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PRELIMINARY REPORT

ON THE WAREHOUSING CONTRACT

by

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with an introduction by the Secretariat

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## INTRODUCTION

It is now more than ten years since the subject of bailment and warehousing contracts first appeared in UNIDROIT's general work programme. It had been included therein in the context of combined transport operations since it was here that the lack of uniform rules for the liability of those persons into whose custody goods had been entrusted, whether before, during or after the transport operation or operations had made itself felt. A preliminary report was presented on this aspect of the topic during 1965 and 1966 by Professor Le Gall and although the Governing Council did not grant priority to the subject, it nevertheless requested the Secretariat to make enquiries of Governments and the appropriate Organisations so as to assess their possible interest in the topic and so as to give greater precision to its scope.

During the triennium 1972 to 1974 the Secretariat noted that a large amount of information assembled by other Organisations was becoming available and that the gap mentioned in the preceding paragraph was being fully brought out during the revision work on the "Hague Rules" within UNCTAD and UNCITRAL. In fact, during this work some countries, in particular developing countries, suggested that a study should be made of the liability of the independent contractors used by carriers by sea, especially warehousemen and storekeepers. A wish was, therefore, expressed by some countries, such as the Federal Republic of Germany, that UNIDROIT should begin studying the subject.

In this context the Secretariat of UNIDROIT requested the Governing Council, when the latter was examining the Institute's draft Work Programme for the period 1975-1977 on the occasion of its 53rd session held in Rome in February 1974, to consider the possibility of the preparation of uniform rules on the contractual position of warehousemen who are given custody of goods during the course of a transport operation and on the liability thereby incurred by them.

After deliberation, the Governing Council decided to instruct the Secretariat to bring up to date Professor Le Gall's report and, during the triennium 1975-1977 to give priority to the convening of a Working Committee entrusted with the preparation, on the basis of the revised report, of draft uniform provisions on the liability of persons other than the carrier having custody of the goods before, during or after the transport operation.

In accordance with these instructions, the Secretariat commissioned a preliminary report on the warehousing contract from Doctor Donald Hill, Senior Lecturer in Law at Queen's University, Belfast, which is annexed hereto.

The Secretariat therefore requests the Governing Council to confirm its decision to set up a Working Committee entrusted with preparation of the draft uniform rules referred to in the preceding paragraph and to take the necessary decisions concerning the nomination of the President and members of the Committee, with a view to a first meeting being held in the first half of 1977.

## I. INTRODUCTION

In preparing a preliminary report for a draft warehousing convention the first problem is to delineate the exact scope of warehousing operations. To do so is far from simple, particularly bearing in mind modern combined transport operations and the rapid changes taking place these days in the transport industry. With the aim therefore of concentrating on the practical concept of warehousing operations an effort has been made to avoid both the problems relating to the theoretical concept of warehousing operations as far as possible, and also the temptation to spend an inordinate amount of time on the multitude of statutes, regulations and general conditions of contract relating to the subject, which exist in the various jurisdictions of the world. To analyse these two areas in depth would involve a detailed consideration of the problem which given the infinite variety of methods of operation and juridical control thereof, would probably be of little practical value except as a descriptive historical study.

First, therefore, it is intended to analyse the present and future pattern of such operations and the various parties involved therein. Whereas in attempting to regulate transportation little difficulty is experienced in establishing the exact scope of the operation to be regulated, it is far from easy in the case of warehousing to establish exactly what operations and operators are the subject of the exercise. For this reason space will be devoted to an outline of the structure and legal status of selected port terminal authorities so as to show the framework within which warehousing operations are carried out. In practice if agreement is to be obtained regarding the provisions of a draft convention on the subject, it is important to establish the various direct and indirect controls to which warehouse operators may be subjected in the absence of any coherent trade organisation to represent their interests.

A general description will also be given of the extent to which warehouses are regulated together with a selective analysis of the pattern of relationships existing in those countries which either, like the United States, have a large volume of international trade, and must therefore affect other trading nations, or else, like France and the United Kingdom, have through their former colonial empires influenced the trade practices of other countries throughout the world.

Next the various juridical problems relating to warehousing will be considered together with the relative importance of the various methods of controlling the relationship between the warehouseman and third parties with particular reference to the problems of combined transport operations. Finally, mention will be made of the position of the developing countries and the extent to which their approach is likely to differ from that of the developed countries.

In conclusion, recommendations will be formulated as to those problem areas which warrant special attention and possible future action on the subject.

## II. FRAMEWORK OF TRANSPORT OPERATIONS

The problem of the warehousing of goods in transit cannot be considered in isolation, as it is merely one element in a complex series of transactions and relationships concerning the disposition of goods within the pattern of national and international trade. It is therefore necessary to consider the whole framework of such relationships if an accurate analysis of the problem is to be achieved.<sup>1</sup>

The framework of operations relating to the handling of goods can be divided into three distinct categories. First, there is the actual transportation of goods by sea, road, rail, air, inland waterway or by any combination thereof. Secondly, there is the handling of the goods by intermediaries who do not actually transport the goods themselves. This category may in turn be divided into two sub-categories. First the actual static warehousing of goods. Secondly, the handling of the goods by non-carrying intermediaries before, during and after transit. In short therefore the physical operations relating to goods in transit can be divided into three distinct categories, carriage, warehousing

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1. See Hill, "The Infrastructure of Combined Transport", (1975) E.T.L.

and handling. Thirdly, there is the intermediary who whilst undertaking responsibility for any of the above categories of operation does not physically perform them himself. These in turn may be divided into two categories. Those who arrange the performance of services on behalf of the shipper or consignee of goods, such as the forwarder, and those who arrange performance of such services on behalf of the carrier, such as the loading broker and the ship's agent. The forwarder will arrange transportation, packing, loading and unloading, stowage, wharfage, tallying and transit and long term warehousing on behalf of the various cargo interests. Similarly, those intermediaries acting on behalf of the carrier may arrange on-carriage, loading and unloading, stowage, wharfage, tallying and transit warehousing.<sup>2</sup> Further discussion of such operations is outside the scope of this report however.<sup>3</sup>

Looked at solely from the viewpoint of transportation there are two distinct aspects of the operation. First, where the goods are actually moving in some form of vehicle. Secondly, where at some stage before, during or after such movement they are being unloaded or otherwise handled outside of such vehicle. During this latter period the goods may either be within the control of the operator of the vehicle or else in the hands of another intermediary. For historical reasons the movement of goods within a vehicle, whether by sea, rail, road, air or inland waterway has gradually been regulated either by international convention, national laws, or else by uniform conditions of carriage introduced by a trade association.<sup>4</sup>

There are three probable reasons for this situation. First, the carrier's operations are of a fairly uniform nature throughout the world and they therefore lend themselves more easily to categorisation and workable regulation. Secondly, the consumer is often cognisant of the carrier's operations because of their uniform nature and is therefore more able to assess whether he is being fairly treated by the carrier in their contractual relationships. Thirdly, historically the various types of carrier have been organised at both national and

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2. In the case of carriage by air the air cargo agent may act on behalf of both the shipper or consignee and the carrier.

3. See Rodiere, "Traite General de Droit Maritime", Dalloz, 1970, volume 3; Murr, "Export/Import Traffic Management and Forwarding", 3rd ed., 1974, Maryland, U.S.A.; Hill, Freight Forwarders, Stevens, London 1972.

4. The Hague Rules (sea), C.I.M. (rail), C.M.R. (road), Warsaw Convention (air). Inland waterways are as yet only subject to national regulation as regards the carriage of goods, although UNIDROIT has produced a draft Convention.

international level for many decades which has made the question of negotiation of uniform conditions of liability much simpler than it would otherwise have been.

By contrast, operations falling in the second category, that is the intermediary who handles goods without carrying them, have been subject to little regulation except at the local level unless a particular state government has decided to impose uniform provisions upon one or more aspects of such operations. This probably results from the following reasons. First, the lack of uniformity in the pattern of operation and the multiplicity thereof have made regulation on any scale rather difficult to implement. For this reason and the fact that the consumer often does not deal directly with the operator has meant that the former has rarely been in a position to assess whether he has been fairly treated in his relationship with the operator. Finally, the non-carrying intermediary has rarely organised himself at more than the local level, and even then this has often been of a very loose nature owing to the individualistic nature of those in the various trades.

Such a position was probably generally acceptable as long as the patterns of transportation and trade remained fairly static in the commercial centres of the world. Since the war, however, with the rapid development of road haulage and air freight, and latterly the technological changes introduced by containerisation, pallettisation, roll-on roll-off ships and LASH barges, the old informal system of regulation and relationships has proved increasingly inadequate. In particular the increased use of combined transport operations and the focus of attention on the various attempts to introduce a combined transport convention has tended to reveal the inadequate state of affairs in relation to the non-carrying intermediary in such operations.

At this stage it must be emphasised that there is virtually no commercial and few legal restrictions in most countries which prevent a company from performing any multiple combination of the above mentioned operations if it so wishes. This perhaps, as will be seen later, is probably one of the most serious drawbacks in compiling an accurate analysis of the various operations relating to the transportation and handling of goods.

### III. OPERATIONS RELATING TO THE HANDLING OF GOODS

Apart from the actual carriage of goods the principal operations which may be performed in relation to transit operations are as follows:-

- (1) The Loading and Unloading of Goods: This is basically the series of operations whereby goods are placed on or removed from the vehicle in which they are to be transported. It will commonly involve the use of some form of crane or other lifting equipment.
- (2) Stowage of Goods: This is the part of the operation whereby the goods are secured and specifically placed upon or within the vehicle for the purpose of transit. It will take place after the goods have been loaded upon the vehicle. Particularly in the case of carriage by sea this is a very highly skilled operation. The goods must likewise be unstowed prior to unloading. In practice it may not be easy to distinguish between where the first operation, i.e. loading and unloading, finishes and that of stowage takes over, unless the two operations are performed by separate operators.
- (3) Wharfage: This operation relates to the movement of goods on the wharf either prior to loading after receipt of the goods from the consignor or after unloading prior to delivery to the consignee. In practice receipt or delivery of the goods may be either from or into a transit or long term warehouse. Equally the consignor or consignee may be represented by a professional agent such as a freight forwarder.
- (4) Transit Warehousing: This constitutes the warehousing of goods in transit as opposed to the long term warehousing of goods in relation to which the question of carriage does not <sup>necessarily</sup> arise. In practice it may not always be easy to demarcate the two types of activity inasmuch as goods may remain in a transit warehouse for considerable periods of time if there is no immediate intention of arranging their onward movement.
- (5) Tallying: The question of tallying is really outside the scope of this report. Various intermediaries do undertake totally goods usually as an ancillary to other operations.

The above operations are those which have traditionally been undertaken in respect of shipments of general merchandise handled by ports in the past with little change in the method of working. Modern methods of transportation, however, have resulted in different methods of working which will be considered in turn below.



### Containerisation:

The pattern of operations in the case of container shipments is basically the same as for traditionally packaged shipments of general cargo. However, wharfage and transit warehousing have generally become merged in one overall operation, because as the container requires no covered warehousing facilities it will be stored on the large apron which fulfils the functions of a wharf, transit warehouse and reception and delivery area where a modern container depot is in operation. Even where containers are handled as an adjunct to general cargo operations, they will still be warehoused on a convenient open site.

### Roll-on Roll-off Traffic:

The rapid development of Ro/Ro traffic on the Channel and North Sea routes has created a special pattern of working in those ports handling such shipments. In general as the question of employing lifting equipment obviously does not arise, the operation of loading, unloading, stowing and unstowing will merge into one single operation, as the trailer, with or without a tractor, will be towed onto the ship and secured (if necessary) by either the shipowner, the terminal operator, the shipper or his representative. The question of transit warehousing is hardly likely to arise in practice unless a container is removed from its trailer in which case the comments applicable to containers mentioned above will also apply here.

### LASH Traffic:

Where a system of LASH barges or a similar system is in operation, although the actual method of transportation is an innovation, the LASH barge itself will be dealt with like any conventional ship as regards stevedoring and other associated operations, the actual method depending on whether shipments are containerised or not. To date LASH barges have tended to carry bulk or non-containerised cargoes so that in most cases the traditional methods of handling would be employed.

### Inland Waterway Traffic:

This will be dealt with like a conventional ship in most cases dependent upon the type of cargo carried and whether shipments are containerised or not. Both transit and long term warehousing will normally be carried out by independent operators unless the waterway carrier possesses such facilities himself. The former may combine wharfage and warehousing facilities or else be a road haulier or freight forwarder.

Rail Traffic:

In the case of carriage of goods by rail operations will not differ from the pattern outlined in relation to conventional traffic and container shipments, except that as loading, unloading, stowing and unstowing will commonly be performed by the carrier and not by a third party unless shipments are handled at a private siding, or a forwarder is acting as a groupage operator. Transit warehousing will normally be performed by the rail carrier himself unless a forwarder is acting as a groupage operator. Long term warehousing may be performed by the rail carrier where he has such facilities available.

Road Traffic:

Here again in the case of carriage of goods by road the pattern of operations will not differ significantly from that outlined in relation to conventional traffic and container shipments. However, loading and unloading will commonly be performed by the consignor and consignee respectively, and stowing and unstowing will generally be carried out by the carrier himself. Independent intermediaries will rarely perform these functions unless a freight forwarder is employed by the consignor or consignee to act on his behalf or else the former is a groupage operator. Transit warehousing will commonly be performed by the carrier himself, but long term warehousing is less commonly undertaken unless the carrier is part of a composite trading group which includes such facilities.

Air Traffic:

The pattern of operations employed in the handling of air cargo differs significantly from that employed in relation to surface transportation. Loading, unloading, stowing and unstowing of the aircraft are generally performed by the carrier himself or by some independent operator who may either be another air carrier or else a specialist ground handling operator. Transit warehousing of cargo will be performed either by the air carrier himself or the ground handling operator acting on his behalf, or else by an air freight forwarder. The latter may warehouse goods in transit in the case of an export consignment which has been entrusted to him to arrange shipment and after delivery to the airport by road he will store them temporarily in his premises. Conversely in the case of an import shipment the forwarder may warehouse goods prior to onward transit by road. In some cases

transit warehousing operations may be divided between the carrier and the air freight forwarder, each holding the goods in a transit warehouse for a limited period of time, depending on the method of operation. Long term warehousing is not generally performed by air carriers as such. Such facilities, however, may be offered by a freight forwarder if he is part of a multiple commercial group.

#### IV. LEGAL STATUS OF TERMINAL OPERATORS

Historically the various operations described above were each performed by individual companies or groups of individuals closely co-operating with those performing associated operations. With the modern transformation of ports in developed countries this is no longer so. In practice all categories of operations may be performed by one organisation, or else grouped in any way deemed commercially convenient. The following classification can, however, be made as regards the present structure of port and other terminal operations used by the various modes of transport.

Firstly, terminal operators may be state or publicly owned. This may take one of several forms. The operator may be a government department or organ of the state although this is rare in practice. More commonly the operator will be a para-statal body, that is wholly owned by the state, but operated as a separate legal entity or corporation.<sup>5</sup> This is commonly the case in the case of rail and air facilities. The method of operation in such cases may be in the nature of a governmental service or else run on a purely commercial basis - most in practice attempt to steer a middle course. Thirdly, the operator may be a local authority or provincial state or city government or else an autonomous corporation controlled by various local interests, and treated like a public utility company.<sup>6</sup>

Secondly, operators may be privately owned, that is run purely as a commercial organisation for private profit. Such operators are of two types. First, they may be owned by a sea carrier or a consortium thereof, who will operate it solely for their own benefit or else partly for third parties and partly for themselves depending upon local

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5. E.g. British Transport Docks Board.

6. E.g. Antwerp, Hamburg, Rotterdam.

conditions.<sup>7</sup> Secondly the operator may be owned by non-carrying interests such as forwarding, road haulage and warehousing groups or more rarely nowadays, by purely individual companies with no other commercial interests. Increasingly operators may be owned jointly by both sea carrier and non-sea carrier interests, the extent of participation depending upon local conditions.

A third possibility must also be considered as increasingly the actual owner of the operation may lease it to another party who may either be a sea carrier, road haulage or forwarding and warehousing group. This may take the form of a simple leasing of premises together with plant and equipment thereon, or else the lessor may retain control of mechanical plant and equipment such as cranes, etc. and employ his own labour to operate them.

Looking briefly at a representative cross-section of European countries in turn it is interesting to note the structural differences in each.

In France since the nineteenth century commercial ports were divided into two categories, non-autonomous or general administration ports and autonomous ports.<sup>8</sup> The former were administered by the state through the Ministry of Public Works. The state maintained the infrastructure, although the Chamber of Commerce and local authorities were permitted to participate in port facilities. Exploitation of the superstructure, that is, the port installations including warehousing, was handled under a concession by the local Chamber of Commerce, local authorities or private operators. The autonomous ports were public corporate bodies with financial independence. However, only Le Havre, Bordeaux and Strasbourg obtained that status.

Under the loi 65-491 of 29 June 1965 a new administrative system was established for certain more important ports, which were designated autonomous ports by governmental décret.<sup>9</sup> Such ports were public corporate bodies with financial independence under the overall control of the Minister of Public Works. Bordeaux, Dunkirk, Le Havre, Marseilles, Nantes and Rouen are so designated. Administration is conducted by a director advised by a port administrative council. The council is

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7. This is a common procedure in the case of container consortia.

8. Loi of 12 June 1920.

9. See also decret 65-933 of 8 November 1965.

empowered to issue binding regulations on all aspects of port working. It will be ultimately responsible for the exploitation of the super-structure including warehousing and storage facilities, which may be operated by the port itself or by concessionaires. The pattern of operation will differ from port to port. The duality of control formerly shared between the state and the Chamber of Commerce thus disappears.

In the United Kingdom a wide range of alternatives is to be found with widely differing regulations. Some docks are owned by the British Transport Docks Board which inherited them from the former British Transport Commission.<sup>10</sup> These are mainly port installations formerly owned by the old private railway companies prior to their nationalisation in 1947. Each still tends to function and regulate much as it did before nationalisation with the net consequence that stevedoring, wharfage, warehousing, etc. operations may be carried out by the port authority itself or other nationalised and private interests, both carrier and non-carrier owned, with few features in common. Other port installations such as the Port of London Authority and the Mersey Docks and Harbour Company, are semi-public bodies which function as such. At the other end of the scale are the small private ports, particularly on the East Coast, which are simply operated as profit making concerns. Here again there is no pattern with regard to the performance of the various operations discussed above. The sole common factor in all United Kingdom ports is that ownership and control of the various operations is increasingly becoming vested in fewer hands, although as integration may be either vertical or horizontal, this has not necessarily reduced the number of actual operators so much as it might otherwise have done. Inland transit terminals have developed in many parts of the country over the past few years. They are operated in most cases by sea carrier or forwarding interests. Given therefore such a widely differing pattern of development there is little value in considering the status or method of regulation in any detail.<sup>11</sup>

In West Germany the principal ports such as Hamburg and Bremer are owned and regulated by the local Länder, although operated on a

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10. See Kahn-Freund, "Law of Inland Transport", 4th ed., London, 84 et seq.

11. A change in the structure of the docks is likely if nationalisation plans are fully implemented.

commercial basis. Some operations may be carried out by the port authority, others by private interests who may be either sea carriers or land based interests. The port authority may operate in direct competition with the latter.

In Belgium the Port of Antwerp is owned by the City of Antwerp, some installations and operations being operated directly by the port authority, others by private interests who may be either sea carrier or land based owned. Again there may be direct competition between the port authority and private operators.<sup>12</sup> In Holland, Rotterdam and Amsterdam operate in a similar fashion.

In the United States an even wider range of differing patterns of structure and organisation exist. Ports may be operated by state, municipal or private interests. Wharves and associated facilities may be operated by powers granted either by special legislation or else by their municipal charter.

The net result of any survey of the situation in different countries is to reveal that the various operations in relation to terminal and transit facilities are interlocked in a complex series of relationships which makes accurate analysis of the legal status and structure extremely difficult, a situation which has been exacerbated over the past few decades by the constant change in method, pattern and ownership of such operations. Needless to say containerisation has proved a valuable catalyst in relation to all aspects of the problem. However, it is clear that the greater the degree of either governmental or municipal control over port operations/<sup>the better</sup> the possibility of regulating warehousing and associated operations. The reverse will probably apply where such operations are largely in the hands of private interests.

#### V. REGULATION AND LIABILITY OF WAREHOUSEMEN

The whole terminal complex, as discussed above, will normally be established and regulated by legislative statute or administrative decree, emanating either from the central government or provincial or

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12. See Smet and Van Doosselaere, "Le Transport Maritime sous Connaissance a l'heure du marche commun," 1966, 110 et seq on the subject of the Natie.

local authority. The method will differ from country to country and as such has little direct bearing on the problems relating to routine terminal operations. In some cases, however, the governing statutes may make detailed provisions in respect of the rights and liabilities of terminal operations such as warehousing, etc. but this is not usual. In most cases the terminal authority will be given the right to promulgate its own regulations in respect of such operations, although they may require formal approval of some higher authority. These regulations may have the force of law within their area of operation, or may only be considered as merely general conditions of contract.<sup>13</sup> To establish the exact position, however, it would be necessary to consider each country in turn and possibly each terminal complex individually. Such a task is not within the practical scope of this preliminary report and would in any case be of little practical value except as a comparative tabulation.

However, to establish whether a pattern exists in respect of warehousing operations, it is necessary selectively to consider a representative cross-section of the national laws applicable and the regulations of certain of the more important ports which may be considered as representative of the country in question, and finally the general conditions of contract employed by the various trade associations.

Warehousing of goods may be subject to regulation in the following ways. Firstly, provision may be made in the civil or commercial codes governing the deposit of goods generally, or under the common law systems in the general provisions relating to the bailment of goods. Secondly, special laws may be enacted governing certain categories of warehouse keeper, such as bonded warehouses, warehouse warrants, etc. Thirdly, the warehouseman may himself impose either contractually or by statutory authority his own general conditions for the receipt, warehousing and delivery of goods.

In France the loi of 18 June 1966 and the décret of 31 December 1966 make provision for the regulation of entreprises de manutention.<sup>14</sup> Here a distinction is made between the actual handling of goods and

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13. I.e. regulations (France and Italy), ordonances and regulations imposed by divers bodies (Germany), general conditions of contract deposited with the court (Holland).

14. See Rodiere, "Traité Général de Droit Maritime," volume 3, section 844 et seq.

such other activities as transit warehousing to take into account the historical distinction between the stevedores of the Northern ports and the acconiers of Marseilles. Provision is made in Art. 50 for the liability of stevedores as such and for associated activities including transit warehousing in Art. 51 of the loi. The reason for this is that whereas the stevedore restricts himself to his traditional function, the acconier may also handle the reception of goods, their storage in the port and delivery to the consignee.<sup>15</sup> For this reason Article 80 of the decret provides that these additional services must be performed if either agreed upon or they are in accordance with the port usage.

Under Article 53(a) the operator is liable in respect of handling operations (as defined in Article 50) for any loss which has resulted from a negligent act which he can be shown to have committed. Under Article 53(b) in respect of other activities including transit warehousing (as defined in Article 51) the operator will be presumed to have received the goods in the condition as declared by the party depositing them.<sup>16</sup> This presumption can be rebutted, however, and the operator will not in any case be liable for loss or damage resulting from certain excepted perils laid down in Article 53. Article 54 makes provision for the fixing of a financial limit of liability by decree and Article 56 regulates the period of prescription. All three articles in fact give the operator the same rights, liabilities and period of prescription as the carrier is given by other provisions in the same loi. Furthermore, the operator is not permitted to exempt himself from the provisions of the law which are mandatory.<sup>17</sup> To avoid direct actions in delict Article 52 provides that the operator acts for the account of the party who requests his services, and his liability is only to the latter, who alone can bring an action.<sup>18</sup>

Under the Ordonnance of 6th August 1945 and the règlement issued under the Décret of 6th August 1945, as amended, provision is made for

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15. Ibid.

16. Article 53: "Quel que soit celui pour le compte de qui l'entrepreneur manipule, reçoit ou garde la marchandise, sa responsabilité est engagée dans les conditions et limites fixées ci-dessous: (a) Lorsqu'il accomplit les opérations visées à l'article 50, il est responsable des dommages qui lui sont imputables; (b) Lorsqu'il accomplit les opérations visées à l'article 51, il est présumé avoir reçu la marchandise telle qu'elle a été déclarée par le déposant."

17. Article 55 loi of 18 June 1966.

18. Article 81 décret of 31 December 1966.



the regulation of Magasins Généraux. A Magasin Général is defined as an "Etablissement à usage d'entrepôt où les industriels, commerçants agriculteurs ou artisans déposent des matières premières, des marchandises, des denrées ou des produits fabriqués, susceptibles d'être l'objet de bulletins de gage négociables: les récépissés-warrants."

Details of the operation of each magasin general are agreed by an arrêté préfectoral.<sup>19</sup> Depositors of goods must declare the nature and value of the goods to the warehouseman who will be liable for the safekeeping of the goods up to the value declared, or in the absence of any declaration to the value estimated by the warehouseman, and pro rata in the case of partial loss. The liability of the warehouseman is not restricted to faute lourde, but is generally subject to force majeure and certain excepted perils.<sup>20</sup> The Ordonnance only applies to magasins généraux (who are authorised to issue warehouse warrants). Other warehouses will be subject to the provisions of Article 1916 et seq. Code Civil governing the contract of depot under which the warehouseman must take such care of the goods as he would take of his own.<sup>21</sup> Unlike in most other countries the magasin général must insure goods against fire, although this obligation is suspended where a marine policy covers those risks.<sup>22</sup> No such obligation exists in the case of warehousemen who do not operate as a magasin général. However, most larger warehouses are in fact magasins généraux.

In the United Kingdom the position of the warehouseman is governed largely by common law.<sup>23</sup> To date there have been no statutory provisions governing his liability. At common law he is merely a bailee who as part of his business has care and custody of the bailor's goods. He is bound therefore to take all reasonable care of the goods and is liable for loss or damage resulting from his own negligence or that of his servants.<sup>24</sup> Consequently if goods are stolen or destroyed by fire without any negligence on the part of the warehouseman or his servants he will not be liable. The warehouseman must, however, show

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19. Article 1 Ordonnance of 6 August 1945.

20. Articles 5 and 5 *ibid.*

21. Article 1926 C.C.

22. Article 12 Ordonnance of 6 August 1945.

23. In some Commonwealth countries certain provisions may have been placed on a statutory basis, but the basic rules generally remain unchanged.

24. See Paton, "Bailment in the Common Law", London, 171 et seq.

that the loss or damage is not due to his negligence or that of his servants. The warehouseman is not an insurer of the goods.<sup>25</sup> He is, however, free to enter into any contractual relationship he may wish to with a bailor of goods whereby his liability is either expanded to render him liable as an insurer of the goods, or else restricting his liability to less than that applicable at common law. Such restriction of liability by the use of general conditions of contract is standard procedure for most warehousemen, although a warehouseman cannot exclude himself from liability for his intentional wrongs. The general conditions of the warehousekeepers association are probably one of the most severe set of general conditions in use in the United Kingdom.<sup>26</sup> Liability is excluded for virtually every conceivable form of liability that is possible at law, and in the rare event where liability is unavoidable it is limited to the sum of £20 per ton.<sup>27</sup>

The wharfinger is likewise subject to the same degree of care as the warehouseman so that at common law there is virtually no difference between them. However, here again the wharfinger generally restricts his liability by general conditions of contract wherever possible.

The general conditions of contract employed by wharfingers, although often restrictive, differ from port to port as to the severity of the restriction of liability. In most cases the common law position is restated, that is, that the warehouseman only accepts liability on proof of his negligence or that of his servant, but only up to a certain financial limit per package or per ton. Here it should be noted that where terminal operators themselves offer warehousing facilities they often do not adopt the National Association of Warehousekeepers Conditions but devise their own which tend to be more favourable to the bailor. Goods in transit may also be warehoused subject to Institute of Freight Forwarders Conditions or those of the British Road Services/British Rail.<sup>28</sup>

The position therefore in the United Kingdom is one of total freedom of contract, although if the current proposals of the Law

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25. His position is therefore similar to that of the private carrier - only the common carrier is an insurer of goods.

26. General Conditions of Contract of the National Association of Warehousekeepers (N.A.W.K.).

27. Clauses 12 and 15 *ibid*.

28. Cf. Clause 12 B.R.S./B.R. Conditions of Carriage. R.H.A. Conditions of Carriage used by the private sector do not make any provision for the warehousing of goods.

Commission on Exemption Clauses become law the application of the general test of the reasonableness of exemption clauses in general conditions of contract to warehousing contract could result in certain more restrictive provisions being struck out.<sup>29</sup>

In Belgium under Liv III Tit XI Code Civil the warehouseman will be liable for loss or damage to the goods except on proof of force majeure.<sup>30</sup> However, his liability may be restricted by the use of general conditions of contract. Inter alia, the conditions commonly in use are the Conditions Générales des Expéditeurs de Belgique<sup>31</sup> and those of the Union des Manutentionnaires de Marchandises of Antwerp (V.B.G.) as many warehouses are controlled by stevedores. The Natie of Antwerp who combines the function of wharfinger and transit warehousemen does not use general conditions of contract, but depends solely upon his position at law.<sup>32</sup>

In Holland the Civil Code makes similar provision to the French Code Civil in respect of the contract of dépôt.<sup>33</sup> However, the General Conditions for Storage, Safekeeping and Delivery of Goods applicable in Rotterdam and Amsterdam are of more practical importance. Under these detailed conditions the warehouseman will be liable for loss or damage to the goods up to their current value, subject to certain excepted perils.<sup>34</sup> Again forwarding conditions may be applicable in respect of transit warehousing operations.<sup>35</sup>

In Germany special provision is made in the Verordnung über Order-Lagerscheine of 16 December 1931 regulating warehouses empowered by the Land Authority to issue order-warrants.<sup>36</sup> The warehouseman will be

29. Law Commission No. 69 - Exemption Clauses, Second Report, 1975.

30. Article 1927 C.C.

31. See Article 31 Conditions Générales des Expéditeurs de Belgique 1969.

32. See footnote 12 above.

33. Article 1731 Civil Code.

34. See Article 39, Warehousing Conditions Amsterdam/Rotterdam, 1955.

35. See Article 1, Dutch Forwarding Conditions.

36. See also Article 808 BGB as to warehouse receipts.

liable for loss or damage to the goods unless this could not have been prevented by the care of a careful merchant.<sup>37</sup> Under the Verordnung liability is limited to 20 marks per kilo unless a higher value has been declared.<sup>38</sup> Goods also will commonly be warehoused subject to the ADSp of the German Freight Forwarders Association which makes specific provision for warehousing.<sup>39</sup> Liability in this case will be governed by the ADSp. Local regulations may also exist in the particular ports governing the handling and storage of goods, as for example in the case of Hamburg.<sup>40</sup>

In Italy the responsibility of the warehouseman is regulated by Articles 1787-1797 C.C., which provides that Magazzini Generali are responsible for the care of goods deposited with them, unless it can be proved that the loss etc. is due to *cas fortuit*, the nature or deterioration of the goods, or defects in the goods or their packing.<sup>41</sup> The individual *magazzini generali* all apply different general conditions although there is little difference between them, although gradually they are becoming more uniform, together with an increased level of responsibility. The general conditions are subject to ministerial approval, and to some extent have been recognised by the courts. In the case of transit warehousing in ports, if goods are damaged whilst in the hands of the port operator the latter will be liable for damage to the goods unless he can establish that the loss or damage was not his fault. The Italian Code of Navigation also makes provision for the regulation of port operators by the port commandant.<sup>42</sup>

In the United States a wharf may be private or public depending upon the circumstances. If it is public the owner is obliged to make its facilities available to the public, whereas if it is a private wharf the owner has the right to restrict user as he thinks fit.<sup>43</sup> Wharves may be regulated at both Federal and state level. Under the

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37. Article 417 and 390 HGB.

38. Article 19 Verordnung.

39. Articles 43 et seq ADSp.

40. Under the Rules and Regulations for Quay Facilities, Hamburg, 1971 detailed provision is made as to liability and financial limits of compensation. Cf. the Betriebsordnung of the Bremer Lagerhaus-Gesellschaft, 1932. In East Germany the liability of operators in sea terminals is regulated by the Seehafenbetriebsordnung of 10 June 1974 which also covers warehousing.

41. Article 1787 C.C.

42. Articles 108-112 and 454 C.N.

43. See 79 Am.Jur. 2d 174.

Shipping Act 1916 the Federal Maritime Commission has authority to exercise certain regulatory powers in respect of wharves, port terminals, etc. In the absence of Federal regulation on a particular matter, the individual states can regulate them either directly or through its municipalities or other governmental agencies. Wharf storage facilities at shipside are subject to the authority of the Federal Maritime Commission by the provisions of the Shipping Act 1916 which gave it certain regulatory powers over any person "carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water." The liability of a wharfinger storing goods is that of a warehouseman.<sup>44</sup>

Many of the rules of law relating to warehousemen are codified in section VII of the Uniform Commercial Code, which has been adopted in virtually all states of the U.S.A., subject to local variations on particular points. A warehouseman is defined as a person engaged in the business of storing goods for hire.<sup>45</sup> The distinction between public and private warehousemen is for many purposes not important.<sup>46</sup> Public warehousemen, however, will be subject to state regulation. In particular the Federal Warehouse Act controls the storage of agricultural products. Various systems of licensing exist at both Federal and state level. The warehouseman's general liability is defined in the Uniform Commercial Code which provides that: "A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care."<sup>47</sup>

This is really only declaratory of the common law relating to bailment, the warehouseman being the bailee and the depositor the

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44. See footnote 48 infra.

45. Section 7-102(1)(h) Uniform Commercial Code.

46. A Public Warehouse is generally defined as a place held out to the public as being one where any member of the public, who is willing to pay the regular charge, may store his goods and then sell or pledge them by transferring the receipt given him by the keeper or manager. Reading Co. v. United States, 316 F2d 738. See also 100 ALR 429.

47. Section 7-204(1) Uniform Commercial Code.

bailor of the goods. This provision is generally held to apply to all classes of warehousing, whether performed by wharfingers, forwarders or common carriers.<sup>48</sup> There is nothing to prevent a warehouseman from contractually undertaking a greater degree of liability than required at law and thus become an insurer of the goods for e.g. loss by fire.<sup>49</sup>

The amount of damages recoverable in the case of loss or damage may be limited by contractual provision which may take the form of a specific liability per item, or value per unit beyond which the warehouseman will not be liable. However the bailor may request a higher level of liability subject to the payment of increases charges.<sup>50</sup> The warehouseman is also free to make reasonable provision in his general conditions of contract as to the time within which claims must be presented and actions commenced.<sup>51</sup>

Having considered the regulation and liability of the warehouseman in a representative cross-section of countries, the question arises as to what common factors can be drawn from the survey? The first is that although it is difficult to categorise liability to any extent the following conclusions can usefully be drawn.

Firstly, in those legal systems derived from the common law the concept of bailment predominates with its associated duty for the bailee to take all reasonable care of the goods and consequent liability for his negligence or that of his servants. On the other hand, liability in those countries of continental Europe subject to the civil law varies from virtually strict liability to liability based upon fault. Wherever permitted by law, however, general conditions of contract will be used to restrict the warehouseman's liability thus producing a greater degree of uniformity in warehousing conditions of contract than would at first appear possible. The contrary may, of course, occur where operators undertake warehousing operations subject to general conditions of contract primarily intended for other types of operation, such as forwarding, carriage, etc.

Secondly, turning to the question of financial limits of liability, there is little value in attempting to analyse those provisions commonly in use owing to the wide range of limits obtaining in the

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48. 78 Am. Jur. 2d 271 et seq.

49. 78 Am. Jur. 2d 285.

50. Section 7-204(2) Uniform Commercial Code.

51. Section 7-204(3) Uniform Commercial Code.

different regulations and general conditions of contract. They can, however, be divided into three distinct categories. First those applied in the general conditions of contract employed by warehousemen per se, which restrict liability to a very low financial level, with a few exceptions. Secondly, those applied where warehousing is subjected to the general conditions of a forwarding or stevedoring operator which again tend to give a low limit. Finally, only where warehousing is performed by a carrier subject to his general conditions will the limits of liability be at a realistic level.<sup>52</sup> It is therefore clear that with few exceptions the financial limit of liability is excessively low because of a combination of historical and economic reasons. The net result is that even where the degree of legal liability is high the practical value of this may be effectively reduced by a correspondingly low level of financial liability.

#### Container Terminal Operations

With the recent development of containerisation most larger ports now have specialised container terminals constructed solely to handle container ships.<sup>53</sup> As mentioned above this has meant that one operator is now responsible for all aspects of port operations including transit warehousing. Consequently general conditions of contract are operative in most ports specifically regulating container operations. Generally these have tended to increase the terminal operators liability as a means of attracting container trade from competing ports. In some cases these conditions are published for general use,<sup>54</sup> in other cases they are negotiated individually with a particular container consortium, the details not being revealed.

A representative negotiated set of general conditions of contract between terminal operator and carrier would provide as follows. The terminal operator will be liable for loss or damage to containers from and to the time of receiving/loading and from discharge until delivery, unless he proves that any loss/damage was not caused by his negligence or default. The terminal operator will be liable for all cargo whilst it is in his custody and will be liable to compensate the carrier for

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52. Also where the warehousing limit is tied to that of the carrier (i.e. under the French law of 1966).

53. For a general picture see "Containerisation International Year Book", London 1976.

54. E.g. the Port of London Authority publishes its Container Terms.

liability to cargo owners or third parties in full unless he can prove that the loss or damage was not caused by his negligence or default. If, due to a special declaration of value, the carrier's liability exceeds the liability as per bill of lading, the terminal operator will only be liable to indemnify the carrier beyond the normal limit where the value was declared to the terminal operator before receiving or discharge. The terminal operator will be liable for consequential loss other than loss of profits, subject to a certain monetary limit.

It can be seen that such provisions make the terminal operator liable considerably in excess of the traditional wharfinger or warehouseman as regards transit warehousing operations. It is possible that with the steady expansion of containerisation traditional warehousemen may be forced to come into line with the container terminal operators on this matter. Moreover this is one area where uniformity is most likely to be achieved.

## VI. THE JURIDICAL PROBLEMS RELATING TO WAREHOUSING

### (a) General classification

Following the discussion of the status and regulation of warehousing operations, the question arises as to whether the theoretical concept of warehousing is of fundamental importance in drafting an international convention.

It is clear from the discussion above that warehousing is essentially a practical commercial operation which has evolved to meet the needs of national and international trade. However every legal system must provide for it in some form or another. The various countries of the world can be divided for this purpose into two juridical categories as regards the regulation of warehousing operations.

First, there are those countries which are subject to the common law and permit complete freedom of contract in respect of warehousing contracts. The United Kingdom is the principal example of this category, although the same approach characterises most Commonwealth countries. At common law warehousing is merely treated as a particular application of the general law of bailment. The rights and liabilities of the bailor and bailee are essentially based upon a duty of reasonable care in relation to the goods bailed. Much case law on the subject has tended to be linked with the action in the tort of negligence, an area of the law which has seen considerable development through extensive



litigation over the past fifty years.<sup>55</sup> However on the subject of warehousing itself there has been relatively little litigation owing to the extensive use of exemption clauses in general conditions of contract together with the common use of insurance to cover the various risks. In Commonwealth countries generally there is a very considerable overlay of general conditions of contract which tend in practice virtually to obliterate the underlying common law. In fact it could be validly asked as to what extent the common law relating to warehousing should seriously be considered as a basis for an international convention bearing this factor in mind, although this problem is likely to lessen in future with the increasing control of commercial intermediaries by statute or other form of regulation.

Secondly, there are those countries where warehousing is subject to statutory control which in turn permits partial freedom of contract to the warehouseman in his operations. Such countries may either be subject to the continental civil law or else to a common law system, the controlling provisions being included in one of the codes or else promulgated as a separate statute which may in many cases be supported by administrative regulation.

Within the common law system this category is exemplified by the United States. The American law relating to warehousing is essentially a codified development of the earlier common law, although subject to a different emphasis from that found in Commonwealth countries. Here the tendency is for the warehouseman to be prevented from restricting the extent of his legal liability, but at the same time given some degree of freedom in limiting the extent of his financial liability. Here the pattern of development has been for the law relating to warehousing to follow that relating to common carriers.

Turning next to the civil law countries of continental Europe, similar considerations apply. In the case of Germany the formal legal provisions relating to warehousing have to a considerable extent become overlaid by the ADSp and the regulations promulgated within the individual ports. A similar situation exists in Holland and Belgium where the general conditions of contract of the warehousemen, forwarders, port operators etc. have tended to overlay the formal law, subject to certain exceptions such as the *Naties* of Antwerp who have attempted to

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55. On the subject of the warehousing contract see Paton, "Bailment in the Common Law", 171 et seq.

avoid liability by reliance on the general law rather than on general conditions of contract. Only in the case of France where the law of 1966 has specifically regulated certain categories of port operators does the underlying law attempt to relate to current operational requirements. It should be added also that there is an increasing tendency in many countries to promulgate special regulations in respect of particular types of warehouses, especially those handling foodstuffs and other perishables.

Next, the question arises as to the value to be placed upon the various local regulations enacted in relation to specific ports or groups of ports and inland transit terminals in different countries. Should these be considered as part of the national law, or are they really only a formalised category of general conditions of contract to be equated with those of the various trade associations? The answer is not a simple one and probably lies somewhere in the middle. In those countries where the ports are relatively few in number, such as in Germany, the port regulations should perhaps be considered as an extension of the general law, given the fact that there are no alternatives. This is equally applicable in the case of many developing countries.<sup>56</sup>

In other countries such as the United Kingdom where every port has its different regulations which it can generally change at will, they are best equated with the general conditions of contract used by the various trade associations. In such countries an investigation of some depth would be necessary to establish to what extent these regulations have any juridical value or not.

Finally, the question arises of assessing the relative importance of the various general conditions of contract employed by warehousemen. In other words, does the practical application of general conditions of contract tend to render statute or case law superfluous where there is total or partial freedom of contract? Comment has already been made above in relation to Commonwealth countries, but it is necessary to establish some acceptable norm to permit an accurate assessment of the situation. It is suggested that the following tests could usefully be applied to reach a result:-

- (1) To what extent do general conditions of contract apply generally to all warehousing operations for a particular country.

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56. See page 28 below.

(2) To what extent is contractual liability for warehousing operations regulated by general conditions of contract which are primarily extended to regulate associated operations such as forwarding, packing, carrying, stevedoring, etc.

If in answer to the first question a wide degree of uniformity is revealed, the general conditions of contract may be considered as an extension of the general law. Conversely, in answer to the second question, if warehousing operations tend to be regulated merely as an ancillary to associated operations, then the general conditions of contract employed cannot be considered as representative of general usage and therefore not as an extension of the general law.

(b) Status and Relationships involving the Warehouseman

To analyse warehousing it is necessary to consider its meaning and scope as an operation as opposed to defining it as a legal concept within a particular system.

Difficulty has been experienced in the past in distinguishing between long term warehousing and warehousing of goods in transit owing to the notion that whereas the latter is an adjunct to transportation, the former is a separate and distinct concept. However, it is extremely difficult to draw a dividing line between the two notions in practice, given the infinite number of variations in commercial procedure and relationship possible in respect of goods which are warehoused at various stages of their commercial existence. Ignoring the question of the furniture repository, which no doubt could be separately classified without undue difficulty, it is arguable that all other forms of warehousing merely differ as to their duration rather than in their nature. In all cases commercial goods will be deposited in a warehouse until transported elsewhere. The mere fact that such goods may be the subject of various other transactions such as sale, pledge, etc. does not affect the nature of the warehousing operation, but merely the question of to whom the warehouseman will be liable for the goods. This does not mean that specific provision may not be made within a particular jurisdiction whereby the various types of warehousing are delineated, but that in reality such a distinction is not essential.

It may, however, be technically desirable for the purpose of drafting a uniform law or convention relating to the liability of a warehouseman merely to provide for such warehousing operations as are closely connected and subordinate to the transportation of goods, thus excluding other categories of warehousing operation. It is felt

though that such a restriction would merely perpetuate arbitrary distinctions.

Warehousing is therefore best described as the static holding of goods before, during or after their transportation. Inevitably unless goods are being warehoused adjacent to the factory in which they were manufactured, some form of transportation is essential to get them to and from the place in which they are warehoused. Warehousing can therefore generally be considered as being linked with transportation to a greater or lesser degree in virtually all circumstances, and much difficulty could be avoided in drafting a convention if this approach were to be adopted.

The warehouseman as the only static holder of goods is placed at the centre of a complex web of relationships. All other intermediaries either move the goods, such as the carrier, or else perform some positive operation in relation to the goods such as packing, loading, unloading, etc. or else like the freight forwarder, they arrange for a third party to perform these functions. The static function of the warehouseman therefore places him in a special category resulting in differing relationships with other parties. Goods may be deposited with him by an intermediary whilst in transit, either prior to transference to another carrier or else after carriage is complete pending transfer to the consignee. Otherwise the owner himself may deposit the goods.

The contractual relationship established by the warehouseman with each of the above parties will usually be subject to the former's own general conditions of contract, although where his contract is with an intermediary such as a forwarder, carrier or combined transport operator, the actual owner of the goods may be subjected to a different set of conditions imposed on him by the intermediary himself. Equally with whom the warehouseman is in contractual relationship in any particular case will depend upon the operation of both national law and also the provisions of the various general conditions of contract interposed between the warehouseman and the owner of the goods. Here the ambiguous status of freight forwarders in some countries together with the different ways in which a combined transport operator may formulate his contractual relationships adds to the uncertainty.

The status of the warehouseman may further be complicated by the

fact that warehousing operations are commonly performed as an adjunct to a number of other operations. In particular carriers such as the larger road hauliers, railways and airlines run warehouses as an integral part of their operations. The larger freight forwarders and stevedores may also do the same. Some such multi-operators may use different general conditions for each specific operation they perform. Some like the freight forwarders in many countries will commonly use one set of general conditions of contract for all their operations. Others, such as the various modes of carriers, may make special provision in their conditions of carriage for the warehousing of goods in transit. The net result is that identical warehousing operations may be performed in the same commercial centre subject to several different sets of general conditions of contract where such are permitted to override the general law. Consequently, even where a warehousing trade association publishes its own general conditions of contract, a large number of warehousing contracts may be entered into subject to widely differing provisions as to the rights and duties of the parties. It may therefore be extremely difficult to establish in any one country or even one commercial centre as to what general conditions of contract are most commonly employed in warehousing transactions.

In this respect it should be noted that in the past undue emphasis has been placed on maritime transport and its associated problems. The operations of noncarrying intermediaries, including warehousemen, have commonly been considered merely as one aspect of maritime carriage to the exclusion of other considerations. However warehousing can take place anywhere and in relation to all modes of transport. It is an integral part of airfreight operations, inland clearance depots, containerbases, inland waterway terminals as well as rail and road freight operations. Only since the advent of combined transport have the problems of warehousing been considered in a global sense.

The question therefore arises as to how warehousing is to be treated for the purposes of a draft convention? One solution is for it to be considered merely as an adjunct to the various modes of transport, the liability of the warehouseman following that of the associated mode of transport. For example, where goods are warehoused before, during and after transit by sea, air, road or rail, the liability of the warehouseman would be the same as that of the carrier in question.<sup>57</sup>

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57. Cf. the French Law of 1966 discussed at page 12 above.

Such a solution would ensure that the consumer would have a uniform level of recourse at all stages of a transit operation, irrespective of whether he claims directly against the warehouseman or against the carrier as the main contractor where the latter is liable for warehousing at any stage of the operation. Equally in the latter situation the carrier will in turn have a complete indemnity against the subcontracting warehouseman, thus obviating the need for recourse to insurance cover to recoup his losses.

Superficially this appears to be a satisfactory method of solving the problem of the warehouseman's liability. However, with the increased growth of combined transport operations this approach could create considerable difficulty. If a C.T.O. is responsible for a combined transport operation on a network basis, the owner's right of recovery for loss or damage to goods in transit whilst in the hands of a warehouseman would differ according to the particular mode of transport in relation to which the warehousing operation took place or else be subject to the residual liability of the C.T.O. This in itself would not place the owner in any worse position than he would be in relation to the individual carriers under a combined transport operation. However problems could occur where goods are warehoused at the point of transfer between two different modes of transport. Here the question could arise as to which mode of transport the warehousing is an ancillary operation. Again the rights of the parties would depend on the answer to this question or whether any provisions relating to the residual liability of the C.T.O. need be invoked or not.

It is felt, however, that no matter what devices are inserted in a draft convention to solve this problem, conflicts and uncertainty are likely to arise. This would be particularly so where in a combined transport operation one segment of the transit is subject to an international convention and the next one to the national law of the country where the warehouseman operates. Here the warehouseman could find his liability differing radically dependent upon which law applied. Moreover his position could be in a constant state of flux dependent upon the pattern of combined transport operation employed. It is therefore felt that such a solution might not be beneficial to either the warehouseman or the owner of the goods.

## VII. DEVELOPING COUNTRIES

Difficulties have been encountered in reconciling the needs of developed and developing countries in drafting a combined transport convention and therefore specific mention of the latter is necessary. Such difficulties are less likely to arise in the case of a draft warehousing convention for the following reasons. First, whereas the C.T.O. is responsible for the activities of third parties and thus replaces traditional operators in relation to the consumer, this problem does not arise in the case of the warehouseman. Secondly, the status of the warehouseman does not significantly differ from developed to developing countries as his function is basically the same in all cases. His methods of operation may differ according to the degree of sophistication of equipment required by the transport infrastructure in the country or port in question, but this again is a problem faced by warehousemen throughout the world. Given the fact therefore that there appear to be few economic impediments in relation to warehousing operations in reconciling the needs of the developing countries to those of the developed, the question then arises as to whether any juridical problems exist which could give rise to difficulties in the formulation of a draft convention.

The majority of developing countries were formerly subject to a colonial power for some period of their existence, and in virtually all cases derived their commercial and public law from the colonial power. This reception of law was either in the form of a carbon-copy of the rules existing in the latter at the date of enactment, or else as a special adaptation for the needs of the country in question. In particular for historical reasons the French and English legal systems served as a model for their respective former colonial empires, and any development since independence has tended to be along the same lines.

In most countries of Anglophonic Africa and Asia the railway systems developed from a central port or ports, and it was common for both to be put under a single administration with a detailed Statute and subsidiary regulations. This would operate as a para-statal body with its regulations based upon current English port and railway practice. Since independence the principal change has been the separation of the ports from the railways for administrative reasons.

Otherwise the pattern has been a gradual change of regulations based upon the immediate needs of the transport developments of the last few decades.<sup>58</sup>

To the extent that the port authority did not carry out the various functions itself, in the past they were generally performed by private companies either owned by carrier or land based interests. Latterly, however, such operations have tended to be taken over by the port authority itself or other autonomous para-statal bodies either by agreement or by nationalisation as in Tanzania. In some cases such operations are covered by regulations or general conditions of contract issued either by the company or the authority in question, and are similar to those found in developed Commonwealth countries. To the extent that these are not applicable the common law will be applicable, statutory provision being rare, except in the case of India. In particular warehousing and associated operations will therefore be subject to the same legal rules as would apply in the United Kingdom, subject to local usage and trade custom.

Similarly the developing countries of the Francophone group are functioning subject to regulations based upon those of the former colonial power, and should therefore not create any particular difficulties from the juridical viewpoint.<sup>59</sup>

#### Conclusion and Recommendations

Many topics such as warehousing documentation, warrants, etc. and the associated question of title to goods have been intentionally omitted because such matters do not affect the basic problems of defining a warehouseman and the universal problem of loss or damage to goods. Other questions such as the warehouseman's right of lien and privilege over deposited goods are of such complexity that they cannot adequately be discussed in a preliminary report on the subject, and in any case may be best left to be regulated by national law. If, however, the subject of a draft warehousing convention is to be subjected to further research and investigation the following factors should be given careful consideration.

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58. In Ghana and Nigeria para-statal port authorities have been set up, separating the ports from the railways administration that formerly ran them. A similar process has taken place in East Africa except that the Ports Authority is controlled by the East African Community rather than by the individual states, again after separation from the East African Railways Corporation.

59. See Rodiere, *Traite General de Droit Maritime*, Vol. 3, 77 et seq.



- (1) A convention relating to warehousing if restricted to transit warehousing and excluding long-term warehousing could create an artificial division between two interrelated operations. Although it might possibly assist in formalising and raising the liability of the non-carrying intermediary in combined transport operations, to maintain the distinction could create as many problems as it solves, when demarcation questions arise, particularly if the long-term warehouseman retains his freedom to restrict his liability in many countries.
- (2) A thorough analysis is necessary of the content and legal validity of the various general conditions of contract employed by warehousemen, forwarders, carriers, etc. and of the regulations imposed by the various port authorities if an accurate picture of the actual legal relationships entered into in the warehousing of goods is to be achieved.
- (3) Consideration should be given of the extent to which the general conditions of contract and regulations referred to in paragraph 2 are altered from time to time to deal with changing needs. If such changes have tended to be frequent care should be taken to ensure that a draft convention does not include matters which for economic reasons are likely to be in a state of flux, otherwise the convention will unnecessarily restrict commercial activity rather than assist it.
- (4) Consideration should be given to the fact that the warehouseman may either be liable as a sub-contractor to a carrier etc. or else directly liable himself to the owner of the goods. Given differing provisions in existing transport conventions, the carrier's liability to the owner of the goods may differ substantially from his right of recovery from the warehouseman, a factor which should be taken into account in further investigation on the subject.
- (5) It is far from clear with impending changes in the various international conventions for the carriage of goods on which/<sup>one</sup> a draft warehousing convention should be modelled, or whether it should be drafted as a complement to the proposed combined transport convention or as a series of rules sui generis. Logically as the growth of combined transport operations has exacerbated the problems relating to warehousing operations then a draft warehousing convention should be patterned as closely as possible thereon. However, it is doubtful whether such an increase of liability would be acceptable in those countries where to date the warehouseman has severely restricted his liability.
- (7) In the light of the above observations it may well be necessary for

some middle course to be steered to give the transit warehouseman a lesser degree of liability than is imposed upon the carrier under the various transport conventions, but considerably higher than that at present accepted by him in many common law countries.

(8) If a distinction is to be maintained between transit warehousing and other categories thereof a possible method of avoiding unnecessary disputes as to the nature of a particular operation would be to require a system of licensing in each country of warehousemen operating under the warehousing convention.