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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

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on the preliminary draft Convention
on the liability of international terminal operators

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Observations on the draft text

1. ITO - Licensing system (Articles 18 and 19)

This alternative solution, which is in opposition to the classic type of international Convention, has been further examined in consultation with the interested insurance, transport and commercial circles. The basic idea is comparable to that of the IATA licensing system for authorised IATA agents. It is well known that under this system IATA members may only act through those agents who have been approved by a two-thirds majority of an IATA Conference. This approval is preceded by an examination of the solvency and commercial soundness of the applicant. Such authorised IATA agents must conclude a standard agency agreement, breach of which may result in the withdrawal of the licence.

This system functions satisfactorily for reasons which are peculiar to international air traffic. The first of these is that IATA is a worldwide organisation, the members of which are responsible for 90% of international airline traffic. The second is the concentration of capital invested in international air traffic. About 60% of IATA members are State owned enterprises. This percentage is even higher if one leaves aside the United States air fleet which is organised on an exclusively private basis.

These are conditions which do not exist in international transport by road, inland waterway and sea and in consequence we must reiterate our preference for regulation by a Convention as is usual in international transport law.

2. Scope of application of the future Convention

From the observations made under paragraph 1, it follows that the Convention must contain a provision regulating its geographical scope of application. A model for such a provision could, subject to some textual amendments, be Article 2, paragraphs 1 and 2 of the Hamburg Rules. It is essential when making this reference to the Hamburg Rules to contemplate a maximum number of connecting factors.

2a. Definition of the ITO

It likewise follows from the remarks made in paragraph 1 that the definition of the ITO cannot be founded on a licensing system.

3. Definition of the concepts of "servants" and "agents"

From the viewpoint of continental lawyers at least, it is not a merit of the Hamburg Rules that, by referring to "servants and agents", they have once more introduced in the rules laid down by the Convention the risk of differences in the interpretation of the concept of an "agent".

For this reason one should either leave out completely such concepts and refer generally in Articles 8, 10 and 11 etc. to persons of whose services the ITO avails himself or alternatively define those concepts. The first solution would seem to be preferable.

4. The safekeeping of the goods as the basis of the rules.

Article 1, paragraph 1 and Article 2, paragraph 1 lay down the principal duty of the ITO as that of ensuring the safekeeping of goods. This is doubtless the main purpose of the rules. Article 2, paragraph 2 gives examples of other services. Two consequences derive from this. The ITO is always a person who warehouses goods, exercises custody over them or is responsible for their safekeeping. He may, in addition, undertake the performance of other services such as stowage, loading, unloading etc.

Would, however, a lighterman or a stowage or transshipment firm etc. which does not warehouse goods be an ITO within the meaning of the definition and for the purposes of Article 2, paragraph 2? If the intention is that the rules should not only apply primarily to warehousing operations but at the same time govern other operations involving handling before, during or after carriage, then both Article 1, paragraph 1 and Article 2 would need to be amended.

5. Ad Article 3

Article 3 is the most important provision of the Convention, intended in particular to fill the gaps in Article 4, paragraph 2 of the Hamburg Rules. The present draft rules need to be examined from three angles.

1. Should the ITO only be obliged to issue a document acknowledging receipt of the goods "at the request of the customer", and in the event of a dispute how can the latter prove that he made such a request?
2. What is the evidentiary value of such a document?
3. What are the legal consequences of the ITO's failure to fulfil his obligation?

5.1 The ITO should always be obliged to issue a document acknowledging receipt of the goods as in the event of a dispute this is the most important documentary evidence. Only in those cases where the customer needs a negotiable document (in the sense of the "Lagerschein" of German law), would the formula "at the request of the customer" be justified.

5.2 The document acknowledging receipt of the goods should constitute prima facie evidence, that is to say it would place upon the ITO the burden of proving the contrary. At the same time, it should be determined in this connection in respect of which indications it would be possible to enter reservations (number of packages or weight).

The possibility of making general reservations on account of the impossibility of making an adequate check would render the whole provision ineffective. One might consider, in respect of goods in bulk (10.000 sacks of phosphate), the extent to which, in the interest of the ITO and of realistic and enforceable rules, provision should be made for legitimate tolerance. In the case of negotiable documents, and by analogy to Article 16, paragraph 3 (b) of the Hamburg Rules, the possibility should be excluded of evidence to the contrary being brought against third parties in good faith.

5.3 Sanctions should be provided in the event of failure to observe the duty to issue a document acknowledging receipt of the goods bearing the date of the handing over and taking delivery of the goods.

Of all the possible solutions, we would consider most practical the approach based on a legal fiction. If the ITO fails to observe his duty to issue a document acknowledging receipt of the goods or if he issues the said document in a way which does not conform to the requirements of Article 3, paragraph 2 (which should consequently be amended in this sense), it shall, in the absence of proof to the contrary, be presumed that he took delivery of the goods in the circumstances appearing from the documentary evidence provided by the customer (which means the last document in the possession of the customer relating to the goods, including his own exit certificate).

6. In Article 6, paragraph 1, the following words should be added: "provided that they have been published or otherwise made available". Article 6, paragraph 2 recalls forwarding agency practice ("Übernahmesatz"). If the provisions are to be maintained, they should be spelt out in more detail, for instance by clarifying whether or not extraordinary expenses caused by third parties (demurrage, overtime payments, the cost of crane operations and any other additional expenses), should be included.

7. Does Article 7, paragraph 1 confer a general lien, by including all claims against the customer independently of whether they relate to the handling operations concerned?

8. The time within which notice of loss or damage must be given is, according to Article 12, paragraph 6, observed also when such notice is given to a "person acting on the ITO's behalf". Is this also the case when notice is given to a member of the crew of a lighter or to a docker etc.? It is perhaps necessary to make an extension analagous to that in Article 19, paragraph 8 of the Hamburg Rules.