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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

Observations of Governments and International Organisations
on the preliminary draft Convention on the liability of
international terminal operators

(with an introduction by the Secretariat of UNIDROIT)

Rome, March 1981

A. INTRODUCTION BY THE SECRETARIAT

1. At its 58th session, held in Rome in September 1979, the Governing Council of the Institute instructed the Secretariat to transmit to States and to the interested international Organisations the preliminary draft Convention on the liability of international terminal operators which had been prepared by the UNIDROIT Study Group on the Warehousing Contract.

2. To date (28 February 1981), the Secretariat has received observations from the Governments of Australia, Austria, Czechoslovakia, the German Democratic Republic, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom, as well as from the Central Office for International Railway Transport (OCTI), the International Association of Ports and Harbours (IAPH), the International Federation of Freight Forwarders Associations (FIATA) and the International Rail Transport Committee (CIT).

3. With the exception of Switzerland and the United Kingdom, whose authorities expressed reservations as to the need for a Convention in this field⁽¹⁾, and of FIATA, which was highly critical of the present draft, reactions were by and large extremely favourable to the UNIDROIT initiative in this field although naturally enough a considerable number of proposals were made with a view to improving the existing text of the preliminary draft Convention.

4. Since the Secretariat has been informed through unofficial contacts with certain national administrations that further observations are to be expected from a number of Governments, it is of the belief that it would be premature at this juncture to prepare a detailed analysis of the observations which it has so far received. Moreover, the Study Group on the Warehousing Contract will not be holding its third, and probably final, session until October 1981. In these circumstances, the Secretariat has considered it preferable to limit itself for the present to indicating the principal points raised in the observations which have so far been communicated to it, and upon

(1) The United Kingdom however stated that UNIDROIT might consider sponsoring the development of a standard warehousing contract or some form of harmonised guide lines for application at a national or regional level on a voluntary basis.

which the members of the Governing Council may wish to comment, bearing in mind the fact that the Council will be called upon at its 61st session in 1982 to proceed to a critical examination of the draft approved by the Study Group and to approve the final text of the draft Convention.

5. An examination of the observations contained in Parts B and C of this document hereafter suggest that the attention of the Study Group should be focused, inter alia, on the following aspects of the preliminary draft Convention:

- the extent to which the draft might be considered to follow too closely the Hamburg Rules and the need to have more regard to the provisions of the United Nations Convention on International Multimodal Transport of Goods;
- the possibility of drawing a satisfactory distinction between warehousing stricto sensu and warehousing connected with international carriage operations;
- the need to circumscribe the territorial scope of application of the future Convention (e.g. if the principal place of business of the ITO is situated in a Contracting State);
- the restriction of the applicability of the future Convention to licensed ITOs (Article 17);
- the suitability of the present definition of the ITO under Article 1 (1) (especially the relationship of his liability to that of the carrier for the safekeeping of the goods during international carriage);
- the need for a definition of the concept of a "terminal";
- the need to distinguish more clearly between the concept of a "customer" under Article 1 (2) and "a person entitled to take delivery of the goods" (especially in the context of Article 9, paragraph 1);
- the adequacy of the definition of goods (Article 1 (3));
- the relationship between paragraphs 1 and 2 of Article 2, and in particular the precise scope of the obligation under paragraph 2 (does the latter provision apply in the event of loss resulting from failure to perform the services other than in the event of loss or damage to the goods ?);
- on the one hand the utility of Article 3 (issue of a document), and on the other the need to widen its scope to provide for the issue of a document in all cases;

- clarification of the ITO's right of retention under Article 4 and the need possibly to delimit the scope of the lien vis-à-vis that of the carrier for payment of freight which may exist under certain national laws;
- the existence of a limitation upon the liability of the ITO under Article 6, paragraph 1 and the desirability of excluding a per package limitation;
- the question of whether the limitation figure is not too low;
- the possibility of a modification of the limitation figure permitted by Article 6, paragraph 3;
- the question of whether the various periods for the giving of notice under Article 9 are adequate in some cases and too long in others;
- the need to complete Article 10 by provisions relating to interruption and suspension of the limitation period.

6. The list of questions mentioned under paragraph 5 above does not claim to be exhaustive and it may well be that other matters of considerable importance will be raised in the observations of Governments and international Organisations which have not as yet been communicated to the Secretariat. A further detailed paper, containing inter alia any observations which may be made by members of the Council, will therefore be submitted to the Study Group at its third session.

B. OBSERVATIONS OF STATES

AUSTRALIA

Whilst supporting further work on the preliminary draft Convention, Australia does not wish to offer detailed comments on the text at this stage. We are, however, concerned in particular, that the liability regime established under any International Terminal Operators Convention should be consistent with those of the UNCTAD Multimodal Transport Convention and the United Nations Convention on the Carriage of Goods by Sea.

It is expected that any comments Australia makes at a later stage (i.e. if the preparation of the Convention is proceeded with) will refer to the need for the inclusion of an appropriate federal clause."

AUSTRIA

"Article 1

It is surprising to note that neither Article 1 nor any other provision of the draft specifies the international purview of the Convention. As in the case of all other comparable conventions, we consider a demarcation of this type indispensable. It would not be appropriate to have to apply the provisions of the Convention even when none of the parties involved (international terminal operator, the person who signs the contract with him, etc.) has a close relationship to a Contracting State. We suggest that it should be stipulated that the Convention shall be applicable if the office of the international terminal operator (ITO) is in one of the Contracting States.

Article 5

(1) In view of the responsibilities of the ITO described in Article 2, one wonders if a case will ever arise in practice of an ITO failing to "hand over" the goods in time. He is not responsible for ensuring the forwarding of the goods, since they are collected from him. At most, if there is a special agreement, he has to assist in loading and/or stowing the goods. In these circumstances, the inclusion without modifications of the corresponding provision (Article 5) of the Hamburg Convention on the carriage of goods by sea seems debatable.

(2) Paragraph 4 appears to exclude any liability for the objects mentioned in this provision even in case of wilful acts or omissions or gross negligence (Article 8 in these cases only invalidates the limitations of liability contained in Article 6). The Federal Ministry of Justice considers that such a limitation of liability goes somewhat too far.

(3) Paragraph 5 is not entirely consistent with paragraph 1. It provides for a reduction of the ITO's liability where the damage has been caused not only by fault or neglect on the part of the ITO (or his helpers) but also by some other cause (e.g. the behaviour of third parties). It seems to have been overlooked that under paragraph 1 the ITO is not only liable when the damage has been caused by his fault (or that of his helpers) but in all cases where he does not succeed in proving that he took all measures that could reasonably be required to avoid the occurrence and its consequences (which is not the same thing). Hence paragraph 5, rather than speaking of fault, should speak of behaviour on the part of the ITO (or his helpers) which leads to the ITO being liable under paragraph 1.

Article 6

(1) The liability limit specified in paragraph 1 (b) seems too low. This limit, which seems to have been taken from the Hamburg Rules in a more or less automatic fashion, does not appear to be appropriate here when one considers that on the one hand the ITO's pay is likely on average to be much less than the carrier's pay, while on the other hand an error by the ITO - e.g. if he issues the wrong instructions - can lead to very long delays.

(2) Paragraph 3 seems superfluous in view of the general provisions of Article 11, paragraph 2.

Article 8

(1) Under paragraph 1, the ITO's liability is only unlimited where he himself commits a wilful act or omission or gross neglect but not where his helpers do so. Such an alleviation of liability may be justified where carriage of goods by sea is concerned (Article 8 of the Hamburg Convention) but in all other spheres the principle must prevail that an entrepreneur has to bear the same responsibility for the behaviour of his agent as he does for his own behaviour [cf. Article 3 of the Convention on the contract for the international carriage of goods by road (CMR), Article 39 of the international Convention concerning the carriage of goods by railway (CIM) etc.].

(2) Apart from this important substantive criticism, there is a technical point to raise:

As the ITO is to benefit from the limitation of the amount of liability specified in Article 6 even in case of gross negligence or intent on the part of his helper (Article 8, paragraph 1), it is apparently the object of paragraph 2 to provide for the helper's unlimited liability in this case. But in its present wording the provision cannot fully serve this purpose. The helper stands in no contractual relationship to the person who suffers damage or loss, hence he is liable to that person only under the law of torts. In most cases, therefore, he will only be liable if he damages the goods by some positive action. Vis-à-vis the person who suffers damage or loss, the helper is not obliged to exercise proper care with respect to the goods carried or to hand over the goods in time; thus omissions by which the goods are lost, damaged or handed over belatedly are not unlawful for the helper, and he does not have to answer for them to the person who suffers damage or loss.

If the intention is to introduce direct liability on the part of the helper, this provision would have to be reworded. Merely to remove the limitation of liability is not enough, it would be necessary to provide a positive basis for the helper's liability. It is however, questionable, whether imposing such personal obligations to exercise care and thus compensation for damage or loss on the helper would be defensible in terms of legal policy - or in the systematic perspective (think notably of worker protection).

Article 10

(1) Paragraph 2 provides without specification that the limitation period commences even if only part of the goods have been handed over. It does not seem proper where part of them have been handed over to let prescription start to run also with respect to those claims which refer to goods not yet handed over.

(2) The provision in paragraph 5 concerning the prolongation of the limitation period relating to a liable person's claim for indemnity may be inconsistent with the limitation provisions of other conventions whose purview includes the legal relationship between the person held liable and the person obliged to pay compensation (e.g. multilateral transport conventions). This provision should therefore either be deleted or defused by adding that it shall not affect intergovernmental agreements relating to the legal relationship between the person held liable and the person obliged to pay compensation.

CZECHOSLOVAKIA

1. General comments:

(a) We assume that in arranging for the liability of a warehouseman it might be possible to take into consideration the analogy with the Convention on Combined Transport and not with the Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea of 1978). An analogy to the position of the combined transport operator and "international terminal operator" (ITO) may be found both in Article 1 and in Article 2, paragraph 2 of the draft Convention, according to which the warehouseman is responsible for the goods in the same way, whether he has committed himself to carry out directly the mentioned services or to provide for them.

(b) We see a problem also in the new concept of the draft Convention which is particularly applied in Article 17. Although it is possible to accept the argument that with the traditional concept of an obligatory international Convention the powerful international terminal operators might impede the ratification of such a Convention, there is a question whether the new Convention with its newly suggested concept cannot be actually affected in the same way. If the Convention after its ratification is to be binding in the Contracting States only for the so-called authorised international terminal operators, it means in practice that the Convention will not be used if the international terminal operators do not apply for being recognized as the so-called authorised operators.

2. Comments on the individual provisions of the draft:

(a) Article 1: Deletion of live animals in the definition of the concept of goods is acceptable; we assume, however, that live animals would deserve a special provision on the care of and responsibility for them at the time of safekeeping.

(b) Article 4: We draw attention to the problem of terminology arising from the English term the "right of retention" in paragraph 1 and "rights of detention" in paragraph 4, although the right of retention is evidently involved in both cases. It should further be taken into consideration that instead of a reference to the internal law of the place of the warehouse (paragraph 4), the draft Convention should contain a more detailed arrangement for exercising the right of retention which would result in a greater uniformity when applying the Convention.

(c) Article 5: In our opinion it would be more appropriate to keep to an objective criterion as provided in Article 5, paragraph 1 of the Hamburg Rules. We also assume that the period of sixty days is too long. The customer would have to wait 60 days before being able to make his claims or consider the goods lost. With regard to the arrangements of continental transport we regard the period of 30 days as appropriate.

(d) Article 6: We do not regard it as appropriate mechanically to take over the limitations of liabilities according to the Hamburg Rules and, moreover, there is a question why essentially the only divergence should just be the only limitation resulting from the gross weight of lost or damaged goods and the deletion of the second criterion adopted in the Hamburg Rules, i.e. the limitation fixed according to the number of packages. We cannot agree to such low limitations as were adopted in the Hamburg Rules as a result of the general compromise. Also here one should proceed from the United Nations Convention on Multimodal Transport while regarding the limitations of liability according to the determination of liability of the multimodal transport operator as a minimum.

(e) Article 8: The draft is a further abridgement as against the Hamburg Rules by its explicit supplement that the limitations of liability provided in Article 6 are not valid in the case of intentionally caused damage or damage caused recklessly and with knowledge of the consequences of such recklessness, except in cases when the damage was caused "personally" by an international terminal operator. This would also be connected with a problem of interpretation if caused by the personal fault of legal persons. On the contrary we assume that for international terminal operators the concept of unlimited liability in cases of intentionally caused damage or damages due to recklessness and with knowledge of the consequences should be analogous to the concept of liability of multimodal transport operators according to the United Nations Convention on Multimodal Transport."

GERMAN DEMOCRATIC REPUBLIC

"1. General remarks

We welcome the fact that UNIDROIT has resumed work on this draft Convention and believe that the proposed uniform rules will permit the filling of an important gap in international transport law.

Indeed, gaps do exist where the sphere of application of the Conventions on carriage of goods either has not yet begun or has already finished, i.e. where the goods have not yet been handed over to the carrier but the sender has already given up control of them by handing them over to an ITO for their safekeeping, or where the carrier has already delivered the goods, but the consignee has not yet taken delivery of them.

A practical example of this is given by Article 5 of the Hamburg Rules.

Although recognising that such a Convention will be of little importance for the international carriage of goods by railway or by road on account of the characteristics of these modes of transport, and of interest mainly, if not exclusively, to carriers, senders and consignees in the context of carriage by air and carriage by sea, we agree on the desirability of providing uniform rules for all modes of transportation.

Clearly it was not by chance that the work of the UNIDROIT Study Group began after the adoption of the Hamburg Rules.

In this paper we intend to confine our comments to those provisions of the draft which seem to us to be the most important ones, while at a later stage of the work we may submit further proposals for amendment.

2. Remarks on specific provisions

Article 3 (Document acknowledging receipt of the goods)

By comparing the present text with the provisions of Article 53 of the French Act on Carriage by Sea No. 66-420 of 18 June 1966, which is at present the only example of national legislation by which the liability of the carrier and of the "ITO" are regulated in a mandatory and substantially similar manner, we see two alternative possibilities for improving the text of the draft.

In passing, we leave out of consideration the fact that the French Act refers to a wider group of persons and agree on the restriction of the scope of the draft as provided for by Articles 1 and 2.

According to Article 53 of the French Act, it is for the ITO to prove that the goods which he received were not in the condition declared by the customer.

As a result of such a provision the ITO is obliged properly to safeguard his interests in the document he issues after receipt of the goods.

One may contemplate either replacing a part of Article 3 by the French regulation or - and we would prefer such a solution - inserting between paragraphs 3 and 4 of Article 3 an additional paragraph which would read as follows:

"If the ITO contravenes the provisions of paragraph 1 and 2, there is a presumption that he has received the goods as described by the customer. The ITO may adduce proof to the contrary."

Article 6

We suggest taking the figures contained in the Hamburg Rules as a point of reference for the determination of the amount of the different limitation figures.

Article 17

In our opinion this article should be deleted. It would jeopardise the whole purpose of the uniform rules.

If a State may declare that the rules will apply only to ITOs who are willing to submit themselves to the those rules it presupposes that in many of the most important ports of these States, there exist several institutions which are concerned with the safekeeping of goods before, during or after international carriage. If this is so, one may presume that such terminals are specialised for particular kinds of goods and/or modes of transport (e.g. traditionally packed goods, containers, goods in bulk, etc.). The customer has therefore no choice and entirely depends on the local organisation of the port.

But even if a freedom of choice between several institutions existed in theory the solution envisaged by the Convention would in any case prove to be ineffective because of the natural competition which would exist among them in practice. The right accorded to ITOs who spontaneously declare that they will apply the rules, to bear the title of an "authorised ITO" is obviously intended to represent a sort of incentive; by adopting this approach the Contracting States would however - provided that within their territory there really does exist a freedom of choice - inevitably "kill" commercially speaking all the other ITOs. Indeed, no customer can be expected to choose an ITO who is not an "authorised ITO", unless such an operator is applying prices which are so much lower that one might question how long he will be able to survive. And this apart from all the other practical difficulties which could be indicated in this respect.

Finally the question is still left open of the territorial sphere of application of the Convention, so far not defined by the draft.

Is the Convention intended to apply only if both the State of the customer and that of the ITO are Contracting States? Or is it sufficient that one of the two or only that of the ITO is a Contracting State? A provision on this point should be included in the draft, as Article 1 deals only with the substantive sphere of application.

Before concluding, we would like to stress the desirability of close cooperation between UNIDROIT and UNCITRAL, in order to ensure uniformity in the field of international trade law."

NETHERLANDS

"General comments

The Netherlands Government has taken note of the draft Convention and explanatory report with much interest and appreciation, and believes that the proposed arrangements could fill in the gap which exists notably with regard to the liability regime for the international carriage of goods by sea.

The draft is to a large extent modelled on the Hamburg Rules and it is therefore primarily to those rules that it provides a valuable supplement. Given that the Hamburg Rules, contrary to the Hague-Visby Rules currently in force, extend compulsory application of the rules on the carrier's liability to cover the entire period during which the goods are in the carrier's charge, the draft Convention (hereafter referred to as the ITO Convention) will enable the carrier to claim compensation in more cases for damage which has occurred during storage of the goods prior to loading on to the ship or after their discharge.

In cases where the Hague-Visby Rules apply, the ITO Convention will probably bring about less change in the situation existing at present. Under those rules the carrier can refuse to accept any contractual liability for damage which occurs prior to loading or after discharging unless the applicable national legislation prohibits such an exclusion clause. The proposed provisions in the draft ITO Convention do not make it clear whether customers who have no contractual link with the ITO will also have the right to make a claim on their own behalf under the ITO Convention.

The draft ITO Convention is also applicable to other branches of international freight transport including carriage by air, rail, road and inland waterway. Although the CMR, CIM and Warsaw Conventions also hold the carrier liable for the entire period the goods are in his charge, the Netherlands Government wonders whether it has become evident for these sectors too that there is a need for the carrier to be able to claim damages from the ITO; customers generally have the right to claim compensation from the carrier for damage which occurs during the said period. It would in any case be desirable to obtain the opinion of the international carriers' organisations on this subject.

Paragraph 22 of the explanatory report notes that the Study Group decided not to include in the draft ITO Convention rules on a number of other aspects of the warehousing contract. The Netherlands Government wonders whether the ITO Convention should not include regulations regarding the liability of the customer towards the ITO for damage caused by goods, particularly dangerous goods. Other aspects could perhaps be regulated more effectively by means of international standard conditions.

Article 1

a. "International Terminal Operator"

The words "either by agreement or by actually taking in charge such goods from a shipper, carrier, forwarder or any other person" give rise to the question of when the Convention is applicable. An ITO will normally take charge of the goods on the basis of a warehousing contract, though there may not always be an explicit written agreement. The text suggests that there might be cases where there is no question of an agreement but perhaps of negotiorum gestio. One example is that of the salvage of a ship and cargo for which no agreement need have been drawn up. It is doubtful, however, whether it would be desirable in such a case for the liability of the salvor to be regulated by the ITO Convention.

b. "Customer"

The definition of "customer", which is partly based on that of "shipper" in the Hamburg Rules, is not very satisfactory, since it allows two people to be considered as the "customer" at one and the same time:

1. the contractual partner of the ITO;
2. the person who has handed over the goods to the ITO for safekeeping, or on behalf of whom they have been so handed over.

Furthermore, the words "including a consignee, carrier, forwarder or receiving agent" are superfluous and confusing.

Article 2

It must be assumed that a precondition for application of the ITO Convention will be that the safekeeping of goods will be the primary obligation and that the other services referred to in paragraph 2 will be merely secondary obligations performed in the fulfilment of the primary obligation. This ought to be more clearly stated in the ITO Convention. In view of the fact that there are cases where the persons who render these services as a primary obligation sometimes have goods in their charge for short periods, the question could arise as to whether the storage of goods as a secondary obligation, for instance by a stevedore, would also have to be regarded as "safekeeping" as referred to in the ITO Convention.

Article 5

The Netherlands Government doubts whether the ITO's liability for delay in delivering the goods can be regulated in the same manner as under the Hamburg Rules.

Paragraph 1 is taken word for word from the text of the Hamburg Rules, so that the same objection may be made to this text as to that of Article 5, paragraph 1 of the Hamburg Rules, namely that the ITO has to prove that he was unable to avoid a particular occurrence, which has resulted in the damage, despite the fact that damage need not always necessarily result from one particular occurrence.

Article 6

The limitation of the ITO's liability for delay must also be considered more closely in the light of the comments made with respect to Article 5.

Article 9

Paragraph 1 stipulates that the customer must give notice to the ITO within a certain period after the goods have been handed over to the person entitled to take delivery of them. If the customer and the person to whom the ITO has to hand over the goods are two different people, it is not clear why such notice must be given by the customer. Article 19 of the Hamburg Rules refers only to the consignee in this context.

It would probably be better to delete paragraph 6.

Article 14

The actual meaning of this provision, based on Article 3 of the Hamburg Rules, is unclear and it would be better to delete it.

Article 17

The Netherlands Government does not consider it desirable to introduce a system of ITOs recognised by the States which are parties to the Convention. It would seem preferable to opt for a system under which the Convention is compulsorily applicable to all contracts concluded with an

ITO relating to goods handed over for safekeeping on the territory of a State which is a party to the Convention, or else for a system along the lines of the TCM Convention. If need be, the introduction of a mixed system could be considered under which a State which is a party to the Convention is authorised to declare that it will only apply the ITO Convention in cases where an ITO document has been issued.

Concluding remark

The present comments are only the first reactions of the Netherlands Government concerning the preliminary draft text for an ITO Convention. The Government reserves the right to make additional remarks and to amend the observations previously made at a later stage in the light of other comments and further discussions on the proposed text.

SPAIN

1. The ITO would seem to represent a new concept in the international carriage of goods, accomplishing the task of the safekeeping of the goods when these are situated in a determined place or area, either when they have been taken over for carriage or, once the carriage operations have been completed, for delivery. In the field of commercial law, and in particular in that of transport law, there would seem to be no opposition on legal grounds to the creation of this new figure, although it would be necessary to state with greater clarity the activity of the operator so that he can carry out his work.

2. The concept of a "terminal"

It is likewise necessary to clarify what is understood by a "terminal" and whether this concept should include distribution, trans-shipment and consolidation centres, or only those of the origin and destination of the goods.

3. Field of the operator's activities

The Convention makes no reference to the possibility of the operator's exercising his functions in port or customs areas, or whether these should be limited to the terminals themselves.

4. Liability

It is possible to deduce from the Convention the independent character of the liability of the operator vis-à-vis the carriers who, in any event, remain subsidiarily liable. However, the Convention does not make it clear whether the operator must assume liability only in respect of the safekeeping of the goods or whether he may also be responsible for liabilities which may arise during the carriage operations from causes exclusively related to those operations.

It is feasible for the operator to be held directly liable in the event of non-delivery to the consignee; in this event it would be logical to suppose that he has a right of recourse against any other person who is liable.

The Convention however, says nothing on this matter, which should, in our view, be clarified in some detail.

5. Right of retention

The operator has a right of retention over the goods in the event of non-payment for their safekeeping.

The Spanish Civil Code, however, in its chapter on the contract of carriage, makes provision for a similar right for the carrier who has not received payment of the freight.

There may therefore be two simultaneous rights, of the carrier and of the operator, which must be delimited.

6. Conclusions

Apart from the points made above, we consider the creation of this new figure to be extremely interesting, especially in the context of multi-modal carriage, since the concentration of liability on a single person would be most useful in ensuring the appropriate performance of the operations."

SWEDEN

"GENERAL COMMENTS

The Swedish Government recognises the need to introduce uniform international rules on the warehousing contract, especially in connexion with international carriage of goods, to fill in the gaps in the liability regime left by existing Conventions regarding international transport. It therefore welcomes the efforts made by UNIDROIT to elaborate such rules. The preliminary draft Convention constitutes, in the view of the Swedish Government, a very useful base for future work within this field.

The Swedish Government would like to emphasize the necessity to create a regime which is acceptable to a great number of States in order to achieve the desired uniformity. Bearing this in mind, the proposed limitation to warehousing operations which are linked to international carriage of goods seems to be a suitable idea to promote that aim.

However, this limitation may give rise to problems in certain respects. In Article 1, an International terminal operator (ITO) is defined as a person who undertakes the safekeeping of goods before, during or after international carriage. This definition is likely to give rise to ambiguities as to the applicability of the Convention due to the difficulties in some cases to determine whether the safekeeping is connected with an international transport operation or is an independent commitment. In order to eliminate these problems it may prove necessary not only to limit the application of the Convention to authorized ITOs (as set out in Article 17), but also to extend the scope to all warehousing operations undertaken by such terminal operators.

However, the Swedish Government finds as a whole the basic principles underlying the preliminary draft Convention acceptable. The Swedish Government also supports the idea of establishing a set of minimum rules governing the liability of ITOs. If there should be a need for further regulations it seems appropriate to supplement the Convention with standard conditions, prepared by interested commercial Organizations.

COMMENTS ON SPECIFIC PROVISIONS

Article 2

An ITO will often be the last link in a transport operation. Consequently, he is likely to receive many claims for damage that has occurred during or sometimes even before transport. An ITO could thus be made liable for large amounts, especially if the words "other similar services" were to be retained. Furthermore, this expression is ambiguous and should be deleted even for this reason.

Article 4

The Swedish Government is of the opinion that the Convention should contain rules conferring a right of lien on the ITO. The lien should, however, be related only to safekeeping of goods and not include all other claims against the customer. The last words of paragraph 1 (in square brackets) should consequently be deleted. Furthermore, this deletion appears to be a logical consequence, if the words "other similar services" in Article 2, paragraph 2, were to be deleted.

It should also be pointed out that the scope of Article 4 will affect the negotiable character of the document provided for in Article 3, paragraph 4. With too broad an application of the ITO's right of detention, the value of such a document would undoubtedly be reduced.

Article 5

The Swedish Government shares the view that it is desirable to follow the liability regime set out in the Hamburg Rules. It should in this context be considered whether it is desirable to include some wording to express the principle of presumed fault or neglect contained in Annex III to the Hamburg Rules.

The practical need for the provisions in paragraph 4 could be questioned and the paragraph ought to be deleted.

Article 6

The Swedish Government shares the views expressed in the explanatory report as to the limitation by kilogramme and the exclusion of the package limitation.

Article 9

The person "entitled to take delivery of the goods" does not necessarily have to be identical with the final receiver of the goods. In such cases the goods would probably not be unpacked until they have reached the final destination. Bearing this in mind, the period of 15 days within which claims must be made in respect of non-apparent damage seems to be too short and should be extended.

Article 10

If one accepts a system according to which the Convention can be made applicable only for operators who undertake to apply the rules of the Convention, the character of the provisions will be closer to standard agreements than to mandatory rules. In such a situation the provisions on limitation of actions in the Convention could in some States be in conflict with corresponding mandatory provisions in the domestic legislation. The courts in such States might as a consequence disregard the provisions of the Convention. The Swedish Government cannot offer any solution to this problem but would merely like to draw attention to the existence thereof."

SWITZERLAND

"As already mentioned in the first statement of our position on 27 February 1977, the work undertaken by UNIDROIT on the warehousing contract is not a matter of over-riding concern to the Swiss legislator. This is indeed an area in which practice seems to manage without any great difficulty on the basis of the existing rules.

Truth to tell, these are fairly rudimentary and to a large extent leave the field clear to individual arrangements or rather to the general conditions and usages prevailing in the circles in question. On the other hand, the international relations which form the subject-matter of the draft Convention are not common in our country, which has few large enterprises and terminal installations such as those to be found in particular in those States which are directly linked by the principal maritime routes. In these circumstances, and while our authorities approve the aim of unification of the law, they have some hesitations about involving themselves in the preparation of a Convention which would probably be of limited interest to Switzerland and which might well raise more problems than it would solve.

The proposals of the Study Group also cause us some concern as regards their substance and this is particularly the case with regard to the principle of limited liability which underlies the preliminary draft. While it is well known that such limitations on liability correspond to a widely followed practice and that there is a clear tendency to make increasing provision for them, also outside the classic field of transport law, the policy of the Swiss authorities is moving in the opposite direction. They are indeed of the belief that limitations on liability should be determined in function of its basis (fault or risk) and not fixed once and for all at a certain amount which is laid down in a more or less arbitrary fashion. Thus, even in an area where the idea of limited liability seems to be well established and is perhaps justified by the extent of the risk and the impossibility of calculating it in advance, that is to say the field of nuclear liability, the Swiss legislator intends to return to the system of unlimited liability. It would therefore be rather strange to grant to terminal operators a privilege refused to operators of atomic energy installations.

However, and notwithstanding these reservations of principle, we would not wish to exclude a priori any Swiss participation in UNIDROIT's future work on this subject, in the event of there being a decidedly positive reaction in the present consultations from those States which are directly interested in the question and of our finding that in Switzerland itself there were to be a little more enthusiasm for such an initiative than hitherto."

UNITED KINGDOM

"The United Kingdom continues to consider that national laws are so disparate that a Convention is not practicable and, although the liability of warehousemen is a question of substantive economic importance, the United Kingdom is not aware of any special difficulties in this field.

The United Kingdom has not been convinced by the arguments in favour of a Convention and, when consulted, neither operators nor the customers expressed a need for such a Convention. It is not clear that a Convention along the lines proposed would result in any advantages to customers; indeed, there may in some cases be disadvantages. A division of responsibility as proposed does not necessarily reflect the most economic approach to insurance, and one effect of such a division must therefore be increased costs. Also, the recent trend in international transport Conventions has been towards increasingly wider coverage of operations at terminals, with a consequent reduction in the significance of any lacunae that may previously have existed. In any case there is very considerable opposition to the idea of a mandatory regime.

Although the United Kingdom considers this particular Convention to be unnecessary, there may be a case for development of a standard warehousing contract or some form of harmonised guide lines for application at a national or regional level on a voluntary basis, and UNIDROIT might consider sponsoring work in this direction."

C. OBSERVATIONS OF INTERNATIONAL ORGANISATIONS

CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT (OCTI)

"The preliminary draft Convention on the liability of international terminal operators seems to us to constitute a sound basis for discussion with a view to the working out of a final draft on the subject.

In our opinion, however, certain provisions of the draft text call for further consideration and in this connection we would make the following observations.

1. Article 1, paragraph 1, line 1:

There seems to be some contradiction between the term "international terminal operator (ITO)" and its proposed definition. In point of fact, the word "terminal" refers rather to the beginning or the end of an international transport operation whereas the text likewise speaks of the safekeeping of goods "during international carriage".

Moreover, this question is related to that which we shall raise under point 4 below concerning the definition of "international carriage".

2. Article 1, paragraph 1, third line

We wonder whether the word "during" (... international carriage) might not give rise to some confusion.

In our opinion, the carrier must, under the contract of carriage itself, ensure the "safekeeping" of the goods which are transported, even though the principal obligation under the contract of carriage is to effect their removal from one place to another. The carrier should not therefore be able to evade the liability incumbent upon him in his capacity as a carrier by referring to the future Convention on the liability of international terminal operators.

Under Article 13 of that draft, "the rights and duties of a carrier which may arise under any international Convention relating to the international carriage of goods" are unaffected.

Nevertheless, the words "during carriage" might perhaps give rise to doubts in connection with the national law governing carriage. The definition of "international carriage" (see Article 1, paragraph 4 of the draft)

might also cover the "multimodal transport operator" under the United Nations Convention on International Multimodal Transport of Goods, adopted at Geneva on 24 May 1980. Now, during the performance of "international multimodal transport" operations, national law relating to the carriage of goods may be applicable to the relations between the multimodal transport operator and the actual carrier with regard to a segment of the carriage. In such cases, the possibility of there being a conflict between national law and the future Convention does not seem to us to be totally excluded.

If the Study Group shares this concern, then the necessary amendments might be made to Article 13 of the draft.

3. Article 1, paragraph 1 in general

The following situation may arise during the performance of international carriage by rail under the CIM:

When circumstances prevent delivery, the railway notifies the sender and asks for his instructions. The sender does not give instructions within a reasonable time or gives instructions which cannot be carried out. In such cases most national laws provide that the goods which have been held up shall be stored by the railway at the expense of the sender or deposited with a forwarding agent or a public warehouse.

Our question is whether the definition of "international terminal operator" appearing in the draft Convention also covers situations where the railway stores the goods in the circumstances described above: in our opinion this would be the case. We would suggest that the Study Group consider this question in more detail.

4. Article 1, paragraph 4

One might wonder whether the expression "contract of carriage" in the definition of "international carriage" covers only the contract of carriage stricto sensu or also the "multimodal transport contract" (see Article 1, paragraph 3 of the United Nations Convention on International Multimodal Transport of Goods), in view of the fact that this contract is characterised as a "sui generis" contract. If so, it would be easier to understand why the word "during" has been included in the definition of the term "international terminal operator" (see our observations under point 1 above). Might it not, however, perhaps be advisable to clarify the text in this regard? Such clarification would, in our opinion, facilitate the interpretation of the definition of the international terminal operator.

5. Article 2, paragraph 2

The proposed text does not seem to us to be sufficiently clear.

On the one hand, it is difficult to see what is the exact scope of the liability for which provision is made. Is it only for damage suffered by the goods during the performance of the services in question or also for the due performance of those services? Furthermore, it would be desirable to determine the period during which the ITO is liable on the basis of this text.

On the other hand, one might ask what it is to which the words "such" refer in the phrase "the ITO shall be responsible for such goods". As regards the goods mentioned in Article 2, paragraph 1, the liability is limited in time while, in paragraph 43 of the Explanatory Report, it is 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 safe-keeping, such as unloading, and others be performed subsequent thereto". In these circumstances it does not seem possible to establish a link between paragraphs 1 and 2 by speaking of "such goods".

6. Article 4, paragraph 4

The word "terminal" does not seem to us to be sufficiently precise; it might perhaps be better to define it in Article 1.

7. Article 5, paragraph 1

The Hamburg Rules (Article 5, paragraph 1) have been used as a model for this text; however the words in the text of the Hamburg Rules "the occurrence which causes the loss, damage or delay took place while the goods were in his charge as defined in Article 4," have not been included in the draft in question. In these circumstances it is not very clear what the word "occurrence" is meant to convey in the last line of the text.

In our opinion, the text could be clarified in two ways:

Alternative I:

"1. ... to avoid the occurrence which caused the loss, damage or delay and its consequences."

Alternative II:

"1. ... to avoid the loss, damage and delay in delivery."

In this connection, we would observe that - in our view - the word "dommage" should be replaced by "avarie" in the French text.

8. Article 9, paragraph 1

We do not see the reason for speaking in line 2 of this provision of the "customer" rather than of "the person entitled to take delivery of the goods". It is not certain that the definition of the term "customer" (Article 1, paragraph 2) covers every person entitled to take delivery of the goods; it is, however, evident that any person entitled to take delivery of the goods must be given the possibility of notifying the loss or damage referred to in the text.

Moreover, the expression "the person entitled to take delivery of the goods" is employed in line 4 of paragraph 1 and in line 2 of paragraph 4 of Article 9.

9. Article 10, paragraph 1

As with other international Conventions (see Article 47, paragraph 5 of CIM and Article 32, paragraph 3 of CMR), it would seem to be desirable to include a provision to the effect that national law shall determine questions relating to the interruption and suspension of the period of limitation.

10. Article 20, paragraph 3, first sentence

We would recall that at the most recent United Nations Conferences dealing with the regulation of international transport, the following rule has been laid down in the Rules of Procedure: "Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting." (See, for example, Rule 33, paragraph 1 of the Rules of Procedure of the 1980 United Nations Conference on a Convention on International Multimodal Transport).

It would perhaps be advisable to reconsider the rule in question in the light of the rules of procedure of United Nations Conferences."

INTERNATIONAL ASSOCIATION OF PORTS AND HARBOURS (IAPH)

"Generally, the results of our investigations and deliberations at this stage of work cover the following areas:

1. In principle, it must be right to standardise by an international Convention the various modes of transport, which all have their own different problems about liability etc., which has been regulated over many years by existing international Conventions or domestic regulations.
2. The constructions of two alternatives for joining the Convention - either a mandatory Convention or a system where those terminal operators who apply the conditions set out in the Convention are authorised to use the name International Terminal Operators (ITO) and its logotype in accordance with Article 17 must facilitate the adoption of the Convention.
3. In principle, it is right to use a model, as far as possible, the so called Hamburg Rules, which probably are going to replace the existing Hague and Hague-Visby-rules for maritime traffic.
4. A reasonable and simple limitation of liability would be convenient for all involved and facilitate obtaining insurance, which would cover all risks for a reasonable amount of money.

The limitation in Article 6 is however not fixed, but can by agreement between the terminal operator (ITO) and the customer exceed the stated limitation (Article 6 (3)). This must lessen the value of the limitation and might result in different limitations for the ITO in contracts with different customers. This must in principle be wrong.

5. Finally, it is obvious that many terminal operators are just not interested in a change in the current situation where they use the conditions of liability as a means of competition with other terminal operators. Many are also reluctant to change from the widely existing culpa clause to the reversed burden of proof in Article 5. This was very evident at the Container Terminal Operators Conference in Oakland in October 1979.

We know that the draft Convention is expected to be supplemented by standard conditions worked out in cooperation with international Organisations like CMI, ICC and FIATA and would be sponsored and recommended by these Organisations.

We have learned that this work is about to start under the leadership of CMI and we would be happy to take part in this work.

As we understand it, work on the draft Convention and the standard conditions have to be seen as a whole and considered together. So we would be happy to have the opportunity to give our further views and comments later when we can see the result of the work on standard conditions. At that stage we also hope to have obtained more views, comments and advice from the terminal operators in our ports."

INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS (FIATA)

"The draft submitted for comment was elaborated at the beginning of 1979. During the discussions of the Study Group, the representative of the "Magasins généraux" de France" and the FIATA representative, Dr. J. Van Alsenoy, insisted more than once on the fact that very often the legal regulations being established did not coincide with practice. It was only towards the end of the discussions that Professor Rodière stated that it would be advisable to accord greater weight to the observations of the practitioners.

Thus, for example, the definition of the ITO in Article 1 is far from clear. All warehousing is either preceded or followed by carriage operations. A distinction must however be drawn between warehousing which is only an ancillary aspect of carriage, and warehousing as an end in itself where the operator stores the goods for a certain time in a specific place. The length of the warehousing plays no rôle, when it is simply an aspect of, or connected with, transport operations.

During the discussions and on the basis of the general considerations, in particular paragraph 12, it was clearly stated that the draft sought only to regulate warehousing operations linked to international carriage.

A terminal operator may be involved in single mode carriage but normally in connection with multimodal carriage.

Questions immediately arise with regard to the document mentioned in Article 3, neither the purpose nor the utility of which are clear, since the terminal operator intervenes on account of, or in relation to, carriage operations. This point was considered neither from a technical nor from a practical standpoint during the discussions.

Another matter which calls for further thought is the terminal operator's sight of retention, for which provision is made in Article 4, in the context of multimodal or through carriage, covered by a combined transport document. On the other hand, regard should be had to the fact that, at the beginning, the terminal operator may also be the combined transport operator and that, at the end of the operations, he will often have to deliver the goods on the basis of a transport document, subject to the application of the stipulations in the contract of carriage concerning liability and delay.

In the case of single mode international carriage, it would often be extremely difficult, on the basis of Article 1 of the draft, to distinguish between traditional warehousing and warehousing connected with carriage.

Finally, Articles 5 to 14 of the draft are based on the Hamburg Rules. There is now a Convention on Multimodal Transport of which account was not taken during the preparation of the draft.

It would seem to be absolutely out of the question to consider the present draft as a final one without at least considering its effects in relation to the existing Convention on Multimodal Transport.

For all these reasons, as well as in the light of practical and economic considerations which it is not the place to develop in more detail at this stage, FIATA is of the opinion that in its present form the draft Convention is unacceptable and that at the very least there must be further discussion which will, above all, take account of practice and of the new legal rules which have been established in the meantime."

INTERNATIONAL RAIL TRANSPORT COMMITTEE (CIT)

"Taken as a whole, we consider this preliminary draft to provide a very useful basis for discussion with a view to achieving the desired result, namely the working out of a text which would be acceptable to the largest possible number of States and widely applied. In view, however, of the opportunity which has been offered to us, we would like to put forward some considerations concerning certain provisions of the preliminary draft.

1. Article 1

The term "international terminal operator" does not seem to us to be entirely satisfactory. Indeed, while the word "terminal" may be suitable to describe the safekeeping of the goods before and after carriage operations, this is not the case when the services are provided during those operations. If the expression "terminal" were to be maintained, it might be desirable to provide a definition of it in Article 1, all the more so as it is used again later in Article 4.

We wonder, moreover, whether it would be wise to extend the Convention's scope of application to the safekeeping of goods during carriage operations. The result might be uncertainty and even the risk of conflicts which it would be difficult to avoid.

Paragraph 1, line 3

Since there is always agreement between the two parties, whether express or tacit, we would suggest the following form of words:

"... either by prior agreement, or by actually taking in charge such goods ..."

Paragraph 2

Our proposal:

"'Customer' means any person, in particular a consignee, carrier, the goods have actually been handed over to the ITO for the purposes of safekeeping ..."

Paragraph 3

The text could be simplified by analogy with the definition of goods contained in Article 1 of the United Nations Convention on the Multi-modal Transport of Goods, to wit:

"'Goods' includes any container, pallet or similar article of transport or packaging, if supplied by the consignor".

2. Article 2, paragraph 2

We would prefer the following formulation which is clearer:

"Furthermore, the ITO shall be responsible for loss resulting from loss of, or damage to, the goods during the performance of other services which he has undertaken to provide, such as loading, stowage, discharging or other similar services, as well as for the due performance of those operations."

3. Article 3

In the interest of the certainty of the operations and with a view to reducing disputes as far as possible, we believe that a document acknowledging receipt of the goods should be drawn up in all cases, and not only at the request of the customer.

The Convention should also include an article concerned with the content of the above-mentioned document.

4. Article 5

The word "occurrence" in the penultimate line of paragraph 1 calls for clarification, for example as follows:

"... to avoid the occurrence which caused the loss as well as its consequences."

We would in addition prefer throughout the Convention the use in the French text of the word "avarie" rather than "dommage".

5. Article 6, paragraph 1 (a)

In the French text, replace the notion of "poids" by "masse".

6. Article 9

Paragraph 1

The natural person to give notice of loss or damage is the one entitled to take delivery of the goods, and not the carrier, the forwarder, the receiving agent or any other person also covered by the notion of customer. The reference to the customer should therefore be replaced.

Moreover, the time within which notice is to be given - not later than the working day after the day when the goods were handed over - seems too short, especially where the person who must give notice is not entitled to take delivery of the goods. The period could for example be extended to three days.

Paragraph 2

As formulated, the reference to paragraph 1 of the article does not seem to us to be appropriate. We would prefer the following wording:

"In cases where the loss or damage is not apparent, the presumption in paragraph 1 only applies when notice of loss or damage has not been given in writing within 15 consecutive days ... of the goods."

7. Article 11, paragraph 2

Paragraph 2 seems to us to be superfluous, given the possibility expressly provided for in Article 6, paragraph 3 for the parties to agree to a higher liability, which could not then be contrary to the provisions of the Convention.

Moreover, we agree with the observations already submitted to you by the Central Office for International Railway Transport in its letter of 4 November 1980."