

# The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea]: the Treatment of “Through Transport” Contracts

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## I. INTRODUCTION: THE HISTORICAL BACKGROUND OF THE DRAFT INSTRUMENT

The United Nations Commission on International Trade Law (“UNCITRAL”) Draft Instrument on the Carriage of Goods [wholly or partly] [by sea] (“Draft Instrument”)<sup>1</sup> constitutes the latest attempt to update the international carriage of goods by sea regime in order to accommodate the current needs of maritime transport.<sup>2</sup> This project was first con-

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1. *Transport Law Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]*, Note by the Secretariat, U.N. Comm’n on Int’l Trade Law, 12th Sess., U.N. Doc A/CN.9/WG.III/WP.32 [hereinafter *Draft Instrument*], available at <http://www.uncitral.org/en-index.htm> (last visited Nov. 9, 2004).

2. See *Official Records of the UNCITRAL General Assembly*, U.N. Comm’n on Int’l Trade Law, 51st Sess., Supp. No. 17, at para. 210, U.N. Doc. A/51/17 (1996) [hereinafter *51st Session of UNCITRAL General Assembly*]; *Official Records of the UNCITRAL General Assembly*, U.N. Comm’n on Int’l Trade Law, 56th Sess., Supp. No.17, at 64-65, para. 345, U.N. Doc. A/56/17 (2002) [hereinafter *56th Session of UNCITRAL General Assembly*], available at <http://www.un.org/documents/ga/docs/56/a5617.pdf>.

ceived in 1996 when, during its twenty-ninth Session, UNCITRAL was advised of the significant gaps the existing national laws and international conventions have left in the area of the international carriage of goods by sea with respect to various issues.<sup>3</sup>

As a result, UNCITRAL considered a proposal to

include in its 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 in the areas where no such rules existed and with a view to achieving greater uniformity of laws. . . .<sup>4</sup>

Therefore, UNCITRAL commissioned the Secretariat to collect information, ideas, and opinions from Governments and international organizations representing the commercial sectors involved in the carriage of goods by sea with respect to the problems that arose in practice and possible solutions.<sup>5</sup>

Next, UNCITRAL collaborated with International Maritime Committee ("CMI") which worked on this project for 3 ½ years. Specifically, CMI first established a Steering Committee which identified the topics to be further examined in a report released in May 1998.<sup>6</sup> In view of this report, CMI set up an International Working Group, which circulated a relevant questionnaire to all National Associations.<sup>7</sup> The same Group also analyzed the responses to the questionnaire<sup>8</sup> and, accordingly, proposed a list of issues to be considered by the International Sub-Committee on Issues of Transport Law ("IS-C").<sup>9</sup>

Then, the key issues examined during IS-C four meetings in 2000,<sup>10</sup>

3. 51st Session of UNCITRAL General Assembly, *supra* note 2, at para. 210.

4. *Id.*

5. *Id.* at para. 215. Such organizations included the International Maritime Committee ("CMI"), the International Chamber of Commerce ("ICC"), the International Union of Marine Insurance ("IUMI"), the International Federation of Freight Forwarders Association ("FIATA"), the International Chamber of Shipping ("ICS") and the International Association of Ports and Harbors ("IAPH").

6. See COMITE MARITIME INT'L (CMI) Y.B. 107 (1998).

7. See *Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B. 132 (1999); *Official Records of the General Assembly*, U.N. Comm'n on Int'l Trade Law, 54th Sess., Supp. No. 17, at 52, paras. 414-15, U.N. Doc. A/54/17 (1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V99/854-/30/PDF/V9985430.pdf?OpenElement>.

8. See *Issues of Transport Law*, *supra* note 7, at 139.

9. *Id.* at 121. IS-C was set up in November 1999.

10. *Report of the First Meeting of the International Sub-Committee on Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B. 176 (2000), available at <http://www.comitemaritime.org/singa-pore/issue/report1.pdf> (last visited Nov. 9, 2004); *Report of the Second Meeting of the International Sub-Committee on Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B. 202 (2000), available at <http://www.comitemaritime.org/singapore/issue/report2.pdf> (last visited Nov. 9, 2004); *Report of the Third Meeting of the International Sub-Committee on Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B. 234 (2000), available at <http://www.comitemaritime.org/singapore/is-sue/report3.pdf> (last visited Nov. 9, 2004); *Report of the Fourth Meeting of*

as well as a first CMI Draft Outline Instrument, drafted by IS-C,<sup>11</sup> were discussed at the CMI's 37th Conference held in Singapore in February 2001.<sup>12</sup> In the light of the resolutions of the Singapore Conference, this first Draft was amended and then released as the "CMI Draft Outline Instrument of 31 May 2001" ("Revised CMI Draft Outline Instrument").<sup>13</sup>

Subsequently, this revised draft and a Consultation Paper<sup>14</sup> were circulated to all national Associations. Following the responses to this Consultation Paper and the comments of several national associations and international organizations,<sup>15</sup> as well as the Fifth and the Sixth Meeting of the IS-C Committee,<sup>16</sup> CMI published its final "Draft Instrument on Issues of Transport Law" ("CMI Draft Instrument") on December 10, 2001.<sup>17</sup> Finally, CMI delivered its final Draft to UNCITRAL for implementation and is now known as the "UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea" ("UNCITRAL Preliminary Draft"), dated January 8, 2002.<sup>18</sup>

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*the International Sub-Committee on Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B. 263 (2000), available at <http://www.comitemaritime.org/singapore/issue/report4.pdf> (last visited Nov. 9, 2004); *Singapore I Agenda Paper*, COMITE MARITIME INT'L (CMI) Y.B. 114 (2000), available at [http://www.comitemaritime.org/singapore/issue/issue\\_agenda.html](http://www.comitemaritime.org/singapore/issue/issue_agenda.html) (last visited Nov. 9, 2004).

11. *CMI Draft Outline Instrument*, COMITE MARITIME INT'L (CMI) Y.B. 122 (2000), available at [http://www.comitemaritime.org/singapore/issue/issue\\_draft.html](http://www.comitemaritime.org/singapore/issue/issue_draft.html) (last visited Nov. 9, 2004).

12. *Singapore II Report of Committee A*, COMITE MARITIME INT'L (CMI) Y.B. 182 (2001) [hereinafter *Singapore II Report*], available at <http://www.comitemaritime.org/singapore2/conference37/is-sue/issues1.html> (last visited Nov. 9, 2004).

13. *CMI Draft Outline Instrument of 31 May 2001*, COMITE MARITIME INT'L (CMI) Y.B. 357 (2001) [hereinafter *Revised CMI Draft Outline Instrument*], available at <http://www.comitemaritime.org/singapore2/singafter/issues/draft.pdf> (last visited Nov. 9, 2004).

14. *Id.*; *Consultation Paper*, COMITE MARITIME INT'L (CMI) Y.B. 379 (2001), available at <http://www.comitemaritime.org/singapore2/singafter/issues/consultation.pdf> (last visited Nov. 9, 2004).

15. *Synopsis of the Responses of National Associations, Consultative Members and Observers to the Consultation Paper and other Comments on the Draft Outline Instrument*, COMITE MARITIME INT'L (CMI) Y.B. 383 (2001) [hereinafter *CMI Synopsis of Responses*], available at <http://www.comite-maritime.org/singapore2/singafter/issues/synopsis.pdf> (Nov. 9, 2004).

16. *Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law*, CMI Y.B. 265 (2001) [hereinafter *Report of the Fifth I-SC Meeting*], available at <http://www.comitemaritime.org/singapore2/singafter/issues/report5.pdf> (last visited Nov. 9, 2004); *Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law*, CMI Y.B. 305 (2001) [hereinafter *Report of the Sixth I-SC Meeting*], available at <http://www.comitemaritime.org/singapore2/singafter/issues/report6.pdf> (last visited Nov. 9, 2004).

17. *CMI Draft Instrument on Transport Law*, CMI Y.B. 532 (2001) [hereinafter *CMI Draft Instrument*], available at <http://www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf> (last visited Nov. 9, 2004).

18. *Preliminary Draft Instrument on the Carriage of Goods by Sea*, U.N. Comm'n of Int'l Trade Law, 9th Sess., U.N. Doc. A/CN.9/WG.III/WP.21 (2002) [hereinafter *UNCITRAL Preliminary Draft*], available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp21e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp21e.pdf) (last visited Nov. 9, 2004).

UNCITRAL Working Group III on Transport Law then took over the project.<sup>19</sup> Group III met three times and examined the provisions of the proposed Draft.<sup>20</sup> During these meetings, Group III took into consideration United Nations Economic Commission for Europe's ("UNECE") and United Nations Conference on Trade and Development ("UNCTAD") comments,<sup>21</sup> the Secretariat's general remarks on the Draft's sphere of application,<sup>22</sup> the replies of national associations and international organizations to the questionnaires circulated by UNCITRAL's Secretariat<sup>23</sup> and UNCTAD,<sup>24</sup> a comparative table between the Draft Instrument and the other transport conventions,<sup>25</sup> as well as the

19. *56th Session of UNCITRAL General Assembly*, *supra* note 2, at 64-65, para. 345.

20. *Report of the Working Group on Transport Law on the Work of its Ninth Session (New York, 15-26 April 2002)*, U.N. Comm'n of Int'l Trade Law, 35th Sess., U.N. Doc. A/CN.9/510 (2002) [hereinafter *Ninth Session Working Group Report*], available at <http://www.uncitral.org/english/sessions/unc/unc-35/510e.pdf> (last visited Nov. 9, 2004); *Report of Working Group III (Transport Law) on the Work of its Tenth Session (Vienna, 16-20 September 2002)*, U.N. Comm'n of Int'l Trade Law, 36th Sess., U.N. Doc. A/CN.9/525 (2002) available at [http://www.uncitral.org/english/workinggroups/wg\\_3/acn9-525e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/acn9-525e.pdf) (last visited Nov. 9, 2004); *Report of the Working Group III (Transport Law) on the Work of its Eleventh Session (New York, 24 March-4 April 2003)*, U.N. Comm'n of Int'l Trade Law, 36th Sess., U.N. Doc. A/CN.9/526 (2003), available at <http://www.uncitral.org/english/sessions/unc/unc-36/acn9-526-e.pdf> (last visited Nov. 9, 2004).

21. *Preliminary Draft Instrument on the Carriage of Goods by Sea, Note by Secretariat*, U.N. Comm'n on Int'l Trade Law, 9th Sess., U.N. Doc. A/CN.9/WG.III/WP.21/Add.1 (2002) [hereinafter *Revised Preliminary Draft*], available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp-21-add1e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp-21-add1e.pdf) (last visited Nov. 9, 2004).

22. *Transportation Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea], General Remarks on the Sphere of Application of the Draft Instrument*, U.N. Comm'n Int'l Trade Law, 11th Sess., at 6-9, paras. 12, 18, 24, 25, U.N. Doc. A/CN.9/WG.III/WP.29 (2003), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/WP-29-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/WP-29-e.pdf) (last visited Nov. 9, 2004).

23. *Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. Comm'n Int'l Trade Law, 11th Sess., U.N. Doc. A/CN.9/WG.III/WP.28 (2003), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/WP-28-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/WP-28-e.pdf) (last visited Nov. 9, 2004); *Preparation of a Draft Instrument on the Carriage of Goods [by sea]- Addendum to Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. Comm'n Int'l Trade Law, 12th Sess., U.N. Doc. A/CN.9/WG.III/WP.28/Add.1 (2003), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp-28-add1-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp-28-add1-e.pdf) (last visited Nov. 9, 2004).

24. *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea] - Information Document Provided by the United Nations Conference on Trade and Development (UNCTAD)*, U.N. Comm'n Int'l Trade Law, 11th Sess., U.N. Doc. A/CN.9/WG.III/WP.30 (2003), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wg3-wp30-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wg3-wp30-e.pdf); *Multimodal Transport: The Feasibility of an International Legal Instrument*, U.N. Conference on Trade and Development, U.N. Doc. UNCTAD/SDTE/TLB/2003/1 (2003).

25. *The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and the Other Transport Conventions, Comparative Tables*, U.N. Comm'n Int'l Trade Law, 11th Sess., U.N. Doc. A/CN.9/WG.III/WP.27 (2002), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/W-P.27-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/W-P.27-e.pdf) (last visited Nov. 9, 2004).

proposals of several countries.<sup>26</sup> Finally, in light of the reports of these three meetings,<sup>27</sup> UNCITRAL published a new version of the Draft, the “Draft Instrument on the carriage of goods [wholly or partly] [by sea]” (“Draft Instrument”).<sup>28</sup> The Draft Instrument was the subject of discussion during the Working Group’s Twelfth, Thirteenth, Fourteenth, and Fifteenth Sessions,<sup>29</sup> where four additional national proposals, UNCTAD’s and the Nordic countries comments, and the provisional re-draft of several provisions were submitted.<sup>30</sup>

26. See *Preliminary Draft Instrument on the Carriage of Goods [by Sea]-Proposal by Canada*, U.N. Comm’n Int’l Trade Law, 10th Sess., U.N. Doc. A/CN.9/WG.III/WP.23 (2002), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/WP-23-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/WP-23-e.pdf) (last visited Nov. 9, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Proposal by Italy*, U.N. Comm’n Int’l Trade Law, 11th Sess., U.N. Doc. A/CN.9/WG.III/WP.25 (2002), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/WP-25-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/WP-25-e.pdf) (last visited Nov. 9, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Proposal by Sweden*, U.N. Comm’n Int’l Trade Law, 11th Sess., U.N. Doc. A/CN.9/WG.III/WP.26 (2002), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/WP-26-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/WP-26-e.pdf) (last visited Nov. 9, 2004).

27. See *supra* note 20.

28. *Draft Instrument, supra* note 1.

29. *Report of Working Group III (Transport Law) on the Work of its Twelfth Session (Vienna, 6-17 October 2003)*, U.N. Comm’n of Int’l Trade Law, 37th Sess., U.N. Doc. A/CN.9/544 (2003), available at <http://www.uncitral.org/english/sessions/unc/unc-37/acn9-544-e.pdf> (last visited Nov. 9, 2004); *Report of the Working Group on Transport Law on the Work of its Thirteenth Session (New York, 3-14 May 2004)*, U.N. Comm’n of Int’l Trade Law, 37th Sess., U.N. Doc. A/CN.9/552 of 24 (2004), available at <http://www.uncitral.org/english/sessions/unc/unc-37/acn9-541-e.pdf> (last visited Nov. 9, 2004); *Report of Working Group III (Transport Law) on the Work of its Fourteenth Session (Vienna, 29 November-10 December 2004)*, U.N. Comm’n of Int’l Trade Law, 38th Sess., U.N. Doc. A/CN.9/572 (2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/600/57/PDF/V0460057.pdf?OpenElement> (last visited Apr. 25, 2005).

30. *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Proposal by the Netherlands on the application door-to-door of the Instrument*, U.N. Comm’n of Int’l Trade Law, 12th Sess., U.N. Doc. A/CN.9/WG.III/WP.33 (2003), available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp-33-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp-33-e.pdf) (last visited Nov. 9, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Proposal by the United States of America*, U.N. Comm’n of Int’l Trade Law, 12th Sess., U.N. Doc. A/CN.9/WG.III/WP.34 (2003) [hereinafter *United States Draft Proposal No. 1*], available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp-34-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp-34-e.pdf) (last visited Nov. 9, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]-Proposal by China*, U.N. Comm’n of Int’l Trade Law, 13th Sess., U.N. Doc. A/CN.9/WG.III/WP.37, available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp-37-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp-37-e.pdf) (last visited Nov. 9, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Proposal by the United States of America*, U.N. Comm’n of Int’l Trade Law, 14th Sess., U.N. Doc. A/CN.9/WG.III/WP.42 (2004), available at <http://daccessdds.un.org/doc/UND-OC/LTD/V04/588/69/PDF/V0458869.pdf?OpenElement> (last visited Apr. 25, 2005); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Comments from Denmark, Norway and Sweden (the Nordic Countries) on the Freedom of Contract*, U.N. Comm’n of Int’l Trade Law, 14th Sess., U.N. Doc. A/CN.9/WG.III/WP.40 (2004), available at <http://daccessdds.un.org/doc/UN-DOC/LTD/V04/579/79/PDF/V0457979.pdf?OpenElement> (last visited Apr. 25, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Comments from the UNCTAD Secretariat*, U.N. Comm’n of Int’l Trade Law, 14th Sess., U.N. Doc. A/CN.9/

Additionally, the Draft Instrument is still being considered by CMI. Specifically, the IS-C has met twice since the submission of the CMI Draft to UNCITRAL.<sup>31</sup> In addition, CMI organized a Colloquium in Bordeaux in June 2003, where one of the sessions focused on the Draft Instrument.<sup>32</sup> Furthermore, the Draft Instrument's provisions were discussed during the 38th International CMI Conference held in Vancouver in June 2004.<sup>33</sup>

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WG.III/WP.41 (2004), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V04/578/84/PDF/V0457884.pdf?OpenElement> (last visited Apr. 25, 2005); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Comments from the UNCTAD Secretariat on Freedom of Contract*, U.N. Comm'n of Int'l Trade Law, 15th Sess., U.N. Doc. A/CN.9/WG.III/WP.46 (2005), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V05/812/08/PDF/V0581208.pdf?OpenElement> (last visited Apr. 25, 2005); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Provisional Redraft of the Articles of the Draft Instrument Considered in the Report of the Working Group III on the Work of its Twelfth Session* U.N. Comm'n of Int'l Trade Law, 13th Sess., U.N. Doc. A/CN.9/WG.III.WP.36, available at [http://www.uncitral.org/english/workinggroups/wg\\_3/wp-36-e.pdf](http://www.uncitral.org/english/workinggroups/wg_3/wp-36-e.pdf) (last visited Nov. 9, 2004); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Provisional Redraft of the Articles of the Draft Instrument Considered in the Report of the Working Group III on the Work of its Thirteenth Session*, U.N. Comm'n of Int'l Trade Law, 14th Sess., U.N. Doc. A/CN.9/WG.III.WP.39 (2004), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V04/580/33/PDF/V0458033.pdf?OpenElement> (last visited Apr. 25, 2005); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Scope of Application Provisions*, U.N. Comm'n of Int'l Trade Law, 15th Sess., U.N. Doc. A/CN.9/WG.III.WP.44 (2005), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V05/811/50/PDF/V0581150.pdf?OpenElement> (last visited Apr. 25, 2005); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Proposed Revised Provisions on Electronic Commerce*, U.N. Comm'n of Int'l Trade Law, 15th Sess., U.N. Doc. A/CN.9/WG.III.WP.47 (2005), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V05/825/84/PDF/V0582584.pdf?OpenElement> (last visited Apr. 25, 2005); *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]-Arbitration: Uniform International Arbitration Practice and the Provisions of the Draft Instrument, Note by the Secretariat*, U.N. Comm'n of Int'l Trade Law, 15th Sess., U.N. Doc. A/CN.9/WG.III.WP.45 (2005), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V05/825/84/PDF/V0582584.pdf?OpenElement> (last visited Apr. 25, 2005).

31. See *Report of the Seventh Meeting of the International Sub-Committee on Issues of Transport Law*, COMITE MARITIME INT'L (CMI) Y.B. 191 (2003) [hereinafter *Report of the Seventh IS-C Meeting*], available at <http://www.comitemaritime.org/year/2003/pdfiles/YBK03-7.pdf> (last visited Nov. 9, 2004); *Draft Report of the Eighth Meeting of the International Sub-Committee on Issues of Transport Law* COMITE MARITIME INT'L (CMI) Y.B. 199 (2003), available at <http://www.comitemaritime.org/year/2003/pdfiles/YBK03-7.pdf> (last visited Nov. 9, 2004).

32. *Introduction, Transportation Law*, COMITE MARITIME INT'L (CMI) Y.B. 121 (2003), available at <http://www.comitemaritime.org/year/2003/pdfiles/YBK03-5.pdf> (last visited Nov. 9, 2004).

33. The documents for the Vancouver Conference are published in COMITE MARITIME INT'L (CMI) Y.B. 2003 & 2004, available at [http://www.comitemaritime.org/year/2003/2003\\_part02.htm](http://www.comitemaritime.org/year/2003/2003_part02.htm) & <http://www.comitemaritime.org/year/2004/pdfiles/YBK04-1.pdf> (last visited Nov. 9, 2004).

## II. THE INTENDED DOOR-TO-DOOR SCOPE OF APPLICATION OF THE DRAFT INSTRUMENT AND “THROUGH TRANSPORT” CONTRACTS

As far as the sphere of application of the Draft Instrument is concerned, the Draft Instrument purports to cover multimodal/door-to-door transport operations provided that the carrier undertakes to perform at least a sea leg.<sup>34</sup> At this point, it is worthy to mention that the Working Group’s original mandate covered only port-to-port transport operations, as the idea of the Draft Instrument was originally conceived in order to harmonize maritime cargo regimes.<sup>35</sup>

The Working Group had, nonetheless, the discretion to study the desirability and feasibility of door-to-door operations, or certain aspects of those operations, and depending on the results of those studies, to propose to the UNCITRAL an appropriate extension of its mandate.<sup>36</sup> The Working Group made use of this discretion and examined the scope of application of the Draft Instrument during the Ninth Session of the Working Group, where there was a strong debate regarding whether the Draft Instrument should be confined to port-to-port operations or whether it should encompass door-to-door operations.<sup>37</sup>

Notwithstanding the expressed objections, the Working Group proposed the extension of the Working Group’s original mandate in order to consider door-to-door transport and establish a regime that would resolve any possible conflict between the Draft Instrument and the regimes that apply to land legs, if such legs precede or follow the sea carriage.<sup>38</sup> Subsequently, the UNCITRAL Commission approved the working assumption that the Draft Instrument should govern door-to-door transport operations.<sup>39</sup> Nevertheless, the Commission decided that the extended working assumption should be reconsidered, after the discussions of the substantive provisions of the Draft Instrument, which will result in a more complete understanding of their functioning in a door-to-door context.<sup>40</sup>

However, the intended door-to-door scope of application of the Draft Instrument is subject to several exceptions, as provided for in Articles 7.2-3 (definition of the place and time of receipt and delivery of the

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34. *Official Records of the UNCITRAL General Assembly*, U.N. Comm’n of Int’l Trade Law, 57th Sess., U.N. Doc. A/57/17, Supp. No.17, at 36, para. 224 (2002) [hereinafter *57th Session of UNCITRAL General Assembly*], available at <http://daccessdds.un.org/doc/UNDOC/GEN/V02/565/81/PDF/V02-56581.pdf?OpenElement> (last visited Nov. 9, 2004).

35. *Ninth Session Working Group Report*, *supra* note 20, at 6, para. 14.

36. *Id.*

37. *Id.* at 9, para. 26.

38. *Id.* at 11, para. 32.

39. *57th Session of UNCITRAL General Assembly*, *supra* note 34, at 36, para. 224.

40. *Id.*

goods),<sup>41</sup> Article 8 (carriage preceding or subsequent to sea carriage),<sup>42</sup> and Article 9 (mixed contracts of carriage and forwarding, also named “through transport” contracts).<sup>43</sup> This article will focus on Article 9 on “through transport” contracts, under which the carrier and the shipper may agree that the carrier, acting as an agent of the shipper, will arrange the performance of a transport leg or legs by other carrier or carriers.<sup>44</sup>

Specifically, Draft Instrument Article 9.1 provides that: “[t]he parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers.”<sup>45</sup> Thus, it makes clear that mixed contracts of carriage and forwarding, which have become customary practice in the liner trade, are legitimate.<sup>46</sup>

In addition, Article 9.2, which provides for the carrier’s obligations, when acting as a freight forwarder,<sup>47</sup> reads as follows: “[i]n such event the carrier shall exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.”<sup>48</sup>

Article 9 is similar to Hamburg Rules Article 11.1, under which a carrier may contract out specified part of the carriage covered by contract of carriage, provided that such part is to be performed by a named person other than the carrier and that such agreement is included in the contract of carriage.<sup>49</sup> In such a case, the carrier is not liable for loss, damage, or delay in delivery caused by an occurrence, which takes place while the goods are in the charge of the actual carrier during such part of the carriage.<sup>50</sup> However, for the sake of the protection of the shipper, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21.<sup>51</sup>

Nevertheless, Hamburg Rules Article 11.1 and Draft Instrument Article 9 are not identical. First, Draft Instrument governs cases where the

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41. *Draft Instrument*, *supra* note 1, at 17, art. 7.

42. *Id.* at 18, art. 8.

43. *Id.* at 19, art. 9.

44. *Id.*

45. *Id.*

46. *UNCITRAL Preliminary Draft*, *supra* note 18, at 23-24, paras. 57-58.

47. *See Draft Instrument*, *supra* note 1, at 19, art. 9.

48. *Id.*

49. *United Nations Convention on the Carriage of Goods by Sea*, U.N. Comm’n of Int’l Trade Law, 12th Sess. (1978), at art. 11.1, available at <http://www.uncitral.org/english/texts/transport/hamburg.htm#TOP> (last visited Nov. 9, 2004).

50. *Id.*

51. *Id.* at art. 21.





per,<sup>57</sup> the CMI Draft Outline Instrument and UNCITRAL Preliminary Draft Instrument adopted the current version in Article 4.3, which was also repeated in the last version of the Draft Instrument in Article 9.2.<sup>58</sup>

#### IV. THE DEBATE OVER THE NECESSITY OF ARTICLE 9

The necessity of the incorporation of Article 9 in the Draft Instrument has been the crux of debate since the beginning of this project.<sup>59</sup> The issue of whether through transport should be permitted was first raised in the Singapore Conference, in February 2001,<sup>60</sup> where no widespread support was expressed for ruling out through transport.<sup>61</sup> On the contrary, there was general support for the transport documents including safeguards and clearly providing for the limits on the carrier's freedom to enter into transport contracts when acting as an agent for the shipper.<sup>62</sup> This issue was raised once again in the CMI Consultation Pa-

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particular mode of transport or are compulsory applicable to the part of the carriage that is contracted out;

(b) take care that parties to such contract shall be the shipper and such third party, while the consignee under such contract should be a subsequent carrier or the consignee under the contract of carriage, as the case may be;

(c) exercise reasonable care, having regard to the specific factors that locally apply, in the selection of the third party;

(d) provide such third party with all information and instructions that are necessary for a proper carrying out of his tasks, including, as the case may be, any information on any loss or damage sustained by the goods and any instructions on the handing over of the goods to a subsequent carrier or to the consignee under the contract of carriage;

(e) take care that any information that the shipper, the controlling party, or the consignee, may reasonably request in respect of the part of the carriage contracted out to the third party, is provided to any of these persons with reasonable dispatch;

(f) provide the consignee under the contract with the third party with all the information and documents that may be required for such consignee to obtain delivery of the goods from the third party;

(g) effect payment of the remuneration due under such contract, unless otherwise agreed.

*Id.*

57. *Consultation Paper*, *supra* note 14, at 379-80; *see also CMI Synopsis of Responses*, *supra* note 15, at 418-31 (Nov. 9, 2004) (member associations' responses to CMI Consultation Paper).

58. *Revised Draft Outline Instrument*, *supra* note 13, at 360, art. 4.3 (alt. II); *cf. Draft Instrument*, *supra* note 1, at 19, art. 9.2.

59. *See, e.g., CMI Synopsis of Responses*, *supra* note 15, at 419, 422, 425, 427, 428, 430 (arguing in favor of the incorporation of Article 9: Denmark, Germany, Peru, BIMCO, ICS, NITL and WSC). *Compare Revised Preliminary Draft*, *supra* note 21, at 18-19 (arguing against the incorporation of Article 9); *Ninth Session Working Group Report*, *supra* note 20, at 15; *Submission from CIFFA to Canadian Maritime Law Association on the CMI Issues on Transport Law Outline Instrument for the OECD's Maritime Transport Committee Workshop in Paris*, at 10 (Jan. 25-26, 2001) [hereinafter *CIFFA Submission to Transport Canada*], available at [www.ciffa.com](http://www.ciffa.com) (last visited Nov. 9, 2004).

60. *Singapore I Agenda Paper*, *supra* note 10, at ch. 2.3.

61. *Singapore II Report of Committee A*, *supra* note 12, at 2.

62. *Id.*

per,<sup>63</sup> as well as during the Ninth Session of the UNCITRAL Working Group on Transport Law.<sup>64</sup>

In fact, as none of the existing transport conventions regulate the customary practice of mixed contracts of carriage and freight forwarding,<sup>65</sup> a provision like Article 9, that strikes a fair balance between the carriers' and the shippers' interests is indispensable.

Specifically, in the light of the application of the Draft Instrument to carriage precedent or subsequent to the sea carriage, Draft Instrument Article 9 accommodates the carriers' interests as it allows them to arrange transport by other carriers.<sup>66</sup> Thus, carriers are free to contract out transport legs they are not in charge of or do not perform.

As a balance to such a carrier's right, the Draft Instrument sets forth safeguards for the protection of shippers, such as the requirement of express agreement for the exclusion of specified parts set forth in Article 9.1.<sup>67</sup> This requirement protects shippers from abusive practices as mixed contracts of carriage and freight forwarding are valid only if they are a considered and are a mutual decision of the parties.<sup>68</sup> Hence, despite arguments to the contrary,<sup>69</sup> the requirement of express agreement bans carriers from taking advantage of Article 9 in order to limit the scope of their liability to the parts of transport they actually perform. And, even if carriers might attempt to take advantage of this possibility, as carriers and shippers are not negotiating on an equal bargaining power, carriers will not have the power to impose such an agreement given that standardized through transport contracts are null and void.

Nevertheless, it may be argued that Article 9 should be deleted, as through transport contracts undermine the intended door-to-door/multimodal scope of application of the Draft Instrument. The reason is that carriers and shippers may exclude part or parts of any transport operation that would otherwise fall into the scope of application of the Draft Instrument.<sup>70</sup>

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63. *Consultation Paper*, *supra* note 14, at 379-80; *see also CMI Synopsis of Responses*, *supra* note 15, at 418-31.

64. *Ninth Session Working Group Report*, *supra* note 20, at 15, para. 42; *see also Revised Preliminary Draft*, *supra* note 21, at 19, paras. 45-46.

65. *See, e.g., Ninth Session Working Group Report*, *supra* note 20, at 15, para. 42; *CMI Synopsis of Responses*, *supra* note 15, at 427-28 (BIMCO's and ICS' Responses to the CMI Consultation Paper).

66. *Draft Instrument*, *supra* note 1, at 19, art. 9.1.

67. *Id.*

68. *See Ninth Session Working Group Report*, *supra* note 20, at 15, paras. 41-42.

69. *See, e.g., Revised Preliminary Draft*, *supra* note 21, at 18-19, para. 45; *Ninth Session Working Group Report*, *supra* note 20, at 15, para. 41; *CIFFA Submission to Transport Canada*, *supra* note 59, at 10.

70. *See CIFFA Submission to Transport Canada*, *supra* note 59, at 6. It is argued that by legitimizing the current "balkanization of through contracts" Article 9 re-affirms the tackle-to-

However, though inconsistent with the scope of application of the Draft Instrument, such a provision is indispensable as it promotes the applicability of the Draft Instrument. Absent such a provision, Article 88.1 would have not permit through carriage.<sup>71</sup> In particular, any agreements for through carriage would have been null and void as they limit the carrier's obligations under the Draft Instrument. Therefore, the contracting parties would have overcome this obstacle by entering into separate contracts of carriage governed by the relevant international conventions and contracts of freight forwarding. They would not have entered into a multimodal transport contract covered by the Draft Rules.<sup>72</sup> Thus, it is evident that such practices would have undermined the application of the Draft Instrument in general, and, accordingly, would have deprived the cargo interests from the Draft Instrument's safeguards.

In addition, it is argued that Article 9 may not accommodate the need of the continuous documentary cover throughout the voyage. The documentary cover is required by the contract of sale,<sup>73</sup> and the Uniform Customs and Practices ("UCP") 500, the set of rules that govern the majority of letter of credit transactions.<sup>74</sup> The reason is that carriers will not be liable for the entire transport operation, and therefore, the transport document they issue may disclaim their responsibility after the end of the performance of their duties.

Specifically, even in cases where the sales contract expressly allows transshipment, the tender of a bill of lading or transport document that disclaims the carrier's responsibility after transshipment, as may happen in the case of Article 9, will constitute bad tender since it does not comply with the requirement for continuous documentary cover.<sup>75</sup> On the contrary, the tender of such a bill of lading or transport document in cases

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tackle period of responsibility of the Hague Rules, whereas the whole premise of a multimodal convention is to modernize the outdated Hague Rules and to provide a new regime for before loading and after discharge activities. *Id.* (borrowing the term "balkanization of through contracts" from WILLIAM TETLEY, MARINE CARGO CLAIMS 925 (1988)).

71. *Draft Instrument, supra* note 1, at 71-72, art. 88.

72. *See, e.g., Report of the Seventh IS-C Meeting, supra* note 31, at 194.

73. CHARLES DEBATTISTA, THE SALE OF GOODS CARRIED BY SEA § 7-14, at 141 (2d ed. 1998); *Hansson v. Hamel & Horley, Ltd.*, 2 A.C. 36 (H.L. 1922) (ruling that in the case of a CIF Kobe/Yokohama sale of cod, the seller breached its duty for continuous documentary coverage because the tendered bill of lading did not cover the first leg).

74. *Revised Preliminary Draft, supra* note 21, at 19, para. 46.

75. DEBATTISTA, *supra* note 58, §§ 7-30 to -31, at 152-53; *See also* Landauer & Co. v. Craven & Speeding Bros., 2 K.B. 94 (1912) (holding that in the case of a CIF London sale of hemp, the tendered bill of lading that did not cover the first sea leg from Manila to Hong Kong did not conform with the requirement for continuous documentary coverage); *Holland Colombo Trading Soc'y Ltd. v. Segu Mohamed Khaja Alawdenn*, 2 Lloyd's Rep. 45 (P.C. 1954) (concluding that a bill of lading containing a transshipment clause that does not provide for continuous documentary coverage, constitutes a bad tender under a C.I.F. contract); *Hansson*, 2 A.C. 36 (H.L. 1922).

where the sale contract is silent as to transhipment will be valid only if the transhipment has not taken place at the time of the tender.<sup>76</sup>

In addition, in the case of ocean carriage, UCP 500 Articles 23(c) and 24(c) provide that, unless the credit prohibits transhipment, banks will accept a bill of lading or a non-negotiable sea waybill stating that the goods will be transhipped if the entire transport operation is covered by one same bill of lading or non-negotiable sea waybill.<sup>77</sup>

Similarly, according to UCP 500, Articles 23(d)(i) and 24(d)(i), if the credit explicitly bans transhipment, banks will accept a bill of lading or a non-negotiable sea waybill indicating that the cargo shipped in containers, trailers, and/or lash barges will be transhipped, only if such transport documents provide for continuous documentary coverage.<sup>78</sup>

On the contrary, under UCP 500 Articles 23(d)(ii) and 24(d)(ii),<sup>79</sup> the bank will also accept such documents if they contain clauses that vest the carrier with the liberty to tranship, irrespective of whether the carrier assumes responsibility for the entire carriage.<sup>80</sup>

Moreover, if the transport operation is multimodal, according to UCP 500 Article 26(b),<sup>81</sup> the tender of a multimodal transport document indicating that the goods will or may be transhipped is valid, irrespective of what the letter of credit says about transhipment, only if the entire transport operation is covered by one document.<sup>82</sup> In contrast to sea transport operations, such a document should impose responsibility for the entire multimodal transport operation on one carrier even though this document provides for the carrier's liberty to tranship.<sup>83</sup>

Thus, the carriers may overcome the obstacle of the continuous documentary coverage under UCP in cases of sea transport if they issue bills of lading or non-negotiable sea waybills that reserve to the carrier the right to tranship.<sup>84</sup>

In addition, carriers may overcome all of the above obstacles by issu-

76. *Soproma S.p.A. v. Marine & Animal By-Products Corp.*, 1 Lloyd's Rep. 367, 388-9 (Q.B. 1966). Compare DEBATTISTA, *supra* note 58, § 7-32, at 153 (arguing that the validity of such a tender depends on whether the transport documents "offer, at the time of the tender, the prospect of continuous cover whether or not the liberties contained therein are exercised").

77. INTERNATIONAL CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) (citing UCP 500 Rules arts. 23(c) & 24) [hereinafter ICC UNIFORM CUSTOMS].

78. *Id.* at arts. 23(d)(i), 24(d)(i).

79. *Id.* at arts. 23(d)(ii), 24(d)(ii).

80. DEBATTISTA, *supra* note 73, § 7-33, at 155.

81. ICC UNIFORM CUSTOMS, *supra* note 77, art. 26(b).

82. Charles Debattista, *Banks and the Carriage of Goods by Sea: Secure Transport Documents and the UCP500*, BUTTERWORTHS J. INT'L BANKING & FINANCIAL L. 336 (1994).

83. *Id.*

84. ICC UNIFORM CUSTOMS, *supra* note 77, at arts. 23(c)-23(d)(ii), 24(c)-24(d)(ii), 26(b).

ing through bills of lading that cover the entire transport operation.<sup>85</sup> In particular, the carrier may sign such a bill of lading on his behalf for the part of the transport operation he undertook to perform and as an agent on behalf of the other carrier(s), making clear that he signs as an agent for the other carriers severally and not jointly.<sup>86</sup> Needless to say, the fact that he also acts as an agent for the shipper will not be a problem as freight forwarders may act as agents for the shipper and the carrier simultaneously.<sup>87</sup>

Despite the arguments to the contrary, Article 9 is an indispensable provision that regulates a customary practice by producing a fair balance between the carriers and shippers' interests.

## V. FOCUSED ANALYSIS OF ARTICLE 9-THE SHIPPER'S SAFEGUARDS

### A. THE PRECONDITIONS FOR THE VALIDITY OF THROUGH TRANSPORT CONTRACTS SET FORTH IN ARTICLE 9.1

Since there was general support that the Draft Instrument should clearly provide for safeguards against abusive practices,<sup>88</sup> Article 9.1 provides for the shippers' protection by setting forth the preconditions for the validity of such mixed contracts of carriage and forwarding.<sup>89</sup>

Specifically, Article 9.1 provides that any agreement for contracting out should be "express," refer to a specified part or parts of the transport of goods, and be included in the contract of carriage.<sup>90</sup> Thus, it should be further examined what such an "express agreement" means, as well as the scope of the specified parts of the contract of carriage a carrier can arrange to be performed by another carrier.

As far as the first issue is concerned, the phrase "expressly agree" implies that such an agreement should be more than a pre-printed clause in the standard terms and conditions in the fine print on the back of a transport document or its electronic equivalent.<sup>91</sup> In fact, there should be some indication that such an agreement was discussed between the parties and that all contracting parties have indeed consented to the agree-

85. DAVID M. SASSOON, C.I.F. AND F.O.B. CONTRACTS 129, at para. 147 (4th ed. 1995).

86. *Id.*

87. JAN RAMBERG, THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING § 1.2, at 13 (1993).

88. *Singapore II Report*, *supra* note 12, at 183; *CMI Synopsis of Responses*, *supra* note 15, at 419 (Denmark's response to the Consultation Paper).

89. *Draft Instrument*, *supra* note 1, at 19, art. 9.1.

90. *Id.* See also *Report of the Sixth I-SC Meeting*, *supra* note 16, at 319; *CMI Synopsis of Responses*, *supra* note 15, at 419 (Denmark indicated that the most important safeguard is that the contract clearly provides for through transport and clearly defines that part of the carriage, which is contracted out and that part which the carrier only arranges carriage as agent for the shipper).

91. See *Draft Instrument*, *supra* note 1, at 19, art. 9.1.



mixed contracts of carriage and forwarding in any issued transport document or electronic record as a precondition for the validity of such agreements.

As far as the second issue is concerned, the scope of the specified parts of the contract of carriage a carrier can arrange to be performed by another carrier, the Draft Instrument does not clarify how the excluded parts of the carriage should be specified, and thus, litigation may entail on this issue. It can be argued that these parts can be indicated very generally, for instance, any segment of the transport not carried out on a vessel under the carrier's management and control.<sup>100</sup>

Nevertheless, the excluded parts of the carriage should be specified more strictly, for example, transport from Paris to Rotterdam. The reason is that the cargo interests, as well as third parties that buy the cargo while *in transitu*, will be better protected from abusive practices if it is agreed at the time of the conclusion of the contract of carriage which specific parts the carrier, acting as an agent for the shipper, will arrange to be performed by other carriers.

Moreover, the wording of Article 9.1 leads to the following conclusions. First, the carrier can only agree with the shipper that he, as shipper's agent, will arrange part or parts of the carriage and not that the entire transport will be carried out by other carriers.<sup>101</sup> If the "carrier" could contract out the entire transport, then he would act only as a freight forwarder and not as a carrier. Since he would not have undertaken to carry the cargo the Draft Instrument would not apply.<sup>102</sup>

Similarly, the carrier when acting as an agent, cannot agree that he will arrange all maritime legs to be performed by other carriers. Under Article 1(a)-(b), a carrier has to undertake to carry the goods wholly or partly by sea, and, thus, the Draft Instrument applies only if he undertakes to perform at least one sea leg.<sup>103</sup>

Finally, it should be pointed out that the Draft Instrument does not explicitly provide for the consequences of the carrier's failure to meet the above mentioned preconditions. However, it is implied that, in such a case the agreement for through transport will have no effect and that the carrier will be liable as a carrier under the Draft Instrument for the entire transport operation.

## B. THE OBLIGATIONS OF THE CARRIER UNDER ARTICLE 9.2

The second set of the shippers' safeguards is set forth in Article 9.2

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100. *Revised Preliminary Draft*, *supra* note 21, at 18-19, para. 45.

101. *See Draft Instrument*, *supra* note 1, at 19, art. 9.1.

102. *Id.* at 8, art. 1(a)-(b); 19, art 9.1.

103. *Id.* at 8, art. 1(a)-(b).



that sets out the carrier's obligations when acting as an agent for the shipper. While drafting Article 9.2, the drafters faced the dilemma of whether the Draft Instrument should include a set of relatively detailed provisions, or whether, it should provide for a more generally worded due diligence obligation.<sup>104</sup>

This dilemma was reflected in the first two drafts that contained two alternatives. Alternative I contained six very detailed obligations, and Alternative II was drafted more generally.<sup>105</sup> The drafters raised this issue in the CMI Consultation Paper, where widespread support was expressed for Alternative II as it is similar to the current Article 9.2.<sup>106</sup> The main concern about Alternative I was that it contained too many self-evident, ambiguous, or controversial terms that would entail unnecessary litigation.<sup>107</sup>

Following these comments, the drafters adopted Alternative II, which imposes on the carriers three main obligations: the obligation to exercise due diligence in selecting the other carrier, the obligation to conclude the contract with such other carrier on usual and normal terms, and the obligation to do everything that is reasonably required to enable such other carrier to perform duly under its contract.<sup>108</sup>

Under its first obligation, a carrier should select the carrier or carriers that will perform the transport operation with due care.<sup>109</sup> It is evident that this obligation is drafted very vaguely since it does not specify the qualities of the other carrier, for instance, whether the carrier should be diligent, reasonable, or reputable.<sup>110</sup>

However, since every freight forwarder has the obligation to select qualified personnel,<sup>111</sup> the relevant case law may be of guidance in order

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104. *Singapore I Agenda Paper*, *supra* note 10, § 2.3, at 115; *CMI Consultation Paper*, *supra* note 14, at 380.

105. *CMI Draft Outline Instrument*, *supra* note 11, at ch. 3.3; *Revised CMI Draft Outline Instrument*, *supra* note 13, at art. 4.3.

106. See *CMI Synopsis of Responses*, *supra* note 15, at 419-24 (includes favorable responses to Alternative II by Denmark, France, Germany, Japan, Netherlands, Norway, Sweden, United Kingdom, United States, BIMCO, CS, Institute of Chartered Shipbrokers). Germany stated "[t]he exercise of due diligence appears to be a sufficient standard of responsibility if through transport is legitimated by an explicit agreement between the contracting parties." *Id.* at 419. In favor of Alternative I was Italy, Peru, and Switzerland. *Id.* at 420-24.

107. See *id.* at 419 (responses of Denmark & Germany).

108. *Draft Instrument*, *supra* note 1, at 19, art. 9.

109. *Id.*

110. *Revised Preliminary Draft*, *supra* note 21, at 18-19, para. 46.

111. See PAUL M. BUGDEN, FREIGHT FORWARDING AND GOODS IN TRANSIT §2-29, at 27 (1999); 2 DAVID YATES, CONTRACTS FOR THE CARRIAGE OF GOODS: BY LAND, SEA AND AIR (1993) § 7.2.7.23, at 7-36; RALPH DE WIT, MULTIMODAL TRANSPORT CARRIER LIABILITY AND DOCUMENTATION § 1.25, at 19 (1995); C. A. Pisani & Co. v. Brown, Jenkinson & Co., Ltd., 64 Lloyd's List L. Rep. 340, 342 (K.B. 1939); Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Acme Fast Freight, Inc., 336 U.S. 465, 484-85 (1949).

to determine when a carrier, acting as a freight forwarder, fulfils this obligation. Accordingly, under the current case law, a carrier will not be guilty of a *culpa in eligendo* if he hires a reputable carrier.<sup>112</sup> For instance, a carrier will fulfil this obligation if he arranges rail transport with a rail carrier he has hired several times in the past and was satisfied with its services.<sup>113</sup> In fact, a reputable carrier will usually be a diligent carrier since its good reputation depends on the diligent performance of his duties.

In addition, the carrier shall conclude the contract with the other carrier on usual and normal terms.<sup>114</sup> At this point, it should be noted that the first two CMI Drafts employed the phrase "customary terms,"<sup>115</sup> which were replaced with the current wording because of the peculiar meaning of this term in English law.<sup>116</sup>

The wording of this obligation has raised several concerns since it is not clear what "usual and normal terms" are, as well as what does "normal" mean beyond "usual."<sup>117</sup>

Therefore, it was proposed that Article 9.2 should be redrafted in order to provide that a carrier should conclude the contract of carriage with the new carrier on "usual terms," like the Cost, Insurance, and Freight ("C.I.F") seller under International Commercial Terms ("INCOTERMS").<sup>118</sup> Thus, the test applied is whether the contract of carriage is in accordance with the usage and practice in the trade to carry

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112. *Consol. Int'l. Corp. v. S. S. Falcon*, 1982 U.S. Dist. LEXIS 9683, at \*17 (S.D.N.Y. 1982) (holding that the freight forwarder was not negligent in hiring a reputable trucking firm, that had been used by both parties hundreds of times before); *Gov't of the United Kingdom of Great Britain and Northern Ireland v. Northstar Servs., Ltd.*, 1 F. Supp. 2d 521, 526-27 (D. Md. 1998) (concluding that the freight forwarder had satisfied its contractual obligation to use reasonable care in selecting a trucking company to transport shipper's degaussing range, and thus was not liable for damage shipment sustained when it struck overpass while on back of truck, where forwarder relied on recommendations of steamship companies who entrusted their own cargo to trucking company and which required trucking company to have adequate insurance, forwarder had used trucking company numerous times in past and was satisfied with company's services). A carrier will breach this obligation of reasonable care if he hires a carrier he does not know without taking some of the recommended precautions, such as checking the driver license of the driver, obtaining his name and address and communicating with the owner of the transport mean. *See, e.g., Gillette Indus. Ltd., v. W. H. Martin, Ltd.*, 1 Lloyd's Rep. 57, 61, 64-65 (C.A. 1965) (concluding that where the freight forwarder hired a hauler from a lorry pool, without taking the above mentioned precautions, the freight forwarder was negligent in selecting the carrier, but was exonerated on the basis of an exclusion clause in his trading conditions).

113. *Consol. Int'l Corp.*, 1982 U.S. Dist. LEXIS 9683, at \*17; *Northstar Servs., Ltd.*, 1 F. Supp. at 526-27.

114. *Draft Instrument*, *supra* note 1, at 19.

115. *CMI Draft Outline Instrument*, *supra* note 11, at ch. 3.3; *Revised CMI Draft Outline Instrument*, *supra* note 13, at art. 4.3.

116. *Report of the Sixth I-SC Meeting*, *supra* note 16, at 319-20.

117. *Revised Preliminary Draft*, *supra* note 21, at 19, para. 46.

118. *Id.*

goods of the contractual description shipped from and to places under a contract of carriage such as that in question.<sup>119</sup>

It was also suggested that Article 9.2 should provide that the carrier should arrange for the transport by the other carrier according to the mandatory provisions of the international transport convention that apply to the specific contracted out part.<sup>120</sup>

Among the above proposed approaches, the last one is preferable as it prevents litigation with respect to the terms the carrier should conclude with the other carrier in order to fulfil this obligation.

Lastly, the carrier has the obligation to facilitate the carrier he has contracted with by doing everything that is reasonably required to enable such other carrier to perform duly under its contract.<sup>121</sup> For instance, a carrier will fulfil this obligation by informing the other carrier about the nature, size, and value of the shipment<sup>122</sup> or about special needs of the cargo, such as refrigeration, provided that the consignor has advised him of any the need for special handling of the cargo based on the cargo's inherent characteristics.<sup>123</sup>

Article 9.2 raises the issue of whether the list of the obligations is exclusive. As drafted, Article 9.2 gives the impression that the carrier bears only the obligations stated therein.<sup>124</sup> However, a freight forwarder is also charged with other duties, such as the general duty to exercise reasonable skill and care,<sup>125</sup> the duty of obedience to principal,<sup>126</sup> the duty to act with reasonable dispatch,<sup>127</sup> to keep its principal informed,<sup>128</sup> and to account to his principal.<sup>129</sup> Therefore, it was suggested that the contracting parties should be free to determine the scope of the carrier's duties and that Article 9.2 should apply as a default rule only in the absence of such agreement.<sup>130</sup>

However, a preferable solution would be the provision for a more

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119. SASSOON, *supra* note 85, at 90, para. 93.

120. *Revised Preliminary Draft*, *supra* note 21, at 19, para. 46.

121. *See Report of the Sixth I-SC Meeting*, *supra* note 16, at 319. The phrase "reasonable required" replaced the "reasonably necessary or desirable" terms contained in the first two CMI Drafts since it was not clear what these terms meant. *Id.*

122. *Northstar Servs., Ltd.*, 1 F. Supp. at 526-27.

123. *See Tenneco Resins, Inc. v. Atlantic Cargo Servs.*, 1988 WL 156290, at \*4 (S.D. Tex. 1988).

124. *Draft Instrument*, *supra* note 1, at 19.

125. DE WIT, *supra* note 111, at 19, para. 1.25; *Cliffe v. The Hull & Netherlands Steam Ship Co., Ltd.*, 6 Lloyd's List L. Rep. 136, 137 (C.A. 1921); *Tenneco*, 1988 WL 156290, at \*4.

126. BUGDEN, *supra* note 111, at 23, para. 2-22; *Tenneco*, 1988 WL 156290, at \*4.

127. BUGDEN, *supra* note 111, at 23-24, para. 2-23; *see also YATES*, *supra* note 111, at 7-34, para. 7.2.7.16.

128. BUGDEN, *supra* note 111, at 26, para. 2-26.

129. *Id.* at 27, para. 2-28.

130. *United States Draft Proposal No. 1*, *supra* note 30, at 12, para. 41.

general stated due diligence obligation, which is inherent to the freight forwarding contracts in order to add flexibility to Article 9.2. A good point to start is BIFA clause 24 under which the freight forwarder undertakes to perform its duties with a reasonable degree of care, diligence, skill, and judgment.<sup>131</sup> Thus, a carrier acting as a freight forwarder should “use such skill and care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the performance of the duties undertaken by him.”<sup>132</sup>

## VI. CONCLUSIONS

The above discussion showed that the incorporation of Article 9 is indispensable for two reasons. First, Article 9 regulates the customary practice of mixed contracts of carriage and freight forwarding by producing a fair balance between the carrier and the shippers’ interests. Second, it promotes the application of the Draft Instrument because, otherwise, the contracting parties would have concluded separate transport contracts in order to circumvent Draft Instrument Article 88.

Nevertheless, there is still a lot of work to be done. Specifically, Article 9 should be revised in order to provide for the incorporation of the express agreement for through transport in any issued negotiable transport. Additionally, Article 9.2 should be also amended to establish a more general stated due diligence obligation. Therefore, Article 9 should be redrafted as follows:

“1. The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of goods the carrier, acting as an agent of the shipper, will arrange carriage by another carrier or carriers. In the event that a negotiable transport document is issued, such document shall on its face reflect any agreement made in accordance with this article.

2. When acting as an agent of the shipper under Article 9.1, the carrier should perform its duties with a reasonable degree of care, diligence, skill and judgment.”

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131. See YATES, *supra* note 111, at 7-30 to -36/1, para. 7.2.7.

132. *Id.* at 7-30, para. 7.2.7.2. See also BUGDEN, *supra* note 111, at 22, para. 2-21 (citing WILLIAM BOWSTEAD, F.M.B. REYNOLDS, B. J. DAVENPORT, BOWSTEAD ON AGENCY art. 42 (15th ed., 1985)); Cliffe, 6 Lloyd’s List L. Rep. at 137.