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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**CARRIER LIABILITY AND FREEDOM OF CONTRACT UNDER THE UNCITRAL  
DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS [WHOLLY OR PARTLY]  
[BY SEA]**

*Note by the UNCTAD secretariat*

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## Background

1. The Commission on Enterprise, Business Facilitation and Development, at its eighth session, reaffirming the recommendations adopted at its seventh session, recommended that the UNCTAD secretariat should "cooperate with other intergovernmental organizations in their work relating to the development of international legal instruments affecting international transport ..., including multimodal transport; disseminate information on their implications for developing countries; and provide negotiating assistance to developing countries as appropriate,...".<sup>1</sup> Furthermore, UNCTAD XI, held in São Paulo in June 2004, specifically requested UNCTAD to "analyse the implications of ongoing developments, and assist developing countries in the ongoing work in UNCITRAL".<sup>2</sup>

2. This note has been prepared in response to these requests. It has been submitted to the UNCITRAL Working Group on Transport Law<sup>3</sup>, which is currently in the process of preparing a new international instrument to govern liability arising from the carriage of goods.

3. It should be recalled that, in 2002, the UNCITRAL Working Group on Transport Law commenced its deliberations on a "*Draft Instrument on Transport Law*" (UNCITRAL document A/CN.9/WG.III/WP.21).<sup>4</sup> The UNCTAD secretariat prepared an analytical commentary on the Draft Instrument, which was published in UNCITRAL document A/CN.9/WG.III/WP.21/Add.1 and as UNCTAD document UNCTAD/SDTE/TLB/4<sup>5</sup>. The Working Group at its ninth to thirteenth sessions has continued its deliberations and both the text and the working title of the Draft Instrument have undergone some revision. The latest provisional text of the "*Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea]*" is contained in UNCITRAL documents A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP36. This note complements the earlier UNCTAD commentary. It deals with some of the central issues for consideration by the Working Group, namely (a) freedom of contract, in particular the question of which contracts may be exempt from the mandatory application of the Instrument and (b) liability of the carrier for cargo loss, damage and delay.

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<sup>1</sup> See the report of the Commission of Enterprise, Business Facilitation and Development on its eight session, paragraph 6 of the agreed recommendations.

<sup>2</sup> See the report of the United Nations Conference on Trade and Development on its eleventh session, São Paulo consensus paragraph 107.

<sup>3</sup> Fourteenth session of the UNCITRAL Working Group on Transport Law to be held in Vienna from 29 November to 10 December 2004.

<sup>4</sup> All UNCITRAL Working documents are available on the UNCITRAL website at [www.uncitral.org](http://www.uncitral.org) under Working Group on Transport Law.

<sup>5</sup> Available on the UNCTAD website at [www.unctad.org](http://www.unctad.org)

## PART A

### FREEDOM OF CONTRACT UNDER THE DRAFT INSTRUMENT

#### 1. Introductory remarks

4. The Draft Instrument focuses to a considerable extent on matters of liability, i.e. on the regulation of liability arising in connection with the carriage of goods. Clearly, the Draft Instrument is intended to provide a modern successor to existing international liability regimes in the field of carriage of goods by sea (i.e. the Hague, Hague-Visby and Hamburg Rules). Moreover, the working assumption is that the Draft Instrument would also apply to multimodal contracts that include a sea-leg. Against this background, it appears appropriate to recall some of the common elements, which, despite their differences, all existing unimodal liability regimes for the carriage of goods by sea, land and air (i.e. The Hague, Hague-Visby and Hamburg Rules, the CMR, COTIF/CIM, Warsaw Convention (as amended), Montreal Convention) share namely:

5. First, **all existing international regimes establish minimum levels of carrier liability, which apply mandatorily**, that is to say the relevant substantive rules on liability of the carrier may not be contractually modified to the detriment of the shipper or consignee.

6. Secondly, **the mandatory scope of application of the relevant regimes extends to contracts of carriage which are not individually negotiated between the parties**, but are conducted on the carrier's standard terms of contract as typically contained in or evidenced by a transport document issued by the carrier.

7. The main purpose of this approach, common to all existing international liability regimes, is to reduce the potential for abuse in the context of contracts of adhesion, used where parties with unequal bargaining power contract with one another. By establishing minimum levels of liability, which apply mandatorily and may not be contractually modified, existing liability regimes seek to ensure the protection of cargo interests with little bargaining power, i.e. small shippers and third party consignees, against unfair contract terms unilaterally introduced by the carrier in its standard terms of contract.

8. Thus, a central feature of existing international liability regimes is a restriction of freedom of contract with the legislative intent to ensure the protection of small parties against unfair standard contract terms.

9. A central question, which arises for consideration of the Working Group is whether and to which extent the Draft Instrument should follow the same approach as existing international liability regimes.

10. In this context, the treatment in the Draft Instrument of so-called service contracts or "Ocean Liner Service Agreements" (OLSAs, as described in UNCITRAL document A/CN.9/WG.III/WP.34, para. 19-22) may be of particular and considerable significance. It has been reported that in some trades, 80%-90% of liner carriage is conducted under this type of contract and that with the increasing trend towards concentration in the liner shipping industry and the emergence of alliances in the global freight-forwarding industry the use of this type of contract is likely to become more prevalent at the global level. Any decision on the treatment of

such contracts may, in consequence, also affect the deliberations on substantive liability provisions.

11. Against this background, the following comments are offered to facilitate the discussion.

## 2. Non-mandatory application of the Draft Instrument to service contracts / OLSAs

12. It has been suggested that OLSAs, as described (in WP.34), should not be excluded altogether from the scope of application of the Draft Instrument, but should be exempt from its mandatory application. This would mean that when cargo is carried under a service contract, **the Draft Instrument liability regime would apply by default, but all or only some of its provisions could be contracted out of or be contractually modified.** When assessing the potential consequences of such an approach, consideration should be given to the following situations.

### (a) *Service contracts involving large shippers*

13. Clearly, in relation to contracts of carriage concluded between parties of broadly equal bargaining power, this approach would not give rise to public policy concerns. Large shippers are just as able to effectively safeguard their interests in contractual negotiations, as are large carriers. Often, the big shippers are themselves carriers, namely freight forwarders, who do not operate any vessels, but have contracted with smaller shippers to transport the cargo from door-to-door. Freight forwarders may thus be both carrier (*vis-à-vis* the smaller shipper) and shipper, (*vis-à-vis* a unimodal carrier, such as a sea-carrier).

14. Nevertheless, it should be noted that if the Draft Instrument were to apply by default, albeit not mandatorily, a contracting party with more detailed knowledge of all the terms of the complete set of rules may find itself at an advantage. This in particular if, as proposed, the parties may selectively exclude or modify individual provisions, rather than the entire framework. Unless both contracting parties pay due attention to all of the potentially applicable provisions of the Draft Instrument, as modified, excluded or supplemented contractually, one or other of the contracting parties may find itself "by default" to have agreed to potentially disadvantageous terms. More generally, the potential benefits associated by commercial parties with a predictable internationally uniform liability regime may, in the longer run, fail to materialize.

15. In any event, however, there is no need to protect parties with equal bargaining power by way of mandatory legislation, provided always that third parties who acquire rights and obligations under these contracts would be protected by the mandatory application of the liability regime.

### (b) *Service contracts involving small shippers*

16. The situation is markedly different if parties with clearly unequal bargaining power contract with one another. It is in this context that **concerns arise about the potential use of service contracts as devices to circumvent otherwise applicable mandatory liability rules.**

17. Current practice suggests that service contracts, which account for more than 80% of liner-carriage in some trades, may be used not only as between large shippers and carriers, but also for the carriage of very small quantities, such as 10-20 TEUs or even 1 TEU. It is clear that in this context, the contracting parties are not of equal bargaining power. A contract concluded between the shipper of 2 containers - or of 25 containers - and one of the world's top 25 liner companies - in control of almost 80% of global TEU carrying capacity (Source: Dyna Liners 06/2004, 6.2.2004) - is not likely to be conducted on the basis of individually negotiated terms. Rather, the carrier's standard terms of contract, as also contained in or referred to in transport documents, such as a bill of lading or seawaybill, will be incorporated into the service contract.

18. In this context it should be recalled that current practice only serves to indicate certain trends, but that future developments at the global level may actually depend on the degree to which the Draft Instrument does or does not safeguard against abuse of "freedom of contract" by parties with stronger bargaining power.

19. If, in the Draft Instrument, service contracts are exempt from the mandatory scope of application of the liability regime without any safeguards to ensure that small shippers are effectively protected against unfair contract terms, it is possible that in future most international liner carriage could be conducted on the carrier's standard terms as incorporated into service contracts and thus not subject to mandatory minimum standards of liability.

20. The provisional definition of the characteristics of OLSAs, as set out in WP.34, does not at present ensure that notional agreement of an OLSA may not be used as a contractual device to circumvent otherwise applicable mandatory liability rules to the detriment of the small shipper.

### **3. The relationship between scope of application and substantive liability regime**

21. As has been pointed out at the outset, by establishing mandatory minimum levels of liability, existing liability regimes seek to ensure the protection of cargo interests with little bargaining power, i.e. small shippers and third party consignees, against unfair contract terms unilaterally introduced by the carrier in its standard terms of contract. There appears to be general agreement that this approach remains appropriate in relation to so-called contracts of adhesion, i.e. contracts concluded on the carrier's standard terms as contained in or evidenced by a transport document (or electronic equivalent).

22. At the same time, it is apparent that in relation to the drafting of the substantive content of the liability regime these considerations are less prevalent than is the case with existing regimes. Rather than being primarily geared to protecting shippers and third-party consignees, the Draft Instrument, based on the assumption that market conditions have changed somewhat over the years, appears to aim for a substantive liability regime to regulate the relationship between shippers and carriers as equal negotiating partners. Under the present draft, the parties may, for instance, agree that the shipper is responsible for some of the carrier's functions (Art. 11(2)) and/or that the carrier acts in respect of some parts of a transport as freight forwarding agent only (Art. 9). Similarly, it has been proposed that the obligations of the shipper, which are much more extensive and detailed than under existing maritime liability regimes, shall be mandatory.

23. However, it is important to note that while the substantive content of the Draft Instrument is to a considerable degree geared towards contracting partners of equal bargaining power,

individually negotiated contracts by such parties may, depending on the outcome of discussions on freedom of contract and scope of application, not be governed by the Draft Instrument.

24. Questions of scope and substance are linked and should therefore be considered more in context. If individually negotiated contracts are excluded from by the Draft Instrument or are not covered by its mandatory scope, then the substantive liability regime applies mandatorily only to what may be called contracts of adhesion. In relation to these contracts, however, there is no room for adopting an approach less protective of shippers and third party consignees than existing maritime liability regimes.

25. Thus, in the light of discussions on the mandatory scope of application of the Draft Instrument, the substantive content of liability provisions may need to be reconsidered.

## PART B

### LIABILITY OF THE CARRIER UNDER ARTICLE 14 OF THE DRAFT INSTRUMENT

#### Introductory remarks

26. Art. 14 of the Draft Instrument deals with the liability of the carrier for loss, damage or delay of the cargo. That is to say, the provision establishes rules, including rules on burden of proof, that determine under which circumstances a carrier shall be liable for loss, damage or delay of the cargo and under which circumstances the carrier shall be exempt from such liability. Losses for which the carrier is not liable need to be absorbed by cargo interests. Therefore, Art. 14 plays a pivotal role in the overall scheme of liability regulation and risk allocation as between carrier and cargo interests under the Draft Instrument.

27. The text of Article 14 (originally Art. 6.1) has undergone several attempts at revision, with the latest version being reflected in WP. 36. Attempts have been made to further clarify the text, notably by the CMI at its annual conference in Vancouver, where an improved draft was prepared.

28. The following comments seek to facilitate the further discussions within the Working Group by highlighting some central considerations relevant to matters regulated in Article 14. These comments should be considered in context with the substantive comments submitted by the UNCTAD Secretariat in relation to the original Art. 6.1 (see UNCITRAL document A/CN.9/WG.III/WP. 21/Add.1, Annex II and UNCTAD/SDTE/TLB/4 at paras. 55-64).

#### I. Basis of liability and list of "excepted perils"

29. Art. 14 (1) sets out a general rule on liability of the carrier. If it is seen necessary to supplement this general rule with a list of exceptions/perils/events ("excepted perils") in Art. 14 (2), the content and wording of the listed "excepted perils" deserves careful consideration.

30. In the Hague-Visby Rules, a relevant list of exceptions is contained in Art. IV, r. 2 (a) – (q). Two of these exceptions, the so-called nautical fault and fire exceptions, contained in Art. IV, r. 2 (a) and (b), are available to the carrier in cases of negligence on the part of the carrier's people. The other exceptions (Art. IV, r. 2 (c) - (q)) are subject to the carrier's performance of his obligations and reflect circumstances where negligence of the carrier is not normally involved (such as events beyond the control of the carrier, acts or omissions of the shipper, defects in the goods or inherent vice).

31. Art. 14 (2) lists a number "excepted perils" which, subject to some textual changes, correspond to Art. IV, r. 2 (c) – (q) of the Hague-Visby Rules. Whether a fire exception (and a currently deleted nautical fault exception) shall be included in the Draft Instrument, possibly in a separate provision, Art. 22, is still subject to discussion<sup>6</sup>.

32. Art. 14 (2) (h) and (i) set out some new exceptions to liability, which are not contained in the Hague-Visby Rules and therefore deserve particular attention. Art. 14 (2) (h) and (i) need to

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<sup>6</sup> See A/CN.9/WG.III/WP.36 at para. 9.



be considered in context with draft Arts. 11 (2) 12, 13 (2), the provisions which - if adopted - would provide the carrier with certain new rights. Pending a final decision on these provisions, Art. 14 (2) (h) and (i) would also need to be placed in square brackets.

## 1. Art. 14 (2) (h)

33. This provision is the corollary to Art. 11 (2), a provision in square brackets, where it is stated that parties may agree that certain of the carrier's obligations in relation to the care, handling and carriage of the cargo shall be performed by or on behalf of the shipper. As has been pointed out in comments by the UNCTAD Secretariat on the original provisions (Art. 5.2.2 and 6.1.3 (ix))<sup>7</sup>, this approach gives rise to concern in the context of contracts of adhesion, i.e. contracts on standard terms of the carrier, typically contained in a transport document and not subject to negotiation. In relation to these contracts, a carrier could, by way of including a clause in the transport document, decide unilaterally to delegate responsibility for the care of the cargo (e.g. loading, stowage and discharge) to the shipper/consignee. Furthermore, according to Art. 14 (2) (h), as drafted, the carrier would also be exempt from liability for cargo loss due to the negligence of his own agents and servants or of any performing parties in handling the goods "*on behalf of the shipper*".

## 2. Art. 14 (2) (i)

34. This "excepted peril" corresponds to rights of the carrier set out in Arts. 12 and 13 (2). Accordingly, when considering whether the carrier should be exempt from liability, as proposed in Art. 14 (2) (i), both these provisions need to be considered in context.

(a) According to **Art. 12, Variant A**, a carrier would be entitled to refuse to carry and, if necessary, destroy goods which "*reasonably appear likely ... to become, a danger to persons or property or an illegal or unacceptable danger to the environment*". The carrier's broad rights would arise "*notwithstanding*" Articles 10, 11 and 13(1), i.e. notwithstanding the carrier's obligations in respect of carriage, care of cargo and seaworthiness of the vessel. Effectively this means that a carrier would not be liable even if negligently caused unseaworthiness of the vessel had given rise to the (potential) danger posed by the goods.

35. The rights of the carrier under this provision differ considerably from those under the Hague-Visby Rules, Art. IV, r. 6. As has already been pointed out in comments by the UNCTAD Secretariat on the original proposal (Art. 5.3<sup>8</sup>), several aspects of the draft provision give rise to concern. These include the degree of discretion afforded to the carrier, the fact that the carrier's rights shall not be subject to the carrier's compliance with his main obligations (in particular the seaworthiness obligation) and the absence of any safeguards against unreasonable claims or behaviour by the carrier in situations where dangerous goods are carried with the carrier's consent.

36. An alternative proposal, **Art. 12, Variant B**, is more closely modelled after the text of Art. IV, r. 6 of the Hague-Visby Rules, but also provides the carrier with rights "*notwithstanding*" its obligations under Arts. 10, 11 and 13(1). Thus, in contrast to the Hague-

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<sup>7</sup> See A/CN.9/WG.III/WP. 21/Add. 1, Annex II at paras. 49-50 and 61.

<sup>8</sup> See A/CN.9/WG.III/WP. 21/Add. 1, Annex II at paras. 51-52.

Visby Rules, the carrier would be entitled to jettison dangerous cargo without compensation, even in cases where, for instance, the vessel was unseaworthy due to negligence of the carrier.

(b) **Art. 13 (2)**, a provision in square brackets, would provide a carrier with a broad statutory right to sacrifice goods. Such a right is not contained in the Hague-Visby Rules or any other maritime liability convention and it is not clear why a binding rule to this effect should be introduced into the set of mandatorily applicable liability rules contained in the Draft Instrument. It should be noted that the right to sacrifice of cargo would arise irrespective of the causes of the peril and "*notwithstanding*" the carrier's main obligations under the Draft Instrument (Arts. 10, 11 and 13(1)). Thus, it would seem that even if a peril was due to other cargo transported on the same vessel or due to negligently caused unseaworthiness of the vessel, a carrier would still be entitled to jettison cargo without compensation.

## **II. Allocation of the burden of proof and allocation of liability in cases of concurrent causes**

37. Much of the discussion on the text of Art. 14 focuses on how to regulate the burden of proof and the allocation of liability in cases of concurrent causes. These issues are both important and complex.

### **1. The relevance of allocating the burden of proof**

38. The legal burden of proof is a technical legal concept, which serves to determine the answer to an important practical question, namely: *if two parties argue, who needs to prove what?* In relation to any legal dispute this is a matter of great significance, which may affect the outcome of the dispute. This is particularly so in cases where evidence is difficult to obtain. The party bearing the burden of proof with regard to a particular issue or argument needs to provide relevant evidence. If it cannot do so, it will lose the argument and will have to accept defeat on the issue in question. Thus, whoever bears the burden of proof bears the risk associated with a lack of evidence.

39. The practical significance of allocating the burden of proof is well illustrated by a recent English decision on the liability of a warehousing company for loss of goods in its possession<sup>9</sup>. According to the relevant contract, the defendant warehousing company would be liable only in cases of negligence. The central question for decision by the court was: which party should bear the burden of proof regarding negligence. *Did the claimants need to prove that the company had been negligent or did the defendant company need to prove that it had not been negligent?* The answer to this question was crucial to the outcome of the claim, as there was virtually no evidence on the causes of the loss. Thus, whoever would bear the burden of proof would have to bear the loss. In the event, the court decided that the burden of proof was on the defendant warehousing company, both for reasons of justice and of common sense: the company would be in a much better position to explain what had happened and, indeed, should be the party to provide an explanation. As the company was unable to disprove negligence, the court decided that it was liable for the loss claimed.

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<sup>9</sup> *Euro Cellular (Distribution) Plc. v. Danzas Ltd. T/A Danzas AEI Intercontinental and another* [2004] 1 Lloyd's Rep. 521. For present purposes it is immaterial that the decision does not relate to the carriage of goods.

40. In relation to loss arising from the international carriage of goods by sea, evidence about the causes of a loss will often be difficult to obtain, particularly for the consignee or shipper of cargo, who may not have access to any of the relevant facts. Moreover, loss, damage or delay of cargo during transit are often due to a combination of factors and, in these cases, evidence about the extent to which different identified causes have contributed to a loss may be even more difficult to find. Against this background, it is clear that rules on the allocation of the burden of proof as between carrier and cargo interests are crucial to the overall allocation of risk as between the two parties.

## **2. The position under the Hague Rules, Hague-Visby Rules and Hamburg Rules**

41. Despite significant differences in the text, under the Hague and Hague-Visby Rules, as well as under the Hamburg Rules, once a cargo claimant has established a loss, the *burden of proof in relation to the causes of the loss* is on the carrier. This is generally recognized. In the absence of sufficient evidence about the cause(s) of a loss, the carrier will be responsible for the (whole) loss. The carrier is therefore generally liable in cases of unexplained losses. In cases where there is a *combination of causes*, the carrier is liable for the whole loss, unless it can prove the *extent to which a quantifiable proportion of the loss was solely due to a cause for which he is not responsible*.

## **3. Burden of proof and allocation of liability for loss due to concurrent causes in Art. 14 of the Draft Instrument**

42. While in relation to the final structure, content and text of Art. 14 a number of issues are still subject to debate, the revised text of Art. 14 (1)-(3) (WP. 36) suggest that the burden of proof relating to the *causes* of a loss shall be on the carrier. Accordingly, the carrier would bear the risk associated with a lack of evidence and would be liable in cases of unexplained losses. However, as parts of the revised text of Art. 14 (1)-(3) are still in square brackets, it is, at this stage, difficult to assess the overall effect of the proposed provisions, in particular in context with Art. 14 (4), the provision dealing with allocation of liability in cases where loss is due to a combination of causes (such as e.g. unseaworthiness and perils of the sea).

43. The draft text of Art. 14 (1) – (3) suggests, more or less explicitly (depending on whether some wording, currently in square brackets, is included) that a carrier would also be required to prove *the extent* to which circumstances for which a carrier was not responsible had *contributed* to a loss. This would correspond to the approach adopted in the established maritime conventions, as set out above.

44. However, Art. 14 (4), which provides that liability shall be allocated on a proportionate basis, contains wording, in square brackets, which seems to reflect a different approach, namely one which corresponds in substance to the second alternative included in Art. 6.1.4. of the original Draft Instrument (WP. 21<sup>10</sup>).

45. The second sentence of Art. 14 (4) provides that liability may be apportioned on a 50/50 basis as between carrier and cargo interests in cases where a court is "*unable to determine the actual apportionment*". This means that, in cases where evidence on the proportion of loss due to

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<sup>10</sup> For relevant comments by the UNCTAD Secretariat on the provision, see A/CN.9/WG.III/WP.21/Add.1, Annex II at para. 64.

the different causes was insufficient to allow any assessment, the carrier would be liable only for 50% of the loss. Therefore, in contrast to the Hague-Visby Rules and the Hamburg Rules, a carrier *would not bear the burden of proving the extent to which a quantifiable proportion of a loss was due to causes for which the carrier was not responsible.*

46. The practical consequences of this difference in approach would be significant. It needs to be borne in mind that a court can only decide - including on the apportioning of liability - on the basis of the evidence available to it, as adduced by the parties to a dispute. The question is how to deal with situations where evidence is not readily available to one or to both parties to a dispute. In this context, burden of proof serves to allocate risk as between the two parties. Under the Hague-Visby Rules, too, a court apportions liability according to the evidence before it. However, under the Hague-Visby Rules, as the carrier bears the burden of proof, he would be held liable for the entire loss (subject to a monetary cap) unless he could prove the *proportion* of loss not due to his fault. In contrast, under Art. 14 (4), as proposed, the situation would be markedly different. In the absence of sufficient evidence, a carrier's maximum exposure would be limited to liability for 50% of a loss (subject to a monetary cap). In practice, a carrier would, therefore, only have an incentive to adduce any relevant evidence if this would reduce his liability even further. Effectively, a cargo claimant would bear the risk associated with a lack of evidence.

47. It is not entirely clear how this approach is to be reconciled with the approach on burden of proof reflected in Art. 14 (1) – (3), referred to above. This in particular if wording currently contained in square brackets was adopted and the carrier would be required (explicitly) to also prove *the extent* to which circumstances for which the carrier was not responsible have *contributed* to a loss.

48. Thus, it appears that a central question, which remains for consideration of the Working Group, is whether in respect of loss due to concurrent/combined causes, the Draft Instrument should follow the approach in established maritime liability regimes or should adopt a new approach. *Effectively, the question is whether, in cases of insufficient evidence on the extent of contributory causes of a loss, a carrier should be liable for the whole loss (Hague-Visby Rules) or, alternatively, whether the carrier should be liable for 50% of the loss only.*

49. It has been suggested that a new approach to burden of proof and allocation of liability may be justified, in particular in view of the fact that the so-called nautical fault exception, contained in Art. IV, r. 2 (a) of the Hague-Visby Rules, may not be available to a carrier under the Draft Instrument. It should be noted, however, that while the applicability of the nautical fault exception may affect the outcome of a cargo claim in some instances, (i.e. where negligence in the navigation or management of the ship causes or contributes to a loss), a change in approach to the general rule on allocation of liability as proposed in Art. 14 (4) could affect a much larger number of cargo claims, namely all cases in which negligently caused unseaworthiness of a vessel had contributed to a loss, but evidence on the relevant proportion was unavailable.

#### **4. Claims by the carrier against cargo interests**

50. It should be emphasized that any decision on burden of proof and allocation of losses due to concurrent causes in the context of Art. 14 would only be relevant in relation to cargo claims, but not in relation to claims brought by the carrier against cargo interests for losses of the carrier, e.g. for damage to the vessel due to the carriage of dangerous cargo under Art. 30. At present, it is not clear how burden of proof and allocation of liability would be regulated in cases where both dangerous cargo and unseaworthiness of the vessel may have contributed to cause a loss *to* the carrier. Such losses *sustained by* the carrier may, in practice, be of significant proportion (e.g. loss of the vessel) and the question of burden of proof and allocation of liability would thus be of considerable interest to potentially liable cargo interests. Under the Hague-Visby Rules, it is clear, at least according to English law, that a carrier would not be able to claim an indemnity from the shipper (cf. Art. IV, r.6) unless he could disprove negligence in respect of the unseaworthiness (cf. Art. IV, r.1) or prove the extent to which a quantifiable proportion of the loss was solely due to the shipment of dangerous cargo, carried without the carrier's knowledge/consent.

51. At present, the Draft Instrument does not include a provision similar to Art. IV, r. 1 of the Hague-Visby Rules and it is therefore not clear whether the position under the Draft Instrument shall be the same as under the Hague-Visby Rules or whether a shipper, in order to defeat a claim by the carrier, would also need to prove that the unseaworthiness which had contributed to the loss was due to the carrier's negligence. The Working Group may wish to consider whether to include a separate provision on burden of proof (similar to Art. IV, r. 1 Hague-Visby Rules) in Article. 13, the provision dealing with the carrier's seaworthiness obligation.

## Annex

### Text of draft articles 10-14 as contained in UNCITRAL documents A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.36

#### "Chapter 4. OBLIGATIONS OF THE CARRIER"

##### "Article 10.

The carrier shall, subject to this instrument and in accordance with the terms of the contract of carriage, [properly and carefully] carry the goods to the place of destination and deliver them to the consignee."

##### "Article 11.

1. The carrier shall during the period of its responsibility as defined in article 7, and subject to article 8, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.

[2. The parties may agree that certain of the functions referred to in paragraph 1 shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]"

##### "Article 12.

###### Variant A

Notwithstanding articles 10, 11 and 13(1), the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, a danger to persons or property or an illegal or unacceptable danger to the environment.

###### Variant B

Notwithstanding articles 10, 11 and 13(1) the carrier may unload, destroy or render dangerous goods harmless if they become an actual danger to life or property."

##### "Article 13. Additional obligations applicable to the voyage by sea

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

(a) Make and keep the ship seaworthy;

(b) Properly man, equip and supply the ship and keep the ship so manned, equipped and supplied throughout the voyage;

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.

[2. Notwithstanding articles 10, 11 and 13(1), the carrier may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.]"

"Article 14. Basis of liability

1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the [claimant] proves that

- (a) The loss, damage, or delay; or
- (b) The occurrence that caused [or contributed to] the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter 3, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person mentioned in article 14 bis caused [or contributed to] the loss, damage or delay.

2. Without prejudice to paragraph 3, if [and to the extent] the carrier, alternatively to proving the absence of fault as provided in paragraph 1 proves that the loss, damage, or delay was caused by one of the following events:

- (a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;
- (b) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process];
- (c) Act or omission of the shipper, the controlling party or the consignee;
- (d) Strikes, lockouts, stoppages, or restraints of labour;
- (e) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;
- (f) Insufficiency or defective condition of packing or marking;
- (g) Latent defects in the ship not discoverable by due diligence;
- (h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;
- (i) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13(2) when the goods have become a danger to persons, property or the environment or have been sacrificed;
- (j) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of

the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Then the carrier shall be liable for such loss, damage or delay if [and to the extent] the claimant proves that:

(i) The fault of the carrier or of a person mentioned in article 14 bis caused [or contributed to] the event on which the carrier relies under this paragraph; or

(ii) An event other than those listed in this paragraph contributed to the loss, damage or delay. In this case, liability is to be determined in accordance with paragraph 1.

3. To the extent that the [claimant] proves [that there was] [that the loss, damage, or delay was caused by] [that the loss, damage, or delay could have been caused by],

(i) The unseaworthiness of the ship;

(ii) The improper manning, equipping, and supplying of the ship; or

(iii) The fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods,

then the carrier shall be liable under paragraph 1 unless it proves that,

(a) It complied with its obligation to exercise due diligence as required under article 13(1). [; or

(b) The loss, damage or delay was not caused by any of the circumstances mentioned in (i), (ii) and (iii) above.]

4. In case the fault of the carrier or of a person mentioned in article 14 bis has contributed to the loss, damage, or delay together with concurring causes for which the carrier shall not be liable, the amount for which the carrier shall be liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to its fault. [The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.]"