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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 second session of the Group
held in Rome from 23 to 26 January 1979

Rome, March 1979

The second session of UNIDROIT's Study Group on the warehousing contract was held in Rome at the headquarters of the Institute from 23 to 26 January 1979 under the chairmanship of Professor Kurt GRÖNFORS (Sweden), member of the Governing Council of UNIDROIT.

The session was opened at 10.15 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.

The Group adopted the agenda set out in ANNEX II.

Item 2 on the agenda - Consideration of the preliminary draft Convention on the liability of international terminal operators

After a brief introduction by Mr. EVANS, Deputy Secretary General of UNIDROIT, of the new documentation placed before the Study Group, the CHAIRMAN invited the participants, and especially the newcomers to the Group, to express their views on questions of a general character before proceeding to a detailed examination of the preliminary draft Convention on the Liability of International Terminal Operators which had been prepared by the Secretariat on the basis of the directives laid down by the Study Group at its first session.

Mr. VAN ALSENOY, representing the International Federation of Freight Forwarders Associations (FIATA), recalled that in the past FIATA had always followed with keen interest UNIDROIT's work in connection with transport law and stated that this was also the case as regards the work now underway on the warehousing contract. He felt obliged, however, to point out that he had understood that the subject under study was warehousing stricto sensu, that is to say the safekeeping of goods for a certain period of time independently of transport operations. It was, in his view, desirable to elaborate general conditions regulating the warehousing operations which he had in mind, conditions which would deal with the question of liability and the issuance of a document which might, or might not, be of a negotiable character and which could be of service to banks as representing the goods entrusted to the warehouseman.

It seemed, however, that the draft prepared by the Secretariat of UNIDROIT and based on the deliberations of the Study Group at its first session, was concerned with an entirely different question, namely warehousing linked to transport operations and in this connection he noted that both in the draft Convention and in the preceding work of the Group the all-important question of insurance had been ignored. As a rule, in particular in the case of carriage by sea, the cargo would be covered by an insurance

policy against all risks from warehouse to warehouse. Provided that such insurance had been taken out, the customer would not be interested in the liability régime applicable to the warehouse where the goods were stored, whether this be a port terminal, or a public warehouse such as a customs warehouse.

The importance of insurance could be illustrated by the attitude of the wharfingers of the port of Antwerp who stipulate that goods deposited with them must be insured by the person depositing them against the risks of fire and theft and that they accept no liability for loss or damage arising from such events. The question therefore boiled down to one of insurance of the goods before, between and after carriage and he feared that the end-result of the exercise upon which the Study Group was engaged would be to increase costs by covering two or three times the risks to goods which were already covered by insurance.

Professor RAMBERG, representing the International Maritime Committee (CMI), considered that while it was true that international Conventions on the carriage of goods contain provisions governing the period of the operator's liability, as was the case with the latest such instrument, the Hamburg Rules, it was also true that they contain a vacuum in regard to liability before and after transport operations. He recognised the force of the observations made by Mr. Van Alsenoy and recalled that such arguments were always advanced in connection with the international regulation of liability for the carriage of goods. The CMI had made observations on the matter at the preparatory meetings which had led up to the adoption of the Hamburg Rules but the general view which had prevailed was that the determination of the liability régime should precede the consideration of insurance questions.

Whatever view one might take of the Hamburg Rules, it might seem to be peculiar to attempt to streamline only the rules governing liability during actual carriage operations for if one were to say that it is the exclusive function of cargo insurance to cover the gaps left by the international transport Conventions, one might ask why it was thought desirable to lay down mandatory rules concerning the carriage itself, which are intended to benefit the seller and the buyer of the goods. Moreover, he recalled that statistics seemed to show that most cases of damage to, or loss of, goods arise before, and more especially after, carriage, at least in the maritime sector and for this reason the CMI considered the work in progress in UNIDROIT to be worthwhile.

As to the methodological approach, three solutions seemed to be available. In the first place, one might envisage a mandatory Convention, such as the Hamburg Rules, which was the traditional approach in the international instruments governing the carriage of goods. The second solution would be that of an international Convention, the provisions of which would be mandatory on condition that certain requirements were complied with. This

had been the case with the draft TCM Convention, whose application was not ipso facto mandatory but only if a CT document was issued, and in the area of warehousing, the requirement which had been suggested was that the operator hold himself out as an international terminal operator for the purposes of the Convention. The third solution which might be contemplated was the elaboration of general conditions which would, hopefully, be accepted on a voluntary basies by terminal operators throughout the world.

In any event, general conditions would always be needed to cover those matters which were not dealt with in the Convention itself and here the CMI, the International Chamber of Commerce and the International Association of Ports and Harbours would in any event seek to cooperate with a view to reaching results beneficial to international trade. It was, in his opinion, essential to ensure that the general conditions which might be worked out by the professional Organisations would be compatible with the draft Convention under preparation by UNIDROIT, especially as regards the liability régime to be adopted, for otherwise chaos would result. For these reasons, the CMI was desirous of remaining in close contact with UNIDROIT.

In theory, he would like to see the adoption of a classic mandatory Convention governing the liability of terminal operators, but he doubted very much whether it was realistic to assume that Governments and the interested commercial parties would accept such a solution in view, in particular, of the technical difficulties in delimiting the scope of such a mandatory Convention applicable to matters customarily regulated by national law, all the more so if it was recognised that an international Convention dealing with the warehousing of goods in international transport would deal with only fifty percent of the problem and that it might be desirable also to regulate other ancillary services.

Finally, as regards the elaboration of general conditions, practice showed that they would stand or fall on their merits so might it not be appropriate to envisage a Convention whose effectiveness would depend on an appeal to the operators voluntarily to accept its provisions, counting on their cooperation in its mandatory application if the régime appeared to them to be a satisfactory one ?

Dr. RICHTER HANNES expressed her appreciation to the Secretariat for the work which had gone into the preparation of the preliminary draft Convention laid before the Group, while regretting the fact that there was not a more substantial representation of the developing countries, as she feared that without their participation in the work of the Group at this early stage its labours might prove to be in vain.

Following the observations of the representatives of the CMI and of FIATA, it seemed to her that the general debate on the nature of the future instrument had now been joined. Her own preference, as she had already stated at the first session of the Group, was for the classic type of mandatory

international Convention. To explain her position, she recalled that the main objective of the new Convention was to fill the gaps left by the existing mandatory international Conventions and, in particular, those left by the Hamburg Rules. What was, therefore, necessary, was to secure the right of recourse of carriers and other persons in respect of damage arising before the loading, and in particular after the unloading, of goods involved in international transport operations. The basic problem was not so much that of the liability régime to be applied, as that of the obligation of the warehouseman and of other handlers to issue a document for otherwise the right of recourse would be only theoretical and of no practical value against the intermediaries concerned.

The adoption of a traditional mandatory Convention, as envisaged by her would, moreover, do no more than what was already done by the French law of 1966 which had, on a mandatory basis, aligned the liability of handlers of goods on that of maritime carriers and in practice provided those carriers with an effective recourse remedy.

As to the "licensing" system on which Articles 17 to 19 of the preliminary draft Convention prepared by the Secretariat were based, this reminded her of the licensing system for IATA agents to which she had drawn attention in the written observations submitted by her. The IATA system, however, worked only because of the special conditions of international air traffic whereunder ninety percent of airlines are IATA members. In no other mode of transport did such a financial concentration exist and it was difficult to envisage a system along the lines of that practised by IATA working without the backing of a worldwide organisation in the sector concerned.

Furthermore, she considered that there was in practice little difference between the licensing system proposed in respect of international terminal operators and general conditions and in her view the only effective solution would lie in the adoption of a traditional mandatory Convention. In this connection, she recalled that broadly speaking Governments might be divided into three categories, namely those concerned primarily with the interests of shippers and cargo owners, those chiefly interested in the safeguarding of the position of carriers and finally those who were concerned with the interests of both and she therefore felt that the chances of ratification by States of a mandatory international Convention regulating the liability of terminal operators was neither greater nor less than that of any other instrument in the field of international transport law.

The CHAIRMAN stated that he could not grasp the analogy suggested with the IATA licensing system. IATA agents had, in effect, a sort of exclusive contract and were under a duty to sell to the public a certain number of airline tickets, failing which they would cease to be IATA agents. The system proposed by the preliminary draft Convention for international terminal operators was a different one and to speak of it as a "licensing" system was

perhaps a misnomer. What was being suggested was a régime which would be mandatory provided certain requirements were met, as had been the case with the CT operator under the draft TCM Convention. The functions therefore of the international terminal operator were very different from those of an IATA agent.

In reply, Dr. RICHETR HANNES admitted that all detailed comparisons would yield differences but she maintained that common factors would emerge the further the analysis was developed in the abstract and insisted that similar features underlay the IATA licensing system and that proposed in respect of international terminal operators. As to the parallel drawn between the latter operators and combined transport operators she did not find this convincing. The combined transport operator was a new juridical figure and it was not unreasonable to suppose that, in the absence of legal rules, a Convention calling for certain requirements to be satisfied before its mandatory character could be asserted would be accepted if commercial practice could fall back on no viable alternative. On the other hand, intermediaries had for hundreds of years been involved in international transport operations; national regulations and practices had developed and it was arguable that the operators directly concerned might not be anxious to see new developments affecting them. For this reason it was essential, if one seriously desired to move in the direction of unification, to think in terms of an international mandatory Convention if the work in progress in UNIDROIT were to have any real chance of success.

For his part, Professor HELM saw two advantages in the draft prepared by the Secretariat. On the one hand it greatly facilated the work of the Group while on the other it followed closely in many respects the Hamburg Rules, in particular as regards the liability régime, concerning which the Group had at its first session agreed that the draft should establish a low standard of liability for international terminal operators. It was, however, of fundamental importance to decide whether the proposed "licensing" system would fulfil the aims which the Group had set itself. In principle, he agreed with the remarks made by Dr. Richter Hannes regarding the IATA licensing system although he pointed out that IATA had never sought to lay down minimum rules governing liability in the context of international air traffic as such rules had already been established by the Warsaw Convention prior to its creation.

He was, however, not opposed to the basic strategy underlying the provision of two options under the draft prepared by the Secretariat although he felt that it was superfluous in Article 1 already to introduce the concept of the authorised international terminal operator, a juridical figure whose existence should not be touched upon until Articles 17 to 19 of the draft where the alternative optional system could be developed in detail once the substantive provisions had been set out in Articles 1 to 16 along the lines of a traditional mandatory Convention.

Professor RODIERE also paid tribute to the preliminary draft Convention submitted to the Study Group for consideration and which seemed to him to have met the preoccupation expressed by the Chairman at the first session of elaborating a mechanism under which the Convention would have a mandatory effect while at the same time leaving it to the terminal operators to accept its provisions and to regulate the performance of their obligations accordingly, in particular by the issuing of a document. It was in this connection that he wished to level a slight criticism at the draft, namely its failure to deal with a question which, left untreated, would deprive the future Convention of much of its interest, that is to say the negotiability of the document to be issued by the terminal operator. He had in mind, in particular, the warehousing of goods without it being known on their arrival at the port of destination who would be the ultimate consignee. This was frequently the case in the Middle East and it was, in his opinion, of the utmost importance to provide for security of title and that the person entitled to the goods should know that they are in conformity with the description in the document issued by the terminal operator. The guarantees provided by such a document would be similar to those available under a maritime bill of lading and in this connection the control mechanism furnished by Articles 18 and 19 of the preliminary draft Convention was of especial significance.

Finally, he expressed the opinion that the parallel suggested with the IATA licensing system was not convincing as IATA was concerned with the setting of tariffs rather than with the elaboration of rules governing liability, while he wished to reserve judgment on the definition of the international terminal operator under Article 1 until further discussions had clarified the matter.

Mr. BERGFELT, speaking on behalf of the International Association of Ports and Harbours (IAPH), informed the Group that the preliminary draft Convention prepared by the Secretariat of UNIDROIT had been considered at a meeting of a number of members of the Legal Committee of IAPH and that the general attitude towards it had been positive in that the draft was aiming at filling in gaps in existing Conventions and was offering what seemed to be an attractive new scheme in the form of the proposed licensing system.

One difficulty arose, however, from the fact that there are wide divergencies in the organisation of different ports. In some ports, the operations under consideration were carried out by companies specialised in terminal operations while in others they were exercised by stevedores, who had no international organisation to represent them but to whom the draft should be distributed so that they might take steps to safeguard their interests and to make known their views. It would therefore take some time to get in all the detailed comments but nevertheless the first reactions were, as he had already stated, favourable.

Mr. REES, representing the International Chamber of Commerce (ICC), recalled the fruitful collaboration which had existed between the ICC and UNIDROIT in the past and expressed his satisfaction that the former was now represented officially for the first time on the Group although it had, of course, already been informally represented by Professor Ramberg at the first session.

The starting point of the ICC's observations was that it was far from convinced that a mandatory international Convention was, in the present circumstances, the best tool to govern relations between parties in international transport, especially in view of the ICC's dissatisfaction with the final result of the UNCITRAL Conference for the adoption of the Hamburg Rules. Changes in transportation techniques and in the institutional framework of the parties were occuring at great speed so the ICC was interested in a compromise between the traditional mandatory Convention and one whose provisions would be rendered effective once certain requirements were satisfied. The ICC was, moreover, committed to working with other commercial Organisations with a view to the preparation of uniform rules on the warehousing contract, and in particular on the elaboration of general conditions, always provided however that the need for them was demonstrated.

He detected, however, some confusion in the general debate so far for he wondered whether the Group was not trying to regulate the international freight forwarding profession, an attempt at which had already proved unsuccessful in the past. His understanding of the object of the exercise was rather to seek to regulate warehousing operations which might be performed by a forwarder, a carrier or a professional warehouse, whether run on a public or a private basis.

On the problem of the negotiability of a warehousing document, the ICC had no strong views at present but he would certainly make enquiries on the matter although it would be fair to say that hitherto ICC circles had not indicated the need for such a document. However, he wished to state that the utmost caution should be exercised in the establishment of new documents in international Conventions in view of the trend towards a much less important rôle for documentation in the context of international transport.

In conclusion, then, the ICC was committed to working with the other commercial Organisations with a view to the preparation of general conditions, should they prove necessary, and to cooperating also with the Institute so that there would be compatibility between any future UNIDROIT Convention on the liability of international terminal operators and such general conditions.

As to the question of the need for a negotiable document covering the period when goods are in a warehouse, Professor RAMBERG agreed that in some cases a maritime bill of lading might still have a rôle to play after the conclusion of carriage operations but this would not always be the situation, as was illustrated by Professor Rodière's example. At the time the goods are

deposited in the warehouse, the bill of lading may have fulfilled its functions and the goods may be sold from the warehouse by the shipper or by a person who bought them during the transport. In this connection, he stated that in circles in London concerned with the commodities market, requests had been made that persons in other countries should provide them with a warehousing warrant which would permit the sale of the commodities against delivery of the document, which would therefore have to be of a negotiable character. The availability of such a document could also be of importance for tax reasons as proof that the goods had actually been acquired so that they might be entered in the balance sheet at the end of the year and written off as assets. In the absence of a negotiable document, it would be necessary for the purchaser, or his agent, to take physical delivery of the goods in order for his title to them to be recognised. It seemed, therefore, that there might be a need in international trade for such a negotiable document.

Professor HELM recalled that there exists in the Federal Republic of Germany a document, the so-called "Lagerschein", which is transferable and under which the licensed warehouseman who issues it incurs an unlimited liability. Most warehousemen's contracts were not, however, based on this document and instead recourse was usually had to the general conditions of the German freight forwarders whose document was not negotiable and who incurred thereunder a very low liability. In Germany, the negotiability or otherwise of a document was not of great importance as claims were freely assignable and he was in consequence somewhat sceptical as to the need for a negotiable document.

Mr. VAN ALSENOY agreed that international trade might have some need for a warehouseman's document representing the goods, whether of a negotiable character or not, once the carriage operations had been completed, but he could not see the need for a negotiable document when the warehousing was directly connected with carriage operations.

Professor RODIERE recognised that where a definite sale contract had been concluded and the carriage operations were related to such a contract, then the issuance of a maritime bill of lading might be sufficient. International trade, however, was extremely diversified and in many cases the goods might, in the course of international carriage, come into the hands of a non-carrying intermediary. In his opinion, the application of different liability régimes was a hindrance to international trade and the French law of 1966 had sought to unify the rules governing the liability of carriers and handlers (both stevedores and "acconiers"). A similar problem was posed when the goods were in the custody of warehousemen and he reiterated his view that the issuance of a document representing the goods when lying in a warehouse and permitting the carrying out of trade operations was a question of the greatest importance.

As regards a suggestion by Mr. Rees that since it was customary for shipments to the Middle East to be consigned to a bank and that a notified party would be indicated in the bill of lading, usually the agent of the seller in the exporting country or a potential buyer, then one might consider the future sale of the goods to be a national sale with the consequence that the realm of international commerce had been left behind, Professor RODIERE drew attention to the common practice in the Middle East, for example Beirut, where goods arriving would subsequently be dispatched to many other countries although at the time of their arrival their future destination was unknown. The continuing international character of such operations was in his opinion indisputable but even when the goods were to be sold in the country where they had been unloaded he considered that one should view the transaction as a whole and thus affirm its international character.

In seeking to sum up the preliminary general discussion, the CHAIRMAN noted that for the most part the reactions of the interested commercial Organisations to the UNIDROIT initiative seemed to be positive, in particular as regards the unconventional idea launched at the first session of the Study Group of preparing an international Convention containing a hard core of provisions which would, in certain circumstances, be of a mandatory character and which would be supplemented by general conditions to be elaborated by the various terminal operators throughout the world on the basis of standard conditions worked out by the interested international commercial Organisations.

He noted, however, that some members of the Group had advocated the preparation of a classic type of international mandatory Convention but he feared that if such a solution were to be chosen then the success of the venture might be compromised, especially on account of the wide differences currently prevailing in the rules applied by ports and harbours throughout the world. As regards the question of liability, the situation could quite simply be said to be chaotic, as levels of liability ranged from very high ones down to virtually zero, although in the former case damages would seldom be paid as the requirements were but rarely fulfilled. Again, differences in the liability systems existed in connection with the burden of proof. If it were desired to achieve a degree of uniformity, then he considered that what was perhaps inappropriately termed the "licensing" system coupled with incentives might be an attractive way of obtaining the cooperation of terminal operators.

Moreover, the classic model of the mandatory Convention seemed to be becoming increasingly outmoded in many fields as the number of States whose agreement was necessary for the adoption of international Conventions had in just a few decades risen from 50 to 150. Many of these States were developing countries with their own ideas as to how problems should be solved and he agreed with the observations of Dr. Richter Hannes regarding the need for a substantial representation of developing countries in the work of the Study Group.

Finally, he stressed the importance of the offers of cooperation from the interested commercial Organisations in the elaboration of standard conditions to supplement the international Convention which would, hopefully, result from the work in progress in UNIDROIT, although there again the path was not free from difficulties.

Mr. MATTEUCCI, President of UNIDROIT, recalled that the Institute had examined in depth the methodological problems associated with the implementation of uniform laws some years ago at a special meeting of international Organisations. While agreeing with the remarks which had been made to the effect that in many areas the traditional mandatory Convention was becoming something of an anachronism, he felt that it would be premature for the Study Group to discuss the question at length at the present time and that in any event a final decision would be taken at a later stage at governmental level, perhaps in the framework of a Committee of Governmental Experts to be convened by UNIDROIT to undertake further work on the draft Convention on the warehousing contract. The Study Group might, therefore, limit itself to suggesting a number of alternative solutions which could be considered.

Dr. RICHTER HANNES expressed support for the views put forward by Mr. Matteucci and insisted in particular that the Group should not prejudice any decision which might ultimately be taken by governmental experts as to the character of the future instrument. In her opinion, the Group should prepare on the one hand an international Convention of the traditional kind and, as an alternative, a text of a less mandatory character. In the meantime, and pending the final elaboration of an international Convention, the work of the private Organisations on the preparation of standard conditions could proceed.

The CHAIRMAN of the Committee once again stressed the desirability of cooperation between UNIDROIT and the commercial Organisations, especially the ICC, CMI and IAPH and insisted that to ensure their continuing interest in UNIDROIT's work it was necessary to develop the outlines of an alternative solution to the traditional mandatory Convention, which might be interwoven with standard conditions.

Mr. REES supported the Chairman's analysis of the situation and in particular his comments as regards the suitability in the present day and age of the international mandatory Convention as a tool for unification. The ICC was not interested in the working out of such an instrument by UNIDROIT and could not wait until the end of the work for the taking of a decision as to the form of that instrument. It would therefore appreciate some indications at a fairly early stage as to the priority solution envisaged. He further stated that the concept of a system whereby States would cooperate through the medium of intergovernmental and private commercial Organisations in the preparation of a Convention and of general conditions was useful, and indeed fundamental. It was

therefore of the utmost importance to avoid a situation arising similar to that which had come about in connection with combined transport where there was a total disharmony between on the one hand the rules worked out by the ICC at a private level and widely applied in practice and on the other the provisions contained in the draft Convention on multimodal transport at present being elaborated within the framework of the United Nations.

Mr. EVANS recognised the need to lay the basis for cooperation between UNIDROIT and the interested commercial Organisations but on the other hand stressed that it was not possible to take any final decision on the character of the future instrument on the warehousing contract until such time as the Governing Council of the Institute had been seized of the question. He considered therefore that all options should be left open for the time being although past experience indicated that it would be wise to attach importance to the observations which the interested Organisations would make on the text of the draft Convention submitted to the Council by the Study Group.

The CHAIRMAN then proposed that the Group proceed to an examination of the preliminary draft Convention on the Liability of International Terminal Operators prepared by the Secretariat of UNIDROIT (Study XLIV - Doc. 5), in particular in the light of the written observations formulated by Dr. Richter Hannes contained in Study XLIV - Doc. 6. On a proposal by the Secretariat, the Group agreed that the report on the session should not reproduce in detail the discussion on the preliminary draft Convention but that the explanatory report on the draft should indicate in depth the reasons which led to the adoption of the provisional text as well as proposals which were rejected(1).

The Group made a number of amendments to the preliminary draft Convention submitted by the Secretariat and the revised text is reproduced in ANNEX III to the present report.

Item 3 on the agenda - Other business

With regard to the future work of the Study Group, the CHAIRMAN considered that it was now important to seek the reactions of trade circles and of Governments to the text prepared by the Group and in this connection he stressed that its provisons must in no way be regarded as final. The ambition of the Group, as he saw it, had been to prepare a text indicating the basic features of the future Convention and not to resolve all questions of detail. This was as much as could be done at present and also perhaps as much as was needed by the commercial Organisations, the ICC, the CMI and IAPH, to embark on the preparation of standard conditions pending further development of the Convention itself.

(1) This explanatory report is at present under preparation by the Secretariat and will be published, together with the text of the preliminary draft Convention, in Study XLIV - Doc. 8.

The text of the draft Convention, together with the Secretariat's explanatory report, would now, in accordance with the institutional procedures of UNIDROIT, be transmitted to the Governing Council of the Institute which, if it saw merit in the text, would authorise its circulation for comments and, in the light of the reactions to it, as well as of the work which would in the meantime be conducted by the commercial Organisations, a further session of the Group could be convened, hopefully with a considerably enlarged membership. The Group would then finalise the text of the draft Convention and at that stage one would be able to see more clearly how the Convention should be implemented and in which forum it could be adopted.

Mr. CHOPRA much regretted that his late arrival, due to transport delays, had prevented him from attending the first part of the session. He stated, however, that in view of the gradual codification of aspects of international trade law in the various international Organisations, India favoured the preparation of uniform rules on the liability of the international terminal operator although it considered that such unification should not bring about a large increase in the cost of the operations concerned.

In reply to a question from Mr. MATTEUCCI as to the Organisations which would sponsor the standard conditions supplementing the Convention and how they would be brought into operation, Professor RAMBERG stated that no definite answer could be given at this juncture. As to the implementation of the standard conditions, it must be recalled that circumstances vary widely from port to port. In some ports the conditions might be included in the tariffs or perhaps their application might be made a condition for the leasing of property to terminal operators while in other cases, for example inland terminals, the standard conditions might be incorporated or referred to in the general conditions of the operator or there might be a reference to them at the time of the conclusion of the contract, for example in the letters between the parties.

With regard to the Organisations sponsoring the standard conditions, he recalled the commitment of the CMI, the ICC and IAPH to cooperate in preparing the conditions although other Organisations were not excluded. FIATA in particular had not as yet taken a final decision on the question of its participation in the work. The first task was in any event to assemble the existing general conditions and to proceed to an analysis of them and it might therefore be preferable if not too many Organisations were involved in that preparatory work.

Mr. VAN ALSENOY stated that the decision to be taken by FIATA as to whether it would join in with the other Organisations in the preparation of standard conditions would be taken in the light of the reactions of users to a proposal for unifying the rules governing the liability of warehousemen and he recalled that in the field of forwarding agency it had been the users themselves who had expressed a decided preference for maintaining the existing situation where the conditions applicable vary from one country to another and who had

been indeed opposed to the introduction of uniform rules. He felt, however, obliged to state that under no circumstances could FIATA agree to having imposed on it general conditions worked out by other commercial Organisations in its absence and affecting the exercise of the profession of its members.

Mr. MERTENS, representing the International Road Union (IRU) announced that his Organisation supported UNIDROIT's work on the question in hand although he considered that there might be some misgivings on the part of a profession already subject to licensing systems in the exercise of its activities at an international level, at the idea of introducing a new licensing system to cover warehousing operations through an international Convention covering both private and public law matters.

As to the next steps to be taken in connection with the draft Convention, he recalled the opposition which had led to the failure of the TCM Convention and pointed out on the other hand the increasing use of the ICC rules on combined transport. He wondered therefore whether there might not be some merit in limiting the Convention in the first place to European States, then broadening its scope of application gradually to other parts of the world.

Dr. RICHTER HANNES considered that the debate which had followed the Chairman's outline of the future work on the draft Convention had raised a number of problems. As to the first of these, namely the elaboration of general conditions and the question of their sponsorship, she noted the absence from the Group of representatives from OCTI and UINF where contribution to the work could be extremely useful. Then again, as regards the general conditions contemplated, she wondered what would be their content. Would such conditions deal with the matters to be regulated by the future Convention ? If so, she feared for the fate of the Convention although the danger would not be so great if such conditions were restricted to those matters not dealt with in the Convention. Then again, might it not be possible for the general conditions themselves to be worked out in UNIDROIT together with the interested commercial Organisations ?

In connection with the suggestion that the text be elaborated in the first instance only with the European context in mind, she agreed that such a solution might be feasible if one were dealing only with terminal operations concerned with land transport but as the draft was designed also to cover such operations when linked to carriage by sea and by air, she deemed it necessary for all regions of the world to be involved in the working out of the draft Convention.

With regard to the procedure to be followed in the future elaboration of the draft Convention itself, she agreed with the Chairman that another session of the Group with the same limited composition would be superfluous but she could see much to be gained by holding a third session in a developing country, thus ensuring the presence of a number of representatives from such countries. She considered that the taking of such a step would do much to enhance the prestige of UNIDROIT in the future as well as that of the future Convention. Thereafter, the text could be submitted to the Governing Council and subsequently examined by a Committee of Governmental Experts. It might then be remitted to a small expert group and a final decision could be taken as to its submission to a Diplomatic Conference for adoption, to be convened either by UNIDROIT or by a United Nations agency.

The CHAIRMAN stated that he shared the preoccupations of Dr. Richter Hannes as regards the limited participation of the developing countries in the first two sessions of the Study Group but on the other hand he did not see the need for a third session of the Group at this stage. If it was agreed that it was premature to work out the text in any more detail now, then the question for the Group was whether it could be submitted in its present form to the Governing Council of UNIDROIT. He personally felt that the answer to this question should be in the affirmative and then, provided the Governing Council agreed to the circulation of the draft, one could envisage a third session of the Study Group to consider the reactions to the draft of States and the interested Organisations, to examine the new material which would in the meantime have been assembled, and to finalise the text of the draft.

Mr. EVANS also regretted that the efforts of the Secretariat to obtain greater representation from the developing countries at the second session of the Study Group had not met with success although he pointed out that at the session of the Governing Council, to be held in September 1979, the text would be subject to the scrutiny of members of the Council from a number of developing countries. If the text of the draft Convention were to be circulated after that session, it would be unrealistic to assume that the necessary consultations could be completed in time to inform the Council of them at its 1980 session. Hopefully, however, the Council might be seized of the question at its meeting in Spring 1981 on which occasion a decision could be taken regarding the reconvening of the Study Group or alternatively the setting up of a Committee of Governmental Experts although if the latter solution were to be adopted this would to a certain extent affect the decision as to who should convene the Diplomatic Conference for the adoption of the future Convention as the transmission of a text elaborated by a Committee of Governmental Experts of the Institute to another such Committee in a different Organisation might be open to the charge of duplication of effort. He felt, however, that this was a question which could not usefully be discussed in depth at the present time.

The CHAIRMAN noted that the timetable suggested by the Secretariat seemed to meet with the approval of the Group and, after warmly thanking all the participants for their cooperation which had resulted in the working out of the preliminary draft Convention on the Liability of International Terminal Operators, he declared the session closed.

ANNEXE I
ANNEX I

LISTE DES PARTICIPANTS
LIST OF PARTICIPANTS

MEMBRES
MEMBERS

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Deputy Secretary General, Secretary of the Committee

Me. Marie-Christine RAULT, Chargé de recherches / Research Officer

ANNEX II

A G E N D A

1. Adoption of the draft agenda.

2. Consideration of the preliminary draft Convention on the liability of international terminal operators.

3. Other business.

ANNEX III

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 thereto agreed as follows:

Article 1

For the purposes of the application of this Convention:

"International terminal operator (ITO)" means any person who undertakes /against payment/ the safekeeping of goods before, during or after international carriage, either by agreement or by actually taking in charge such goods from a shipper, carrier, forwarder or any other person and with a view to their being handed over to any person entitled to take delivery of them;

"Customer" means any person, including a consignee, carrier, forwarder or receiving agent, by whom or in whose name /or on whose behalf/, a contract for the safekeeping of goods has been concluded with an ITO, or any person by whom, or in whose name /or on whose behalf/ the goods have actually been delivered to the ITO 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/;

"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.

Article 2

1. The ITO shall be responsible for the safekeeping of goods from the time he has taken them in charge until their handing over to the person entitled to take delivery of them.

2. Furthermore, the ITO shall be responsible for such goods in respect of which he has undertaken to perform, or to procure the performance of, services such as loading, stowage, discharging or other similar services.

Article 3

1. The ITO shall, at the request of the customer, issue a dated document acknowledging receipt of the goods and stating the date on which they were actually taken in charge.

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.

3. Such a document is prima facie evidence of the contract for the safekeeping of goods and the taking in charge of the goods as therein described.

4. The document issued by the ITO may, if the parties so agree, and the applicable national law so permits, contain an undertaking by the ITO to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

5. Nothing in this Convention shall prevent the issuing of documents by any mechanical or electronic means, if not inconsistent with the law of the country where the document is issued.

Article 4

1. The ITO 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 ITO 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 ITO 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 internal law of the place where the terminal is situated shall determine the effects which third party rights may have on the ITO's rights of detention and sale and on the proceeds of such sale.

Article 5

1. In the performance of his obligations under Article 2 of this Convention, the ITO is liable for loss resulting from loss of, or damage to, the goods, as well as from delay in delivery, unless the ITO 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 ITO 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 ITO 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 ITO, his servants or agents combines with another cause to produce loss, damage or delay in delivery the ITO is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the ITO proves the amount of the loss, damage or delay in delivery not attributable thereto.

Article 6

1. (a) The liability of the ITO for loss resulting from loss of or damage to goods according to the provisions of Article 5 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 ITO for delay in delivery according to the provisions of Article 5 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 ITO, 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 12.

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

Article 7

1. The defences and limits of liability provided for in this Convention apply in any action against the ITO 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 ITO, 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 ITO is entitled to invoke under this Convention.

3. Except as provided in Article 8, the aggregate of the amounts recoverable from the ITO 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 8

1. The ITO is not entitled to the benefit of the limitation of liability provided for in Article 6 if it is proved that the loss, damage or delay in delivery resulted from /a personal/ act or omission of the ITO 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 7, a servant or agent of the ITO is not entitled to the benefit of the limitation of liability provided for in Article 6 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 9

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 ITO 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 ITO of the goods as described in the document issued by the ITO 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 ITO 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 ITO 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 ITO's behalf is deemed to have been given to the ITO./

Article 10

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 ITO 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 11

1. Any stipulation in a contract for the safekeeping of goods concluded by an ITO 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 ITO may increase his responsibilities under this Convention.

Article 12

1. The unit of account referred to in Article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 6 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 6 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 13

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 14

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 15

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 16

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 17

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare by notification addressed to ..... that :

1. it will only guarantee effect to the rules on the liability of international terminal operators contained in this Convention in respect of operators who undertake to apply those rules;

2. it will recognise such operators as Authorised International Terminal Operators (authorised ITOs);

3. only such authorised ITOs may use the special logotype, the form of which is set out in the Annex to this Convention;

4. it will undertake to regulate the use of the term "authorised ITOs" and of the special logotype within its territory and to introduce, if necessary, appropriate sanctions in the event of their misuse.

Article 18

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 19

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 20

1. Notwithstanding the provisions of Article 19, a Conference only for the purpose of altering the amount specified in Article 6 and paragraph 2 of Article 12 of this Convention or of substituting either or both of the units defined in paragraphs 1 and 3 of article 12 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 21

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 22

1. The original of the present Convention, in the [.....] 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 16;

(d) any declaration received in accordance with Article 17;

(e) any declaration received in accordance with Article 18 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 19, paragraph 1 and 20, paragraph 2;

(g) any denunciation received in accordance with Article 21 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.