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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

R E P O R T

of the Secretariat of UNIDROIT
on the first session of the Group
held in Rome from 10 to 12 April 1978

Rome, May 1978

The first session of UNIDROIT's Study Group on the warehousing contract was held in Rome at the headquarters of the Institute from 10 to 12 April 1978.

The session was opened at 10.10 a.m. by the President of UNIDROIT, Mr. Mario MATTEUCCI, who extended a warm welcome to the participants, a list of whom is reproduced in ANNEX I hereto. On a proposal by him, the Study Group elected Professor Kurt GRÖNFORS (Sweden), member of the Governing Council of UNIDROIT, as chairman of the Committee.

The Group adopted the agenda set out in ANNEX II to the present report.

Item 3 on the agenda - Consideration of the desirability and feasibility of drawing up uniform rules on the warehousing contract.

In introducing the general discussion on this item on the agenda, the CHAIRMAN noted that the task of preparing uniform rules on the warehousing contract was a difficult one. Hitherto attention had been focused on goods in transit and the result had been a series of Conventions dealing with the contract of carriage in the various modes of transport. The problem of intermediaries dealing with the goods at terminal ports was however one of great economic importance and merited close examination. With a view to facilitating the work of the Study Group, two documents had been prepared, the first of which was a preliminary report on the warehousing contract, prepared by Dr. Donald Hill at the request of UNIDROIT (Study XLIV - Doc. 2) and the second an analysis of the replies to the enquiry conducted by UNIDROIT on the desirability and feasibility of drawing up uniform rules on the warehousing contract which had been prepared by the Secretariat and was contained in paper Study XLIV - Doc. 3.

At the request of the Chairman, Dr. HILL proceeded to outline his study. In the first place, he recalled that the movement of goods could be divided into two stages, those when they are physically moving, and those when they are physically static. From the insurance angle, many problems arose in the latter situation when the goods were in the hands either of a carrier or of a non-carrying intermediary. The goods were, moreover, sometimes moved or stored by such intermediaries but the fact remained that such operators were holding them in a static sense. In view of the complicated relations involved he had therefore considered it necessary at the outset of his report briefly to examine the framework of transport operations and then the principal operations, apart from the actual carriage of the goods, which might be performed in relation to transit operations in the various modes of transport as well as the impact thereon of new techniques such as containerisation, roll-on roll-off traffic and lash traffic.

He had then proceeded to a comparison of the legal status generally of terminal operators for it was essential in his view clearly to understand the organisation of the operations in question as this would to a large extent govern the acceptance of the future Convention or uniform rules. His research had indicated that for the most part terminal operators were directly or indirectly owned or controlled by semi-independent para-statal bodies. This was an important point to bear in mind

for it could increase the chances of a successful attempt at unification as there would be fewer interlocutors to be convinced than had been the case, for example, with forwarding agents.

He had then turned to the liability and status of warehousemen and compared the civil law systems which were largely based on the French concept of "dépôt" and the Common Law notion of bailment, both of which had their roots in Roman Law and he had concluded that in practice the two institutions presented far more similarities than differences. Usually the matter was regulated by the law as supplemented by general conditions although the situation in the United States of America was peculiar to that country, being governed partly by law and partly by regulatory commissions. As to the liability of warehousemen, he considered that two features were common to almost all countries, namely restrictions on legal liability and a low level of financial responsibility, and this irrespective of the source of the rules whether it be statute, conditions of trading or general conditions. He noted in passing, however, that with the development of containerisation the larger consortia had been successful in obtaining higher levels of liability from the warehousing profession.

His general examination of the problems involved had led him to believe, however, that there were no easy solutions to the problems involved. The warehouseman could be compared to a spider at the centre of a complex web of relationships and with increasingly sophisticated transport techniques modern terminal operators were performing functions which the traditional warehouseman would not. Nor could the problem of combined transport be overlooked and in many cases the warehouseman would be a sub-contractor of the combined transport operator; the latter would be liable for damage attributable to the former but would not always be able to recover from him in full, and sometimes not even at all, in a recourse action. The problem of the indemnity due by a warehouseman in his capacity of sub-contractor was one which needed careful study. If possible, a uniform liability should be devised which might perhaps be modelled on the residual liability contemplated under the draft TCM Convention or the uniform rules of the International Chamber of Commerce on combined transport, and which would thus be related to the liability of the principal contractor.

In view of the complexity of the issues involved he had however been cautious in his conclusions and recommendations. One point ought nevertheless to be stressed, namely that in view of the time it takes for Conventions to be adopted by States, to enter into force and to function smoothly, it might be advisable to envisage a period of experimentation during which uniform rules on the warehousing contract might operate in practice in the same way as the ICC rules on combined transport to which he had already alluded.

Professor RODIERE complimented Dr. HILL on his study which he saw as having the great merit of starting out from the factual situation. He wondered however whether the subject of the warehousing contract was not perhaps too modest when one recalled the hope which had been engendered

by the work on combined transport. In his view the question of warehousing was to a large extent resolved for, as Dr. Hill had already pointed out, notwithstanding the conceptual differences between the Civil Law and the Common Law, in practice the almost complete absence of imperative rules of law and the resulting contractual freedom accorded to the parties had led to similar solutions being adopted. The only difficulties lay perhaps in the regulations of certain ports and terminals governing the legal status of warehousemen, such as access to the profession, but these did not affect private law relations. It would, he felt, be impossible in view of the very wide contractual freedom accorded to the parties in the context of the contract of "dépôt" or under the law of bailment to prepare mandatory rules on the warehousing contract and he therefore suggested that the field of study be extended to cover what he termed the "contrat de transit" which covers all operations arising between two different transport operations, whether carried out by the same or by different modes of transport and which constitutes a sort of hinge between them. Such an exercise would be extremely interesting and could be undertaken without entering upon the difficult terrain of combined transport or forwarding agency, in which latter area it had proved impossible within the framework of UNIDROIT to reach agreement on uniform rules. As to the nature of the rules envisaged by him, he considered that today what are needed are not binding rules but rather uniform rules which the parties are free to accept or reject but which gradually become almost universally used in the relevant trade branches and in this connection he cited the York/Antwerp Rules on general average and the ICC Uniform Customs and Practice for Documentary Credits.

Professor HELM also congratulated Dr. Hill on his report and expressed interest in the views put forward by Professor Rodière. On the question of the nature of the future rules he recalled that what the Group was concerned with here was not so much a question of individual contracts but rather one of general conditions and he noted the recent legislation in a number of countries, such as the Federal Republic of Germany and the United Kingdom, which were extending the powers of the courts to control general conditions, especially in the interest of consumer protection. This trend had created a certain degree of uncertainty which could be avoided by casting the future rules in the form of a Convention, even if of a non-mandatory character. He was furthermore convinced that while the ICC was an appropriate forum for the drawing up of uniform rules, UNIDROIT should be concerned with the preparation of international Conventions.

Dr. RICHTER HANNES echoed the tribute paid to Dr. Hill's report which in her view greatly facilitated the work of the Group. She considered that it was necessary to adopt a working hypothesis that the maritime carrier be granted under international regulation a right of recourse against non-carrying intermediaries which would complement the rules contained in the Hamburg Convention, Article 4, paragraph 2 of which did not provide a sufficient solution to the problem. Like Professor Helm, she believed that the instrument which the Group was going to prepare should be a mandatory international Convention for she considered that while it might be sufficient to prepare model rules when commercial

practice has a vital need to use such rules, that is to say that it is in the interest of both parties, such was not the case here where the non-carrying intermediary had no interest in seeing such rules developed. For this reason she argued in favour of the elaboration of an international Convention which would make provision for a minimum set of rules governing the rights and obligations of intermediaries and also lay down a mandatory liability system. After this aim had been achieved in connection with maritime carriage, attention could be turned to carriage by road and the other modes of transport.

Professor RAMBERG recalled that already three years ago the Comité Maritime International had prepared a preliminary study on the subject of port terminals to see how the general conditions were construed in different countries. The study had been undertaken because the view was held that from a practical standpoint the subject was more important than the carriage of goods by sea as most damage occurred after carriage, with some before, but very little during the actual carriage operations. At present the liability of port terminals ranged from total exclusion up to that of the maritime carrier and attempts had been made in vain to regulate the problem in the UNCITRAL Convention.

The first problem as he saw it was the delimitation of a possible international Convention on the subject and this raised the question not only of the liability of persons taking the goods in charge for safekeeping but also that of the various cargo handlers such as stevedores. Such a Convention could not be tied to the classical contract types and he believed that it would also be difficult to get the innovatory "contrat de transit" mentioned by Professor Rodière accepted in national systems.

Another problem which he foreaw was the difficulty of delimiting the period under consideration to that of warehousing before and after carriage by sea. When did the maritime element begin and end? There was, for example, a development towards the setting up of distribution terminals outside the ports, which were frequently subject to congestion; goods stored in such terminals might subsequently be dispatched by any of the various modes of transport and beforehand it might not be known by which. Admittedly, one would know ex post facto that the goods had been transported by sea but even then it would have to be decided when, as it were, the maritime flavour began.

Even so it would not be impossible to work out uniform rules taking as a starting point the notion of depositum or bailment with its liability system and a limitation on liability and using this as a basis for general conditions to govern transit operations. He had noted the scepticism of some members of the Group regarding a solution based on general conditions or on non-mandatory rules generally and he recognised that there must be an incentive for them to be widely applied. In this connection it would be interesting to hear the reactions of the International Association of Ports and Harbours (IAPH) who themselves would have an interest, he believed, in ensuring stability in ports through the application of uniform rules, so that those ports which applied them would strengthen their commercial position. There was, he felt, a possibility

of finding a solution which would avoid the objections to both general conditions and a mandatory Convention.

Mr. BERGFELT, speaking on behalf of the IAPH, considered that it would be difficult to achieve uniform solutions in the context of the widely differing existing systems and indeed lack of systems. Ports would, however, welcome uniform rules, perhaps on the basis of a non-mandatory Convention. In addition such rules would benefit customers who would thus know which rules were applied in the different ports and the element of competition between ports with different régimes would be greatly reduced to the extent that uniform rules were applicable.

In summing up this general discussion, the CHAIRMAN noted that all the speakers had agreed that difficulties arose out of the heterogeneity of the present situation. The operators in question were sometimes private, sometimes public entities with a wide variety of liability régimes, ranging from non-liability up to a modest one. There was therefore a need for uniform rules but it did not seem that these could be exclusively mandatory or non-mandatory. What should be sought was what might at first sight seem to be a contradiction in terms but which he nevertheless considered to be realisable, that is to say uniform rules which would be mandatory and binding but at the same time optional, the mandatory character lying in the incentives held out to operators to apply them. Before, however, proceeding to a detailed examination of the possible content of the uniform rules to be envisaged and of what those incentives might be, he suggested that the Secretariat briefly introduce Document 3 containing the analysis of the replies received to its enquiry into the measure of support for the initiative taken by UNIDROIT in connection with the warehousing contract.

Mr. EVANS, Deputy Secretary General of UNIDROIT, informed the Committee that after examining the preliminary report on the warehousing contract prepared by Dr. Hill, the Governing Council had instructed the Secretariat to transmit it to Governments and the Organisations 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 and that it had been in the light of the fact that the bulk of the observations received had favoured continuance of the work on the subject by UNIDROIT that the Governing Council had decided to set up the present Study Group. The purpose of the document which was now before the Group was in the first place to indicate the reactions of Governments and the interested Organisations 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 this connection, he paid particular tribute to the assistance received from the Intergovernmental Maritime Consultative Organization (IMCO) at the thirty-second session of whose Legal Committee there had been a most interesting exchange of views on the UNIDROIT initiative.

Mr. Evans then stated that broadly speaking the reactions of States to the UNIDROIT enquiry had fallen into three distinct categories, the first and most numerous of which had 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 were Austria, Finland, France, the Federal Republic of Germany, the German Democratic Republic, Italy, Liberia, Poland, South Africa and the Vatican City.

The second group of States were also in favour of continuing the work 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 but that 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. Mitigated support for the study of the warehousing contract was also 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. 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.

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 considered 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.

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 from the various Governments as to result in a treaty.

The favourable attitude demonstrated by the majority of States was however shared by the vast majority of the Secretariats of the international Organisations and Institutes consulted. He referred in particular 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 had been received from Dr. Richter-Hannes and from Professor Jean Pierre Le Gall (Paris).

The widespread interest shown by States, intergovernmental and professional Organisations in the UNIDROIT initiative had been further demonstrated by the many specific comments received on Dr. Hill's preliminary report and a brief analysis of them was also contained in the document prepared by the Secretariat.

Mr. Evans stated that he did not wish to burden the Group with a lengthy account of the many comments made on the different questions and he therefore simply drew attention to the points which had been raised. There had, in the first place, been discussion of the definition of the warehousing contract while some replies had considered at length the nature of the warehousing operations to be covered by the future instrument and in particular the desirability or otherwise of drawing a distinction between long-term and transit warehousing, a suggestion which met with considerable opposition from a number of quarters. Many replies had also alluded to the relationship between the future rules and the different modes of transport and in this connection stress had been laid on the particular importance of intermediaries in the context of carriage by sea and combined transport as opposed to the other modes of transport. A few replies raised the central question of the liability régime to be applied under the future rules and although there had been little detailed comment on that question a certain preference had been expressed for a régime broadly based on that applicable to carriage by sea. Finally, reference had been made to the nature of the instrument in which the rules would be contained and, as had already been the case with the preliminary discussion on that point within the Study Group, there had been a certain divergence of opinion as to the relative merits of a Convention and of a model contract or general conditions.

In the light of this information, the CHAIRMAN suggested that the Group defer further discussion on the form of the future instrument to be envisaged and that it turn its attention to some of the matters of substance referred to by the Secretariat and covered by the list of questions contained in Part IV of Document 3. The first of these could be the question of whether the future rules should apply to both transit and to long-term warehousing.

Dr. HILL recalled that in his report he had stated that the difference between the two kinds of warehousing was one of duration rather than of nature and the difficulties of the United States authorities to

which Mr. Evans had referred were not of a conceptual character but were caused essentially by the disputes over jurisdiction between the various regulatory commissions. He considered that the important question was that of relating warehousing to transport operations and that any attempt to restrict the uniform rules contemplated to transit warehousing and to exclude long-term warehousing would create an artificial division. Although such a distinction might possibly assist in formalising and raising the liability of the non-carrying intermediary in combined transport operations, its maintenance could create as many problems as it would solve when demarcation questions arose, particularly if the long-term warehouseman were to retain his freedom to restrict his liability which he at present enjoys in many countries. Admittedly, warehousing operations might be conducted for varying commercial purposes but this would affect not so much the nature of the liability of the warehouseman as the nature of the document issued by him. He had however in his study attempted to avoid dealing in detail with the status of documents which for banking and other purposes give rise to many problems of both private and public law and with liens which create insoluble problems in connection with bankruptcy and are best left to be dealt with by domestic law.

Professor RODIERE agreed that the scope of the study should be limited to warehousing connected with transport operations and if this were done then the distinction between transit and long-term warehousing would be of no interest. The differences between the two types of warehousing were essentially of a financial character involving problems regarding the negotiability of documents but this, he felt, was the only point of difficulty and could be avoided precisely by Dr. Hill's proposal to restrict the application of the future rules to warehousing linked to transport operations.

Professor RAMBERG thought that if an appropriate liability régime could be developed for warehousemen then there might be no need to distinguish the two types of situation. There still remained, however, the problem of the limitation technique on account of the dual system per package and per kilo as in the Hamburg Convention and the extent to which warehousemen would seek to obtain the applicability of the Himalaya clause although both these problems could probably be solved if a satisfactory liability régime could be devised. Another question which required some thought was that of carriage being conducted by an operator who was at the same time a warehouseman. At what time would his carrier's liability cease and that of a warehouseman begin? This was not so much a case of warehousing operations being linked to those of carriage but rather of a warehouseman having previously been a carrier. Perhaps the solution might lie in saying that a certain time after discharge the carrier became a warehouseman, as is provided in certain general conditions.

The CHAIRMAN noted that the Group was in favour of concentrating on those warehousing operations which are connected with carriage rather than drawing distinctions based on differences between long-term and transit warehousing and that, as Professor Ramberg had pointed out, enlightenment on this point might be derived from consideration of the core problem of liability. He drew attention to the views expressed in the Secretariat analysis of the replies to its enquiry where reference had

been made to the possibility of introducing a system based on the law regarding bailment, which in effect provides a presumption of fault rule, or on the Hague Rules or on the recent Hamburg Convention. Consideration could perhaps be given to the extent to which a presumption of fault rule might be appropriate while the recent development whereby under modern container contracts a carrier often extends his liability to the period when goods are in a port terminal should not be overlooked. Warehousemen often seek to obtain the benefit of advantages enjoyed by carriers and one might consider the possibility of providing that a warehouseman shall be liable as if he were a carrier insofar as the carrier has so extended his own liability. In conclusion, he expressed the view that the liability of the warehouseman should be a moderate one and noted that international trade and banking interests desire such a liability régime with no gaps or loopholes. There must be minimum rules and in his opinion the lowest level of liability which the warehouseman could be required to shoulder would be one based on the presumption of fault.

Professor HELM stated on this latter point that in the Federal Republic of Germany a warehouseman's liability based on a presumption of his fault would be the minimum acceptable and that any general conditions purporting to place the burden of proof on the consumer would be struck down.

Taking up the possibility to which the Chairman had referred of the carrier extending his liability so that the warehouseman could benefit from any advantages which might be derived therefrom, Professor RAMBERG expressed some concern at the possibility of the warehouseman's being subject to a dual régime, that is to say either a uniform one or a sort of network system where the warehouseman would be liable in the same way as the carrier in the relevant mode of transport when the latter had extended his liability to cover warehousing operations. The second solution would raise the question of pinpointing when this extended carrier liability would end, which was very difficult to say in the maritime area insofar as the complicated text of Article 4 of the Hamburg Convention would one day come into force. He therefore favoured a basic warehouseman's liability *per se* and even if there were occasionally to be slight differences between that of the warehouseman and that of the carrier in one sense or the other this would not in his view be particularly serious.

Professor RODIERE felt that the problem of the liability of the warehouseman should be linked to that of the carrier but a difficulty of course lay in the fact that the liability régimes applicable to carriers in the different modes of transport vary considerably under the various mandatory international Conventions, a problem which had proved to be particularly acute in the context of the work formally undertaken by UNIDROIT in connection with combined transport. If it were desired to link the liability of the warehouseman to that of the carrier responsible for the preceding operations then the liability régime applicable should be the least severe one attaching to the mode of transport in question under the various international Conventions.

Dr. RICHTER-HANNES stated that she agreed with Professors Ramberg and Rodière on the need for a uniform régime of liability for warehousemen and stressed the difficulties inherent in a system which referred to the various liability régimes obtaining in the different modes of transport. She further noted that in the context of carriage by sea alone, which today contained the lowest level of liability, there were at present three possible régimes available, namely that of the 1924 Brussels Convention, that of the 1968 Protocol thereto and that of the Hamburg Convention. For these reasons she suggested that a possible alternative could be one along the lines of that provided by the TCM draft.

In this connection Dr. HILL noted that there had been another development in maritime law which might give pause for thought before applying the régime applicable to carriers by sea to warehousemen, namely the introduction of the alternative between the package limitation and the limitation by kilogram. He was doubtful whether it would be advisable to contemplate such a double limitation for warehousemen and suggested that there should be a restriction to a weight limitation.

Professor RAMBERG also was opposed to the introduction of the package limitation into the area of warehousemen's liability, one practical difficulty being that goods might arrive in a warehouse in the form of a package after carriage by sea and then be broken up and sent on perhaps by other modes of transport.

Professor RODIERE for his part insisted on the need to distinguish carefully between presumed fault and presumed liability which had so often been confused in the past. The distinction, he urged, was not a theoretical one, as had been shown by the results of the modification in the wording of the Warsaw Convention. By way of a concrete example he stated that if goods were to suffer damage in a warehouse, and if the rule were to be one based on presumption of fault, then the warehouseman would be relieved of liability to the extent that he could show that he had not been at fault and that the damage had been due to an unknown cause; if, however, there were to be a presumption of liability then the warehouseman would be liable for damage the cause of which remained unknown.

Professor HELM considered that it would be preferable to avoid the complicated questions of causa and culpa since these were particularly difficult problems and in practice different legal systems would reach the same result even though there were divergencies in the theoretical basis underlying the reasoning.

Dr. HILL wondered whether Article 17 of the CMR, which laid down a general statement of liability with some exceptions and which was itself based on the corresponding provision of the CIM, might not offer a useful model. It had proved its worth over the last twenty years in practice and had also been seen to be acceptable to a wide variety of legal systems.

Professor RAMBERG noted that the CMR system seemed to have certain attractions as far as a number of members of the Group were concerned although it had given rise to considerable litigation. If, however, he had understood correctly that there was a broad measure of support for following the Hamburg Convention insofar as the maritime Conventions provided the least severe liability régime at the present time, then it would seem logical to follow that Convention and the test of reasonableness contained in Article 5 thereof rather than Article 17 of CMR which, although now rarely interpreted as laying down a genuine strict liability, nevertheless contained a more severe liability than did the maritime Conventions. Whichever system were to be chosen however, the real difficulty in practice was that of pinpointing the time at which the damage occurred, that is to say whether this was during a segment of the transportation or in the warehouse itself and this raised problems of documentation.

Mr. MERTENS, representing the International Road Union (IRU), agreed with Professor Helm that it was preferable not to enter into detailed discussion at this session of the refinements of causa and culpa and à propos of the formulation of Article 17 of CMR, he recalled that the rule contained therein was based on that adopted a hundred years ago in Switzerland in the context of CIM and which had been taken over in the road Convention with a view to ensuring a certain degree of rail/road coordination. IRU did not consider that the future rules on warehousing need cover this idea of coordination however and this seemed to him to be an additional reason for not following the CMR formulation.

In summing up the discussion on this aspect of the warehouseman's liability, the CHAIRMAN recalled the support which had been expressed for a solution along the lines of Article 17 of CMR but also the objections raised and the preference evident in certain quarters for a formulation which would substantially follow the rule contained in Article 5 of the Hamburg Convention. After noting that the latter solution seemed to be generally acceptable he drew attention to another problem of practical importance which was that of liability for delay in the handing over of the goods by the warehouseman.

Dr. HILL considered that the question of delay was one essentially tied up with the movement of goods; something which is moving does not arrive within a stipulated period and the problem is therefore one related to delivery. What were being dealt with here were stationary goods and he feared that there was a danger of running into documentary problems, for example the warehouseman's warrant, and in consequence impinging upon matters falling within the compass of domestic law. Furthermore, he pointed out that often delay in many developing countries in handing over goods to the ultimate consignee is caused not by the warehouseman but by the customs authorities.

Professor RAMBERG recalled that there were many reasons why goods might not be delivered on time to the consignee by the warehouseman, many of which would be beyond the control of the latter and that the action against him for failure to hand them over might be brought either by the cargo owner directly or by the carrier under a recourse

action. In practice what would happen if the future rules were to ignore the question of delay would be that a warehouseman could justify *ad infinitum* his failure to produce the goods on the grounds of delay and that moreover any skilful draftsman preparing general conditions would exclude any liability on the part of the warehouseman for delay. One way of dealing with the problem, he indicated, would be to follow such instruments as CIM, CMR and the Hamburg Convention by including a provision to the effect that after a certain period delay is converted into physical loss.

Mr. MERTENS drew particular attention to the modern rôle of the warehouseman who frequently acts as a distribution agent and suggested that cases of delay in his actually distributing the goods would almost always be due to delay in the carriage and in the goods reaching the warehouse. General conditions at present excluded warehousemen's liability for delay and since he deemed the problem to be more a theoretical one than a practical one, he felt that liability under the uniform rules should be restricted to physical damage to the property.

Professor RODIERE recalled as another possible solution the rule contained in Article 34 of CIM that in the event of the transit period being exceeded and even in the absence of proof by the claimant that loss or damage has actually been suffered thereby, the railway shall be obliged to refund one-tenth of the carriage charges for each day's delay. He stressed however that what he had in mind was delay which could be attributed to the warehouseman himself as opposed to that due to the carrier, in the sense that the former was unable to hand over goods which he had taken in charge on a certain date. The very fact that he had taken goods into his custody should place upon him an obligation to hand them over on demand.

In conclusion, the CHAIRMAN found that there was general agreement that the future rules should contain some provision on delay and that the orientation to follow should be that of the conversion of delay into loss after the lapse of a certain period of time. In addition he observed that Professor Rodière's intervention raised the question of the period of responsibility of the warehouseman, a concept which must be developed in one way or another. There was however a difficulty in that often there was no written contract and no document issued by the warehouseman. He considered that the key concept was that of the taking in charge of the goods by the warehouseman. It was at this point that his liability would commence and would continue until delivery either to the customer or to the next operator in the transport chain.

In this connection, Professor RAMBERG recalled that earlier in the discussions Professor Rodière had spoken of the future rules being applicable to the "contrat de transit", that is to say to all operations occurring between different legs of a carriage operation or following carriage and preceding delivery to the customer. In view of the recent references in the discussions to the liability period beginning with the taking in charge of the goods, he wondered whether it was the case that this implied that such operations as cargo handling by stevedores or crane drivers who did not take the goods in charge were to be excluded.

After the CHAIRMAN had noted that Professor Ramberg's intervention raised the question of who was to be regarded as a terminal operator for the purposes of the future uniform rules, a matter which he would prefer to leave until later in the discussions, until after the period of liability had been determined, Mr. MERTENS expressed the opinion that it was important to know not only who is to be regarded as a terminal operator but also whom he is representing for if he is a representative of a sea carrier, and delivery is made through the terminal, then the task of delivery will remain that of the sea carrier. The problem was therefore one related to the question of the period of the terminal operator's liability.

Dr. HILL considered that the problems associated with representation should be avoided altogether. The starting point should be that someone who is a static non-carrying intermediary will take possession of the goods from the carrier and be liable to someone as a sub-contractor, but for the present purposes one should not worry about the question of the person to whom he is liable. The road and rail Conventions were structured around documentation while in carriage by sea goods were often handled by non-carrying intermediaries on the basis of notice before any signature had been given with the result that the stevedore remained in limbo. There was therefore a need to consider the problem of documentation and even the possibility of requiring signature of documents by the warehouseman at the time of taking over the goods as evidence that the goods had in fact been taken in charge by him. If this difficulty were not squarely faced then he foresaw problems arising similar to those connected with Article 34 of CMR relating to successive carriers.

In reply to these observations, the CHAIRMAN recalled that the main feature of bailment and such contracts was the taking over of the goods and he stated that the idea of introducing a requirement of signature caused him some concern. The problem which had been raised was that of pinpointing the moment of damage and he felt that it would be advisable to be content with a provision in the future instrument concerning the taking in charge of the goods by the warehouseman or terminal operator. In multimodal contracts what was crucial was that the MTO accepts an end to end liability including the doubtful cases and it is only when it can be established that the loss occurred while the goods were in the hands of the warehouseman that there will be any interest in bringing an action against him. It was therefore in his view not necessary to draw a hard and fast demarcation line between the liability of the carrier and that of the warehouseman.

Professor HELM drew attention to the additional difficulty of the situation where a person accepts the goods as a carrier and then some time later delivers them as a warehouseman. He wondered at what time the contract of carriage would become a warehousing contract and the liability régime change. If the liability systems were to differ then it would be necessary to pinpoint the moment at which the change in régime took place.

Professor RODIERE noted that the discussion had recently been concerned with the question of the taking in charge of the goods by the warehouseman and of the desirability of the latter's issuing a document which would act as a receipt for them. In practice, such a solution might well work when goods were handed over by a consignor to a road haulier and then, after the carriage, to a warehouseman who would issue a document giving a precise inventory of them. The situation was however totally different when bulk cargo was loaded onto a ship, stowed, unloaded and then placed in the custody of an operator from whom it would be impossible to obtain a receipt.

For his part, Mr. MERTENS suggested that a distinction should be drawn between simple warehousing operations where there should be little difficulty in establishing a uniform liability régime and the more complicated kind where the terminal operator is also responsible for the invoicing, checking and perhaps even the assembling of the goods.

After suggesting that the problems of the functions of the terminal operator be discussed later, the CHAIRMAN reverted to the question of the period of his liability and asked Professor Ramberg to give some indications regarding the so-called "fifteen day" rule contained in Article 5 of the new Nordic Conditions on freight forwarding, warehousing, carriage etc.

Professor RAMBERG stated that this rule, which had been accepted also by customers, provided that the freight forwarder's liability as a carrier, which begins when he takes the goods in charge for transport, ceases when the goods at destination have been tendered to the receiver or placed at his disposal according to instructions and that in any event the freight forwarder's liability as a carrier ceases fifteen days after notice of the arrival of the goods has been given to the receiver by the carrier or the freight forwarder.

In this connection Dr. HILL stated that the former British Road Services and British Railways conditions contained a provision that on a fixed number of days after the arrival of the goods in the carrier's depot transit ceased and the carrier would henceforth be liable as a warehouseman in certain cases only. He was therefore in principle in favour of a provision similar to that contained in the Nordic Conditions whereby liability would, after a certain period, be downgraded from that of a carrier to that of a warehouseman.

In summing up the general discussion on liability, the CHAIRMAN stated that there was broad agreement in favour of imposing upon the warehouseman a modest liability régime, perhaps along the lines of the Hamburg Convention, with a limitation on liability which might perhaps also follow the Hamburg rules which laid down the sum of 2.5 SDR's per kilo. In addition there should be liability for delay which could take the form of a provision converting delay into loss.

On the question of the limit of liability, Professor HELM noted that the minimum limit under the Hamburg Convention was higher than that under the Hague-Visby rules and under the usual residual liability provided for in the context of general conditions on combined transport operations.

Also in relation to the Chairman's summing up, Professor RAMBERG indicated that the limitation on liability based on a unit per kilo would probably be satisfactory if the future rules were to be limited to damage to goods, loss and delay but that if other liabilities were to be covered, then perhaps it might be necessary to consider the possibility of a limitation per contract, a phenomenon of increasing importance.

On a point of detail, the CHAIRMAN proposed that the future rules should not apply to money, valuables and bonds unless there were a special agreement to that effect and asked whether there were any other comments on the liability régime to be envisaged.

One question was raised in this connection by Professor HELM who wondered whether there would be any cases under the future rules where the warehouseman would be liable in full, for example where he had been guilty of gross negligence?

By way of reply, the CHAIRMAN recalled that under the Hamburg Convention the liability of the sea carrier was unbreakable unless the top management level had been guilty of gross negligence, that of the captain of the vessel not being included in the concept of top management.

While Dr. HILL stated that he could accept a provision along the lines of either the Hamburg Convention or of the Athens Convention of 1974 on the carriage of passengers and their luggage by sea, Professor RAMBERG drew attention to the difficulties of making such a rule effective in the absence of a mandatory Convention. Such an element of persuasion to accept it, he believed, could be found in the provision of a limit which would in principle be unbreakable. He believed that the inclusion of such a provision in the Convention on the warehousing contract would be attractive not only to terminal operators themselves but also to insurers and trade interests generally and thus provide an incentive to accept it.

Professor HELM expressed agreement with the views expounded by Professor Ramberg regarding the problem of obtaining acceptance of general conditions and pointed out that in the light of recent jurisprudential developments in the Federal Republic of Germany a provision in general conditions to the effect that a merchant can exclude or limit his liability for gross negligence under a commercial contract will not be held valid unless it can be shown that adequate insurance cover has been taken out. Such provisions would however be upheld to the extent that they are contained in an international Convention and would strengthen support for its adoption in business circles.

Dr. HILL observed that in the United Kingdom also there had been recent legislation which would affect general conditions, the aim being to permit the courts to judge the validity of clauses purporting to exclude liability for negligence on the grounds of reasonableness. It seemed that the Act would also subject contracts of indemnity to the test of reasonableness but would probably not cover the types of indemnity employed in carriage and forwarding contracts.

Mr. MERTENS laid stress on the importance of finding the best wording for a clause preventing the warehouseman from excluding or limiting his liability in certain cases and to this end he recommended that contained in the Warsaw Convention which had proved in practice to be a good one. He also agreed with Professor Ramberg's observations on the question of the limitation of liability but felt that an adequate clause should be prepared on the liability of the principal for the consequences of accepting goods in his warehouse, those contained in the CIM and CMR being unsatisfactory. Finally, he felt that it would be easy to lay down a rule regarding limitation of liability, based for example on SDR's, but that it was more important in practice to contemplate a general limitation per contract to take account of those cases where the client suffered loss as a result, for example, of the warehouseman forgetting to repack the goods or to clear out old invoices.

For his part, Mr. BERGFELT recalled that the rules under discussion were minimum rules. At present the liability of ports and harbours was very low or even non-existent and these proposed new rules would involve higher costs for them. If it was contemplated that these minimum rules could be altered by negotiation between the parties, for example through the pressure exerted by large container companies, he wondered what incentive there would be for the ports to accept such rules.

In reply to this intervention the CHAIRMAN stated that he hoped that in the course of the session a number of incentives would emerge. However, he felt obliged to point out that under the existing transport law Conventions, only CMR laid down rules from which it was impossible to derogate and that in all others the provisions were nothing more than minimum rules which could always be modified to the detriment of the carrier.

After this wide-ranging discussion of certain aspects of the liability régime to be applied to warehousemen, the CHAIRMAN suggested that the Group turn its attention to an examination of the different functions and obligations of terminal operators and afterwards to the obligations of customers. Personally he considered it advisable to see the terminal operator as one link in the chain between the carrier and the customer but a number of preliminary questions arose, such as whether it was intended to deal only with warehousing associated with maritime carriage and the extent to which operations other than the actual storage of the goods should be dealt with, for example loading and discharging. Today terminal operators often carry out a wide range of functions in addition to storage and all these operations might, as it were, be placed under one "umbrella". There were however very wide differences between one port and another and in some of them the various handling operations might be carried out by different independent operators such as stevedores and crane drivers.

Professor RAMBERG also stressed the multiplicity of functions of some modern terminal operators and suggested that it might be useful to bear in mind the distinction of French law between "actes juridiques" and "actes matériels", suggesting that the future rules should not deal

with the former as otherwise the Group would be faced with the whole problem of freight forwarding and the legal régime applicable thereto. Storage should remain the Group's primary concern but other functions such as the loading and unloading of the goods needed to be looked at and possibly regulated.

On a linguistic point, Mr. MERTENS observed that the term "warehouse" implied the notion of a "house" whereas much warehousing was today done in the open air. Was it also intended to cover terminal operators who had no building?

In reply, Dr. HILL stated that the concept of a "warehouse" was to some extent a nineteenth century notion and that the term "entreposage" was much clearer. For him the future instrument should cover all operators statistically holding goods, independently of wherever such goods are held. On the question of handling, he felt that it might not be too difficult in the maritime area to apply the future rules to stevedoring operations, or at least to some of them, but he could foresee problems if it was intended to include handling in road haulage as the CMR already covered some, though not all, aspects of loading and unloading.

Professor RODIERE expressed interest in Professor RAMBERG's reference to the distinction between "actes juridiques" and "actes matériels" but he feared that it would not be possible to exclude the former completely in the context of the safekeeping of goods. He recalled that in the preceding discussions mention had been made of the liability of the warehouseman arising at the time he took the goods into his charge and reference had also been made to the issuing of documents as a form of receipt. If, however, the point at which the carrier's liability were to end and that of the warehouseman to begin were to be the time at which the goods were taken over by the warehouseman, then clearly such taking over would itself constitute an "acte juridique".

Dr. RICHTER HANNES for her part thought that it might be reasonable to exclude from the scope of the future instrument those handling operations which are supervised by the carrier or by the consignee. As a general rule she did not favour definitions but here it might be useful to have one so as to identify the type of operation it was intended to cover. She therefore proposed that an "intermediary of transport operations" should be defined as "any person to whom goods have been entrusted by a carrier, shipper or consignee for the purpose of stowage, loading, discharging, warehousing or delivery of the goods in order to fulfil a contract of carriage". Such wording would, she considered, permit the borderline of the scope of application of the future Convention to be established. She also added that she had chosen the term "intermediary of transport operations" as opposed to Dr. Hill's term, "the non-carrying intermediary" because such an operator might sometimes have to carry the goods, for example from a roadstead port to another port for the purposes of loading. Her definition restricted the scope of the Convention to transport operations and also left open the question of the claimant who could be a shipper, a consignee or a carrier.

While recognising the advantages of a definition along the lines of that suggested by Dr. Richter Hannes, Professor HELM noted that its effect would be to remove from the scope of the future instrument most long-term warehousing as emphasis was placed on contracts creating an obligation of custody concerned with carriage. He believed that it would be preferable to concentrate on formulating a definition based on the central duty or obligation of custody. If it were wished to cover certain operations other than storage of the goods and at the same time to include long-term warehousing within the future rules, then one might envisage two definitions, the first covering warehousing and the second the other operations to which Dr. Richter Hannes had alluded. Finally, he stressed that the definitions ultimately adopted should be flexible enough to allow for the development of new techniques.

Professor RAMBERG found the general idea behind the proposed definition to be acceptable although he too wondered whether it would be possible in practice to distinguish the different types of warehousing. He was however concerned by the use of the word "entrusted", which to him seemed to convey the notion of covering not only the actual operator physically handing over the goods, but also persons to whom particular functions have been entrusted such as freight forwarders. He therefore proposed that the word "entrusted" be replaced by "tendered". He also suggested that after the words "for the purpose of", there be added the phrase "operations such as" so that the list would not be an exhaustive one.

In this connection, the CHAIRMAN supported the proposals of Professor Ramberg and suggested that when the terminal operator was carrying out operations such as stuffing and stripping of containers under the "umbrella" to which he had referred, then they should also be covered by the scope of the future rules.

Dr. HILL also saw difficulties in attempting to distinguish between the different kinds of warehousing. He considered that a definition of the operations to be covered by the future instrument was invaluable and while he was of the opinion that it might be appropriate to speak of the operator being responsible for loading and stowing in the context of carriage by sea, he was less sure that this could be said in the field of carriage by road where there was a risk, under the present definition, of introducing a new intermediary whose functions were in any event usually performed by freight forwarders.

With regard to Dr. Richter Hannes' proposed definition, Professor RODIERE stated in the first place that the definition should refer to any "independent" operator so as to exclude servants and agents. Secondly, he noted that if the future Convention were to cover certain operations such as loading and stowage, the fact should be borne in mind that in many cases these operations would not be performed by the warehouseman and to the extent that they were performed by other operators such as stevedores they should fall outside the scope of the instrument. Thirdly he pointed out that the phrase at the end of the definition "to fulfil a contract of carriage" was wide enough to cover forwarding agents and he therefore suggested that it would be preferable to speak rather of the "completion of the contract".

Dr. HILL did not think there should be any real problem in covering handling operations provided that the Group recalled Dr. Richter Hannes' reference to the goods being handed over by a carrier, shipper or forwarder, which took account of modern developments, for example inland terminals, and to the extent that freight forwarders themselves performed operations such as loading they would not fall within the scope of the Convention. He recognised however that it was only in the context of rail and road carriage that the forwarder would conduct such operations himself.

Professor RAMBERG considered that if the aim were to try and bridge the gap between the time when the carrier's liability ceases up until that of delivery to the consignee on the basis of a mandatory Convention, then he foresaw grave difficulties. One should return to the point of departure in the sense that if there is a warehousing contract and this includes other operations such as cargo handling, then the future instrument should also apply to such operations for if it did not then the operator could always claim that the damage had occurred in the course of an operation other than storage and that therefore it fell outside the scope of the rules. He also raised the question, which had not so far been discussed, of whether they would govern all operations or only those of an international character. Lastly, in connection with long-term warehousing, he stated that most of it would be excluded if there were to be a restriction to international operations, and he recalled that if domestic relations were to be covered then difficulties might arise in distinguishing long-term warehousing from the leasing of real estate and contracts for the preservation of goods or the renting of space.

Mr. MERTENS stated that he was in agreement with Dr. Hill about the implications of the definition for road transport and also with Professor Ramberg that the starting point of the Group's consideration should be the warehousing of goods, which would avoid certain difficulties, after which one might consider the ancillary services provided by the warehouseman under the "umbrella" referred to by the Chairman. By way of analogy, he cited FIATA, which provided an umbrella for operators providing a variety of services in the field of forwarding agency but which did so without any legal régime.

Professor RODIERE agreed that the starting point of a definition should be the warehousing contract and that purely stevedoring operations should not be included. He therefore proposed the following definition which, he thought, would take account of the various points raised within the course of the discussions: "any independent operator to whom goods have been handed over by carrier, a shipper, a forwarder or any other person for the purpose of safekeeping and with a view to their being handed over to a person entitled to them, a consignee, a carrier, a receiving agent or any other person".

Broadly speaking, this proposal received wide support although it was agreed that while the word "independent" might be necessary in the French text, so as to avoid covering servants or agency relationships, it was not so in the English version and might indeed even give rise to misunderstanding as the term "independent operator" was often used in English to describe private as opposed to state-owned operators.

After the CHAIRMAN had raised the question of whether there was a need to define geographically the scope of operations of the persons whom the Group was seeking to define, rather like that of an aerodrome under the Warsaw Convention, Dr. HILL noted that the concept of an aerodrome had become outdated as the new airports were large complexes in a way almost resembling cities. He also considered that there was much to be said for Professor Rodière's proposed definition which not only took account of the need for flexibility in view of the rapidly changing patterns of the movement of goods but also corresponded perfectly to the ideas underlying the French concept of "garde" and the Common Law institution of bailment. Moreover the specific reference to the forwarder removed all the difficulties which could arise in connection with forwarding agency contracts.

For his part, Professor RAMBERG also supported Professor Rodière's definition of the person of the operator and, returning to his suggestion that the scope of the future rules be restricted to international operations, he suggested that after the word "goods" the following phrase be added: "which, with his knowledge, have been or will be the subject of an international transport". In this context he admitted that an objection might be levelled against his proposal that although the warehouseman would probably know when the goods entered the warehouse after international carriage, there would be cases in which he would not know their destination prior to carriage and would thus claim that the future instrument was not applicable to him. It would therefore be necessary to attempt to find some form of words to cover the situation.

While Professor RODIERE agreed with Professor Ramberg's proposed amendment to his definition, the CHAIRMAN pointed out that the formulation introduced a subjective element with associated problems regarding the burden of proof and Professor HELM pointed out that difficulties could arise concerning the applicability of the future Convention when damage was suffered by a consignment of goods part of which was intended for national carriage and the rest for international carriage.

Mr. BERGFELT pointed out that problems could also crop up with regard to goods stored in a free port for often it would only be after the goods had been taken in charge that it would be known whether they were destined for national or for international carriage.

On the question of the restriction of the future instrument's scope to international operations, Dr. HILL stated that a problem analogous to that raised by Professor Ramberg already existed in connection with CMR. Often a carrier does not know whether he is operating under CMR until after he has taken over the goods and thus this ex post facto determination of the applicability of the Convention would be preferable to the test based on the knowledge of the warehouseman suggested by Professor Ramberg.

In reply Professor RAMBERG observed that it was precisely because of the situation obtaining under CMR that he had suggested the formula based on knowledge, bearing in mind especially the possibility of the future rules assuming the form of a mandatory Convention. In addition, warehousemen are often in practice converted into CMR carriers in view of the variety of functions performed by certain operators and so the situation would not

be worse than it is already today. Finally he noted that there will always be borderline cases and he did not claim that the form of words suggested by him, and on which he did not insist, would cover all cases.

In the light of these explanations Dr. HILL suggested that all options should be kept open. Professor Ramberg's formulation could be tried out in the context of general conditions and if subsequently a Convention were to be adopted then it could be abandoned. On a drafting point, he suggested that the English version of Professor Ramberg's proposal might be phrased along the following lines: "which, to his knowledge, have been or will be the subject of international carriage".

For his part, Mr. MERTENS supported Professor Ramberg's suggestion that there should be a restriction to goods in international transport and that the principal should be required to prove the presence of this international element.

Mr. MATTEUCCI drew attention to the fact that there seemed to be a difference between the original French text of Professor Rodière's proposal and the English version. The latter seemed to be stricter in that it spoke of goods being handed over for the purposes of safekeeping, implying that this should be the only purpose, while the French text referred to their being handed over "en vue de les garder". The English text, he suggested, would therefore exclude stevedoring operations.

Dr. HILL agreed with Mr. Matteucci's observations but he did not think that stevedoring operations could be covered by changing a few words in the definition, for example by replacing the phrase "for the purposes of safekeeping" by "involving safekeeping".

Dr. RICHTER HANNES also thought that the question raised by Mr. Matteucci was a significant one. She had understood that Professor Rodière's proposal had been intended to restrict the Convention to warehousing operations and if this was so then it was correct to speak of safekeeping. In her view, however, it was premature to decide to exclude other operations and she suggested that for the present a wider definition be adopted as it would always be possible to restrict it later.

In replying to this last intervention, the CHAIRMAN stated that it had been his understanding that the intention of the provision proposed by Professor Rodière had been to take the basic operation of warehousing, to add thereto any other services expressly agreed upon by the parties such as handling and then from this starting point to enumerate the obligations of the parties, for example, the right of the operator to improve damaged packing without giving notice to the customer, a provision found in many sets of standard conditions, as also was that requiring the customer to give information concerning dangerous goods.

Professor RODIERE considered that before discussing the question of liability it would be preferable to state the duties of the operator and to this end he put forward a proposal which would seek to cover all the situations under the most general formula possible rather than to provide

an exhaustive list, and which was worded as follows:

"1. The operator must ensure the safekeeping of the goods handed over to him; he must also ensure their custody with a view to their being handed over to the person entitled to them.

2. Furthermore, he may under the terms of the contract concluded by him with the person handing over the goods undertake all ancillary services preceding or subsequent to the period of the principal obligation of safekeeping."

Subsequently, he suggested, one could determine the question of the precise nature of the presumption of fault rule which would act as a sanction for the operator's failure to perform his obligations.

Professor HELM noted that this proposal introduced a new element, namely that of having to decide whether safekeeping was the principal obligation. If a decision were to be taken to exclude from the future instrument contracts where the principal obligation was not safekeeping then its scope would be severely restricted. The question was, however, one which had yet to be decided. Reverting to the Chairman's reference to the obligation of the parties and more particularly those of the customer, he raised the question of the latter's liability for damage caused by his goods to the warehouse itself or to other goods contained in it.

Mr. MERTENS expressed the opinion that it would be preferable to begin the discussion with the obligations of the customer rather than the rights of the operator and in this connection he asked whether the terms "entrepreneur" in French and "operator" in English carried with them an implication that there should be payment for the services performed by the operator and, if so, whether the payment contemplated was for the safekeeping of the goods only or also for the ancillary services to which Professor Rodière had referred.

Dr. RICHTER HANNES felt that the discussions had now reached a crossroads and that a decision had to be taken as to whether the nature of the provisions to be drawn up should be of a detailed or of an abstract character. So as to avoid interfering with what are often highly complex provisions of national law she expressed a preference for an abstract method of regulation along the lines of Professor Rodière's proposal, although perhaps not with its present wording. At this juncture, moreover, she wished to draw attention to the need for detailed regulation of warehousing documentation. It was in her view of no value to prepare an elaborate liability régime if no documents were available to prove that the goods had been taken in charge. In some countries no confirmation documents were issued or, if they were, then many weeks or months after discharge of the goods from the terminal. This was particularly the case with barge enterprises in typical roadstead ports or with customs warehousemen. There should therefore be a duty to confirm the taking over of the goods and a statement of their quantity and quality within a certain limited time period in a dated document. In reply to a question by the Chairman as to whether this indicated a desire on her part that terminal operators should in all cases be obliged to issue a document, she stated that this was not her intention and that

in many cases there would be a confirmation of the taking over by a bill of lading. What was necessary was that the carrier or other person concerned should have something in writing to prove that he had effectively transferred the goods to another person.

In this connection, Professor RAMBERG remarked that the need for a confirming document as evidence of taking in charge would vary according to the circumstances. In some cases the parties would prefer to dispense with the need for evidence as too expensive and he proposed that, at the most, the document should be issued at the request of the person handing over the goods, as for example when it would be necessary for a seller to prove to a buyer that the goods had in effect been delivered. As to Professor Rodière's formulation, he fully supported it although he felt that it might be a cause of difficulty for some legal systems if a distinction were to be drawn between principal and ancillary services. He therefore proposed the deletion of the words "principal" and "ancillary" and the adding at the end of the second paragraph of the word "including", after which examples might be given of some of the obligations the Study Group had in mind, a proposal with which Professor RODIERE himself agreed.

After noting general agreement regarding the obligations of the terminal operator on the basis of Professor Rodière's proposal as amended by Professor Ramberg, the CHAIRMAN suggested that the Group turn its attention to the undertakings of the customer. In his view, the two basic duties of the customer were those of paying for the services provided and of giving instructions in respect of the handling and storage of the goods.

Mr. MERTENS recalled that only in CIM among the transport Conventions is the contract not concluded nulla consensu; he supposed that warehousing contracts would be like the other transport contracts and he expressed the opinion that the primary duty of the customer is not to pay the price to the operator but rather to put the goods at the disposal of the operator at the time and place agreed.

The CHAIRMAN stated that in his view there was a difference between contracts of carriage and warehousing for in the latter there was often no contractual link in the ordinary sense of the term between the warehouseman and the person entitled to the goods, whose relations could be qualified as quasi-contractual or sui generis. In his view the relationship usually began in the case of goods in transit with the taking in charge of the goods by the warehouseman and the customer was therefore under no duty to put the cargo in the warehouse. Dr. HILL agreed with this analysis of the situation as far as the Common Law contract of bailment was concerned.

In the light of these observations and with a view to laying down the basic obligations of the customer Professor RODIERE suggested the following texts:

Article [1]

1. The person handing over the goods shall place them at the disposal of the operator at the time and place agreed in the contract or

in accordance with local usage or, in their absence, with the operator's general conditions of contract.

Article [2]

1. The operator is entitled to the price fixed by the contract, by local usage or by the general conditions of contract of the operator.

2. An all-in price may include the services defined in Article [1] above.

In making these proposals he noted that experience had shown that in this type of contract the receipt issued by the operator provided, like a bill of lading, for a description of the goods received by him and that often on the back of such a receipt the operator would print his general conditions.

Professor RAMBERG appreciated that it might be worthwhile to spell out the obligations of the customer as was done in INCOTERMS although he felt that it went without saying that the customer must pay the price of the services. He was however concerned by the wording of Professor Rodière's proposal as it was rare for the customer to be active in connection with warehousing operations and to the extent that the text conveyed the idea that he would be present at the time of the handing over of the goods it did not reflect practice. He was, furthermore, worried that the provision might be construed as referring to an obligation of specific performance to place the goods in the warehouse. If the customer did not deposit the goods in the warehouse he could not be required to perform the contract and to the extent that his failure to hand over the goods amounted to non-performance he could still be required to pay the price of the services, a rule which would be somewhat akin to that regarding dead freights. It was necessary to state precisely the obligation which it was intended to place upon the customer for if the obligation were to be to deposit the goods then force majeure would be a defence but if the obligation were to be that he must pay the price then force majeure would only be a defence insofar as it actually prevented him paying, for example as a result of government intervention.

Dr. RICHTER HANNES stated that she entertained certain reservations similar to those expressed by Professor Ramberg. The references in the proposal to what had been agreed in the contract suggested the idea of something having been agreed in writing and of there being a negotiation period before the conclusion of the contract. However in practice contracts of this nature were usually concluded in a factual way rather than in writing and there was no duty on the consignor to hand over the goods. In her view, the only thing to provide for in the Convention in this connection was that the customer should be under a duty to inform the operator of the dangerous character of the goods and the precautions to be taken in handling them.

Dr. HILL agreed with Dr. Richter Hannes that it was necessary to deal with the problem of dangerous goods and while also noting Professor Ramberg's concern on the question of specific performance, he was not particularly worried by the problem, since under the Common Law specific performance is a discretionary equitable remedy which will never be granted in respect of contracts of bailment or contracts for the performance of services.

Mr. MERTENS recalled that he had already suggested that as the warehousing contract is a contract nulla consensu the first obligation on the customer is to put the goods in the warehouse at the right time and place in accordance with the contract or the usual practices. He pointed out that the obligations of the parties begin with the acceptance of the agreement so that if a customer agrees to put goods in a warehouse on a certain day for a certain period, it is no defence for him subsequently to claim that the delay in handing over the goods was due to the late arrival of the ship carrying them.

Professor HELM noted that the Group was dealing with commercial contracts in which a price is always paid for the services provided. He therefore considered that it would be preferable not to include a provision on the payment of the price in the future Convention for there might be cases in which the warehouseman would undertake by a special agreement to perform certain services without payment and thus avoid the application of the Convention.

The CHAIRMAN considered this discussion on the payment of the price to be an interesting one and that it raised the question of what was needed to create a liability and how the operator could ensure that the obligations of the customer would be performed. In his opinion it was not necessary to deal with all the questions arising in connection with warehousing contracts in the future Convention, some of which could be regulated by standard conditions. The Group should, in his view, concentrate on what was required to establish a basic liability régime. For him the obligations of the customer to be dealt with were those relating to dangerous goods and that of cooperating with the warehouseman when the goods are ready for delivery.

Professor RODIERE recalled that he had prepared two articles to deal with two different questions, namely the obligations of the customer towards the operator and that of paying the price. As to the first, he felt that it was necessary to state that the customer must hand over the goods as this is a contractual obligation. In the light of the observations of Professor Ramberg and Dr. Hill he stated that he was of the opinion that there was no question here of specific performance but only of compensation payable for failure to perform a contract. He agreed, however, with the remarks which had been made concerning the need for a provision regarding dangerous goods and he therefore suggested the addition of a second paragraph to the first of the two suggested articles proposed by him to the effect that "the person handing over the goods shall furthermore indicate the nature of the goods". As regards the second article, he admitted that while it was perhaps not absolutely necessary to include a provision on the payment of the price,

nevertheless there was some advantage in it as it permitted a distinction to be drawn between an all-in price covering a variety of services and a price fixed for the individual warehousing operation which might be based on the contract, on local usage or finally on general conditions.

Dr. HILL considered that something along the lines suggested by Dr. Rodière should be included in the future rules. He also agreed with Professor Rodière that the question of specific performance did not really arise and stated that in his experience all general conditions contained provisions concerning the payment of the price.

The CHAIRMAN stated that he was somewhat worried by the differences of opinion which had been aired on the customer's duty to hand over the goods. He personally considered that the relationship between the customer and the warehouseman began when the latter took the goods in charge unless there was a prior agreement between the parties.

Dr. RICHTER HANNES wondered whether it might not be possible to combine the drafting of Professor Rodière with a recognition of the fact that 90% of warehousing contracts arise only at the time that the goods are taken over by the operator. One might therefore say that the contract between the operator and the customer shall be deemed to be concluded at the time when the goods are handed over unless there is a prior agreement between the parties.

Professor RAMBERG noted that there could be cases of standing agreements, for example for the duration of one year, and he suggested that a provision might be formulated to the effect that a warehousing contract arises from the agreement of the parties and that in the absence of such agreement then the handing over of the goods by the customer or with his authorisation shall be deemed to constitute a contract. Such a text might be completed by a provision to the effect that the customer must tender goods which are not dangerous or, if they are dangerous, then that the appropriate instructions must be given in respect of them.

Mr. MERTENS agreed that it was necessary to distinguish between the two situations. Professor Helm had stated that as these were commercial contracts, the customer would always have to pay the price but he could imagine that, in the context of an agreement for a certain period, the goods might not be delivered to the warehouse and that the customer would claim that as there had been no custody of them, then he should not be required to pay the price. For this reason he agreed with Professor Rodière that in the event of the customer's failure to hand over the goods he should have to fulfil his obligation to pay. Turning to the other type of situation to which Dr. Richter Hannes and Professor Ramberg had referred, namely that of the goods being delivered without any prior agreement between the parties, there would in any event always be a document of some sort such as a maritime bill of lading or a CMR consignment note in the absence of which the warehouseman would not take the goods into his charge. There would thus

be some sort of legal basis for the contract even if it was not known from the outset the length of time during which the goods would remain in the warehouse.

In reply to these observations, Professor RAMBERG stated that the documents might arrive after the goods themselves and thus after their taking in charge by the warehouseman and the beginning of his liability. The CHAIRMAN also stated that he had knowledge of cases where the goods arrived without any prior warning, let alone the relevant documentation, and that this was a feature of modern transportation where the speed with which goods can be transported has outstripped the communication of documents, with the resultant need for the introduction of electronic systems to accelerate the transmission of documentation so as to keep pace with the goods.

Mr. BERGFELT recalled in connection with the question of dangerous goods the IMCO Code on the subject which regulates the precautions to be taken in handling them and he considered that to the extent that the Code was applied, there might be no need to consider the matter further here. Moreover, if the operator did not follow the rules he might be placed under a special liability.

After Professor HELM had raised the question of whether there might not be an unlimited liability in connection with dangerous goods, the CHAIRMAN reminded the Group that at its present session it was only being asked to lay down certain guidelines for the future instrument so that it might at this stage be content with a broad statement that the customer must inform the operator of the nature of the goods, give the necessary instructions regarding them and if necessary take care of them himself.

Professor RODIERE noted that there seemed to be general agreement on the questions under discussion and recalled the phrase in his proposed text to the effect that "the operator is entitled to the price fixed by the contract, by local usage or by the general conditions of contract of the operator". This phrase, he suggested, could be of particular value in view of the practical observations made by Dr. Richter Hannes and by Mr. Mertens so that one might envisage that the entry of the goods into the warehouse would imply the conclusion of the contract on the basis of the general conditions of the operator.

The CHAIRMAN attached great importance to Professor Rodière's intervention in that it indicated the fact that the elaboration of a Convention providing for a standard minimum liability régime did not necessarily dispense with the necessity of general conditions or local bye-laws. He recognised the need for some provision regarding the payment of the price in the two types of situation which had been mentioned and suggested also that some provision was also essential on the problem of dangerous goods. A solution, he suggested, might be found along the lines of the provisions contained in the Hamburg Convention or in CMR stipulating that the customer is under a duty to inform the operator of the nature of the goods and to give the necessary instructions regarding them. If it was accepted that the liability of the customer

could be dealt with on this basis then the Group might turn its attention to the question of who is the customer. Here there were two possible situations. In the first, where there was an agreement prior to the taking over of the goods by the warehouseman, one would know who the customer was but the position was less clear when the goods arrived in the absence of such a contract and might be handed over by a carrier, a shipper, a forwarder, a consignee or a consignor. In such cases he felt that the customer should be the person who delivered the goods.

Professor RAMBERG considered that it was important in practice for the warehouseman to know who is paying the price of the services and who is responsible for the condition of the goods. In the export situation, the position was less complicated as an agreement would have been concluded and one would know who the customer was, namely the person on whose authority they had been delivered. The situation was less clear when the goods were being imported. In practice it would usually be the carrier who would hand over the goods to the warehouseman and one could perhaps construe an authority to the carrier but the question would remain, whose authority, that of the shipper or that of the receiver? He therefore proposed that a general formula be devised to cover both situations, to the effect that the customer is the person who concludes the contract with the warehouseman or in cases where the contract arises out of delivery of the goods then the person who makes delivery or under whose authority delivery is made. As to the question of the burden of proof, he suggested that the normal principle should apply that it rests upon the person alleging that there is a contractual relationship.

Mr. MERTENS considered that there must be a stipulation in the future rules regarding the nature of the goods, as situations could arise where prejudice is caused to the warehouseman other than by dangerous goods and he cited cases in which warehousemen had been held liable to governmental authorities in respect of goods which had been the subject of fraudulent documentation. In other words there should be some sort of broad "hold harmless" clause.

Dr. HILL suggested that in practice the problem of identifying the customer might not be as acute as at first seemed to be the case and he recalled that the Natives of Antwerp, for example, state that they are acting on behalf of the carrier. It might therefore be simpler to make the carrier pay the charges and consider him to be the customer. He also referred to the distinction between dangerous goods and perishable goods and suggested that in the latter case the warehouseman should be given the right of sale, acting as a sort of agent of necessity. Under the Common Law, however, an agency of necessity only arises if the owner of the goods cannot be found and in consequence both British Road Services and British Rail made provision in their general conditions for a right of sale which would replace the contractual right of sale.

Mr. MERTENS stated in connection with the right of sale that some difficulties arise in practice regarding the exercise of the right to dispose of goods or to destroy them on account of environmental legislation. In some cases, for example dangerous chemicals, the warehouseman will not be entitled to destroy the goods and if that is so then he must be able to require that the person responsible for them should take them away.

Professor RAMBERG expressed agreement with the observations of Mr. Mertens and noted that it would not be enough in this context simply to take over a provision on dangerous goods from one of the carriage Conventions. The future rules should contain some sort of "hold harmless" clause, perhaps along the lines of Article 26 of the Nordic Conditions on freight forwarding, which would relieve the warehouseman of liability not only for damage caused by dangerous goods but also for any juridical consequences resulting from his taking over the goods.

After noting that there seemed to be general support for the inclusion of a provision of this nature, the CHAIRMAN raised another question, namely that of what happens when the customer does not pay the price. He recalled that in the different legal systems the operator is usually given some sort of security over the goods which he is holding for safekeeping, such as a general lien or a privilege and that similar provision is made in the general conditions of operators. Dr. HILL in his report had suggested not dealing in the future instrument with the question of liens but the Chairman wondered, in view of the type of mandatory binding yet at the same time optional character, which he envisaged for the rules, whether the inclusion of a general lien in the operator's favour might not constitute one of the incentives to which he had referred earlier in the discussions.

Dr. HILL agreed that it was necessary to try and make the rules which were going to be elaborated attractive to warehousemen and if he had recommended in his report that the question of liens should not be dealt with, it was because his examination of the problem had shown that the one factor common to carriers' and warehousemen's liens throughout the world was that they were never the same in any two systems, rooted as they so often were in bankruptcy and insolvency law. There were, for example, the differences between the simplistic Common Law liens, the sophisticated French privilèges and in German law the distinction between civil and commercial liens. In the United Kingdom there was also the problem of the exercise of the contractual right of general lien against third parties. Moreover in many countries extensive rights of general lien were accorded to forwarders and the like by general conditions and he wondered whether the inclusion of a general lien provision in the future instrument on the warehousing contract would really constitute an incentive for operators to accept it, given the rights they already enjoy. For this reason he thought that it might be preferable to leave the problem of liens to domestic law and perhaps be content with a provision in the Convention to the effect that nothing therein shall affect the applicability of existing statutory and contractual rights of lien.

Professor RAMBERG confirmed what had been said by Dr. Hill about all general conditions of freight forwarders including a general lien clause but he nevertheless felt that such a provision in the future Convention granting a right of general lien to warehousemen might constitute an incentive under some systems of law where such a right cannot be secured under general conditions. He further noted that such a lien enables warehousemen to give credit to the customer and would therefore be attractive to them. Moreover, the creation of such a lien by means of an international Convention would also contribute to the unification of law in an area where there is at present considerable confusion due to the wide divergences in the types of security available. Finally, he recalled that the Group had in principle agreed that the future rules should contain some sort of provision concerning delay and although no final decision had been taken on the character of that provision there seemed to have been support for converting pending delay into physical loss after a certain period. Now if the warehouseman were to refuse to hand over the goods to the customer, alleging for example that he had not been paid, then if there were to be no provision in the Convention granting him a right of lien and a court were to find in favour of the customer, it might be argued that his refusal to hand over the goods amounted to delay which would subsequently be converted into total loss.

In reply to a question by Professor HELM as to which legal system should determine the existence of the lien, Mr. MERTENS suggested that it should be the place where the warehouse was situated. He further noted that there were two elements in the problem, that of the right of detention of the goods, and that of the exercise of a lien, which raised more complicated problems and which could give rise to difficulty if dealt with in a mandatory Convention. He therefore suggested that a rule might be adopted granting the warehouseman a right of detention over the goods but that the question of the lien be left to national law. He further observed that often when goods are being handled in transit various taxes are paid by the operator and that generally speaking such debts are highly privileged. The future rules should therefore give protection to the operator in respect of such sums as are due to him.

In this connection Mr. EVANS noted that the same problem had arisen in connection with the work of the Institute on the preparation of a Convention on the hotelkeeper's contract and that the Study Group which had prepared the preliminary draft articles had agreed unanimously to recognise the hotelkeeper's right of detention although there had been differences of opinion on the wisdom of attempting to deal also with the problems associated with the exercise of a lien by the hotelkeeper.

In conclusion, the CHAIRMAN suggested that efforts should be made to try to find a solution which would be attractive to the warehousing profession and act as an incentive for them to accept the future uniform rules. If, however, it subsequently transpired that such a solution was unattainable then the Group could fall back on the idea put forward by Dr. Hill of including a provision to the effect that the

rules would be without prejudice to existing laws and practice regulating warehousemen's security over property which has been handed to them for safekeeping. Noting that the Group agreed to this proposal he then observed that it had now exhaustively discussed the question of the type of operator the future instrument should cover and his liabilities as well as the question of who is the customer and his liabilities. Referring also to the document prepared by the Secretariat it seemed to him that with the exception of the subjects of jurisdiction and arbitration, which could only be approached when the Group had some texts on the substantive issues, all the questions listed by the Secretariat at the end of Document 3 had been answered or at least touched upon in the course of the discussions, and that it was now time to revert to the problem of the method of unification to be envisaged by the Group.

Early on in the session he had spoken of the need for an unconventional approach, namely the elaboration of uniform rules of a mandatory, binding character which would at the same time be optional and he was, after listening to the discussions on the various matters raised, more and more convinced that this was the right direction. In particular he had heard a number of participants speak of the need for both a Convention and for supplementary standard conditions, not least on account of the very great problems which would arise in defining the scope of a traditional mandatory Convention dealing with the subject-matter in hand. Reference had also been made to the question of whether the future rules should be limited to international operations so that many of the complex problems which arise in this field and which concern only domestic relations might be left to be governed by national law. Further difficulties had been seen in the preparation of a mandatory Convention due to the differences between port terminals, some of which used ultramodern handling techniques while others relied on more old-fashioned methods. In these circumstances, what he envisaged was an international Convention which would state that it contained a set of rules constituting an agreed international standard for terminal operators with as its core a minimum level of liability. It would, in each country, be optional for the individual terminal operator to adopt this standard and to the extent that he did so he would then be authorised under national law to hold himself out as an international standard terminal operator and perhaps use a special logotype designed for the purpose, the use of which would be supervised by the Contracting Parties to the Convention. Insofar therefore as an operator were to accept this status the uniform rules contained in the Convention would be mandatory for him, a system not unlike that once considered in connection with the work on the draft TCM whereby the Convention became mandatory once a TCM document had been issued.

If such a scheme were to prove successful, however, it would be necessary to make it attractive to the interested parties by means of a series of incentives which he thought might be summarised as follows:

1. with consumer orientated legislation mushrooming throughout the world and national courts becoming more and more active in examining and striking down general conditions it would only be if the liability system contemplated were to be contained in a national law based on a

Convention that there would be a guarantee that the judiciary would not interfere with it;

2. the uniform rules might contain provisions regarding a possible right of detention or a lien. At present some important legal systems had difficulties with the question, especially as regards the enforcement of liens against third parties but there was little doubt that if a lien could be devised this would be a considerable incentive to terminal operators to accept the Convention;

3. another important element would be the pressure which might be exerted by customers on terminals to operate under an internationally agreed liability system and the international logotype. Moreover, the moderate level of liability contemplated without any gaps or loopholes would be attractive not only to operators themselves but also to trade and banking interests, it being for analogous reasons that some container companies had already extended their liability from "tackle to tackle" to "port to port";

4. a further incentive to operators could be provided by pressure from parties to certain sales contracts, for example, CIF and C&F contracts, who might incorporate in such contracts a formula not only on the usual routes to be followed but also on the agreed liability, thus making goods flow through ports operating under the international logotype;

5. another point of importance had been raised by Professor Rodière who had expressed the opinion that the subject could not be dealt with only on the basis of a mandatory Convention but that standard conditions were also necessary. Here he saw the possibility for an extremely useful form of cooperation between the Organisations involved under which UNIDROIT might be responsible for the preparation of the international Convention which was envisaged while the CMI which had already begun a study of the liability of port terminals, and the IAPH representing professional interests and the ICC those of consumers, could proceed to the drawing up of standard conditions which would be based on the liability régime contained in the Convention and necessary to supplement it. The active participation of the various Organisations in the preparation of the different instruments could only serve to increase the prestige of the latter and thus their chances of acceptance by the various interests involved;

6. lastly, some participants had laid considerable emphasis on the need for a warehousing document or warrant which might be used in commercial circles and provision could be made for the issuing of such a document by the international standard terminal operator under the envisaged Convention.

Professor RODIERE stated that he could associate himself entirely with the remarks made by the Chairman, especially on the planned cooperation between the various Organisations involved in the work on the warehousing contract. He would, however, confine his remarks for the time being to that which would be undertaken by UNIDROIT, that was to say the preparation of an international Convention. As to the unconventional character of the instrument proposed he recalled that an examination of the many Conventions adopted at the Brussels maritime law Conferences showed that a wide variety of obligations had been laid

on States, sometimes to take action, on other occasions to abstain from it and he considered that a suitable formula could be found to meet the requirements of the case in hand. He further noted that the instrument would lay down minimum rules on liability and also contemplate the issue of a document, to be more precise a warrant, the issuing of which by the operator would entail the application of the minimum standard liability contained in the Convention as well as provide certain guarantees regarding the goods in respect of which it was issued. As to the restriction to international operations which had been suggested by Professor Ramberg, he considered that this international element could not be defined by reference to the criteria which determine the applicability of the various transport law Conventions for these differ from one another, and one could not expect that the warehouseman should know in every case whether the conditions of applicability had been satisfied. The only criterion which could therefore be retained with a view to defining the international element was that of whether the goods cross the boundaries of one State into the territory of another and with these considerations and the observations of the Chairman in mind, he had prepared the texts of two articles which read as follows:

"1. The signatory States agree that no authorisation shall be given to an operator conducting international operations to designate himself an "approved operator" or to deliver warrants of the type described below unless he undertakes to be bound by the obligations and to be subject to the liability defined in the following articles.

2. An "approved operator" conducts international operations when he takes over goods which have been or are intended to be transported across the boundaries of the State in which the premises of the operator are situated."

Dr. RICHTER HANNES felt that the system outlined by the Chairman was a somewhat idealistic one and which could perhaps be accepted if Europe were the only continent to which it had to be "sold" and in this connection she expressed the hope that future sessions of the Group would see the presence of representatives from developing countries. Although she recognised that some aspects of warehousing were primarily of interest to domestic law and that they might therefore be left outside the scope of a future Convention it should not be forgotten that the Group was dealing with a number of problems of vicarious liability and that it was necessary to fill in certain gaps left by the mandatory Conventions on international carriage. In the first place she considered that the instrument proposed by the Chairman was far more voluntary than mandatory in character while other points raised by the Chairman which he had cited as incentives or as examples of pressure which might be brought to bear upon operators to accept the future Convention were not really likely to be effective in practice and, for example, she could not see what interest there was for operators voluntarily to accept to issue a document which could subsequently be used by the customer against them. In her view it was only through the acceptance by States of a mandatory Convention that operators could be brought to issue the type of document she envisaged. Finally, and while appreciating the competence of such bodies as the ICC and the CMI, she felt that they could only work effectively insofar as they acted in conjunction with

an international intergovernmental Organisation.

For his part, Professor HELM suggested that to the extent that the uniform rules were to be embodied in an international Convention, a further incentive to operators would lie in the exclusion of their tortious liability which was at present a problem in his own country.

With regard to the question of cooperation between the interested Organisations, Professor RAMBERG stated that he felt that the preparation of an international Convention did not exclude the need for standard conditions for warehouses and he was convinced that the ICC, the CMI and IAPH would be only too happy to associate UNIDROIT with their forthcoming deliberations on standard conditions. There was, he felt, therefore, no question of competition between the CMI and UNIDROIT and he was also sure that he was echoing a similar view of the ICC, which had not been able to be represented at the session but with officials of which he had been in contact prior to the session of the Study Group. While it was feasible to regulate international transport by mandatory Conventions he was less sure that such a solution would be appropriate in the present context and he was particularly impressed by the text proposed by Professor Rodière, which recognised that unlike international carriage which requires mandatory regulations, warehousing was an activity which takes place solely in one country so that the case for mandatory regulation was less strong. Professor Rodière's proposal had the merit of leaving it open to States to apply the rules of the future Convention in a mandatory way or to leave an option to operators to apply them or not as they chose. It therefore avoided the danger of States refusing to accept it as being too constrictive and of the best solution becoming the enemy of a good one. In conclusion he expressed interest in the suggestion made by the Chairman regarding the linking of INCOTERMS with the scheme of internationally approved operators outlined by him, an idea which called for further consideration.

Mr. BERGFELT considered that the proposal that an international Convention should be prepared by UNIDROIT and standard conditions by other Organisations based on the scheme for the limited liability of terminal operators was a good one in that there might be a possibility of experimenting with the standard conditions in Europe pending the entry into force of an international Convention which might become effective on a worldwide basis.

For his part, Dr. HILL stated that he was very much in agreement with what had been said, in particular regarding the trying out of solutions through general conditions pending their introduction by way of international Conventions, and in this connection he recalled how, after the failure of the TCM draft Convention, which had not been welcomed in the Commonwealth countries which were reluctant to be bound by it, the TCM, partly through the adoption of the ICC rules, had been incorporated into combined transport documents issued in the United Kingdom and in both developed and developing Commonwealth countries to such an extent that it seemed almost that the TCM Convention had become law by mistake.

In conclusion, the CHAIRMAN noted that the only alternative to cooperation between Organisations was chaos. In the context of the future work on the warehousing contract as he saw it each Organisation would retain its own identity and carry out the functions best fitted to its character. He was also convinced of the possibility of effective pressure being exerted by Governments and by the commercial world to bring about the adoption of the uniform rules which were contemplated while at the same time he agreed with those participants who had argued in favour of the presence at the second session of the Study Group of representatives of developing countries.

Item 4 on the agenda - Other business

As to the future work, the CHAIRMAN suggested that on the basis of the discussions of the Group at its first session, the Secretariat should prepare a report to be followed by a set of draft articles based on the deliberations of the Group and the texts so far circulated, together with an explanatory memorandum. The draft articles might be communicated to the members of the Group and to the observers in the autumn and any observations thereon forwarded to the Secretariat so that they too might be distributed in good time for the second session of the Study Group .

Mr. EVANS stated on behalf of the Secretariat that all attempts would be made, within the financial limits imposed by the Institute's budget, to ensure the presence at the second session of the Study Group of members from Asia and Africa and that a preliminary draft set of articles and an accompanying explanatory report would be prepared for circulation in the autumn, following the communication of the report of the session in May or June.

Finally, the Study Group agreed that its second session would begin on 23 January at 10 a.m. and last until midday on 26 January.

ANNEXE I

ANNEX I

LISTE DES PARTICIPANTS

LIST OF PARTICIPANTS

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M Mario MATTEUCCI, Président / President

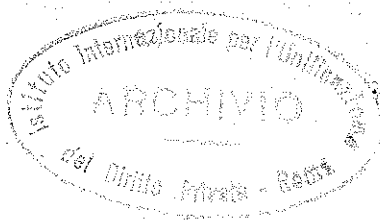
M Riccardo MONACO, Secrétaire Général / Secretary General

M Malcolm EVANS, Secrétaire Général Adjoint, Secrétaire du Comité
Deputy Secretary General, Secretary of the Committee

Ms. Marie-Christine RAULT, Chargé de Recherches / Research Officer

A G E N D A

1. Election of the Chairman
2. Adoption of the agenda
3. Consideration of the desirability and feasibility of drawing up uniform rules on the warehousing contract
4. Other business.



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CORRIGENDUM

Page 9, last paragraph, line 6: for "formally" read "formerly"

Page 17, line 13: for "statistically" read "statically"