this right can be restricted or excluded contractually (Art. 11.6). Exercise of the right of control (i.e. the giving of instructions under Art. 11.1) requires that the controlling party provides identification. It should be noted that the mechanisms of transfer of the right of control are not set out in the Draft Instrument, but, according to Art. 12.3, such transfer "may be effected in accordance with the national law applicable to the contract of carriage relating to transfer of rights". Art. 12.3 nevertheless adds that transfer cannot be effected by passing a document or electronic record, but may be made electronically and that the transferor or transferee need to notify the carrier of any transfer. Art. 12.4 provides that "if the transfer of rights under a contract of carriage … includes the transfer of liabilities that are connected to or flow from the right … transferor and transferee are jointly and severally liable …".

(2) Where a negotiable transport document has been issued: The holder (Art. 1.12) of all originals is the sole controlling party (the word "sole" is not used in relation to the controlling party under Art. 11.2(a)). It is not clear who would be the controlling party if several originals were in different hands. The holder may transfer the right of control by transfer of (all originals of) the document in accordance with Art. 12.1 to another party. In order to exercise rights under Art. 11.1, the holder may be required to produce (all originals of) the document and once the holder has given instructions under Art. 11.1 (ii) (iii) and (iv), these need to be stated on the document.

(3) Where a negotiable electronic record has been issued: The holder is the sole controlling party and may transfer the right of control in accordance with Art. 2.4. In order to exercise any rights under Art. 11.1, the holder may be required to produce evidence of its being a holder in accordance with Art. 2.4. Once the holder has given instructions under Art. 11.1 (ii) (iii) and (iv), these need to be stated in the electronic record. As Art. 2.4 itself only provides that parties may agree on a procedural protocol, the provision in Art. 11.1 effectively restates that the transfer of the right of control is governed by contractual agreement.

12. Transfer of rights

125. The provisions of chapter 12 deal with the mechanism of the transfer of rights "under a contract of carriage" or "incorporated" in a negotiable transport document or electronic record. These rights are, effectively, the right of control set out in chapter 11, including the right to demand delivery of the goods at destination. Chapter 12 further contains rules on the effects of a transfer. It is proposed to completely reconsider the text and structure of the provisions and, more generally, the inclusion of the chapter in the Draft Instrument.

126. **Art. 12.2.2** states that any holder, other than a shipper, who exercises any rights under the contract "assumes liabilities imposed on it under the contract to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or negotiable electronic record". As drafted, the provision appears to considerably benefit carriers. The provision would allow contracting carriers to include standard clauses in the transport document/ electronic record to extend any liability of the shipper (under the contract as well as under the Draft Instrument) to the holder of the document/record. For instance, a standard clause might state that anyone falling within a wide definition of the term "merchant", (including the consignor, shipper, consignee, holder etc.) was to be liable for the payment of freight, demurrage and expenses and for losses arising from the shipment of dangerous cargo and/or the inaccuracy of contract particulars.

127. Under the Hague-Visby Rules the position is as follows: (1) Freight and demurrage are not dealt with in the Hague-Visby Rules. Whether the clause would be effective in this respect would depend on the relevant law applicable to the contract. (2) Under Art. III r.5, only the shipper is liable for losses due to the inaccuracy of particulars. The carrier is liable to the consignee, but remains entitled to an indemnity from the shipper. Any contractual clause which purports to impose these liabilities on a party other than the shipper would arguably be incompatible with Art. III r.8 and thus be null and void. (3) Under Art. IV r.6, the shipper is liable for losses which are due to the shipment of dangerous goods without knowledge and consent of the carrier. Whether this liability is transferred to a third party endorsee of a bill of lading is controversial and varies from jurisdiction to jurisdiction. Under the Draft Instrument, by virtue of Art. 12.2.2, any clause imposing any and all of the shipper's obligations on a third party holder would be effective. It is not clear why this should be justified. In the light of Art. 12.2.2, the title of chapter 7 ("Obligations of the Shipper") is, to some extent, misleading.

13. Rights of suit

128. See the General Observations.

14. Time for suit

129. **Art. 14.1**: This provision deals with the time allowed for the institution of legal or arbitral proceedings, a matter of immense practical significance. The provision adopts for both judicial and arbitral proceedings a strict one-year time-bar. Its wording resembles the provision in Art. III r. 6 of the Hague-Visby Rules, which

establishes a comprehensive time-bar extinguishing any claims against the carrier (contrast the Hamburg Rules two-year limitation period which does not have the same effect). The time bar as drafted in Art. 14.1 would extinguish any cargo claim against the carrier, or indeed against any "other person", i.e. the carrier's subcontractors, employees, agents or any "performing" parties and their subcontractors, employees and agents (see Art. 6.3.3). The time bar would also be applicable in any action against the shipper for breach of its obligations under Chapter 7, though not for other claims, e.g. regarding matters dealt with in chapter 9. It is not clear, whether the time-bar would apply in an action against the consignee, controlling party or holder. In contrast to the Hague-Visby Rules, the provision does not make reference to liability of the "ship", which may mean that the time-bar would not apply in actions *in rem*, commenced against a vessel. It should be noted that the wording "liability … in respect of the goods" is based on the Hague-Visby Rules. However, the wording of related provisions, dealing with liability and limitation of liability, differs from that of the corresponding provisions in the Hague-Visby Rules. As a result, there may be differences in the judicial interpretation of the scope of application of the time-bar in Art. 14.1.

130. **Art. 14.2**: As the short limitation period under Art. 14.1 is drafted as an absolute bar to the commencement of any proceedings, it is extremely important to be clear about the beginning of the one-year period. The wording of Art. 14.2 is similar to Art. 19(2) Hamburg Rules, but there are some differences to both the Hague-Visby Rules and the Hamburg Rules. There is no reference to cases of partial delivery of goods and there is a specific reference to "the goods concerned". More importantly, the limitation period is stated to commence "on the day on which the carrier has completed delivery of the goods concerned pursuant to Article 4.1.3 or 4.1.4 …". This reference to delivery "pursuant to Article 4.1.3 or 4.1.4" introduces some uncertainty, mainly due to the fact that Art. 4.1.3 itself defines the delivery obligation in an unclear and unsatisfactory manner. It is important to note that Art. 4.1.3, as drafted, appears to allow the carrier to unilaterally introduce standard terms for its own benefit, defining the "contractually agreed" time/location of delivery (see comments to Art. 4.1). Finally, it should be noted that in cases, where the consignee fails for any reason to take delivery of the goods in accordance with Art. 4.1.3, chapter 10 provides the carrier with various courses of action. In these instances, the limitation period may start running, under Art. 14.2, irrespective of whether delivery had actually taken place.

131. **Art. 14.3**: This provision explicitly refers to "any person against whom a claim is made", rather than to "the carrier" and the "shipper" as Art. 14.1. For the sake of clarity, the same terms should be used throughout. It may be advisable to include an obligation on any party who is asked to extend the limitation period "as carrier" to inform the applicant if it is not a contracting carrier. This way, some of the problems associated with correctly identifying the contracting carrier within a short period of time could be avoided. It is to be expected that such problems would continue to exist, despite the requirement in Art. 8.2 (i) (e) to include the name and address of the carrier in the contract particulars. Similar problems of identification may also arise in claims against other parties, due, for instance to the complex definition of "performing party" in Art. 1.17.

132. **Art. 14.4**: This provision corresponds in substance to Art. 20(5) of the Hamburg Rules and Art. III r. 6bis of the Hague-Visby Rules. Although apparently no change in substance was intended, the text of the provision is new.

133. **Art. 14.5**: It should be noted that this provision would be of no help to a cargo claimant who sued a bareboat charterer, only to find that another party, e.g. a time or voyage-charterer, was the contracting carrier. The bareboat charterer would not be liable and any action against the contracting carrier would be time-barred under Art. 14.1. This situation would be unsatisfactory from the point of view of cargo interests. See also the comments to Art. 8.4.2.

15. General average

134. An overview over the arguments for and against general average an be found in reports prepared by UNCTAD on the subject.[8] Art. 15 is identical with the corresponding provision in Art. 24 of the Hamburg Rules. However, it should be noted that the provisions relating to the carrier's liability under the Hamburg Rules are different to those under the Draft Instrument. This needs to be borne in mind when considering whether the inclusion of this provision in the Draft Instrument would be appropriate.

17. Limits of contractual freedom

135. **Art. 17.1**: This is one of the most crucial provisions for consideration, as it defines the mandatory scope of the Draft Instrument. The text of the provision adopts elements of both the relevant provisions in the Hague-Visby Rules (Art. III r.8) and the Hamburg Rules (Art. 23 (1)). As a result, established case law on either provision would be of only limited relevance. The Hamburg Rules prohibit any direct or indirect contractual derogation, but permit an increase of the carrier's liability. The Hague-Visby Rules prohibit any contractual derogation reducing or limiting the carrier's liability. Art. 17.1 is drafted so as to prohibit any contractual derogation which is "intended or has as its effect" to exclude or limit the liability of any party, including the shipper and consignee. Moreover, in brackets, the draft text also prohibits any contractual increase of liability.

136. Given that contracts for the carriage of goods by sea are concluded on the basis of standard terms, drafted by and often for the benefit of the carrier, it is clearly vital to protect potential cargo claimants from unfair contract terms which exclude or reduce the carrier's liability to an unacceptable degree. It was on the basis of these considerations that the original Hague Rules were adopted in 1924, following national legislation in Canada and the US. Consequently, it is appropriate to give the minimum levels of liability established in any new International Instrument mandatory status. However, it is not at all clear, why the obligations or liabilities of the shipper or consignee should also be mandatory. If a carrier freely chooses to enter an agreement under which the shipper's or consignee's liability would be reduced, the agreement should be given effect. There are no policy considerations apparent which suggest that interference into the principle of

[8] *General Average, a preliminary review*, TD/B/C.4/ISL/58; *The Place of General Average in Marine Insurance Today*, UNCTAD/SDD/LEG/1.

freedom of contract would be justified in this context. Equally, there appears to be no convincing reason why a contractual increase of the carrier's liability should not be permissible. In the light of these considerations, it appears appropriate to amend the provision in Article 17.1 so as to prohibit only contractual derogation to excluding, reduce or limit the liability of the carrier (or any other person who performs or undertakes to perform any of the carrier's obligations under the Draft Instrument).

137. **Art. 17.2**: This provision allows contractual exclusion of liability by the carrier or the performing carrier where live animals are carried or where 'special cargo', not carried in the ordinary course of trade, is transported. Both types of cargo remain otherwise subject to the Draft Instrument. The Hague-Visby Rules do not apply to live animals and, with regard to the transportation of special cargo, allow contractual limitation of liability, if not contrary to public policy. In contrast, the Hamburg Rules apply to live animals, but contain a special provision excluding the carrier's liability where loss, damage or delay is due to special risks inherent in that kind of carriage (Art. 5(5). The Hamburg Rules do not contain special provisions relating to 'special cargo not carried in the ordinary course of trade'. It is not clear why the Draft Instrument in Art. 17.2 (a) permits contractual exclusion of the carrier's liability where live animals are carried. It would seem appropriate for a carrier who consents to the carriage of live animals and remains entitled to the benefit of the limitation and time-bar provisions to also be subject to minimum liability levels. The same may be true as regards 'special cargo not carried in the ordinary course of trade'.