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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

ANALYSIS OF THE REPLIES TO THE ENQUIRY CONDUCTED BY UNIDROIT

ON THE DESIRABILITY AND FEASIBILITY OF DRAWING UP

UNIFORM RULES ON THE WAREHOUSING CONTRACT

(Secretariat memorandum)

Rome, December 1977

I. INTRODUCTION

1. When deciding at its 53rd session, held in February 1974, to authorize the resumption of work on the preparation of uniform rules on the warehousing contract, the Governing Council instructed the Secretariat to bring up to date the preliminary report on the subject prepared by Professor Le Gall in 1965 and 1966 and furthermore urged that during the triennium 1975 to 1977 priority be given 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 or operations.
2. In accordance with these instructions, the Secretariat commissioned a preliminary report on the warehousing contract from Dr. Donald Hill, Senior Lecturer in Law at Queen's University, Belfast, which is contained in Study XLIV - Doc. 2. Dr. Hill outlined his report to the Council at its 55th session held in September 1976, and in conclusion made a number of points which he believed to be of particular importance in the event of UNIDROIT's deciding to draw up uniform rules on the question.
3. After discussion, the Council instructed the Secretariat to transmit Dr. Hill's report to Governments and the Organizations concerned with a request for observations on the desirability and feasibility of preparing uniform provisions on the liability of persons other than the carrier having custody of goods before, during or after transport operations.
4. The bulk of the observations of Governments and interested Organizations favoured continuance of work on this subject by UNIDROIT and the Governing Council, at its 56th session held in May 1977, decided to set up a Study Group, the composition of which should reflect a balance between States with different economic and legal systems and also between the various modes of transport, to draw up uniform rules on the warehousing contract.
5. The purpose of the present document is, in the first place, to indicate the reactions of Governments and the interested Organizations to the proposed initiative and, in the second, to bring to the attention of the members of the Study Group certain observations received during the course of the enquiry on more specific questions relating to the warehousing contract. In addition a list of questions is set out at the end of the document, answers to which might assist the Study Group in delimiting the scope of its work.

II. GENERAL REACTIONS TO THE PROPOSAL TO DRAW UP UNIFORM RULES ON THE WAREHOUSING CONTRACT

6. Broadly speaking, the reactions of States to the UNIDROIT enquiry fall into three distinct categories.

7. The first, and most numerous, was that which considered the importance of warehousing operations and the present confused situation to justify the examination of the possibility of drawing up uniform rules regarding them. Partisans of this view who replied directly to UNIDROIT were Austria, Finland, the Federal Republic of Germany, Italy (1), South Africa and Vatican City. In addition, France, the German Democratic Republic, Liberia and Poland expressed support for the UNIDROIT initiative in the course of a discussion thereon which took place at the thirty-second session of the Legal Committee of the Intergovernmental Maritime Consultative Organization (IMCO) in May 1977.

8. The second group of States were also in favour of continuing with the work on the subject although, for differing reasons, they had some doubts about its ultimate value. Thus the Swiss authorities stated that up to now the warehousing contract had not given rise to special problems and that the interested circles did not see any great need for the elaboration of uniform rules. However, in view of Switzerland's interest in all attempts at unification of law as a matter of principle, it would be prepared to collaborate in the work of an expert Committee if the enquiry were to reveal that a sufficiently representative number of UNIDROIT's member States were to consider the study to be useful.

9. Mitigated support for the study of the warehousing contract was received from the Danish and Norwegian authorities. The former pointed out that the subject is so closely related to transport that it is doubtful whether it is suited to being dealt with separately although Denmark could agree to a continuation of the studies within this field with a view among other things to defining more clearly its relationship with transport law. (2) The competent Norwegian authorities also thought it desirable that the warehousing contract be subject to a closer examination although it was observed that the contract's close relation to national conditions might limit the number of adherents to a possible international Convention. On the other hand, they considered that a set of international regulations, even if not acceptable to all, might function as a most useful model for national provisions in the field.

(1) Subject to the remarks below in paragraph 18.

(2) For further observations on this point, see paragraph 16 below.

10. Of the third group of States, which was by and large opposed to the UNIDROIT initiative, the most detailed reply was received from the authorities of the United States of America who, after deliberation, had reached the conclusion that it would not be desirable for UNIDROIT to take up this subject. They cited a variety of reasons to support this conclusion, including the problems which were raised by Dr. Hill in his report. A major one was the problem of attempting to distinguish between transit warehousing and long-term warehousing. Furthermore, there was the question whether a convention limited to problems of defining the nature and extent of the liability of a warehouseman was not too limited a topic to justify the resources which would have to be employed in producing a convention on the subject. On the other hand, an attempt to move beyond this limited field into areas such as warehouse receipts would appear to have little likelihood of success. Accordingly, it seemed desirable for UNIDROIT to concentrate upon subjects which appeared to have greater promise.

11. For their part, the United Kingdom authorities considered that national laws were so disparate that a Convention was not practicable and, although the liability of warehousemen was a question of substantial economic importance, they were not aware of any special difficulties in this field. Moreover the Netherlands reply considered that although from a juridical point of view the warehousing contract was an interesting subject, it seemed doubtful whether it would receive sufficient attention by the various Governments as to result in a treaty. The position would alter if a United Nations Organization, such as UNCTAD or UNCITRAL, were to become interested.

12. In addition, at the thirty-second session of the Legal Committee of IMCO referred to above (paragraph 7) the point was made that the need for uniform rules on the warehousing contract might be diminishing in view of the increased use of "through contracts of carriage".

13. Nevertheless the main conclusion of the Legal Committee was the same as that which had emerged from the replies of States to the UNIDROIT enquiry, namely that further study of the topic by the Institute was desirable. This view was also shared by the vast majority of the Secretariats of the International Organizations and Institutes consulted. Particular reference may be made to the interest shown by the Economic and Social Commission for Asia and the Pacific (ESCAP), the International Civil Aviation Organization (ICAO), the Commission of the European Communities, the European Free Trade Association (EFTA), the Central Office for International Railway Transport (OCTI), the International Road Union (IRU), the International Rail Transport Committee (CIT) and the International Maritime Committee (CMI). In addition, extremely interesting observations were received from Dr. Richter-Hannes of the Institut für ausländisches Recht und Rechtsvergleichung of the Akademie für Staats- und Rechtswissenschaft of the German Democratic Republic and from Professor Jean Pierre Le Gall (Paris).

14. The widespread interest shown by States, intergovernmental and professional Organizations in the UNIDROIT initiative was further demonstrated by the many specific comments received on Dr. Hill's preliminary report and it is with a brief analysis of them that Part III of this document is concerned.

III. COMMENTS ON VARIOUS ASPECTS OF THE WAREHOUSING CONTRACT

15. As indicated in the preceding paragraph, many replies went beyond simply expressing an opinion on the desirability of preparing uniform rules on the warehousing contract and drew attention to particular difficulties or aspects of the contract which they considered to be especially important. An attempt has been made in the following pages to give some logical grouping to these observations and it is in the light of them, as well of course as of Dr. Hill's report, that Part IV of this document has been prepared.

(1) Definition of the warehousing contract

16. Generally speaking, the replies to the UNIDROIT enquiry did not deal with the definition of the warehousing contract, warehousing operations or of a warehouseman. Nevertheless certain replies raised questions which suggested that at some stage or another of the work of the Study Group the question of definitions would have to be squarely faced. Thus, as already stated above (paragraph 9), the Danish authorities indicated that the study of the warehousing contract would be useful, inter alia to the extent that it would define more clearly its relationship with transport law, while the reply of IRU drew attention to the conflicting decisions in French caselaw regarding the precise borderline between contracts of carriage and contracts of bailment when the two operations are intermingled (1). This difficulty was also alluded to by CIT.

(2) Nature of the warehousing operations to be covered by a future instrument.

17. A considerable number of replies took up the point made by Dr. Hill in his report concerning the possibility of drawing a distinction between transit and long-term warehousing. As has already been noted above (paragraph 10), the difficulty of attempting to draw such a distinction was mentioned in the reply of the United States of America as being one of the reasons for not embarking upon the preparation of uniform rules in this field but a number of other replies argued against the drawing of any such distinction. Thus the observations of ESCAP noted with approval Dr. Hill's remark that the difference between warehousing of goods for a long term or in transit was one of duration rather than nature while Dr. Richter-Hannes considered that, at first sight at least, the drawing of a distinction between transit and long-term warehousing was unreasonable and would create difficulties of definition. Similarly the reply from OCTI, while considering that

(1) Note by L. BRUNAT, in "Bulletin des Transports" (1972) no. 1767, pp. 78 and 79.

the question required further study, nonetheless stated that the impression had been gained that any future international rules on warehousing should not be limited to transit operations.

18. The sternest opposition to the idea of disassociating long-term warehousing came however from the Italian Ministry of Justice. This reply indicated in the first place sympathy for all attempts at harmonization and coordination of the various national laws, in particular in connexion with those matters which touch upon international trade relations. Turning to the specific question of warehousing, the reply considered that it was certainly desirable to seek uniformity but it expressed the most serious reservations concerning the limitation of the study originally proposed by UNIDROIT to goods in transit or to persons into whose custody goods had been entrusted before, during or after the transport operation or operations. Such a limitation, it was urged, would not only excessively restrict the field of application of the future rules, but also introduce doubt as to the subject matter to be dealt with: i.e. whether it was intended to deal with the liability of warehouses for goods deposited there or rather whether the rules were to be seen in the context of the liability of the carrier, or at least his servants and agents. In any event, if the restriction were to be upheld, then the Ministry entertained very considerable doubt as to the advisability of the initiative for although there might be occasions on which general principles of liability in contract or in tort might have to bend before the specific requirements of given situations, on the other hand an excessive and unjustified fragmentation of such principles based not only on the different legal considerations involved but in addition upon the length of the legal relationship to be regulated seemed scarcely to be warrantable.

(3) The relationship between the future rules and the different modes of transport.

19. One of the most interesting features of the replies to the enquiry was the insight given by various Organizations into the importance of warehousing not only in connexion with combined transport but also with the different modes of transport themselves. This information was particularly valuable in the light of the general question raised by Dr. Hill in his report as to whether the future rules on the warehousing contract should be drafted in the form of a complement to the proposed Convention on multi-modal transport or rather as a series of rules sui generis. The following comments were made with reference to the various modes of transport.

(i) Carriage by air

20. The reply from ICAO indicated that warehousing operations connected to air transport do not raise problems at the present time since warehousing is restricted to transit warehousing (short-term warehousing) and is usually considered as an ancillary service provided for by the air carrier. It added that when the goods have been delivered to the carrier and an airway bill has been issued, they are considered to be under the custody of the air carrier although they might be warehoused before, during or after transit by air. In case of loss or damage the conditions of carriage of the airway bill apply and the person who has ownership of the goods (consignor or consignee) may, in case of loss or damage, recover directly from the carrier, in accordance with the provisions of the contract of carriage, such being the practice which at the same time complies with the provisions of international air law conventions. It appeared then that the interests of the holder with title to the goods are already well protected. The ICAO reply concluded therefore that as far as air transport is concerned there is no need at the present time to draft uniform rules as the matter of warehousing falls under the conditions of carriage binding upon the parties. If, therefore, a Convention were deemed to be necessary, it should be restricted, as far as air transport is concerned, to transit warehousing closely connected to air carriage.

21. For her part, Dr. Richter-Hannes drew attention to the fact that intermediaries are of minor importance in air transport in view of the fact that air carriers normally carry out the operations ancillary to carriage.

(ii) Carriage by road

22. In its reply, IRU stated that in general international carriage by road is performed without breaking bulk. It might, however, occur that for commercial reasons or perhaps even by chance, the goods must be stored in a warehouse for a short time. In this event there is a successive carriage within the meaning of Articles 34 and 35 of the CMR Convention. Moreover, if there are obstacles to delivery, the carrier by road may entrust the goods to a third party (contract of bailment) by virtue of Article 16, paragraphs 2 and 3 of CMR. Since road hauliers conduct warehousing operations as well, this type of activity falls within their sphere. For these reasons IRU considered the transit warehousing of goods to constitute an important element in international transport operations and more especially in connexion with combined transport. In consequence, it felt that the preparation of uniform rules on the warehousing contract would serve the interests, in international traffic, of all those who have recourse to the various modes of transport.

23. In her reply, Dr. Richter-Hannes noted that intermediaries do not play an important rôle in carriage by road since the road haulier normally carries the goods from house to house.

(iii) Carriage by rail

24. The CIT stated in its reply that the warehousing contract is only marginally related to the law of carriage by rail. It went on to add that the legal relations in this area concern warehousing before, or above all after, carriage by rail or again between two transport operations. The International Convention concerning the Carriage of Goods by Rail (CIM) in no way regulates such relations which remain governed by the national law applicable at the place of the warehouse. For a railway therefore the application of the national law, usually its own, represents a relatively simple solution although it is not fully satisfactory on all points. More detailed observations could only be made in the light of further study but broadly speaking CIT was in agreement with the conclusions reached by Dr. Hill in his report.

25. Dr. Richter-Hannes observed in her reply that intermediaries are of minor importance in rail transport since it is always the railway itself which takes over and delivers the goods. She further indicated that cases of substitute delivery under Article 16, paragraph 2 of CIM are exceptions to this rule as also are cases of delivery of the goods to the domicile of the consignee (Rollfuhr) and that even in those cases the delivery would normally be effected by means of transport owned by the railway.

(iv) Carriage by sea

26. As has been described above, Dr. Richter-Hannes stressed in her observations the relative unimportance of intermediaries in connexion with carriage by road, rail and air. She estimated that the most common use of intermediaries is in regard to carriage by sea which requires intermediaries during the taking over of the goods, stowage, the discharging of the goods and, most important of all, during their delivery. She noted in this connexion that international statistics show that damage or loss occurs most often not during the actual carriage but during the last stage of the operations between discharge and delivery. She added that it would depend on the contract of carriage whether the carrier or the shipper/consignee was a party to the relations with the intermediaries involved in the operations and she concluded that of all the modes of transport the one most urgently requiring regulation of the problems associated with warehousing was maritime transport. The operations connected with that form of transport should, in her view, in consequence be placed at the centre of further investigations and particular attention should therefore be paid to the UNCITRAL draft Convention on Carriage of Goods by Sea.

27. The CMI likewise drew attention to the importance of the study begun by UNIDROIT in relation to carriage by sea. It thus made especial reference in its reply to its own work of investigating the conditions prevailing in the major sea ports of the world and it communicated to the Institute a preliminary report on the matter prepared by Professor Jan Ramberg. The CMI also stated that it had been in contact with the International Association of ports and harbours (IAPH) with a view to promoting the introduction of standard conditions to be used by sea terminals in the various ports. It hoped therefore that while operating in this limited field its work would facilitate that of UNIDROIT in exploring the possibilities of achieving an international Convention.

28. The preliminary report prepared by Professor Ramberg⁽¹⁾ referred to in the preceding paragraph is particularly illuminating on many aspects of the position of intermediaries operating in the context of the maritime carriage of goods and it is interesting to note that, like Dr. Richter-Hannes, he considers the risk of loss and damage to cargo probably to be greater in the periods preceding loading and after discharge than during the sea carriage itself. His study touches in particular upon the question of who operates the sea terminals⁽²⁾, administrative regulation of them and the nature of the liability rules currently applied. He also advances a number of interesting ideas concerning the possible effect of the future UNCITRAL Convention on the carriage of goods by sea on certain operations ancillary to such carriage and makes suggestions regarding the nature of future rules to govern the liability of sea-terminals and their possible content. Some of these observations will be referred to in more detail below.

(1) Published in CMI Documentation, 1975, II, p. 94

(2) Professor Ramberg explains in his report that the term "sea terminal" was chosen in order not to attach the study to particular legal concepts in the various national laws - such as e.g. the "basic" contract types mandatum, depositum, locatio operis - but rather to get at the practical realities. The Associations consulted had therefore been requested to interpret "sea terminals" in a broad sense as including all facilities ashore where the goods are handled after the shipper has delivered them for sea transport and before the consignee has actually received them.

29. Finally in connexion with maritime transport, the welcome given to UNIDROIT's study of the warehousing contract by the Legal Committee of IMCO should not be overlooked. The Committee emphasized that it could not however at the present stage make any commitment to undertake further work on the subject itself. It felt, indeed, that whether any such work would be desirable and if so whether it should be undertaken in IMCO would depend on the outcome of the forthcoming Conference on the carriage of goods by sea and on the interest shown by other Organizations in the future development of the subject matter.

(v) Combined transport

30. As was pointed out by Professor Ramberg in his report, some of the difficulties arising in connexion with certain intermediaries may be removed in the modern door-to-door carriage of containerized, palletized or otherwise unitized cargo in combined or single mode transport operations, but even so many of the problems referred to by Dr. Hill in his report will subsist and the importance of examining the warehousing contract in the context of combined transport was stressed in the reply from IRU.

31. Dr. Richter-Hannes agreed that the development of multimodal transport, to the extent that it should be understood as referring to unified cargo (containers, LASH etc.), would eliminate the source of quite a large amount of damage and although she felt that there were reasons for not linking too closely the future rules on warehousing with multimodal transport, she considered that it could be helpful to study any uniform liability system which might be contained in a multimodal transport Convention as this might reflect an average level of the carrier's liability. Similarly the reply from CIT recommended that any future uniform rules governing the warehousing contract should not be too closely linked with rules concerning combined transport, all the more so since warehousing operations may well precede or follow single mode transport.

(4) The liability régime to be adopted

32. Very few replies dealt with the problem of the liability of the warehousekeeper in any detail. By way of general comment, Professor Jean-Pierre LeGall remarked that any future liability system should not be worked out "from above" in an abstract manner but rather be based on an examination of the degrees of protection and care to be accorded to, or required of, the contracting parties. In this respect he considered it difficult at the present time to answer questions of the type posed at the end of Dr. Hill's report such as whether there should be an extension to the contract of warehousing of the liability system applicable to carriers.

33. The reply from CIT drew attention to the need to find a middle path between the various liability systems currently in force which often differ widely one from another. This reply evidenced as one of the principal sources of difficulty the considerable differences already existing in the rules applicable to warehousing operations which are often founded, especially in ports, on very ancient practices and which it would be difficult for a uniform law Convention to supplant.

34. For her part, Dr. Richter-Hannes considered the choice of the liability régime to be a minor difficulty. The real problem in her view lies in obtaining an indemnity from the middleman handling the goods. In this context she maintained that a special difficulty is caused by the impossibility of receiving a confirmation-document proving the taking over of the goods and their quality and quantity. This, she asserted, happens in many ports after the discharging of the goods and taking over of them by barge enterprises in typical roadstead ports or by warehousemen (including customs warehousemen). Sometimes, such confirmation documents would be issued but received as much as three months after the discharge of the goods. There should therefore be a duty to confirm the taking over of the goods within a certain limited time period in a dated document. This should be seen as a precondition of the realization of any liability system and in her opinion the basis of liability, the defences, rules relating to the burden of proof, limitation of actions and vicarious liability could be modelled principally on the UNCITRAL draft on carriage of goods by sea with some reference to the uniform liability which might be devised in connexion with multimodal transport. This, she concluded, would amount to following the new French maritime legislation and adopting it at an international level.

35. Broadly speaking, Professor Ramberg expressed similar views to those of Dr. Richter-Hannes. In particular he made allusion to the difficulties of recovery from intermediaries, the refusal by certain public bodies operating sea terminals to pay compensation for damage, the relationship between the warehouseman's liability and that of the carrier and the application of the same limitation of the amount of compensation as applies to the carriage of goods by sea under the Hague Rules as amended. As to the liability régime, he recommended that the burden of localizing loss or damage to the sea terminal's period of responsibility be placed on the claimant, that an obligation to exercise due diligence and liability for negligence be imposed on sea terminals, that they have placed upon them the burden of proving that they have not been negligent and that they be vicariously liable for their servants' negligence.

(5) The nature and content of the future rules on the warehousing contract

36. The reply from the Secretariat of ICAO noted that as regards the relationship between carrier and warehouseman, it might be desirable to adopt some uniform rules regarding their rights and obligations, although it was added that the relationship between professionals could be governed by a contract mutually agreed upon. As to the content of the future rules, it was suggested that for economic and social reasons, they should comply with existing practice concerning warehousing.

37. For his part, Professor Ramberg stated that he was rather pessimistic about the possibility of reaching international consensus on an international convention regulating the liability of sea terminals, the more so if it should contain a mandatory regulation which could not be departed from by private contract. Indeed, in these times of changes in the traditional distribution techniques some caution, and therefore flexibility, was necessary. He presumed, therefore, that it would be better to aim at the desired unification by the introduction of a model contract. If such a contract were supported by the CMI and other organizations of international repute and, last but not the least, by its own merits, it would stand a reasonable chance of being universally adopted. Even those who favoured a unification based upon an international convention should, in his view, be prepared to support the idea of a model contract, since they might well regard this as a preparatory step towards their ultimate goal.

38. As to the content of the contract, he felt that in addition to the proposals made by him regarding liability (see paragraph 35 above), the international maritime community might well be prepared to agree to a reasonable limitation of the periods for the notice of claims and the filing of suits.

39. In contrast to Professor Ramberg, Dr. Richter-Hannes would seem to prefer a Convention. As mentioned above (paragraph 34) she sees the duty to confirm the taking over of the goods as a central element of such an instrument which should be restricted to the rights and liabilities of those persons whose functions can be carried out or controlled neither by the carrier nor by the cargo interests. She would therefore eliminate from the scope of the future instrument stowage operations as those are conducted on the ship so that there is a possibility for supervision by the captain and his crew who are obliged to control the stowage. She suggested that the future Convention should apply to all warehousemen, including customs warehouses, and to barge enterprises (in particular in roadstead ports) and to the operations of tallying by land and to the loading and unloading of the goods. Dr. Richter-Hannes further suggested that both the carrier and the cargo interests should be able to act as claimants. In conclusion, she argued that by concentrating on the principal aspects of the rights and duties of the parties concerned so that a high degree of abstraction of the rules could be achieved, it would then be possible to overcome difficulties springing from unnecessary commercial restrictions and from differences in the legal status of the persons concerned and in the local provisions and customs at present prevailing.

40. Finally, the reply from the Secretariat of ESCAP emphasized that any future international instrument on the warehousing contract "should meet the requirements and capabilities of both developed and developing countries so that countries, from both categories, could be attracted to adhere to the instrument and comply with the provisions set forth therein."(1)

(1) This reply and that of the Mexican Government suggested that further study be carried out in relation to warehousing as practised in the ESCAP countries and in Latin America respectively, with particular reference to developing countries.

IV. QUESTIONS WHICH MIGHT BE CONSIDERED BY THE STUDY GROUP

41. As indicated in paragraph 5 of the introduction to this document, the Secretariat, following a practice employed by it on many occasions in the past, has prepared a non-exhaustive list of questions the answers to which should facilitate the Study Group in delimiting the scope of its future work. In view, however, of the complexity of the subject as results from a reading of Dr. Hill's study and the replies to the UNIDROIT enquiry, the Secretariat has considered it advisable to frame fairly general questions at this stage as it may well be that further study of some aspects of the problem will be required before any form of drafting can be envisaged.

1. With a view to distinguishing warehousing from other operations it would seem desirable to adopt some working definition or description of warehousing operations. How should such a definition or description be framed ?
2. Should the future rules govern long-term as well as transit warehousing and, if so, should any distinctions be drawn between the two types of warehousing ?
3. Should any exclusion from the application of the future rules to any types of warehouseman be contemplated (e.g. customs warehousing or the carrier acting as warehouseman)?
4. In view of the particularities attaching to the various modes of transport should the future rules apply to warehousing operations connected with the carriage of goods in all modes of transport (including multimodal transport) without distinction or should allowances be made for the differences between them ?
5. Subject, of course, to the answers to the preceding questions and especially to questions 2 and 4, should the liability régime applicable to warehousing approximate as far as possible to that governing carriage of goods?
6. Should the future rules govern only problems of liability and related questions such as prescription, arbitration etc., or should it extend to other aspects of warehousing contracts such as the warehouseman's lien over the goods?
7. To what extent, if any, should the future rules be of mandatory application? In particular should an international Convention containing a uniform law or rather a model contract be envisaged?