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

Proposal by the United States of America

Note by the Secretariat

In preparation for the twelfth session of Working Group III (Transport Law), during which the Working Group is expected to commence its second reading of a draft instrument on the carriage of goods [by sea] based on a note by the Secretariat (A/CN.9/WG.III/WP.32), the Government of the United States of America, on 11 July 2003, submitted the text of a proposal regarding ten aspects of the draft instrument for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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Annex

Proposal by the United States of America

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Introduction

1. The United States welcomes this new initiative by UNCITRAL to promote the cause of harmonization of international transport law. Our gratitude also goes to the *Comité Maritime International* (CMI) for its contribution in this field.

2. At the ninth, tenth, and eleventh sessions of Working Group III, the delegates and observers discussed the individual provisions of the Draft Instrument[1] in isolation. This was a very helpful process, and the United States appreciates all of the constructive views that were expressed during these discussions in an effort to advance the project. We feel that the time has now come, however, to recognize that the controversial issues cannot be resolved on an individual basis. Successfully completing the present project will require commercial compromises in which the various affected industries can each achieve only some of their overall goals.

3. Within the United States, we have consulted with representatives of the major affected industries and they have actively participated in the negotiation process in the effort to achieve a commercial compromise that may be broadly acceptable to all of the affected interests. The current proposal, based on the results of this negotiation process, seeks to address the key contested issues comprehensively. We believe that a convention based on this comprehensive proposal will promote efficiency and uniformity in international trade.

4. This proposal covers ten key subjects that should be addressed in any future convention, but the proposal should be considered as an integrated whole. It represents a careful balancing of interests and equities. This does not mean that the United States is unwilling to discuss individual aspects of this proposal. It simply means that changes to one aspect of the proposal may require reconsideration and revision of other aspects in order to preserve the careful balance of interests that we believe is necessary to achieve much-needed reform. Each of the principal commercial interests involved has already made significant concessions to reach the compromise position expressed here.

I. Scope of application and performing parties

5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle applies to supersede these provisions. To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.

6. In addition to establishing the liability regime between the contracting carrier and the cargo interests, the Instrument should provide the substantive liability rules for "maritime performing parties," meaning those that perform or undertake to perform the contracting carrier's obligations for the port-to-port aspect of the carriage. Maritime performing parties would thus include, for example, ocean

[1] All references in this proposal to the "Draft Instrument" refer to the Draft Instrument on Transport Law annexed to A/CN.9/WG.III/WP.21.

carriers, feeder carriers, stevedores working in the port area, and marine terminal operators.

7. With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention such as CMR. In others, it may be a mandatory or nonmandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.

8. To implement this proposal with respect to performing parties, the United States supports the adoption of the performing party definition suggested in paragraph 16 of the commentary to the Draft Instrument. The definition in article 1.17, which requires "physical" handling of the cargo, is too restrictive. A slightly broadened definition that refers to a party that "performs or undertakes to perform" the contracting carrier's duties would be more appropriate. A party that undertakes to perform a portion of the carriage but then fails to perform at all should not be in a better position than a similarly-situated party that attempts to perform in good faith but does so negligently. Furthermore, to the extent that the motivation to restrict the definition was based on a desire to avoid imposing liability on inland parties that did not physically handle the goods, that concern is addressed by our proposal to exclude all inland performing parties from the Instrument's liability terms.

9. *Recommendations*: To implement this aspect of the proposal, article 1.17 of the Draft Instrument should be amended along the lines proposed in paragraph 16 of the commentary. An additional definition should be added to clarify which performing parties are "maritime" performing parties. Articles 6.3.1 and 6.3.2(b) of the Draft Instrument should be revised so that the Instrument creates a direct cause of action against maritime performing parties only, and article 6.3.3 of the Draft Instrument should be revised so that automatic Himalaya clause protection is extended only to the maritime performing parties that assume liability under the Instrument.

II. Hague Visby liability limits / procedure for amendment

10. A fundamental element of any new cargo liability Instrument will be the liability limits. At the moment, article 6.7.1 is incomplete; it does not specify the applicable limits, but leaves blank spaces for the numbers that will be provided later. As part of the overall package, the United States supports the completion of article 6.7.1 with the package and weight limits specified in the Hague Visby Rules (i.e., 666.67 SDRs per package or 2 SDRs per kilogram). We believe that the current Hague Visby limits represent a fair balancing of interests. Shippers receive reasonable protections for payment of claims, as the overwhelming majority of claims fall within the Hague-Visby limits.[2] Carriers receive the reasonable level of predictability that they need to make insurance and risk calculations.

[2] Not only do the overwhelming majority of claims fall within the Hague-Visby limits, but the

11. To ensure that a new Instrument does not become outdated over the years, however, the United States suggests that the Instrument should also include a procedure that could be used to update the liability limits included in the Instrument. As part of the overall package, the United States supports a procedure with the following features: (i) the limits would not be subject to adjustment for a period of seven years from the time the Instrument entered into force or the limits were last adjusted; (ii) before any change is considered, a majority of the parties to the Instrument must forward a proposal for an adjustment for consideration by all of the parties; (iii) a vote of two-thirds of the parties to the Instrument would be required to adjust the limit; (iv) the limit in effect could not be increased or decreased by more than 21 percent in any single adjustment, and in total, the limit could not be increased by more than 100 percent cumulatively above the initial limits; and (v) any adjustment would be effective one year from the date of the vote approving the adjustment.

12. Including an amendment procedure in the new Instrument as described above would allow the Instrument to remain a "living" document and, thus, would avoid the difficulty of having to renegotiate an entirely new treaty simply to update the liability limit in the future. But the proposed procedure would not provide for an automatic adjustment to the limitation. Rather, it would provide for predictability by holding the limitation firm for at least an eight-year period. It would require more than just a few parties to advance a proposal to update the limits and would require a two-thirds vote before an amendment could be adopted. Furthermore, the procedure includes a cap as to the percentage change to the limitation that could be adopted. We believe that this procedure represents a balanced approach for addressing the carrier's level of liability to be applied in the future.

III. Exemptions from liability, navigational fault, and burdens of proof

13. As part of the overall package, the United States supports the retention of almost all of the carrier's exemptions now contained in article 4(2) of the Hague and Hague-Visby Rules in substantially the same form as they now appear in the Hague and Hague-Visby Rules. The only exemption that should be deleted is the navigational fault defense now contained in article 4(2)(a) of the Hague and Hague-Visby Rules (and in article 6.1.2(a) of the Draft Instrument). We would also support the redrafting of the fire defense now contained in article 4(2)(b) of the Hague and Hague-Visby Rules in order to ensure that expanding the scope of application from "tackle-to-tackle" (under the Hague and Hague-Visby Rules) to "door-to-door" (under the new Instrument) does not expand the substance of the fire defense.

14. The defenses included in the Instrument should exonerate a carrier from liability, rather than serve only as a presumption that the carrier was not at fault. There is no real difference in practice between the two approaches. Even under the exoneration system of the Hague and Hague-Visby Rules, a carrier's right to rely on an exemption is still lost if the cargo interests can prove the carrier's fault. Thus the exoneration system operates in practice as a presumption system. We nevertheless

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average claim is also well below the Hague-Visby limits. In 2001 (the most recent year for which data is available), the average value of shipments to and from the United States was 0.44 SDRs per kilogram. Furthermore, the so-called "container clause" (which is carried forward as article 6.7.2 of the Draft Instrument) has the practical effect of ensuring that all but the most exceptional "packages" in a containerized shipments are worth less than 666.67 SDRs.

prefer that the list of carrier defenses be retained as exceptions to liability in order to achieve greater predictability and uniformity in the application of the defenses, given the substantial case law that has already developed under existing cargo liability treaties that consider the defenses to exonerate the carrier from liability.

15. Although the United States supports the elimination of the navigational fault defense, we believe that this change creates problems with the current allocation of burdens of proof. Under the allocation of the first alternative in article 6.1.4 of the Draft Instrument, which is consistent with current law in many countries (as explained in paragraph 89 of the commentary), the elimination of the navigational fault defense may well have the unintended effect of depriving the carrier of every statutory defense in any case in which navigational fault could plausibly be argued. The second alternative in article 6.1.4, which is further explained in paragraphs 90-91 of the commentary, corrects this problem. Furthermore, the second alternative offers a more balanced and workable approach toward dealing with situations of partial carrier fault and situations in which the extent of the carrier fault and any applicable exoneration are uncertain.

16. *Recommendation*: To implement this aspect of the proposal, articles 6.1.2 and 6.1.3 of the Draft Instrument should be replaced by a text substantially the same as article 4(2)(c)-(q) of the Hague and Hague-Visby Rules. In addition, article 6.1.4 should be redrafted along the lines of the second alternative. Finally, the fire defense should be included in substantially the following form:

> Neither an ocean carrier nor a ship is responsible for loss or damage from fire on a ship unless the fire was caused by the ocean carrier's fault or privity, with respect to a fire on a ship that it furnished. The carrier is not responsible for loss or damage from fire on a ship unless the fire was caused by the carrier's actual fault or privity.

17. This provision introduces the term "ocean carrier," which could be defined as "a performing party that owns, operates, or charters a ship used in the carriage of goods by sea."

IV. Ocean liner service agreements

18. A key issue in the United States (and we believe in other parts of the world as well) is how the Instrument should treat certain specialized and customized agreements used for ocean liner services that are negotiated between shippers and carriers. As part of the overall package, the United States believes that this kind of agreement, which we refer to as an Ocean Liner Service Agreement ("OLSA"), should be covered by the Instrument, unless the OLSA parties expressly agree to derogate from all or part of the Instrument. A decision to derogate from the Instrument, however, would be binding only on the parties to the OLSA. There are differing views, both within the United States and internationally, on the option to derogate down from the Instrument's liability limits. Nevertheless, the U.S. view is that the parties to an OLSA should be able to depart from any of the Instrument's terms.

A. What is an ocean liner service agreement?

19. OLSAs have grown in use in many international trades since U.S. regulation of the ocean liner industry was reformed in 1984 and 1998 to allow for

competitively negotiated liner service contracts. As a result, a substantial volume of liner cargo now moves under such agreements in numerous international trade routes.

20. OLSAs are exclusively used for liner services. They are not used for private or industrial carriage with respect to bulk, tanker, neo-bulk or other non-liner cargo services. As such, they are distinguishable from charter parties and volume contracts (mentioned in chapter 3 of the Instrument), which are used for non-liner services.

21. The term "liner service" is well understood in all trades. A liner operation is one used for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports. Unlike private carriage arrangements, a liner vessel sails on a publicly available schedule with regular port calls, whether or not it has cargo to transport. Typically, the liner service is advertised and is available to all customers having cargo that is appropriate to move on the vessels and service offered by the carrier.

22. For purposes of defining contracts qualifying as OLSAs under the Instrument, the following characteristics should be present: (1) they are agreed to by the parties in writing (or comparable electronic means), other than by a bill of lading or transport document issued at the time that the carrier or a performing party receives the goods; (2) they are used for liner services; (3) they involve a carrier service commitment not otherwise required of carriers under the Instrument (e.g. the obligation of the carrier to properly receive, load, stow, carry and deliver the cargo); (4) the shipper agrees to tender a volume of cargo that will be transported in a series of shipments (i.e., the contract covers more than a single shipment); and (5) the shipper and carrier negotiate rates and charges based on the volume and service commitments.

B. Treatment under chapter 17 versus chapter 3 of the Draft Instrument

23. The United States believes that, as a general matter, all shipments moving under OLSAs should be subject to the Instrument, except to the extent that the parties specifically agree to derogate from all or part of the Instrument's provisions. This will ensure that the majority of traffic moving under OLSAs are subject to the Instrument, unless the contracting parties expressly agree to derogate. Any agreement to derogate from the provisions of the Instrument shall be binding only on the parties to the OLSA. Thus, when bills of lading or other transport documents are issued for OLSA-based shipments, any party to or holder of the bill of lading or transport document that is not also a party to the OLSA would not be bound by any agreement to derogate from the Instrument.

24. Allowing parties to agree on specialized terms enhances efficiency and has promoted services better tailored to the needs of international businesses. The experience of almost 20 years has shown that neither carrier nor shipper industries are particularly disadvantaged in terms of negotiating power with regard to basic transport terms. Rather, the parties to an OLSA often enter into such contracts with the purpose of designing a customized transportation relationship based on the business needs of the parties.

25. If OLSAs are addressed in chapter 3 and excluded from the Instrument under article 3.3.1, thousands of liner shippers, and a substantial volume of cargo, would be outside of the scope of the Instrument unless the parties entered into a contract

which successfully applied the Instrument as a matter of private contract. The United States strongly opposes this approach. We believe that the Instrument should be the norm that automatically applies door-to-door as between shipper and carrier for shipments moving under an OLSA. When the needs of commerce so require, however, commercial parties should be free to structure their transport arrangements as they see fit, which includes an agreement to derogate from the Instrument.

26. Concern has been expressed that this provision might be unfair to smaller shippers. In practice, this has not been the case with regard to the ability of small shippers to enter into and negotiate the rate and service terms of liner contracts. Moreover, if any shipper is dissatisfied with the result of an OLSA negotiation, it may choose not to enter into the contract and may ship its cargo pursuant to the standard price lists or tariffs typically offered by the liner carriers, or it may ship with a competing carrier. The availability of such standard tariff terms and regularly available competitive alternatives also distinguishes liner shipping from other forms of maritime transport.

27. Unlike treaties dealing with passengers and luggage, which primarily involve carriers and consumers, it is noteworthy that the Instrument will deal almost exclusively with businesses familiar with the requirements of international transactions. A basic level of business knowledge is needed by buyers and sellers of goods to deal with purchase orders and sales agreements, logistics, transfer of title, packing, customs duties, security, letters of credit and other financial documentation, warranties, and insurance. Such parties should also be capable of negotiating special liability terms as part of a particularized contractual transportation service arrangement should they so desire.

28. Finally, because of an issue created by U.S. law, which effectively prevents non-vessel operating common carriers (NVOCCs) from entering into OLSA-type agreements with their customers, we are willing to address certain concerns raised by these interests to avoid unduly disadvantaging NVOCCs. In particular, it would be acceptable to include a provision prohibiting ocean carriers from entering into OLSAs with NVOCCs that include liability limits lower than the standard provided in the Instrument.

C. Recommendation

29. To implement this aspect of the proposal, article 17 should be amended to give the parties to an Ocean Liner Service Agreement the freedom to modify the Instrument's liability terms as explained above. In addition, the term "Ocean Liner Service Agreement" should be defined in the Instrument as follows:

> (a) An "Ocean Liner Service Agreement" is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or a performing party receives the goods, between one or more shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo.

(b) For purposes of paragraph (a), a "meaningful service commitment" is a service commitment or obligation not otherwise mandatorily required of a carrier under this Instrument.

(c) For purposes of paragraph (a), a "liner service" is an advertised maritime freight transport service using vessels for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports.

(d) An Ocean Liner Service Agreement does not include the charter of a vessel or the charter of vessel space or capacity on a liner vessel.

V. Forum selection

A. General Rule

30. As part of the overall package, the United States believes that the Instrument should limit the permissible forum for litigating or arbitrating claims to certain reasonable places. As a general rule, an approach substantially along the lines adopted in the Hamburg Rules would be acceptable, but two principal revisions would be necessary. First, the Hamburg Rules give the choice among the specified forums to "the plaintiff," leaving open the possibility that a carrier (the potential defendant in a claim for cargo damage) could bring an action as the plaintiff for a declaration of non-liability, thus preempting the choice that properly belongs to the injured claimant. The Instrument should clarify that the choice is the claimant's. Second, the list of reasonable forums should be defined as:

(i) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel;
(ii) the place where the goods are delivered by the carrier or a performing party pursuant to article 4.1.3 or 4.1.4, or the port where the goods are finally discharged from an ocean vessel;
(iii) the principal place of business or habitual residence of the defendant; or
(iv) the place specified in the contract of carriage or other agreement.

31. This list differs from the Hamburg Rules list in two principal respects. It uses the places of receipt and delivery in addition to the ports of loading and discharge. This change simply recognizes the Instrument's potential door-to-door application (in contrast with the Hamburg Rules' port-to-port application). The place of contracting is also omitted from the list. In today's era of electronic contracting, the place of contracting is often difficult to determine, and is generally irrelevant to the transaction even when it can be determined. Furthermore, it can easily be manipulated if there is any advantage to doing so.

32. Determining the relevant "place" that qualifies as an appropriate forum for cargo claims could be handled in several ways. The Hamburg Rules' approach (to look to the court that has jurisdiction over the precise physical location mentioned) would be acceptable. This solution, of course, leaves considerable scope to the domestic laws regulating court procedure.

33. The Instrument's door-to-door application and its treatment of performing parties also require special attention in the drafting of the provision governing

forum selection. In our view, the list of acceptable forums should apply only to actions between the carrier and the cargo interests. The listed forums may not be suitable for actions against a performing party. To the extent that a cargo claimant has a cause of action under the Instrument against a performing party, the plaintiff should be permitted to bring suit in any forum having jurisdiction over the defendant.

B. Exceptions to general rule in OLSA cases

34. Although an approach substantially along the lines adopted in the Hamburg Rules would be acceptable as a general rule, two exceptions should be allowed in cases involving an OLSA (see part 4, above). First, the parties to an OLSA, as between themselves, should have the ability (for reasons explained above) specifically to agree in writing to derogate from all or part of the Instrument—including the forum provision. Thus the OLSA parties may agree that their own litigation will be in any specified forum (even if this agreement may not bind third parties). This choice should be in lieu of any other choices provided by the Instrument. This freedom may be important in situations in which the parties know that no transport documents will be negotiated to third parties (e.g., a shipment from a company to an overseas branch, or a shipment in which the carrier's contractual counterpart is the consignee).

35. Second, when the parties to an OLSA designate a forum for cargo claims, we believe that the Instrument should provide for the extension of the chosen forum to a subsequent third party (e.g., the consignee or subsequent holder of the bill of lading) under certain conditions, thus binding both the carrier and the third party in actions between them. (The third party would not be bound by any designated forum in an action against a performing party.) In particular, we propose to allow such an extension under the following conditions:

(i) the parties to the OLSA must expressly agree in the OLSA to extend the forum selected to a subsequent party;
(ii) the subsequent party to be bound must be provided written or electronic notice of the place where the action can be brought (e.g. in the bill of lading or otherwise);
(iii) the place or places chosen by the OLSA parties must be
  (a) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel, or
  (b) the place where the goods are delivered by the carrier or a performing party pursuant to article 4.1.3 or 4.1.4, or the port where the goods are finally discharged from an ocean vessel, or
  (c) the principal place of business or habitual residence of the defendant,
  with regard to one or more shipments moving under the relevant OLSA; and
(iv) the place selected in the OLSA must be located in a country that has ratified the Instrument.

VI. Qualifying clauses

36. The United States generally supports the risk allocation established by article 8.3 of the Draft Instrument, but in certain situations we feel that the Draft Instrument's treatment of containerized cargo places too great a burden on potential cargo claimants. For the reasons explained in paragraphs 151-152 of the commentary, in such cases cargo claimants legitimately expect greater protection for containerized cargo than the Draft Instrument currently provides. To achieve a fair and sensible means of addressing the issues of what may reasonably be presumed with respect to cargo descriptions provided by shipper, the Instrument should be amended along the lines proposed in paragraphs 153-154 of the commentary.

VII. Deviation

37. For most of the world, the deviation doctrine does not create any serious problems. Unfortunately, it remains a problem in the United States (and perhaps in some other common law jurisdictions). Although we support the Draft Instrument's treatment of deviation, we nevertheless feel that the text should be revised to clarify that the only deviation for which the carrier can be held liable is an "unreasonable" deviation and that this concept relates only to the routing of an ocean-going vessel (operated by the carrier or a performing party). Similarly, the text should more clearly state that, in the event of an "unreasonable" deviation, the carrier would lose the benefit of its liability limits only pursuant to article 6.8.

38. *Recommendation*: To implement this aspect of the proposal, article 6.5 of the Draft Instrument should be revised as follows:

> (a) The carrier is not liable for loss, damage, or delay in delivery caused by any deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.
>
> (b) To the extent that a deviation constitutes a breach of the carrier's obligations under a legal doctrine recognized by national law or in this Instrument, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of an ocean-going vessel.
>
> (c) To the extent that a deviation constitutes a breach of the carrier's obligations, the breach has effect only under the terms of this Instrument. In particular, a deviation does not deprive the carrier of its rights under this Instrument except to the extent provided in article 6.8.

VIII. Delay

39. The United States supports the Draft Instrument's treatment of liability for delay as expressed in article 6.4.1 without the bracketed language. Because we see delay as a commercial matter that should be negotiated between the parties, we also believe that that—unless otherwise expressly agreed by the parties—compensation for delay should be limited to the amounts due for physical loss or damage, subject to the general liability limits of article 6.7 of the Draft Instrument. In other words, recovery for consequential damages should be permitted only if expressly agreed by the parties. This position would also require the deletion of the bracketed language referring to delay in article 6.8.

40. *Recommendation*: To implement this aspect of the proposal, the bracketed language in article 6.4.1 and the bracketed language referring to delay in article 6.8 should be deleted. Article 6.4.2 should be revised as follows:

> If delay in delivery causes loss not resulting from physical loss of or damage to the goods carried, the carrier may be held liable for such loss only if the carrier has expressly agreed to be liable for such loss resulting from delay.

IX. Mixed contracts and shipper's agent arrangements

41. The United States generally supports the Draft Instrument's treatment of mixed contracts and shipper's agent arrangements as expressed in article 4.3, but we feel that some amendments and clarifications are necessary. Most significantly, we believe that when the carrier is acting not as a "carrier" but as the shipper's or consignee's agent, then article 4.3.2 should apply only as a default rule. The parties should have the freedom expressly to agree on the level of the carrier's duties. We would thus add the phrase "Except as otherwise expressly agreed" at the beginning of article 4.3.2.

X. Misstatement of shipper

42. Receiving an accurate description of a commodity is vitally important to the safe and successful transport of goods. The nature and value of a commodity will affect the freight rate that a carrier charges, risk management arrangements, physical security, and other measures that might be needed to ensure the successful transport of goods. For this reason, we believe that, without limitation of other provisions in the Instrument related to the failure properly to provide required information, there should be a specific provision to address this concern (as in the third paragraph of article 4(5) of the Hague Rules (article 4(5)(h) of the Hague-Visby Rules)). This provision should declare that the carrier is not liable for loss or damage if the nature or value of the goods was knowingly and materially misstated by shipper.

43. *Recommendation*: To implement this aspect of the proposal, we propose a new provision at the end of article 6.1 as follows:

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