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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

(approved by the Study Group at its second session)

and

EXPLANATORY REPORT

(prepared by the Secretariat of UNIDROIT)

Rome, March 1979

PRELIMINARY DRAFT CONVENTION
ON THE LIABILITY OF INTERNATIONAL TERMINAL OPERATORS ⁽¹⁾

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.

(1) Articles 1 to 14 and Article 17 were approved by the UNIDROIT Study Group. The preamble, Articles 15 and 16 and 18 to 22 were not discussed at any length by the Group and responsibility for their wording, which is based on the pattern of other international instruments, remains that of the Secretariat of UNIDROIT.

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 Depository 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./

EXPLANATORY REPORT

I

HISTORICAL INTRODUCTION

1. It was in 1960 that the subject of bailment and warehousing contracts first appeared in UNIDROIT's general work programme. It had been included therein in the context of combined transport operations since it was here that the lack of uniform rules for the liability of those persons into whose custody goods had been entrusted, whether before, during or after the transport operation or operations had made itself felt. A preliminary report was presented on this aspect of the topic during 1965 and 1966 by Professor Le Gall⁽¹⁾ and although the Governing Council did not grant priority to the subject, it nevertheless requested the Secretariat to make enquiries of Governments and the appropriate Organisations so as to assess their possible interest in the topic and to give greater precision to its scope.

2. During the triennium 1972 to 1974 the Secretariat noted that a large amount of information assembled by other Organisations was becoming available and that the gap mentioned in the preceding paragraph was being fully brought out during the revision work on the "Hague Rules" within UNCTAD and UNCITRAL. In fact, during this work some countries, in particular developing countries, suggested that a study should be made of the liability of the independent contractors used by carriers by sea, especially warehousemen and storekeepers. A wish was, therefore, expressed by some countries, such as the Federal Republic of Germany, that UNIDROIT should begin studying the subject.

3. In this context the Secretariat of UNIDROIT requested the Governing Council, when the latter was examining the Institute's draft Work Programme for the period 1975-1977 on the occasion of its 53rd session held in Rome in February 1974, to consider the possibility of the preparation of uniform rules on the contractual position of warehousemen who are given custody of goods during the course of a transport operation and on the liability thereby incurred by them.

4. After deliberation, the Governing Council decided to instruct the Secretariat to bring up to date Professor Le Gall's report and, during the triennium 1975-1977, to give priority to the convening of a Study Group entrusted with the preparation, on the basis of the revised report, of draft uniform provisions on the liability of persons other than the carrier having custody of the goods before, during or after transport operations.

(1) U.D.P. 1966 - Etudes: XLIV - Doc. 1.

5. In accordance with these instructions, the Secretariat commissioned a preliminary report on the warehousing contract from Dr. Donald Hill, Senior Lecturer in Law at Queen's University, Belfast⁽²⁾. Dr. Hill outlined his report to the Council at its 55th session, held in September 1976, and in conclusion made a number of points which he believed to be of particular importance in the event of UNIDROIT's deciding to draw up uniform rules on the question.

6. After discussion, the Council instructed the Secretariat to transmit Dr. Hill's report to Governments and the Organisations concerned with a request for observations on the desirability and feasibility of preparing uniform provisions on the liability of persons other than the carrier having custody of goods before, during or after transport operations.

7. The bulk of the observations of Governments and interested Organisations⁽³⁾ favoured continuance of work on this subject by UNIDROIT and the Governing Council, at its 56th session held in May 1977, decided to set up a Study Group, the composition of which should reflect a balance between States with different economic and legal systems and also between the various modes of transport, to draw up uniform rules on the warehousing contract.

8. The Study Group held two sessions under the chairmanship of Professor Kurt Grönfors (Sweden), member of the Governing Council of UNIDROIT⁽⁴⁾. At the first session⁽⁵⁾, held in Rome from 10 to 12 April 1978, the Group had before it Dr. Hill's preliminary report, as well as the analysis of the replies to the enquiry conducted by the Secretariat. On the basis of this documentation, the Study Group gave lengthy consideration to such questions as the nature of a possible future instrument on the warehousing contract, the scope of the operations to be covered by it, the obligations of the warehouseman and the liability régime to which he should be subject, including rules on limitation of liability, the obligations of the customer, the warehouseman's lien etc. On many points a wide measure of agreement emerged and the Group instructed the Secretariat to prepare for its next session a set of draft articles based on the deliberations of the Group, accompanied by an explanatory report.

(2) Study XLIV -- Doc. 2, UNIDROIT 1976.

(3) Analysed in UNIDROIT 1977, Study XLIV -- Doc. 3.

(4) For a full list of the participants, see the Annex to the present document.

(5) For the report on which, see UNIDROIT 1978; Study XLIV -- Doc. 4.

9. In accordance with these instructions, the Secretariat prepared the text of a preliminary draft Convention on the liability of international terminal operators⁽⁶⁾ which was considered by the Study Group at its second session, held in Rome from 23 to 26 January 1979⁽⁷⁾.

10. In the course of this session, the Study Group made a number of modifications to the draft Convention elaborated by the Secretariat and instructed the latter to prepare an explanatory report for submission, together with the text of the draft Convention, to the Governing Council at its 58th session.

II

GENERAL CONSIDERATIONS

11. In embarking upon the preparation of uniform rules governing the warehousing contract, the Study Group recognised from the outset that its task was one of particular difficulty, the complexity of the problem having already been clearly illustrated by Dr. Hill in his preliminary report. Not only was there the distinction between long-term and transit warehousing but in addition customs and practices differed widely between one warehouseman or terminal operator and another, not only as regards the conduct of their operations but also in respect of the liability régime applied. Then again, unlike carriage operations, warehousing was a sphere of activity which had been left almost exclusively within the province of national regulation and it was to be feared that there might be strenuous opposition to the introduction of rules designed to bring about uniformity.

(6) UNIDROIT 1978, Study XLIV - Doc. 5.

(7) The report on this session is contained in UNIDROIT 1979, Study XLIV - Doc. 7.

12. Notwithstanding these difficulties, there was a general feeling that there was a real need for the introduction of uniform rules on the warehousing contract, especially in the context of the international carriage of goods. This latter subject had, to a very large extent, been regulated by international Conventions and yet, paradoxically perhaps, the most frequent cases of damage to, or loss of, goods could be proved statistically to occur before and after transport operations. In these circumstances it seemed important to try to fill in the gaps in the liability régime left by the existing international transport law Conventions and to ensure the availability of a recourse action to the carrier or the multimodal transport operator against non-carrying intermediaries such as the warehouseman or terminal operator, an objective which in the opinion of some members of the Group could only be achieved by insisting upon the issuance of a document acknowledging receipt of the goods. This document, it was further suggested, might be of importance in the facilitation of international trade if it were to be of a negotiable character.

13. Given these premises, the majority of the Group was of the opinion that it would be desirable to limit the application of the future instrument to international warehousing operations as it was felt that unification of domestic law, where there are substantial differences in conceptual approach between different legal systems, might be an unrealistic goal at the present time. A consequence of this conclusion was a decision to deal only with those warehousing operations which are linked to the international carriage of goods as it is this dynamic element alone which would permit the delimitation of the scope of the draft Convention in such a way as to exclude from its application purely domestic warehousing operations. It was further agreed that the future instrument should be applicable irrespective of the mode, or modes, of transport preceding or following the warehousing operations.

14. The regulation of international warehousing operations is, therefore, the main objective of the draft Convention but the Group recognised at the same time that modern terminal operators often undertake a number of services associated with the handling of goods, such as loading, stowage and unloading and while there was little support for the idea of extending the scope of the instrument to cover the performance of such operations in all cases, and thus to regulate what might be termed the "contrat de transit", it was nevertheless agreed that to the extent that the operator who undertakes the safekeeping of goods also undertakes to perform or to procure the performance of such operations, he should be liable in the same way and on the same basis as he would be in the performance of his obligation to ensure the safekeeping of the goods.

15. Another question which was the subject of lengthy discussion by the Group was that of the character of the future instrument. While some members argued in favour of a Convention of a traditional nature, the provisions of which would be of a mandatory character, others considered that it might be difficult to overcome the pressure of the professional interests involved on States not to adopt such a Convention and in consequence a compromise solution was reached. Those States which wished to do so might apply the provisions of the future instrument to all terminals operating on their territory while others should be free, in accordance with Article 17, to make a declaration to the effect that they would only guarantee their application to authorised international terminal operators who would be designated as such on condition that they voluntarily undertake to observe the minimum rules laid down in the Convention. Those pleading in favour of this latter solution considered that such voluntary acceptance of the minimum rules might be obtained if the Convention were to contain a number of incentives such as a moderate liability régime, based on that of the Hamburg Rules, a limitation on liability which could be broken only in highly exceptional circumstances, the granting of a general lien over the goods and above all the fact that the insertion of these rules in general conditions would be recognised by the courts of Contracting States whereas otherwise such conditions would be exposed to the risk of being struck down in the face of the growing pressure of consumer protection lobbies.

16. Turning now to the general structure of the draft Convention prepared by the Study Group, it may be stated that it is built around the concept of the "international terminal operator (ITO)", who is defined in Article 1 as "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 with a view to their being handed over to any person entitled to take delivery of them". As mentioned above, the draft is thus concerned with warehousing operations connected with international carriage which, for the purposes of the draft Convention, 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".

17. Article 2 of the draft lays down the general statement of the liability of the ITO in respect of the performance of his obligations for the safekeeping of the goods and also indicates the period during which he shall be liable. The article further affirms the liability of the ITO in respect of certain services connected with the handling of the goods which he performs, or the performance of which he procures, in addition to the safekeeping of the goods.

18. Two key articles of the draft are Articles 3 and 4. Article 3 is concerned with the issuance by the ITO of a dated document acknowledging receipt of the goods and stating the date on which they were actually taken in charge. Such a document, however, need only be issued if requested by the customer. Article 4, which is closely modelled on a corresponding provision in the UNIDROIT draft Convention on the hotelkeeper's contract, deals with the ITO's rights of retention and sale over goods.

19. Articles 5 to 14 of the draft Convention are based to a very large extent on the corresponding provisions of the Hamburg Rules and this is true especially of the basic liability régime (presumed fault with the burden of proof reversed) and the rules governing limitation of liability, availability of defences, loss of the right to limit liability, notice of loss, prescription, nullity of stipulations contrary to the provisions of the Convention and unit of account. In particular, Article 13 provides that the 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".

20. Articles 15 to 22 contain a set of draft final clauses and, like the draft preamble, these were not discussed at any length by the Group. The one exception is Article 17 which makes provision for a declaration by States excluding the absolute mandatory character of the future instrument, which has been mentioned above in paragraph 15 of this report and which is discussed in detail below in paragraph 86 et seq.

21. The Group realised that the draft Convention prepared by it did not deal with a number of important aspects of warehousing contracts. In particular it was silent on the question of the customer's obligations such as those of paying the price for the services and, in the event of his tendering dangerous goods to the ITO for handling or safekeeping, that of giving the necessary instructions. Neither did it deal with the ITO's right to dispose of or sell dangerous goods nor with the obligations of the customer to tender the goods for safekeeping or the ITO to take them in charge when a contract for their safekeeping had been concluded in advance. It was, in effect, an outline draft concerned essentially with establishing a set of minimum rules governing the liability of ITOs and many points of detail had been omitted which might be fitted in at a later stage or alternatively regulated by standard conditions which, if a need for them were to be recognised, might be prepared by the interested commercial Organisations such as the ICC, the CMI and IAPH. Other Organisations might wish to cooperate in this task but what was above all to be avoided was incompatibility between such conditions and the future Convention on the liability of international terminal operators.

22. In these circumstances the Group decided that the draft Convention worked out by it should be submitted to the Governing Council of UNIDROIT, with a recommendation that the text, and the accompanying explanatory report to be prepared by the Secretariat, be circulated to the interested Organisations and perhaps also to Governments. In the light of reactions to it, as well as progress which might be accomplished in the preparation of standard conditions, the Governing Council could, at a later date, take a decision as to future work in this connection.

III

ARTICLE BY ARTICLE COMMENTARY ON THE PRELIMINARY DRAFT CONVENTION

Article 1

23. Article 1 lays down a number of definitions which the Study Group considered to be indispensable for the application and interpretation of the preliminary draft Convention. It should, however, be pointed out that in point of fact some of the definitions indirectly determine the scope of application of the future instrument and this is true in particular of that of the "international terminal operator (ITO)". For the purposes of the Convention, he is defined as "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".

24. Now, it will readily be seen that this definition of a legal figure, the ITO, not only contains a description of his primary obligation, that of "the safekeeping of goods with a view to their being handed over to any person entitled to take delivery of them", but also specifies the warehousing operations with which the draft Convention is concerned, namely those which occur "before, during or after international carriage" and in addition the manner in which the ITO undertakes the safekeeping of goods, that is to say "by agreement or by actually taking them in charge."

25. In these circumstances it would seem desirable to examine in detail the constituent elements of the definition, which to a large extent reflects the whole philosophy underlying the draft Convention.

26. In the first place then, why speak of a "terminal operator" rather than a warehouseman in English and of an "opérateur de terminal" instead of an "entrepositaire" in French? The reason for the Group's choice of terminology was that, on the one hand, some members felt that the very concept of a "warehouse", with its implication of shelter, was becoming increasingly outmoded as new techniques of storing goods developed, while on the other that in view of the decision to hold the operator liable in certain cases in respect of the performance of handling services which would not normally have been entrusted to the traditional warehouseman (see below, paragraph 40 et seq.), it could be positively misleading to use the terms "warehouseman" or "entrepositaire", the latter of which had fairly strict connotations in some legal systems. It was therefore deemed advisable to seek a more neutral term and the growing use of the concept of "terminal" in a number of modes of transport was seen as militating in favour of the expression "terminal operator".

27. In addition, the use of the adjective "international" further to define the ITO sprang from the decision of the Group referred to in paragraph 13 above to exclude from the scope of application of the future Convention purely domestic warehousing operations and, therefore, to link the operations to be covered by it to international transport; hence the reference in the definition of ITO to the safekeeping of goods "before, during or after international carriage". The reason for the limitation to international warehousing operations has been given already in this report in paragraph 13, but it should be noted that the view was not shared by all members of the Group.

28. In particular, some participants considered that it would be a worthwhile task to unify the law relating to all warehousing contracts throughout the world and that from a practical viewpoint the limitation of the scope of the future instrument to warehousing operations connected with international carriage would deprive it of much of its interest. In this connection, it was stressed by one participant that, 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. He feared therefore that the end result of the exercise upon which the Group was engaged would be to increase costs by covering two or three times risks to the goods which were already covered by insurance. The future instrument should therefore, he argued, deal with warehousing operations per se and not concentrate on those occurring between different legs of a transport operation for otherwise there was a danger of impinging upon the activities of freight forwarders and combined transport operators.

29. To this it was replied that while insurance considerations were most certainly of importance, the fact could not be overlooked that at the recent UNCITRAL Conference for the adoption of the Hamburg Rules the general view had prevailed that the determination of the liability régime should precede the consideration of insurance questions. Moreover, if one were to argue that it is the exclusive function of cargo insurance to cover the gaps left by the international transport Conventions, one might equally well ask why it was thought desirable to lay down mandatory rules governing the carriage operations themselves. Finally, statistics seemed to show that most cases of damage to, or loss of, goods arose before, and more especially after, carriage, at least in the maritime sector, and in this connection stress was laid on the need to secure the availability of an effective right of recourse to carriers who have extended their liability beyond the period of actual carriage itself, especially under modern container contracts, and to other persons, including freight forwarders and combined transport operators against intermediaries handling the goods such as terminal operators.

30. This view was shared by the majority of the Group, which also considered that if the definition of the ITO were to contain a clear statement of his principal obligations, namely the safekeeping of the goods and their handing over to any person entitled to take delivery of them, it might not be necessary to define the contract for the safekeeping of goods. This approach was reinforced once the Group had agreed that the ITO should, in certain cases, also be responsible, under the terms of Article 2, paragraph 2 of the draft Convention, for the performance of other services associated with the handling of the goods as the performance of such services could not be regarded as falling within the traditional scope of warehousing operations.

31. As mentioned above in paragraph 24 of this explanatory report, the definition of the ITO also indicates the manner in which he assumes the obligation of safekeeping of the goods and although it was considered that in a great majority of cases the contract would be concluded by his actually taking the goods in charge, it was agreed that logic dictates that reference should first be made to the situation in which an agreement is concluded for the safekeeping of the goods prior to their actual taking in charge.

32. Two other points should be raised in connection with the definition of the ITO. The first of these is that the words "against payment", inserted in square brackets, have been taken over from the definition of a carrier under the Hamburg Rules and their presence in this draft would seem to meet the view expressed by some participants that the future instrument should not apply to warehousing operations conducted by operators on an own account basis but only to those carried out by operators acting for reward and hire. As to a statement of the customer's obligation to pay the price for the services provided by the ITO, the Group felt however that it would be desirable to leave this to be regulated in the context of the general conditions of the operator.

33. The last aspect of the definition of an ITO calling for comment is the reference to the persons from whom the ITO takes in charge the goods, namely the "shipper, carrier, forwarder or any other person" a formula which recognises the central position of the ITO in the context of the international movement of goods and the variety of factual situations in which he may be called upon to act.

34. Turning to the definition of the term "customer", it should be noted that this is based in part on the definition of the term "shipper" in Article 1, paragraph 3 of the Hamburg Rules. This parallel caused one participant to ask to what extent the future Convention on the liability of ITOs would be of direct interest to shippers, that is in the sense of the owners of the goods, as the non-exhaustive list contained in the provision referred only to consignees, carriers, forwarders and receiving agents. In reply, it was suggested that the drafting of the provision certainly covered shippers in the strict sense of the term, that is to say persons by whom or in whose name the goods are actually delivered to the ITO or by whom or in whose name a contract for the safekeeping of goods is concluded before such operations. Any confusion which might exist could be attributed to the inclusion in the definition of a "shipper" in the Hamburg Rules of the obscure words "or on whose behalf". For this reason, these words have been placed in square brackets in the definition of "customer" in the draft Convention and the general feeling was that a later stage of the elaboration of the instrument they should be deleted altogether.

35. Doubts were also expressed as to whether the definition of a "customer" was not also lacking in precision to the extent that damage might be caused in the terminal by dangerous goods so that it would be of importance to determine who was the "customer" from whom the ITO might recover compensation for such damage. The Group recognised that this might prove to be a real problem but the majority view was that the question should not be dealt with in the draft Convention but rather settled in the context of the standard conditions to be drawn up by the interested commercial Organisations.

36. As regards the definition of "goods", this is taken over from Article 1, paragraph 5 of the Hamburg Rules and, apart from the exclusion of live animals, it need only be noted that for the reasons set out in paragraph 34 above, the words "or on his behalf" have been placed in square brackets.

37. With regard to the last paragraph of Article 1 of the draft Convention, the Group considered that it was necessary to define the international carriage to which reference is made in paragraph 1. Recognising the different definitions of "international carriage" in the existing international Conventions regulating the carriage of goods in the various modes of transport, the Group decided that it would be desirable to formulate a definition for the purposes of the present draft which would concentrate on the sole fact that under the contract of carriage to which the goods are subject, they are to be transported from one State to another.

38. In the introductory remarks on the definition of the ITO contained in paragraph 23 above, it was stated that to a certain extent Article 1 is concerned with the scope of application of the future instrument and one might perhaps wonder whether a provision should not be inserted in a new article to the effect that the Convention shall, subject to the provisions of Article 17 (see below, paragraph 86 et seq.), govern the liability of ITOs under the Convention whenever the operations referred to in Article 2 (see below, paragraph 39 et seq.) are carried out on the territory of a Contracting State.

Article 2

39. Paragraph 1 of this article reverts to the primary obligations of the ITO referred to in Article 1, providing as it does that he "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." It should be noted that this pinpointing of the time during which the ITO is liable for the safekeeping of goods excludes his liability under the draft Convention for failure to accept them when he has undertaken to do so by prior agreement, as the Group as a whole considered that this question should not be dealt with in an international instrument seeking to lay down minimum rules governing the ITO's liability but rather left to be regulated by general conditions, as also should a number of other matters connected with non-performance of the contractual obligations of the parties.

40. As mentioned above in paragraph 17 of this explanatory report, paragraph 2 of the article provides that the ITO shall also be responsible for goods which he has taken in charge, or agreed to take in charge, for safekeeping, when he undertakes to perform in relation to them services such as loading, stowage, discharging or other similar services or undertakes to procure the performance of such services by an independent contractor. This solution, which reflects the view of the majority of the Group, represents a compromise between two more radical proposals. One of these recommended the application of the future instrument to all handling operations performed before, during, or after international carriage operations, irrespective of whether the operator has undertaken the primary obligation of the safekeeping of the goods, while the other would have restricted the scope of the draft to warehousing operations stricto sensu, principally on the grounds that Article 2, paragraph 2 would introduce differences in the liability régime applicable to those engaged in handling operations according to whether or not such operations are linked to the safekeeping of the goods.

41. The majority, however, considered that the draft Convention should, as far as possible, fill in the gaps left in the liability régime by existing international Conventions dealing with the carriage of goods and that in consequence it was legitimate to take account of the fact that more and more

comprehensive services are provided by modern terminal operators. Such operators should not, therefore, be permitted to avoid the application of the provisions of the Convention by alleging that the damage occurred to the goods not during the period of safekeeping, but in the course of the performance of other handling operations. On the other hand, it was felt that there would be most strenuous resistance on the part of the interested professional circles to an extension of the Convention to cover all handling operations before, during or after international carriage, principally because the liability régime proposed under Article 5 might not prove to be suitable for all such operations.

42. Desirable as it might be, therefore, to establish at international level a uniform liability for handling intermediaries on the model of the French law of 1966, it was considered unrealistic to seek to achieve this goal at the present time and the Group further agreed that the operations contemplated by Article 2 paragraph 2 should not extend to those, such as checking of the goods, which would fall within the French concept of "actes juridiques" as opposed to "actes matériels", and the defective performance of which, although giving rise to financial loss, does not result in actual damage to, or loss of, the goods.

43. In conclusion, it should be noted that paragraph 2 of Article 2, unlike paragraph 1, does not refer to the period of responsibility of the ITO as some of the services contemplated might precede the actual taking in charge for the purposes of safekeeping, such as unloading, and others be performed subsequent thereto, such as stowage.

Article 3

44. This article was the subject of lengthy discussion by the Group and represents a compromise solution between the various proposals made. On the one hand, some participants expressed scepticism as to the need for another document in international transport operations. In particular, it was suggested that it would be unnecessary for the ITO to issue a document acknowledging receipt of the goods when they were already covered by a transport document, and that today as modern transport techniques increase the speed with which goods are moved, operations might be unduly slowed down if an ITO were always to have to issue a document when taking the goods in charge. In addition, one participant considered that if the ITO were to be obliged to issue a document, the evidentiary value of which would have some bearing on his liability, he ought to be entitled to insure the goods unless he received contrary instructions indicating that they were already covered.

45. Against this view, one member of the Group considered that there was no value in laying down an elaborate liability régime for ITOs intended to fill in the gaps in Article 4, paragraph 2 of the Hamburg Rules and providing a recourse action to the carrier, if no documents were to be available to prove that the goods had actually been taken in charge. In some countries, no confirming documents were issued or, if they were, then many weeks or months after discharge of the goods from the terminal. This was particularly the case with barge enterprises in typical roadstead ports or with customs warehousemen. There should therefore be a duty to confirm the taking over of the goods and a statement of their quantity and quality within a certain limited time in a dated document, for if the issue of the document were to be conditional upon a request by the customer, and the ITO were to refuse to issue it, how could the former prove that he had in fact requested it? Only in those cases where the document was to be of a negotiable character therefore, should it be necessary for the customer expressly to request it and provision should in addition be made for sanctions in the event of the ITO's failure to observe the duty to issue a document acknowledging receipt of the goods. In such cases, as also in those where the ITO issues the said document in a way which does not conform to the requirements of Article 3, paragraph 2 of the draft, it should, 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, i.e. the last document in the possession of the customer relating to the goods, including his own exit certificate.

46. The majority, however, considered that such a proposal would go too far. In the first place, it was suggested that the need for a confirming document as evidence of taking in charge would vary according to the circumstances. In some cases, the parties would prefer to dispense with a document as evidence for the taking in charge as being too expensive or time-consuming and a simple receipt would be sufficient, especially in those cases where the goods were not of any great value. Moreover, on the question of refusal by the ITO to issue a document on request, it was suggested that the matter could best be left to be determined by national law, and one member of the Group recalled that in his experience he had come across no case of a maritime carrier's refusing to issue a bill of lading in accordance with Article 3, paragraph 3 of the 1924 Brussels Convention on bills of lading.

47. In these circumstances, the Group agreed that Article 3, paragraph 1 of the draft should merely provide for the issuing by the ITO at the request of the customer of a document acknowledging receipt of the goods, it being understood that signature by the ITO of a carriage document should be regarded as the issuance of a document for the purposes of the provision. With a view to allaying some of the fears expressed during the discussions, paragraph 1 further stipulates that the document must be dated and that it must also state the date on which the goods were actually taken in charge. The question of the legal consequences of failure to issue such a document is therefore left to

national law although as one member of the Group pointed out, the possibility of administrative sanctions being taken against an ITO in those States which avail themselves of the reservation clause contained in Article 17 of the draft Convention (see below, paragraph 86) should not be overlooked in this connection.

48. The document to be issued in accordance with paragraph 1 of Article 3 is not however a mere receipt as paragraphs 2 and 3 are concerned respectively with its content and with its evidentiary effect. Here the Group considered that it was unnecessary to enter into the detail to be found in the various Conventions concerning the carriage of goods, for example the provisions of Articles 15 to 18 of the Hamburg Rules. As regards the content of the document, therefore, paragraph 2 provides that it 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", although one member was of the opinion that the last words of the paragraph were unduly wide and that they might permit the ITO to make general reservations of a sweeping character in cases where it would be impossible to make an adequate check, thereby rendering the whole provision ineffective. In reply to these observations, it was however recalled that the draft under elaboration was not seeking to regulate all points of detail and that one might perhaps envisage the preparation by the interested professional Organisations of some kind of checking list to assist the ITO.

49. With respect to the evidentiary value of the document to be issued by the ITO, paragraph 3 is modelled on Article 18 of the Hamburg Rules in that it provides that the document is "prima facie evidence of the contract for the safekeeping of goods and the taking in charge of the goods as therein described".

50. Paragraph 4 of Article 3 seeks to deal with a question which was discussed at considerable length by the Group, namely whether the document acknowledging receipt of the goods should be of a negotiable character or not. The principal difficulty encountered in this connection was that the Group did not feel itself to be in a position to judge the extent to which international trade actually experiences the need for a negotiable warehouseman's document although it was recognised that there might well be some such need at distribution terminals in cases where it is not known to whom the goods will be sold upon their arrival at the terminal. In consequence, it was decided that no final decision should be taken on the question until further information had been obtained but with a view to stimulating discussion on the question within the interested circles it was agreed to make provision in paragraph 4, the wording of which is in part inspired by Article 1, paragraph 7 of the Hamburg Rules, for the possibility of the ITO's document being of a negotiable character, subject however to two conditions, namely that the parties so agree and that the national law, i.e. the law of the State where the terminal is situated, so permits.

51. Paragraph 5 was inserted at the request of a number of participants, who considered that the future Convention should take account of the ever increasing trend away from the traditional paper documentation in favour of the use of mechanical and electronic means of communication and the provision is based on a simplified form of wording of Article 14, paragraph 3 of the Hamburg Rules. In this connection, it should however be pointed out that, as it stands, paragraph 5 may be taken as referring only to the document referred to in Article 3 itself and that provision should also be made elsewhere in the draft, as is the case with Article 1, paragraph 8 of the Hamburg Rules, to the effect that "writing" includes, inter alia, telegram and telex, which could be of relevance in particular in connection with Articles 5, 9 and 10 of the draft.

Article 4

52. Although some members of the Group were of the opinion that it might not, at the present time, be realistic to attempt to unify the widely differing national laws governing the warehouseman's lien, others felt that the presence of a provision on the matter in the future instrument conferring a right of general lien on the ITO might prove to be an incentive to operators to accept the provisions of the Convention as a whole. Such a lien would permit the ITO to grant credit to the customer, thus speeding up the flow of goods, and would also be important in those situations where there was a dispute between the ITO and the customer over the price of the agreed services, for in such cases there could be a risk of the ITO's liability for delay in delivery of the goods being converted into a liability for physical loss (see below, paragraph 62). It was, admittedly, true that many freight forwarders' and warehousemen's general conditions provided for such a general lien but it was far from clear that such liens were recognised in all countries and so the availability of a right of general lien under an international Convention would be of real benefit to operators in those countries where the exercise of such a lien was not permitted or where it was doubtful whether it would at present be upheld by the courts. If, therefore, the lien were not to be a general lien, it might be preferable not to deal with the question at all.

53. Other participants, however, were opposed to the granting to the ITO of a general lien, partly on the grounds that such a lien in favour of warehousemen was not recognised by their legal systems and partly for fear of the confusion which might be caused by the creation of unconnected liens. In these circumstances the Group agreed that the words in paragraph 1 of the article dealing with the question of general liens should be placed in square brackets.

54. Otherwise, the language of paragraph 1, which affirms the ITO's right of retention over the goods taken in charge by him, as also that of the other paragraphs of Article 4, is based on that of Article 10 of the draft Convention on the hotelkeeper's contract, work on which has recently been completed by a

Committee of Governmental Experts convened by UNIDROIT. One might, however, wonder whether the wording of paragraph 1 is not perhaps too broad for it is unclear whether the article applies only in respect of claims relating to the safekeeping of the goods or also to the other services which may be provided by the ITO and for which he is responsible under Article 2, paragraph 2.

55. Paragraph 2 of the article makes provision for the operator's being obliged to release the goods if the customer provides, or obtains from another person, a sufficient guarantee for the sum claimed, as he might be willing to do so as to ensure that the goods may be moved out of the terminal and sold, pending the settling of a dispute between the operator and himself. Similarly, the operator will not be entitled to detain the goods if a sum equivalent to that claimed by him is deposited with a mutually accepted third party or with an official institution.

56. Paragraph 3 contains the principle that the ITO, in addition to his right of detention of the goods, may also sell them up to the amount necessary to satisfy his claim and after giving "adequate and timely notice". Although one member of the Group considered that the provision should lay down a specific time-limit, the majority felt that the precise meaning of this phrase must be determined by each legal system, and the impossibility of laying down general rules governing the conditions and procedures of the sale led the Group to limit itself to providing that such conditions and procedures shall be governed by the law of the place where the terminal is situated. It should also be understood that the term "conditions and procedures" covers the repayment of any surplus proceeds realised and that the law referred to is the law of the jurisdiction in question, to the exclusion of conflicts of law rules, as such procedural matters are usually regulated by the internal law of that jurisdiction.

57. Paragraph 4 is concerned with the difficult problem of the effectiveness of the ITO's rights of detention and sale against third parties with rights or interests in the goods, a problem which had already been discussed at length in the context of UNIDROIT's work on the hotelkeeper's contract. Although one participant considered that the text of paragraph 4 would not be acceptable in his country, the majority of the Group however found it satisfactory in that it attempts only to lay down a choice of law rule as regards the priority to be accorded to claims over the goods. Thus it will be the internal law of the State where the terminal is situated, that is to say the national law excluding the rules relating to conflict of laws, which will determine the question of priority. However this law will not determine the existence of any third party rights over the goods which may have been created under the law of another State, and to ascertain the existence of such rights the law of the forum will have recourse to its own conflict of law rules.

Article 5

58. This article lays down the basic liability régime to which the ITO is subject under the draft Convention and it will readily be seen that not only the régime itself but also the wording of the article follows closely Article 5 of the Hamburg Rules. Broadly speaking this solution represents the preference of the Group as a whole for no participant spoke in favour of a system under which the customer could be called upon to prove that the loss or damage had been caused by the fault of the ITO or his servants and agents as a pre-condition for recovery. Although some doubts were expressed as to whether a régime based on that of the Hamburg Rules and founded on the presumed fault of the ITO, which was less severe than that imposed upon carriers by air, road and rail, was appropriate, the choice of the "Hamburg" solution was seen by the majority of the Group as being dictated by a number of considerations.

59. In the first place, it had to be recalled that at present the legal position of warehousemen, as Dr. Hill's report had illustrated, was characterised by many restrictions on legal liability and a low level of financial responsibility, irrespective of whether the rules were based on statute, conditions of trading or general conditions, although with the development of containerisation, it was recognised that larger consortia have been successful in obtaining higher levels of liability. If, therefore, one hoped to overcome the opposition of the profession to the imposition of liability in excess of that to which it is accustomed, then a realistic, uniform level of liability should be established. It was this concern for laying down a uniform liability for ITO's, an innovation which would certainly be favoured by banks who are opposed to gaps in liability régimes which also led the Group to reject the idea of increasing the ITO's liability to the level of that of the carrier in those cases where the carrier has himself extended his liability to cover the period after carriage and before delivery to the ultimate consignee, while reasons based on considerations of practicality caused it to dismiss a similar suggestion that the ITO's liability might somehow be related to the mode of transport with which the terminal operations were connected. Such a solution might be workable, although contrary to the interests of uniformity, if only one mode of transport were involved but if the terminal operations were to be sandwiched between carriage effected by different modes of transport there would be no objective criterion for determining which liability régime should be applicable.

60. Like Article 5 of the Hamburg Rules, Article 5 of the draft Convention makes provision for the liability of the ITO in the event of delay in delivery to the person entitled to take delivery of the goods. Some participants, however, were opposed to holding the ITO liable in such cases on the grounds that the question of delay is one essentially tied up with the movement of goods

as opposed to stationary goods, such as those deposited in a warehouse. In addition, it was suggested that there might be considerable difficulty in practice in determining whether delay in delivery to the ultimate consignee has been due to delay in the carriage itself or in the handing over of the goods by the ITO.

61. To these arguments, it was replied in the first place that there was no reason why an efficient ITO should not in normal circumstances be able to hand over goods to the consignee on demand and in the second that there would usually be evidence, for example the issuing of a receipt for the goods by the ITO to the carrier, which would indicate whether the delay in delivery to the consignee had been caused during the transport operations or by an event occurring while the goods were in the terminal. The question would, moreover, be of no interest to the customer in those cases where the carrier had extended his liability to cover the period while the goods were in the terminal after carriage as the customer could sue the carrier and, in all probability, benefit from a more favourable régime than that laid down by the draft Convention under discussion.

62. It was further pointed out that if the future instrument were to contain no provisions relating to the ITO's liability for delay, he might for an indefinite period claim that the goods were not lost or damaged but merely mislaid and it was to meet this situation that the Group agreed to the insertion of paragraph 3 of Article 5 providing for the conversion of liability for delay into liability for physical loss after a certain period. The time-limit of 60 days in paragraph 3 is taken over from the Hamburg Rules but since some participants felt this might be too long, the figure has been placed in square brackets pending the taking of a final decision at a later date.

63. With the exception then of delay in the delivery of the goods, Article 5 is concerned only with those cases where the goods have been damaged or lost as a result of the defective performance of the ITO's obligations as set out in Article 2 of the draft Convention. It was not the Group's intention, therefore, that he be liable under the Convention for loss caused, for instance, by his failure to take the goods in charge at the agreed time in cases where the contract for the safekeeping of the goods has been concluded prior to the actual taking in charge as it was felt that such questions could best be dealt with in standard conditions (see above, paragraph 21). Similarly, the wording of Article 5 is such that the ITO will not be liable thereunder where the customer suffers financial loss as a result, for example, of the ITO's failing to clear out old invoices.

64. To the extent that Article 5 closely follows, where appropriate, the corresponding article of the Hamburg Rules, its provisions do not call for any detailed comment, except for two points, the first of which is the use of the words "servants and agents". A number of participants expressed

dissatisfaction with this term, in view of the differences in interpretation to which the concept of an "agent" is open. The suggestion was therefore made that some form of words such as those to be found in Article 3 of the CMR, which speaks of the persons of whose services the carrier makes use in the performance of his obligations, might be preferable. Ultimately, however, it was decided to retain the term used in the Hamburg Rules as it represented the most recent expression of the will of States, although here again it was agreed that the matter would be reverted to a later stage of the elaboration of the draft Convention when a final decision could be taken as to the precise form of wording to be employed, it being understood that what the Group had in mind were the classes of persons referred to in Article 3 of the CMR.

65. Finally, the Group considered that it would be desirable to exclude the ITO's liability for securities, money or valuable articles unless a special agreement to the contrary has been entered into in writing (paragraph 4).

Article 6

66. With one exception, this provision corresponds almost completely to Article 6 of the Hamburg Rules, both as to wording and to content, especially the limitation figure of 2.5 SDR's per kilogramme of the gross weight of the goods. The essential difference lies in the fact that the majority of the participants were opposed to the application to the liability of ITO's of the alternative between the package limitation and the limitation by kilogramme, an important practical difficulty as regards the former being that goods might arrive in a warehouse in the form of a package after carriage, especially by sea, and then be broken up and sent on by other modes of transport to another destination.

67. Some hesitations were also expressed in connection with the taking over from Article 6 of the Hamburg Rules of the provision contained in paragraph 3 of this article of the draft Convention to the effect that "by agreement between the ITO and the customer, limits of liability exceeding those provided for in paragraph 1 may be fixed". It was, in particular, suggested that by making provision for such an alteration of the limit on compensation payable by the ITO, the future instrument might prove less attractive to the operators in question, some of whom were exposed to pressure by large shipping companies, and that it was in principle undesirable to stimulate competition between them, not on the ground of price and efficiency but on that of the most favourable limitation amounts on offer.

68. Sympathy was expressed with this view but on the other hand it was recalled that it was only in the CMR from among the international Conventions dealing with the carriage of goods that a prohibition was put upon altering the limitation figure established by the Convention and that even there ingenious

insurance schemes were sometimes used to get round the letter of the Convention. In addition, the fact that the limitation figures contained in Article 6 were to be found in an international Convention, which would hopefully be backed up by standard conditions to be prepared by the interested professional Organisations, would strengthen the bargaining position of terminal operators, although of course the latter would not be entirely protected thereby against pressure being exerted on them to raise their limitation figures by strong shipping lines. It was also pointed out in this connection that some States might have difficulty in accepting a Convention which did not make allowance for an increase in the limitation figure.

Article 7

69. This provision, dealing with the applicability of the defences and limits of liability provided under the Convention to non-contractual claims, follows Article 7 of the Hamburg Rules, subject only to the necessary drafting changes, and was adopted unanimously by the Group.

Article 8

70. Following the pattern of the preceding articles, Article 8 is worded in an almost identical fashion to Article 8 of the Hamburg Rules. One amendment was, however, made to that text, which sprang from the desire of the majority of the Group to make the limitation as "unbreakable" as possible, and this for two reasons. In the first place it is well known that as a general rule insurance prefers unbreakable limits and, in the second, the Group considered that such a limitation would be attractive to ITOs and would be an incentive to them to accept the provisions of the future Convention as a whole. It was therefore agreed that the word "personal" be added before the words "act or omission of the ITO" in line 3 of paragraph 1 of Article 8 for while those who had been present at the Diplomatic Conference for the adoption of the Hamburg Rules had intended that the carrier's limitation should not be broken as a result of an act or omission of a servant or agent done with the intent to cause loss, damage or delay in delivery of the goods or recklessly and with knowledge that such loss, damage or delay would probably result, this was not apparent from the text.

71. The word "personal" has been inserted in square brackets so that a final decision on the question may be taken at a later stage. As to the precise meaning of the word, with regard to which some participants experienced difficulty in those cases where one would have to determine what is the "personal" act or omission of a legal person, it was suggested that it referred only to very senior executives such as the managing director and possibly the board of directors.

72. Finally, it should be noted that the same objections to the word "agents" were made in this connection as had been levelled against its use in Article 5 (see above, paragraph 64).

Article 9

73. Subject to some amendments aimed at simplifying the text and at taking account of the differences between carriage and warehousing operations, this provision concerning the giving of notice of loss, damage or delay is based on Article 19 of the Hamburg Rules. Two points of substance were however raised in the course of the Group's consideration of the article.

74. First, one participant considered that the period of 60 days within which a claim must be made in respect of delay under the terms of paragraph 5 was too long and he saw no reason why the customer should not make his claim immediately, or at most within a shorter period than sixty days, since paragraphs 1 and 2 lay down periods of the working day after the day when the goods were handed over, and 15 consecutive days after the day on which they were handed over, within which claims must be made in respect of apparent and non-apparent damage respectively. In reply to these observations it was indicated that the period of 60 days in respect of delay, which might perhaps be too long in respect of the warehousing of goods, was presumably included in the Hamburg Rules as the liability in respect of delay was an innovation in the Maritime Conventions and many people might not immediately be aware of their rights under the Hamburg Rules. In addition, the point was made that the purpose of paragraph 5 was different from that of paragraphs 1 and 2 for whereas the former had the effect of barring the claim to compensation altogether, the latter merely shifted the burden of proof onto the customer. In these circumstances, it was decided provisionally to retain the period of 60 days in paragraph 5.

75. The second question of substance relates to paragraph 6, which provides that "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". The difficulty raised in this connection was that of determining who are the persons to whom such notice may validly be given. Would notice to a lighterman or a docker, for example, be sufficient? The Group considered that if the word "person" were to be read as a "person authorised to receive such notice", then the provision would be acceptable and indeed paragraph 8 of Article 19 of the Hamburg Rules gives some guidance on the matter by speaking of "a person....., including the master or the officer in charge of the ship". Even this formulation was not, however, fully satisfactory as the number of persons might be increased considerably by the application of the eiusdem generis rule. In the present case, however, no indication was given at all, although one might assume that

notice could only be given to someone acting in a clerical capacity. In these circumstances, one participant suggested that the provision be deleted in its entirety but as one member of the Group pleaded in favour of its retention, at least provisionally, it was decided to maintain it in square brackets with a view possibly to specifying the persons to be covered by it at a later date.

Article 10

76. This article, which deals with limitation of actions, is based on Article 20 of the Hamburg Rules and here three questions of substance were raised.

77. The first of these concerned the two year limitation period provided for in paragraph 1 which was, in the view of some participants, perhaps too long and the alternative of one year was suggested. It was, however, replied that even a two year period would represent a substantial improvement in the position of warehousemen in some countries where the general limitation period of thirty years is at present applicable to actions brought against them.

78. The second question related to the absence in the article of any provision concerning the interruption or suspension of actions of the kind to be found in the CIM and CMR Conventions which, it was suggested, would be advantageous to the extent that they permit a reduction in litigation. In this connection it was pointed out that the CIM/CMR system whereby the lodging of a substantiated claim automatically interrupts the period of limitation often gave rise to difficulties of computation in practice and that the solution, which had hitherto been confined to European regional Conventions, had not been taken over in the Hamburg Rules.

79. Even if the CIM/CMR system were not adopted, another participant still considered that the drafting of the article was defective in that it did not state whether the limitation period could in any circumstances be suspended or interrupted and reference was made in particular to the difficulties which had arisen in the interpretation of Article 29 of the Warsaw Convention in respect of which the highest tribunals of different States had reached widely divergent decisions. Some rule regarding interruption and suspension of actions, it was therefore recommended, should be included in the article. Another participant pointed out that it was the wording of Article 29 of the Warsaw Convention and the difficulties surrounding the concept of a "délai de déchéance" which had given rise to problems of interpretation and while he therefore saw no serious defect in the text as it stood, he proposed that a provision be inserted to the effect that questions relating to the interruption and suspension of the limitation period be left to be regulated by national law. After further discussion, however, the Group decided to adopt the formulation of the Hamburg Rules without prejudice to reverting to the matter in the final stages of drafting.

80. The last point raised with regard to this article was concerned with paragraph 4, in which connection it was suggested by one participant that it was unreasonable that the possibility of extending the limitation period should be offered only to the person who would usually have no interest in its extension, namely the ITO.

Article 11

81. This article, concerned as it is with certain contractual stipulations, is inspired by paragraphs 1 and 2 of Article 23 of the Hamburg Rules. Although no comments were made on paragraph 1, objections similar to those made in connection with Article 6, paragraph 3 (see above, paragraph 67) were levelled at paragraph 2 which permits derogations from the provisions of the draft Convention in favour of the customer over and above that relating to the limitation figure to which Article 6, paragraph 3 addresses itself.

Article 12

82. Apart from the changes necessitated by the decision of the Group not to introduce a limitation per package in respect of the ITO's liability (see above, paragraph 66), this article corresponds in its entirety to the unit of account provisions contained in Article 26 of the Hamburg Rules.

Article 13

83. This article resolves in favour of international Conventions relating to the carriage of goods any conflict which might arise between the provisions of such Conventions regarding the rights and duties of carriers and the provisions of the future instrument governing the liability of ITOs.

Article 14

84. This article reproduces a provision increasingly to be found in international Conventions dealing with private law matters adopted within the framework of the United Nations, and corresponds to Article 3 of the Hamburg Rules.

Articles 15 to 22

85. As already stated in the note on page 1 of this explanatory report, the Group did not, with the exception of Article 17, examine in any detail the final clauses of the draft Convention prepared by the Secretariat. In consequence, these provisions, like the draft Preamble, are submitted for consideration under the sole responsibility of the Secretariat and are modelled in part on those of the Hamburg Rules and in part on those contained in the draft Convention on the hotelkeeper's contract, which is the most recent international instrument to be worked out by a UNIDROIT Committee of Governmental Experts. It would, therefore, seem premature to make any detailed comments on them at this stage.

86. Article 17, on the other hand, was the subject of lengthy discussion by the Group. As indicated above in paragraph 15 of this explanatory report, there was a division of opinion among the participants as to the character of the future instrument. Some considered that it should be cast in the form of a traditional international Convention of a mandatory character which, it was argued, would be the only way of ensuring the application of its provisions by a profession whose activities had hitherto been left almost exclusively to the realm of national law and who had in many countries been accustomed to including in their general conditions restrictions on their liability and extremely low limitations on that liability. These participants further suggested that the chances of obtaining a large number of ratifications of such a Convention were no less and no greater than was the case with any other Convention dealing with the international transport of goods.

87. Other participants, however, were of the opinion that for the future Convention to be successful a new approach was necessary. They drew attention in particular to the growing disenchantment in professional circles with the classic mandatory Convention as a means of regulating and facilitating operations concerned with international trade and suggested that the commercial interests involved might exert pressure on their Governments in many countries not to adopt a Convention laying down rules of mandatory application. In these circumstances they proposed a solution not dissimilar from that envisaged in the old draft TCM Convention with the difference that whereas there the applicability of the TCM Convention depended upon the issuance of a CT document, here the Convention would be automatically applicable once a terminal operator held himself out as an ITO applying the provisions of the Convention. His activities would then be supervised in some way by the State, which would designate him an "authorised ITO", and permit him to use a special logotype, the form of which would be established in an Annex to the future Convention. The voluntary cooperation of terminal operators in accepting this status, it was further suggested, might be obtained by providing in the Convention a series of incentives such as a standard level of liability with a low and virtually unbreakable limitation figure, a general lien over the goods and the certainty that general conditions containing the provisions of the Convention would not be struck down by the courts of States which had ratified it. Moreover such operators might benefit from the channelling to them of business from customers attracted by the guaranteed liability accepted by them.

88. One of the partisans of the classic Convention of a mandatory character objected to the system on two principal grounds. In the first place it would oblige even those States which wished to apply the provisions of the Convention automatically on their territory to introduce what might be termed a "licensing" system for ITOs and secondly it was far from certain that operators would be prepared to cooperate on a voluntary basis. The proposed solution, it was argued, was not unlike the IATA licensing system, which functioned satisfactorily for reasons which were peculiar to international air traffic. The first of these was that IATA is a world-wide organisation, the members of which are responsible for 90% of international airline traffic and the second was the concentration of capital invested in international air traffic, about 60% of IATA members being State owned enterprises. This percentage was even higher if one left aside the United States air fleet which is organised on an exclusively private basis. It was further stated that these were conditions which do not exist in international transport by road, inland waterway and sea.

89. Other participants considered that it was incorrect to compare the IATA licensing system with that proposed for ITOs, especially in view of the fact that IATA is essentially concerned with the fixing of tariffs rather than the elaboration of rules governing liability and that the Warsaw Convention had indeed predated the setting up of IATA.

90. Ultimately, the Group devised a solution which, it was hoped, would give a measure of satisfaction to all concerned. The basic structure of the draft Convention, that is to say the substantive provisions contained in Articles 1 to 14, would in principle be of a mandatory character and would be applied as such by a Contracting State on its territory. However, Article 17 is drafted in such a way as to permit those States which do not wish to impose the provisions of the Convention on all terminal operators on their territory handling goods involved in international carriage, to make a declaration, the principal effect of which is that they 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" (paragraph 1). With a view to the implementation of this obligation, paragraph 2 requires that such operators shall be recognised as "Authorised International Terminal Operators (authorised ITOs)" and paragraph 3 that only such authorised ITOs may use the special logotype, the form of which is to be set out in an Annex to the Convention. Finally, paragraph 4 requires that the States concerned "undertake to regulate the use of the term "authorised ITOs" and of the special logotype within their territory and to introduce, if necessary, appropriate sanctions in the event of their misuse", the Group being of the opinion that it would be preferable to leave the determination of the sanctions to be applied to national law rather than to seek to lay down detailed rules of an administrative character in what is essentially a private law Convention.

91. In conclusion, the Group considered that although the formula contained in Article 17 might perhaps need to be reviewed as to its detailed presentation at a later date, it set out in sufficiently broad outline the philosophy underlying it so that reactions to it could be obtained from States and from the interested professional circles.

COMITE D'ETUDE

STUDY GROUP

Le Comité a tenu deux sessions à Rome

1. Du 10 au 12 avril 1978
2. Du 23 au 26 janvier 1979

The Group held two sessions in Rome

1. From 10 to 12 April 1978
2. From 23 to 26 January 1979

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