United Nations A/CN.9/WG.III/WP.36

General Assembly

Distr.: Limited
23 March 2004*

Original: English

United Nations Commission on International Trade Law
Working Group III (Transport Law)
Thirteenth session
New York, 3-14 May 2004

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

Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session (A/CN.9/544)

Note by the Secretariat

Contents

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

Introduction

1. During its twelfth session, Working Group III considered a number of provisions of the draft instrument on the carriage of goods [wholly or partly][by sea] as contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.32). The Secretariat was requested to prepare a revised draft of those provisions considered, based on the deliberations and conclusions of the Working Group during its twelfth session as contained in the report of that session (A/CN.9/544). The provisional redraft of those articles appears in sections I to VII below.

I. Title of the draft instrument

2. The title of the draft instrument was considered by the Working Group as reported at paragraphs 16 to 19 of A/CN.9/544. For the purposes of discussion, the title of the draft instrument will continue to be: "Draft instrument on the carriage of goods [wholly or partly][by sea]" until a decision is made in that respect by the Working Group.[1]

II. Scope of application and performing parties

A. Definition of "performing party" in article 1(e)

3. In addition to the definitions proposed in paragraph 4 below, the Working Group considered at paragraphs 34 to 42 of A/CN.9/544 the text of draft article 1(e) as it appeared in A/CN.9/WG.III/WP.32. While the exclusion of non-maritime performing parties from the draft instrument was discussed with approval by the Working Group at paragraphs 21 to 27 of A/CN.9/544, the definition of 'performing party' was also considered as it appeared in A/CN.9/WG.III/WP.32, without the exclusion of non-maritime performing parties. Following the discussion of the Working Group at its twelfth session, the provisional revised version of draft article 1(e) would read as follows:

[1] As noted at para. 19 of A/CN.9/544, the Working Group decided to retain the current title unchanged for the purposes of future discussion.

"(e) 'Performing party' means a person other than the carrier that physically performs or undertakes physically to perform[2] any of the carrier's responsibilities under a contract of carriage, including[3] the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.[4] The term 'performing party' does not include any person who is retained by a shipper or consignee, or is an employee, agent,[5] contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee."[6]

B. Definitions of "maritime performing party" and "non-maritime performing party

4. The Working Group considered at paragraphs 28 to 33 of A/CN.9/544 proposals for the definition of maritime and non-maritime performing parties. Should the Working Group ultimately decide to remove "maritime performing parties" from the definition of "performing party" in draft article 1(e) as set out in paragraph 3 above, the definition would have to be slightly adjusted as noted below, and following the discussion of the Working Group at its twelfth session, the provisional revised version of proposed definitions of 'maritime performing party' and 'non-maritime performing party' would read as follows:[7]

"(e) 'Performing party' means a person other than the carrier that physically performs or undertakes physically to perform any of the carrier's responsibilities under a contract of carriage, including the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. The term 'performing party' includes maritime performing parties and non-maritime performing parties as defined in subparagraphs (f) and (g) of this paragraph but[8] does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee."

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[2] As noted at para. 42 of A/CN.9/544, the Working Group made a provisional decision that the phrase "undertakes physically to perform" should be included in the definition without square brackets in order to both broaden the definition and clarify its limits in terms of physical performance pursuant to the contract of carriage.

[3] As further noted at para. 42 of A/CN.9/544, the Working Group asked the Secretariat to consider adding an inclusive phrase, such as "among others", "inter alia" or a reference to "similar functions", to the list of the carrier's functions. The word "including" has been added here.

[4] In keeping with the Working Group's request (see para. 42 of A/CN.9/544) to consider shortening the definition the phrase "regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage" has been deleted.

[5] As noted at para. 41 of A/CN.9/544, it was emphasized that the definition should not include an employee or agent as a performing party.

[6] As noted at para. 41 of A/CN.9/544, if the Working Group decided to exclude non-maritime performing parties from the application of the draft instrument, language along the lines of the proposed definition in para .4 below with respect to maritime and non-maritime performing parties would have to be included in this general definition in draft article 1(e).

[7] As noted at para. 31 of A/CN.9/544, there was general agreement in the Working Group that these definitions were a good basis for continuing the discussion on how to define maritime and non-maritime performing parties, and that a geographical approach to the definition was appropriate. It was also noted at the same paragraph that experience under national law in some States indicated that the application of the geographical approach (while generally appropriate), was likely to generate substantial litigation.

[8] The phrase, "includes maritime performing parties and non-maritime performing parties as defined in subparas. (f) and (g) of this paragraph but" has been inserted into the general definition of "performing party" in order to allow for the exclusion of non-maritime performing parties. See note 6, *supra*.

"(f) 'Maritime performing party' means a performing party who performs any of the carrier's responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] and their departure from the port of discharge [or final port of discharge as the case may be][9]. The performing parties that perform any of the carrier's responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading shall be deemed not to be maritime performing parties."

"(g) 'Non-maritime performing party' means a performing party who performs any of the carrier's responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge." [10]

III. Scope of application and localized or non-localised damage (draft article 18(2))

5. The text of draft article 18(2) was considered by the Working Group as reported at paragraphs 43 to 50 of A/CN.9/544. As noted at paragraph 50 [11] of A/CN.9/544, the Working Group decided that it would be appropriate to maintain the draft article in square brackets pending the decision of the Working Group on the liability limit set forth in draft article 18(1). Therefore, the provisional text of draft article 18(2) would remain as follows:

"[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.]" [12]

[9] As noted at para. 31 of A/CN.9/544, there was support in the Working Group for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, as, for example, in the case of a movement by truck from one dock to the next, but that a widely shared view was that movement between two physically distinct ports should be considered as part of a non-maritime performing party's functions. This clarification could be achieved by the inclusion here of the phrase "including inland movements within a single port". It was further suggested at para. 31 of A/CN.9/544 that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. The Working Group may wish to consider this suggestion.

[10] A concern was raised at para. 33 of A/CN.9/544 regarding whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole.

[11] The Working Group took note at para. 50 of A/CN.9/544 that opinions were fairly evenly divided between those who favoured the deletion of draft article 18(2) in its entirety, and those who favoured retaining it. Those in favour of deletion held that position firmly. However, some of those who favoured maintaining the provision for the moment did so with a number of nuances. The Working Group decided that it would be appropriate to maintain the draft article in square brackets pending the decision of the Working Group on the liability limit set forth in draft article 18(1).

[12] As noted at paras. 47 and 50 of A/CN.9/544, there was strong support for the deletion of draft article 18(2). Some of those who favoured maintaining the provision for the moment did so with a number of nuances. As noted at para. 46 of A/CN.9/544, it was suggested that as a matter of drafting, the phrase "international and national mandatory provisions" should be changed to "international or national mandatory provisions". A further refinement suggested was to keep draft article 18(2) in square brackets pending the insertion of liability limits in draft article 18(1), but to insert square brackets around the phrase "and national mandatory provisions" in order to mirror the current text in article 8. Another alternative suggested was that draft article 18(1) could establish the specific liability limit for localized damage, while draft article 18(2) could establish a second specific liability limit for non-localized damage without any reference to other liability limits in international and national mandatory provisions.

IV. Scope of application: definition of the contract of carriage and treatment of the maritime leg (draft articles 1(a) and 2)

6. The text of draft articles 1(a) and 2 was considered by the Working Group as reported at paragraphs 51 to 84 of A/CN.9/544. Following the discussion of the Working Group at its twelfth session, the provisional revised version of draft articles 1(a) and 2[13] would read as follows:

"Article 1. Definitions

"For the purpose of this instrument:

(a)[14] Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place[15] in one State to a place in another State; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.[16]

"Article 2. Scope of application

"1. Subject to paragraph 3, this instrument applies to all contracts of carriage if

(a) the place of receipt [or port of loading] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or][17]

(d)[18] the contract of carriage provides that this instrument, or the law of any State giving effect to it, is to govern the contract.[19]

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[13] As noted at para. 67 of A/CN.9/544, the prevailing view in the Working Group was that Variants A, B and C of draft article 2(1) in A/CN.9/WG.III//WP.32 should be deleted from the future revised version of the draft instrument. In addition, as noted at para. 74 of A/CN.9/544, the Working Group decided that the 'second proposal' for draft articles 1 and 2(1) should be kept for continuation of the discussion at a future session.

[14] As noted at para. 75 of A/CN.9/544, a further variant for draft article 1(a) could be:

"Contract of carriage means a contract under which a carrier against the payment of freight undertakes to carry goods from a place in one state to a place in another state if:

(i) the contract includes an undertaking to carry the goods by sea from a place in one state to a place in another state; or

(ii) the carrier may perform the contract at least in part by carrying the goods by sea from a place in one state to a place in another state, and the goods are in fact so carried.

In addition, a contract of carriage may also include an undertaking to carry goods by other modes prior to or after the international carriage by sea."

[15] As noted at para. 69 of A/CN.9/544, in view of the difficulties anticipated in the definition of "port", the prevailing view was that the more neutral word "place" could be used, in view of the focus on the sea carriage being expressed throughout the draft provision.

[16] As further noted at para. 69 of A/CN.9/544, and consistent with the last phrase of the variant suggested at para. 75 of A/CN.9/544 (also, see note 14, *supra*), it was suggested that the second phrase in subpara. (i) might read as follows: "In addition, such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after such international carriage by sea."

[17] As noted at para. 59 of A/CN.9/544, the Working Group decided that the text should be maintained between square brackets for continuation of the discussion at a future session.

[18] As noted at para. 58 of A/CN.9/544, general support was expressed for the deletion of subparagraph (d) as it appeared in Variants A, B and C of draft article 2(1) of A/CN.9/WG.III//WP.32.

[19] The Working Group may wish to consider the suggestion (see para. 60 of A/CN.9/544) to replace at the beginning of the draft provision the words "the contract of carriage" with the words "the contract of carriage or any related contract" or the words "the contract of carriage or any contract related to the

"[1bis. A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage under article 1(a), provided that the goods are actually carried by sea.]" [20]

"2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.[21]

"3. This instrument does not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].[22]

"4. Notwithstanding paragraph 3, if a negotiable transport document or a negotiable electronic record is issued pursuant to a charter party, [contract of affreightment, volume contract, or similar agreement], then the provisions of this instrument apply to the contract evidenced by or contained in that document or that electronic record from the time when and to the extent that the document or the electronic record governs the relations between the carrier and a holder other than the charterer. [23]

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execution of the contract of carriage".

[20] As noted at para. 74 of A/CN.9/544, the Working Group decided that the second proposal for draft articles 1(a) and 2(1) as reflected at para. 68 of A/CN.9/544 should be kept for continuation of the discussion at a future session, subject to the relocation of subpara. (ii) in square brackets outside of the definition of "contract of carriage" in draft art icle 1(a). This subpara. (ii) has now been relocated as para. 2(1bis). While divergent views were expressed on the issue of whether this subpara. should be deleted (see para. 72 of A/CN.9/544), or improved (see para. 71 of A/CN.9/544), the general view expressed at para. 73 of A/CN.9/544, was that while the text of this subpara. might need considerable redrafting, it was also felt that the draft instrument should provide for the situation where no specific mode of transport had been stipulated in the contract. The Working Group may wish to consider the approach taken in article 18(4) of the Montreal Convention, as suggested, the text of which is as follows: "The period of the carriage by air does not extend to any carriage by land, by sea or by inland wat erway performed outside an airport. If, however, such carriage takes place in the performance of a contract of carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air."

[21] As noted at para. 76 of A/CN.9/544, the Working Group found the substance of para. (2) to be generally acceptable.

[22] While there was broad agreement in the Working Group (see para. 77 of A/CN.9/544) that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis, such as those contracts that, in practice, were the subject of extensive negotiation between shippers and carriers, there were diverging views on the best legislative technique to be used in excluding those contracts that should not be covered on a mandatory basis (see para. 78 of A/CN.9/544). One suggestion was that such contracts should not be dealt with in draft article 2 but rather in chapter 19 dealing with freedom of contract, with the possible addition of a reference to "ocean liner service agreements (OLSAs)" as described in document A/CN.9/WG. III/WP.34, a proposed definition for which was set out at para. 78 of A/CN.9/544. Another view was that para. (3) should be deleted and that the issue should be dealt with in the provisions of the draft instrument on freedom of contract (see para. 79 of A/CN.9/544), while another view was that instead of defining types of contracts to be excluded from the application of the draft instrument, it might be easier to define situations where it would be inappropriate for the draft instrument to apply mandatorily (see para. 80 of A/CN.9/544). While the Secretariat was requested to prepare a revised draft of this provision, with possible variants, the Working Group may wish to engage in further discussion and clarification of this issue, for example, with respect to whether the scope of application should be decided on the basis of the types of transport documents to be included in the mandatory regime, or whether inclusion should be based on the contract of carriage, or on the basis of the type of trade intended to be included in the mandatory regime.

[23] As noted at para. 83 of A/CN.9/544, subject to possible reconsideration of the placement of para. (4)

"5. If a contract provides for the future carriage of goods in a series of shipments, this instrument applies to each shipment to the extent that paragraphs 1, 2, 3 and 4 so specify."[24]

V. Exemptions from liability, navigational fault, and burdens of proof (draft article 14)

A. Draft article 14

7. The text of draft article 14 was considered by the Working Group as reported at paragraphs 85 to 144 of A/CN.9/544. Following the discussion of the Working Group at its twelfth session, the provisional revised version of draft article 14 would read as follows:[25]

"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][26] 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[27] caused [or contributed to] the loss, damage or delay.

"2.[28] Without prejudice to paragraph 3,[29] if [and to the extent][30] the carrier, alternatively to proving the absence of fault as provided in paragraph 1[31] proves that the loss, damage or delay was caused by one of the following events:

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after the discussion of chapter 19, the Working Group found the substance of the draft provision to be generally acceptable. It was decided that the words "[contract of affreightment, volume contract, or similar agreement]" should be retained in square brackets for further discussion.

[24] As noted at para. 84 of A/CN.9/544, subject to possible reconsideration of the placement of para. (4) after discussion of chapter 19, the Working Group found the substance of the draft provision to be generally acceptable. Further, if para. (1 bis) is maintained in this draft article, reference to it should also be included with the references to the other paras. in the final phrase of this para.

[25] As noted at para. 110 of A/CN.9/544, unanimous support was expressed that the third redraft (in respect of subparas. (2) and (4); see para. 108 of A/CN.9/544) and the second redraft (in respect of the remainder of draft article 14, see para. 101 of A/CN.9/544) should form the basis for future work on draft article 14(2); subject to those additional drafting suggestions indicated at paras. 85 to 144.

[26] As suggested at paras. 105 and 133 of A/CN.9/544, the word "shipper" has been replaced with the word "claimant", however the Working Group may wish to consider whether a definition of "claimant" should be included in draft article 63 of the draft instrument when it discusses that provision.

[27] This is a reference to draft article 15(3) in A/CN.9/WG.III/WP.32, which the Working Group agreed should become a separate article provisionally numbered 14 bis. See paragraph 167 of A/CN.9/544 and the discussion of draft article 15(3) summarised at paragraphs 166-170.

[28] As noted at para. 115 of A/CN.9/544, with the various changes made to this provision, the counterproof provisions in subparagraphs (i) and (ii) of para. (2) might have become unclear, and the suggestion was made to separate paragraph 2 into two separate sentences in order to clarify this potential problem. The Working Group may wish to consider this suggested clarification.

[29] The phrase "Without prejudice to paragraph 3" was added in order to clarify the relationship between paras. (2) and (3) as agreed by the Working Group at para. 112 of A/CN.9/544.

[30] The phrase "[and to the extent]" was added as agreed by the Working Group at para. 112 of

…… *[insert the "excepted perils", see section B below]*

Then the carrier shall be liable for such loss, damage or delay[32] if [and to the extent][33] 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[34] contributed to the loss, damage or delay. In this case, liability is to be determined[35] in accordance with paragraph 1.[36]

"3. To the extent that the [claimant][37] proves [that there was] [that the loss, damage, or delay was caused by] [that the loss, damage, or delay could have been caused by],[38]

(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[39] liable under paragraph 1 unless it proves that,

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A/CN.9/544.

[31] The square brackets around the phrase ", alternatively to proving the absence of fault as provided in paragraph 1" were removed as agreed by the Working Group at para. 113 of A/CN.9/544.

[32] As noted at para. 105 of A/CN.9/544, the following alternative language was suggested for the phrase "then its liability ... will arise": "then the carrier's liability is maintained or continued", or "then the carrier shall be liable for such loss, damage or delay".

[33] The phrase "only in the event" was deleted, and the phrase "if [and to the extent]" was substituted as agreed by the Working Group at para. 112 of A/CN.9/544.

[34] As noted at para. 111 of A/CN.9/544, it was suggested that a remedy for the inadvertent result that the text of subpara. 2(ii) could suggest that it was necessary for the shipper or claimant to prove both the additional cause for the loss and that it was outside the list of "excepted perils" in subpara. 2(i) would be to insert in subpara. 2(ii) after the phrase "an event other than those listed in this paragraph", the additional phrase "on which the carrier relies". The Working Group may wish to consider the addition of this phrase.

[35] For greater certainty, the word "assessed" has been changed to "determined".

[36] As noted at para. 114 of A/CN.9/544, in order to express the general agreement that where the shipper or claimant proved a cause for the damage attributable to the carrier but outside the list of "excepted perils" under subpara. (ii), resort should be had back to paragraph 1, the following sentence was added to the end of subpara. (ii): "In this case, liability is to be assessed in accordance with paragraph 1."

[37] See note 26, *supra*.

[38] As noted at para. 132 of A/CN.9/544, the Working Group was of the view that the text should remain with its two alternative approaches for further consideration and consultation prior to making a decision on this matter. It was also suggested that the notion of "likelihood of causation" by one of the events in subparas. (i), (ii) or (iii) might need to be further explored, and that wording along the lines of "[that the loss, damage, or delay could have been caused by]" could be a possible formulation for the third alternative.

[39] As noted at para. 103 of A/CN.9/544, one drafting observation made with respect to the

redrafted article as a whole was that the phrase “shall be liable” and “is liable” were both used, and that consistency should be sought in this regard.

(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[40] mentioned in (i), (ii) and (iii) above.][41]

"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.][42]"

B. The "excepted perils"

8. The text of the "excepted perils" in draft article 14 of A/CN.9/WG.III/WP.32 was considered by the Working Group as reported at paragraphs 117 to 129 of A/CN.9/544. Following the discussion of the Working Group at its twelfth session, the provisional revised version of the list of "excepted perils" in draft articles 14 would read as follows:

"(a) [Act of God][43], war, hostilities, armed conflict, piracy, terrorism,[44] riots and civil commotions;[45]

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[40] In an effort to achieve greater clarity, it is suggested that this word could be changed from "facts" to the more inclusive "circumstances", or, alternatively, to "occurrences" or "matters".

[41] The Working Group may also wish to consider the alternative structuring for para. (3) of which it took note as follows at para. 134 of A/CN.9/544 :

"3. The carrier is not liable for loss, damage, or delay resulting from the unseaworthiness of the ship as [alleged] [proved] by the claimant, to the extent that the carrier 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 facts mentio ned in (i), (ii) and (iii) above.]".

[42] As noted at para. 143 of A/CN.9/544, a widely accepted proposal was to add in square brackets the last sentence proposed in the second redraft along the lines of "[The court may only apportion liability on an equal ba sis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis]." It was widely felt that further discussion could be based on that text. The Working Group may also wish to consider further an alternative proposal of which it took note, which was intended to take into account the situation addressed in subpara. 2(ii) where the damage was not caused by actual fault , as follows:

"4. In case the fault of the carrier or of a person mentioned in article 14bis [or an event other than the one on which the carrier relied] has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is 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 such fault [or event]."

[43] As noted at para. 120 of A/CN.9/544, there was broad suppo rt in the Working Group for the proposal that the "act of God" exception should be maintained.

[44] As noted at para. 121 of A/CN.9/544, the general view in the Working Group was that piracy

"(b) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers[46] or people [including interference by or pursuant to legal process][47];

"(c) Act or omission of the shipper, the controlling party or the consignee;

"(d) Strikes, lockouts, stoppages or restraints of labour[48];

"(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[49];

"(g) Latent defects in the ship[50] not discoverable by due diligence[51];

"(h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper,[52] 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

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and terrorism should be included in the list.

[45] As noted at para. 125 of A/CN.9/544, it was suggested that subparas. (a) and (b) should be broadened by adding the phrase "and all other events that are not the fault of the carrier". The Working Group may wish to consider this suggestion.

[46] As noted at para. 125 of A/CN.9/544, the word "rulers" was questioned as meaningless in light of modern political realities. The Working Group may wish to consider this in future discussions.

[47] As noted at para. 122 of A/CN.9/544, there was support for the suggestion that the square brackets be removed and the text be maintained, but the question was raised whether the phrase "including interference by or pursuant to legal process" could also include the situation where a cargo claimant arrested a ship. The suggestion was made to clarify the meaning of that phrase. The suggested clarification could be achieved by returning to the language of article IV.2.g of the Hague and Hague-Visby Rules, where "seizure under legal process" clearly excluded the arrest of a ship. See, also, the suggestion in footnote 45, *supra*.

[48] As noted at para. 123 of A/CN.9/544, the Working Group noted the suggestion that the subparagraph might need to establish a distinction between general strikes and strikes that might occur in the carrier's business, and for which the carrier might bear some fault. Further, as noted at para. 125 of A/CN.9/544, uncertainty was expressed with respect to the precise meaning of the phrase "restraints of labour". The Working Group may wish to consider further these issues.

[49] As noted at para. 125 of A/CN.9/544, it was proposed that it be clarified that the packing or marking should have been done "by the shipper". Again, the Working Group may wish to consider further this suggestion.

[50] As noted at para. 125 of A/CN.9/544, there was support for the view that this subparagraph should make it clear that the latent defects referred to were those in the ship.

[51] As noted at para. 125 of A/CN.9/544, it was noted that if the phrase "due diligence" was used elsewhere, for example in draft article 13, it should also be repeated here in the interest of consistency.

[52] As noted at para. 125 of A/CN.9/544, it was suggested that the phrase "or on behalf of the shipper" in this subparagraph should be deleted as confusing. The Working Group may wish to consider further this suggestion.

the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." [53]

9. As noted at paragraph 117 of A/CN.9/544, support was expressed in the Working Group that the two exceptions to the general approach of including the list of perils from article IV.2.c through article IV.2.q of the Hague and Hague-Visby Rules were the deletion of article IV.2.a (error in navigation), and the redrafting of article IV.2.b (fire exception) to reflect its limited application to the maritime leg of the transport. As noted at paragraph 128 of A/CN.9/544, the Working Group agreed to leave the fire exception and the currently-deleted exception for error in navigation in chapter 6, draft article 22 of the draft instrument (A/CN.9/WG.III/WP.32) and separate from the list of "excepted perils" in draft article 14, for future consideration of where best to place them in the draft instrument. The text of the fire exception in both variants A and B of draft article 22 will remain as it currently exists:

"Article 22. Liability of the carrier

[…]

"fire on the ship, unless caused by the fault or privity of the carrier." [54]

10. As noted at paragraph 127 of A/CN.9/544, the prevailing view in the Working Group was that the deletion of the navigational error exception should be maintained, but also that the impact of that decision should be considered with respect to the allocation of burdens of proof in discussions to come.

VI. Obligations of the carrier in respect of the voyage by sea (draft article 13)

11. The text of draft article 13 was considered by the Working Group as reported at paragraphs 145 to 157 of A/CN.9/544. Following the discussion of the Working Group at its twelfth session, the provisional revised version of draft article 13 would read as follows:

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

"1. The carrier shall be bound, before, at the beginning of, and during [55] the voyage by sea, to exercise due diligence to:

[53] This is the text of article IV.2.q of the Hague and Hague-Visby Rules, inserted for future discussion of the text. As noted at paras. 117 and 129 of A/CN.9/544, the Working Group agreed that the list of "excepted perils" should be included in the draft instrument, and that the substance and content of the exceptions on the list should be inspired from the Hague and Hague-Visby Rules, including article IV.2.q.

[54] As noted at para. 126 of A/CN.9/544, while it was agreed that the fire exception should be maintained, diverging views were expressed in the Working Group with respect to the text of the exception, and its text is thus reproduced without change.

[55] As noted at para. 153 of A/CN.9/544, the Working Group agreed that the carrier's obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft article 13(1) surrounding the phrases "and during" in draft article 13(1), "and keep" in draft article 13(1)(a), and "and keep" in draft article 13(1)(c) should thus be removed, and the text in them retained. The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft instrument, and that care should be taken by the Working Group to bear this in mind in its consideration of

"(a) Make and keep the ship seaworthy;

"(b) Properly man[56], equip and supply the ship and keep the ship so manned[57], equipped and supplied throughout the voyage[58];

"(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[59] human life or[60] other property involved in the common adventure.]"[61]

VII. Liability of performing parties (draft article 15)

12. The text of draft article 15 was considered by the Working Group as reported at paragraphs 158 to 181 of A/CN.9/544. Following the discussion of the Working Group at its twelfth session, the provisional revised version of draft articles 14 bis and 15 would read as follows:

"Article 14 bis.[62]

"Subject to paragraph 15(4),[63] the carrier shall be responsible for the acts and omissions of

consideration of the rest of the instrument.

[56] As noted at para. 148 of A/CN.9/544, a drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man ... the ship". The Working Group may wish to consider this suggestion.

[57] *Ibid.*

[58] As noted at para. 153 of A/CN.9/544, the Working Group requested the Secretariat to make the necessary changes to subpara. (b) to ensure that this obligation was understood to be of a continuing nature. It is suggested that the addition of the phrase "throughout the voyage" could achieve this effect. A possible alternative could be to insert the phrase "and continuously" after the opening word, "Properly".

[59] As noted at paras. 156 and 157 of A/CN.9/544, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the presence of imminent danger, but that care should be taken not to prejudice or alter the rules on general average. Consistent with the language in Rule A of the York-Antwerp Rules of 1994, the phrase "from peril" was added after the word "preserving".

[60] As noted at para. 157 of A/CN.9/544, the Working Group requested the Secretariat to consider the drafting suggestion to include a reference to the preservation of human life. The phrase "human life" has been added before the phrase "or other property".

[61] As noted at para. 157 of A/CN.9/544, the Working Group decided to maintain draft article 13(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 17 on general average.

[62] Formerly draft article 15(3), but moved and provisionally numbered "article 14 bis" on the agreement of the Working Group as noted at para. 167 of A/CN.9/544.

[63] As noted at para. 170 of A/CN.9/544, the Working Group decided to maintain this opening phrase, although the suggestion was made that it should be replaced with the phrase "Subject to the liability and limitations of liability available to the carrier" since draft article 14 bis (formerly draft article 15(3)) dealt with actions brought against the carrier, while draft article 15(4) (formerly draft article 15(5)) dealt with actions brought against any person other than the

(a) any performing party, and

(b) any other person, including a performing party's subcontractors, employees[64] and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own. The carrier is responsible under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.

"Article 15. Liability of maritime[65] performing parties

"1.[66] A maritime[67] performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument if the occurrence that caused the loss, damage or delay took place[68] (a) during the period in which it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

"2. If the carrier agrees to assume responsibilities other than those imposed on the carrier under this instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods shall be higher than the limits imposed under articles 16(2), 24(4) and 18[69], a maritime[70] performing party shall not be bound by this agreement unless the

carrier.

[64] As noted at para. 168 of A/CN.9/544, the Working Group agreed to the addition of the word "employees" so that draft article 14 bis would mirror the language in draft article 15(3) (formerly draft article 15(4)). As further noted at para. 168, as a matter of drafting, further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

[65] As noted at para. 159 of A/CN.9/544, the word "maritime" has been inserted in accordance with the decision of the Working Group that the title of the draft article should be adjusted to reflect its agreement to limit the scope of draft article 15 to "maritime performing parties" as discussed at paras. 23 to 33 of A/CN.9/544.

[66] Draft article 15(1) uses Variant A (from A/CN.9/WG.III/WP.32) as its basis, given the broad support for Variant A as noted at para. 162 of A/CN.9/544.

[67] As noted at para. 161 of A/CN.9/544, the Working Group reaffirmed its understanding that the draft instrument should, in principle, avoid dealing with non-maritime performing parties and that the scope of para. (1) should be restricted to maritime performing parties. The word "maritime" has been added to reflect that understanding.

[68] As noted at para. 162 of A/CN.9/544, the Working Group agreed to insert the words: "if the occurrence that caused the loss, damage or delay took place" before the text of subpara. (a).

[69] As noted at para. 165 of A/CN.9/544, the Working Group took note of the suggestion to limit the reference to draft article 18, since it was stated that, while the reference to paras. (1), (3) and (4) of draft article 18 was acceptable, para. (2) of draft article 18 should not be referred to since the performing party was not liable in case of non-localized damage. The Working Group decided that this suggestion might need to be further discussed after a decision had been made regarding the inclusion of para. (2) of draft article 18 in the draft instrument.

[70] As noted at para. 163 of A/CN.9/544, the Working Group agreed that the scope of para. (2) should be restricted to maritime performing parties.

maritime[71] performing party expressly agrees to accept such responsibilities or such limits.

"3.[72] Subject to paragraph 4[73], a performing party shall be responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its subcontractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency.[74]

"4.[75] If an action under this instrument[76] is brought against any person[77], other than the carrier, mentioned in article 14 bis[78] and paragraph 3,[79] [, including employees or agents of the contracting carrier or of a maritime performing party,][80] that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency.

"5.[81] If more than one maritime performing party[82] is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 16, 24 and 18.

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[71] *Ibid*.

[72] This provision, formerly para. (4), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[73] This provision, formerly para. (5), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[74] As noted at para. 172 of A/CN.9/544, the Working Group reaffirmed its decision that the structure of this para. should mirror new draft article 14 bis, and took note of the views expressed regarding whether draft article 15(3) (formerly 15(4)) should cover both maritime and non-maritime performing parties for continuation of the discussion at a future session.

[75] This provision, formerly para. (5), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[76] As noted at para. 176 of A/CN.9/544, it was suggested that the phrase "under this instrument" should be added after the phrase "an action" to clarify it.

[77] As noted at para. 175 of A/CN.9/544, the Secretariat was requested to examine the possibility of introducing a further variant limiting the scope of this para. to the maritime sphere. It is suggested that this could be accomplished by substituting the words "maritime performing party" for the word "person", as was done in para. (5) (formerly para. (6)).

[78] This provision, formerly draft article 15(3), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[79] This provision, formerly para. (4), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[80] As noted at para. 175 of A/CN.9/544, the Working Group agreed that, as an alternative to the existing text of para. (4) (formerly para. (5)), the words "employees or agents of the contracting carrier or of a maritime performing party" should be inserted in square brackets for continuation of the discussion at a future session. The Working Group may wish to consider the following simplified text for the opening phrase of the paragraph ending with "that person": "If an action under this instrument is brought against any maritime performing party [, including its sub-contractors, employees or agents,] that person…".

[81] This provision, formerly para. (6), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[82] As noted at para. 180 of A/CN.9/544, the Working Group agreed that the scope of this paragraph should be limited to maritime performing parties, thus the phrase "maritime performing party" has been substituted for the word "person". It was suggested that a proposal

"6.[83] Without prejudice to article 19, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument." [84]

to simplify the text of this paragraph along the following lines: "The contracting carrier and the maritime performing party are jointly and severally liable" should be further discussed in the context of para. (6) (formerly para. (7)).

[83] This provision, formerly para. (7), was renumbered to account for the separation of draft article 15(3) into the new draft article 14 bis.

[84] As noted at para. 181 of A/CN.9/544, due to the absence of sufficient time, the Working Group did not discuss this paragraph.