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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

PRELIMINARY DRAFT CONVENTION

ON THE LIABILITY OF INTERNATIONAL TERMINAL OPERATORS

and

Explanatory Report

(prepared by the Secretariat of UNIDROIT)

Rome, October 1978

## I Introduction

1. At its first session, held in Rome from 10 to 12 April 1978, the UNIDROIT Study Group on the warehousing contract had before it two documents, the first a preliminary report on the warehousing contract, prepared by Dr. Donald Hill at the request of UNIDROIT, and the second an analysis of the replies to the enquiry conducted by the Institute on the desirability and feasibility of drawing up uniform rules on the warehousing contract, which had been prepared by the Secretariat. This latter document contained a list of questions, the answers to which might supply guidelines for the drawing up of an international instrument on the subject in hand and, on the basis of the discussions of the Group, it was decided that the Secretariat should prepare a set of draft articles together with an explanatory memorandum. It was further agreed that these draft articles be communicated to the members of the Group and to the interested Organisations and that any observations on them be forwarded to the Secretariat so that they too might be distributed in good time for the second session of the Study Group.

2. The present document has been prepared by the Secretariat in accordance with these instructions. It should, however, be noted that in view of the preliminary character of the draft, as well as of the need to distribute the articles as soon as possible to the members of the Group and to interested circles, the Secretariat has limited itself to the preparation of an extremely brief explanatory note, it being understood, of course, that the revised draft, which will emerge from the deliberations of the second session of the Study Group, will be accompanied by a detailed commentary to be drawn up by the Secretariat of UNIDROIT.

## II General observations

3. In the course of the discussions of the Study Group at its first session, two lines of thought were expressed regarding the nature of the future instrument on the warehousing contract. The first called for the elaboration of a classic international Convention laying down rules of an imperative character applicable to all terminal operators (to use the terminology employed in the draft articles prepared by the Secretariat) operating on the territory of a Contracting State, while the second was less ambitious and contemplated a voluntary licensing system under which operators who accepted the

rules contained in the future instrument would be bound by them and subject to the application of sanctions in the event of their failure to observe them.

4. In preparing the draft articles contained in the Annex hereto, the Secretariat has attempted to leave open both options. On the one hand the substantive rules (Articles 1 to 16) have been cast in a mandatory form along the lines of the traditional transport law Conventions and it is envisaged that any Contracting Party may introduce them into its law as such. On the other, Articles 17 to 19 seek to make provision for a licensing system creating the legal figure of the International Terminal Operator (ITO). Whichever system, or perhaps a combination of the two, is ultimately adopted, however, the Secretariat has recognised that the future instrument will need to be supplemented by general conditions, a point which was emphasised by a number of participants at the first session of the Study Group, and in consequence a specific reference to general conditions has been made in Article 17, paragraph (b).

### III Commentary on the draft articles

5. To a large extent Article 1 of the draft, like many of the other articles, is modelled on corresponding provisions of the Hamburg Rules of March 1978. In adopting this approach the Secretariat has not overlooked the fact that the future instrument may well operate in the context of the international carriage of goods by modes of transport other than by sea or in that of multimodal transport of which only one leg is maritime but it has nevertheless felt that to the extent that the Convention concerning warehousing operations will fill a gap left by the existing Conventions dealing with the international carriage of goods it should as far as possible employ the terminology used in the most recent instrument expressing the will of States, namely the Hamburg Rules. Of particular interest in Article 1 are the definitions of "operator", which is based essentially on the definition suggested by Professor Rodière at the first session of the Study Group, of the "contract for the safekeeping of goods", which indicates the basic operations with which the future instrument is concerned, and of "international carriage", again inspired by observations of Professor Rodière. In this latter context, it should be noted that nothing in the draft articles prepared by the Secretariat would prevent a Contracting State from extending the application of the uniform rules contained therein to all warehousing operations carried out on its territory.

6. In accordance with the general view expressed by the Group at its first session, the Secretariat has stated in paragraph 1 of Article 2 the basic obligations of the operator to undertake the safekeeping of the goods while paragraph 2 recognises that the modern terminal operator may undertake to perform additional services traditionally performed by operators other than the warehouseman such as the "loading, stowage, discharging, checking or other services relating to the handling of the goods". To the extent that he contracts to do so under the terms of the contract for the safekeeping of the goods, the operator's liability will be governed by the terms of the future instrument under consideration.

7. One of the most interesting features of the draft is Article 3, paragraph 1 of which provides that the operator must, at the request of the customer, issue a document acknowledging receipt of the goods. Paragraph 2 further stipulates that if such a document is in fact issued, then to the extent that the contract has not already provided for the checking of the goods, the operator must indicate in the document acknowledging receipt any inaccuracy or inadequacy of any particular concerning the description of the goods taken in charge "as far as this can be ascertained by reasonable means of checking".

8. In connection with Article 3, it should further be noted that on the one hand the draft makes no reference to whether the document, may be of a negotiable character or not, a question which was not considered by the Study Group at its first session, while on the other no provision is made for the consequences of the refusal by the operator to issue a document. The present draft would leave the operator open only to any administrative sanctions for which Contracting States might provide under any eventual licensing system, the alternative being the introduction of a rule, to be found in a number of transport law Conventions, to the effect that the operator would be liable for any prejudice suffered by the customer as a consequence of the failure to issue the document.

9. Articles 4, 5 and 6 have been placed in square brackets. The reason for this is that one might consider that such provisions, especially Articles 5 and 6, the formulation of which follows closely that proposed by Professor Rodière at the first session of the Study Group, might more suitably find their place in standard conditions. This is perhaps less true of Article 4 and the attention of the Group is drawn in particular to these provisions.

Another key article of the draft is Article 7, which is concerned with the general problem of the operator's lien or right of detention of the goods. This is a particularly delicate problem in view of the widely differing solutions of the problem adopted at national level and, in drafting the article, the Secretariat has to a large extent based itself on the corresponding formula to be found in Article 19 of the UNIDROIT draft Convention on the hotelkeeper's contract which deals with an analogous problem and which has received the tentative approval, at the level of a Committee of Governmental Experts, of some twenty States.

Article 8 introduces a series of provisions dealing with the operator's liability (Article 8 - general basis of liability, Article 9 - limitation of liability, Article 10 - miscellaneous provisions concerning liability, Article 11 - loss of the right to limit liability, Article 12 - notice of damage, Article 13 - prescription, Article 14 - nullity of stipulations contrary to the provisions of the Convention, Article 15 - unit of account) and Article 16 (supremacy of other Conventions) which with only minor variations follow very closely the wording of the Hamburg Rules and which, to the extent that that model is acceptable, would not seem to call for detailed comment at this stage.

As mentioned above, in the context of the general observations of the draft articles (paragraph 4), Articles 17 to 19 have been drafted to take account of the possible introduction of a licensing system for ITO's, while Articles 20 to 28 constitute the basis for a set of final clauses which follow in part those contained in the Convention containing the Hamburg Rules and in part those to be found in the international Conventions adopted at Diplomatic Conferences to which UNIDROIT drafts have been submitted.

ANNEX

PRELIMINARY DRAFT CONVENTION ON THE LIABILITY OF  
INTERNATIONAL TERMINAL OPERATORS

Preamble

THE STATES PARTIES TO THE PRESENT CONVENTION

HAVING RECOGNISED the desirability of determining by agreement certain rules on the liability of international terminal operators;

HAVE DECIDED to conclude a Convention for this purpose and have there-  
to agreed as follows:

Article 1

For the purposes of the application of this Convention:

"Operator" means any person authorised as an International Terminal Operator (ITO) operator in accordance with Article 18, paragraph 1 of the present Convention, to whom goods have been /or are to be/ handed over by a shipper, carrier, forwarder or any other person for the purposes of safekeeping before, during or after international carriage, and with a view to their being handed over to any person entitled to take delivery of them, including a consignee, a carrier, a forwarder, or a receiving agent.

"Customer" means any person by whom or in whose name or on whose behalf a contract for the safekeeping of goods has been concluded with an operator, or any person by whom, or in whose name or on whose behalf the goods have actually been delivered to the operator for the purposes of safekeeping.

"Goods" shall not include live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed "goods" includes such article of transport or packaging supplied by the customer or any person acting in his name or on his behalf.

"Contract for the safekeeping of goods" means any contract whereby the operator, as defined in paragraph 1 of this article, undertakes to ensure the safekeeping of goods.

"International carriage" means any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States /or in a single State if, according to the contract of carriage or the scheduled itinerary, the goods will in the course of carriage, enter the territory of another State/.

#### Article 2

1. The operator undertakes to ensure the safekeeping of the goods with a view to their being handed over to the person entitled to take delivery of them.
2. Furthermore, the operator may, under the terms of the contract for the safekeeping of the goods, undertake to perform services, such as loading, stowage, discharging and checking or other services relating to the handling of the goods before, during or after the period of safekeeping.

#### Article 3

1. The operator shall, at the request of the customer, issue a document acknowledging receipt of the goods.
2. Such a document shall indicate any inaccuracy or inadequacy of any particular concerning the description of the goods taken into charge as far as this can be ascertained by reasonable means of checking.

#### Article 4

1. If the packing of the goods is damaged or insufficient for its purpose, the operator may repair the damage or otherwise improve the packing without giving any notice to the customer.
2. If the goods have not been cleared by customs, the operator may pay, on behalf of the customer, any customs fees.
3. If risk arises of the devaluation of goods taken in charge or if they constitute an actual danger to life, property or the environment and the customer cannot be reached or if, when requested to remove the goods, he fails to do so without delay, the operator may take all necessary precautions regarding the goods and, if need be, sell them in an appropriate manner.

4. Goods which are in danger of being destroyed or subject to substantial devaluation or which may give rise to imminent danger may, according to the circumstances and without notice, be sold, rendered harmless or destroyed by the operator on the customer's behalf.

5. In the situations contemplated under paragraphs 3 and 4 of this article:

(a) the customer shall be entitled to no compensation in the event of the rendering harmless or destruction of the goods;

(b) in the event of the sale of the goods, the customer shall be entitled to the proceeds of the sale, less the reasonable expenses incurred by the operator./

Article 5

The customer shall place the goods 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 6

1. The customer shall pay the price fixed by the contract, by local usage or by the operator's general conditions of contract.

2. An inclusive price may include the services referred to in Article 2, paragraph 2 of this Convention./

Article 7

1. The operator shall have a right of retention over the goods he has taken in charge, not only for costs and claims relating to such goods, fees and warehousing rent included, but also for all other claims against the customer.

2. The operator shall not, however, be entitled to detain such goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution.



3. The operator may, after giving adequate and timely notice, cause to be sold the goods detained by him up to the amount necessary to satisfy his claim. The conditions and procedures of the sale shall be governed by the law of the place in which the terminal is situated.

4. The provisions of this article shall not affect the rights of which any third party might avail himself over the goods or over the proceeds of the sale thereof.

Article 8

1. In the performance of his obligations under Article 2 of this Convention, the operator is liable for loss resulting from loss of, or damage to, the goods, as well as from delay in delivery, unless the operator proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been handed over to the person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent operator having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered within / 60 / consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

4. The operator is liable for securities, money or valuable articles only if a special agreement to that effect has been entered into in writing.

5. Where fault or neglect on the part of the operator, his servants or agents combines with another cause to produce loss, damage or delay in delivery the operator is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the operator proves the amount of the loss, damage or delay in delivery not attributable thereto.

Article 9

1. (a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of Article 8 is limited to an amount equivalent to 2.5 units of account per kilogramme of gross weight of the goods lost or damaged.

(b) The liability of the operator for delay in delivery according to the provisions of Article 8 is limited to an amount equivalent to two and a half times the price payable for the safekeeping of those goods delayed, but not exceeding the total price payable under the contract for the safekeeping of the goods.

(c) In no case shall the aggregate liability of the operator, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. Unit of account means the unit of account mentioned in Article 15.

3. By agreement between the operator and the customer, limits of liability exceeding those provided for in paragraph 1 may be fixed.

Article 10

1. The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss or damage to the goods covered by the contract for the safekeeping of goods, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the operator, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

3. Except as provided in Article 11, the aggregate of the amounts recoverable from the operator and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

Article 11

1. The operator is not entitled to the benefit of the limitation of liability provided for in Article 9 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the operator done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of Article 10, a servant or agent of the operator is not entitled to the benefit of the limitation of liability provided for in Article 9 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 12

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the customer to the operator not later than the working day after the day when the goods were handed over to the person entitled to take delivery of the goods, such handing over is prima facie evidence of the delivery by the operator of the goods as described in the document issued by the operator or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the person entitled to take delivery of the goods.

3. If the state of the goods at the time they were handed over to the person entitled to take delivery of the goods has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the operator and the person entitled to take delivery of the goods must give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the operator within 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of the goods.

6. For the purpose of this article, notice given to a person acting on the operator's behalf is deemed to have been given to the operator.

### Article 13

1. Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the operator has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

### Article 14

1. Any stipulation in a contract for the safekeeping of goods concluded by an operator or in any document evidencing such a contract is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

2. Notwithstanding the provisions of paragraph 1 of this article, an operator may increase his responsibilities under this Convention.

#### Article 15

1. The unit of account referred to in Article 9 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 9 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in Article 9 as is expressed there in units of account. Contracting States must communicate to the Depositary Government the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

Article 16

This Convention does not modify the rights or duties of a carrier which may arise under any international Convention relating to the international carriage of goods.

Article 17

Each Contracting State undertakes that not later than six months after the date of entry into force of the present Convention in respect of that State, it will guarantee effect to the rules on the liability of international terminal operators contained in this Convention by:

- (a) introducing the said rules into its law or
- (b) taking the necessary steps to ensure their validity in the form of administrative regulations or general conditions.

Article 18

1. Each Contracting State agrees to recognise those operators who undertake to apply the rules on the liability of international terminal operators contained in the present Convention as International Terminal Operators (ITO Operators).

2. Such operators shall be authorised to use the ITO logotype, the form of which is set out in the Annex to this Convention.

Article 19

Each Contracting State undertakes to regulate the use of the term "ITO Operator" and of the ITO logotype within its territory and to introduce, if it considers it necessary, appropriate sanctions in the event of their misuse.

Article 20

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

Article 21

1. The present Convention shall be open to signature by all States at ..... from ..... 19.. to ..... 19..

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States.

3. After ..... 19.., this Convention shall be open indefinitely for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession shall be deposited with the Government of ....., which shall be the Depositary Government.

Article 22

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, with the Depositary Government.

2. For each State which becomes a Contracting State to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force six months after the deposit of the appropriate instrument on behalf of that State.

Article 23

No reservations may be made to this Convention.

Article 24

1. If a State has two or more territorial units in which different systems of law apply to matters respecting the safekeeping of goods, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

Article 25

1. At the request of not less than one-third of the Contracting States to the present Convention, the Depositary Government shall convene a Conference for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

Article 26

1. Notwithstanding the provisions of Article 25, a Conference only for the purpose of altering the amount specified in Article 9 and paragraph 2 of Article 15 of this Convention or of substituting either or both of the units defined in paragraphs 1 and 3 of article 15 by other units shall be convened by the Depositary Government in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision Conference shall be convened by the Depositary Government when not less than one-fourth of the Contracting States so request.

3. Any decision by the Conference must be taken by a two-thirds majority of the participating States. The amendment shall be communicated by the Depositary Government to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted shall enter into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance shall be effected by the deposit of a formal instrument to that effect, with the Depositary Government.

5. After the entry into force of an amendment, a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not, within six months after the adoption of the amendment, notified the Depositary Government that they are not bound by the amendment.



6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

#### Article 27

1. Any Contracting State may denounce the present Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification.

#### Article 28

1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of ....., which shall transmit certified copies thereof to each of the signatory and Contracting States, and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and Contracting States, and to the International Institute for the Unification of Private Law, of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance, approval, or accession;
- (c) any date on which this Convention enters into force in accordance with Article 22;
- (d) any declaration received in accordance with Article 23;
- (e) any declaration received in accordance with Article 24 paragraph 2, and the date on which the declaration takes effect;
- (f) any requests for the revision or amendment of this Convention and the convening of a Conference for such revision or amendment in accordance with Articles 25, paragraph 1 and 26, paragraph 2;

- (g) any denunciation received in accordance with Article 27 paragraph 1, and the date on which the denunciation takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorised to that effect, have signed the present Convention.