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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, April 1981

INTRODUCTION BY THE SECRETARIAT

1. Since the publication of Study XLIV - Doc. 9, which contains the observations of Governments and International Organisations on the UNIDROIT preliminary draft Convention on the liability of international terminal operators, the Secretariat has received further comments on the preliminary draft Convention from the Governments of the Federal Republic of Germany, Madagascar, Norway, Turkey and Uruguay.

2. The observations of those Governments are reproduced hereafter. As already mentioned in paragraph 4 of Study XLIV - Doc. 9, the Secretariat anticipates further comments from a number of Governments and a detailed analysis of all the observations received will be set before the Study Group on the Warehousing Contract at its third session in October 1981.

FEDERAL REPUBLIC OF GERMANY

VI. The Federal Government forwarded the Preliminary Draft Convention on the Liability of International Terminal Operators to the competent Federal and State authorities and to the top organizations of the economy for their comment.

In the comments received from them different views are expressed, in particular with regard to the question whether it is expedient to harmonize the law of warehousing operations associated with international carriage as is provided for by the Convention. Those who think that there is no need for such a Convention point out, inter alia, that the rules of international transport law on the carrier's liability for loss of or damage to the goods to be carried cover also transit warehousing necessitated by traffic conditions; that there is, therefore, no gap that would require to be filled. On the other hand, those who support the Draft Convention argue that it is difficult to understand why international carriage operations should have been subjected to mandatory liability rules while warehousing operations, which are particularly prone to damage, including the services mentioned in Article 2 paragraph 2 of the Draft, are left to be regulated by laws which are not harmonized; that it is true that under the transport law in force the carrier is, as a rule, liable to the consignor also for the loss of or damage to the goods while they are in transit warehousing necessitated by traffic conditions; that, in spite of this, the proposed harmonization of the rules on the liability of terminal operators is desirable because it would prevent excessive contracting out by terminal operators and thus facilitate recourse by carriers, forwarders and insurers against the terminal operator; that, in turn, such recourse is of importance for assessing the insurance premium for carriage and thus for the costs of carriage.

However, in detail the views on the effects of the proposed Conventions on the costs of carriage are controversial. While some argue that the carriage costs will decrease on the carrier's part as a result of the possibility of having recourse against the terminal operator, others express the fear that in view of the nature and extent of the liability, covering in particular also damage caused by delay, the costs for the third party liability insurance of the ITO might increase out of proportion and thus the total costs of carriage might increase rather than decrease.

The comments, which pointed out in particular the economic consequences, reveal that the question whether harmonization of the warehousing operations law is expedient cannot be judged isolated from the further unification of international transport law. The proposed Convention must be viewed in particular in conjunction with the Convention on the Carriage of Goods by Sea (Hamburg Rules) and the Convention on the International Multimodal Transport of Goods. It is, therefore, appreciated that the provisions of the Draft follow the Hamburg Rules as far as possible. The desired harmonization and delimitation of the liability rules applicable to the ITO on the one hand and to the carrier on the other can, at any rate, be achieved only if also the Hamburg Rules and the Convention on the Multimodal Transport of Goods are applied by many.

II. As to the individual Articles of the Convention, the following observations must be made:

Article 1

1. The intention of the Draft to cover only warehousing operations associated with international carriage is not met with sufficient clarity by the wording of Article 1 paragraph 1 and Article 2. From the wording of these provisions it could rather be inferred that the ITO shall be subject to the rules of the Convention even if, in the individual case, he undertakes the safekeeping of goods without there being any association with international carriage. Some clarification appears to be advisable.

2. The definition of "International Terminal Operator" leaves open whether, for the necessary association with international carriage, what is material is the original intention of the customer at the time when he hands over the goods for safekeeping or what actually happened after that. On this point, too, some clarification would be appropriate. For in many cases it is not yet known at the time the goods are handed over for safekeeping whether they will subsequently remain within the country or be exported. Moreover, frequently the original dispositions regarding the dispatch of the warehoused goods will be changed.

3. The definition of "International Terminal Operator" distinguishes between the agreement on the safekeeping of goods and the actual taking in charge of the goods. To avoid the erroneous inference that in the latter case an agreement on the safekeeping is not concluded, some clarification appears to be necessary.

4. The words "against payment", which are put in square brackets, could be understood to mean that the provisions of the Draft shall apply only if the customer pays a sum of money as consideration. However, a consideration may be paid also in a way other than by payment of a sum of money. The provisions of the Draft should not be applied only if the safekeeping of the goods takes place without any consideration whatsoever.

5. The words in square brackets "on whose behalf" and "on his behalf" should be deleted in order to avoid difficulties in ascertaining the ITO's other party to the contract. If a person concludes a contract in his own name but on behalf of another, only the person making the declaration himself should be a party to the contract.

6. Long-term warehousing of goods, in particular for the purpose of stockkeeping, should be excluded from the application of the Convention, even if such stockkeeping has some association with international carriage.

Article 2.

1. According to the wording of Article 2 paragraph 2 of the Draft, which insofar differs from the Explanatory Report, the ITO can be liable under the Convention for the performance of services such as loading, stowage and discharging of goods even if, in the individual case, he does not warehouse the goods. A clarifying supplementation of the text appears to be advisable.

2. Paragraph 2 could be understood to mean that "similar services" within the meaning of this provision might include also the distribution of the warehoused goods to a -possibly large - number of individual consignees if the ITO has assumed such an obligation. It should be made clear that such a distributive activity is not one of the services covered by paragraph 2.

Article 3

Paragraph 2 does not show unambiguously to what extent particulars regarding the goods taken in charge must be included in the document to be issued in accordance with paragraph 1. It is doubtful whether only inaccuracies or inadequacies regarding the number, type or condition of the goods compared with the description of such goods in a transport document, or whether quite generally particulars on the condition of the goods to be warehoused, should be included in the document. It is advisable to clarify this. Moreover, the costs of the checking to be made in accordance with Article 3 paragraph 2 should be imposed on the customer for whose benefit such checking is made.

Article 4

1. The text put in square brackets in paragraph 1 should be deleted. To secure the ITO's claims it should be sufficient - and it is also in the interest of a speedy performance of the warehousing operations - to restrict the right of retention to those claims which have some connection with the safekeeping of the goods.

2. Apart from that, it should be made obligatory for the ITO to render account to the customer in case the goods detained by him are sold.

Article 6

It appears necessary to supplement the proposed liability regime and provide for a limit of liability per event. In the case of excessive damage, e.g. through explosion or fire, the liability per kilogramme could lead to an incalculable loss and thus to a risk that can hardly be insured. We think that the limit of liability could not be fixed generally and uniformly for all warehousing enterprises. The standard for comparison could be a value per squaremetre of the storage space or the annual turnover.

Article 8

The text of Article 8 paragraph 1 of the Draft should be adapted to the formulation in Article 8 paragraph 1 of the Hamburg Rules.

Article 9

1. Practical reasons make it appear expedient to draw up, instead of the written notice of loss or damage, at least a joint record on the result of the checking made during a joint inspection. Such a scheme should be admitted or prescribed.

2. Paragraph 6 should be deleted.

Article 10

We should consider a supplementation of paragraph 2 to the effect that in case of a total loss of the goods, provided the ITO gives notice thereof, the limitation period shall commence already on the day on which such a notice is received.

Article 11

Following Article 23 paragraph 3 of the Hamburg Rules it should be laid down in the Convention that the ITO shall generally be obliged to make a statement that the safekeeping of the goods is subject to the provisions of the Convention.

Article 16

The number of ratifications required for the Convention to enter into force should be increased considerably.

Article 17

A licensing system for ITOs such as is admitted by Article 17 of the Draft gives rise to doubts. Where Contracting States avail themselves of this possibility it should, at any rate, be ensured that every enterprise which fulfils the requirements mentioned in the Convention will, upon application, be recognised as an "Authorised International Terminal Operator".

MADAGASCAR

"I. GENERAL OBSERVATIONS

It would have been preferable to speak of warehousing operations rather than the warehousing contract, inasmuch as warehousing is usually a prolongation of the contract of carriage so that the two should constitute a legal unity. The contract of carriage would be the principal transaction and warehousing operations accessory to it. The draft should therefore have been built around the theory of the "accessory transaction", which would have avoided a certain number of problems at different levels.

- Written document: the conclusion of the contract of carriage should suffice to cover all the subsequent operations. Nevertheless, so as to provide protection for the ITO, the latter should draw up with the agreement of the other party a "receipt" for the goods, which would be added to the contract of carriage.
- Reservations: these should be made by the "customers" or by their forwarders or agents.
- Retention of the goods: the ITO should not need to take this step in that he would always receive payment from the person who concluded the contract of carriage, whatever the nature of the sale.
- Delivery of the goods: it should be for the "customers" or their agents to take delivery of the goods and for the ITO to hand them over to them, in conformity with the receipt which the ITO would have drawn up in agreement with the other party. Two solutions should be envisaged for the problems associated with delay on the part of customers:
 - either to relieve the ITO of liability as from the day when the goods should have been removed by the customers;
 - or to institute a system making provision for a tax in respect of each day of delay.

Finally, the warehousing operation should be analysed in terms of the simple provision of services, which would result in the ITO's being viewed as the agent of two distinct principals according to the nature of the operations, that is to say as either the agent of the carrier or as the agent of the shipper.

II. SPECIFIC OBSERVATIONS

Article 2, paragraph 1 - the words "From the time he has taken them in charge" should be replaced by the formula "from the time he has agreed to take them in charge".

The second proposal presupposes that the ITO had prior knowledge of the nature and character of the goods for whose safekeeping he accepts responsibility. He should therefore be relieved of liability if the principal makes a false statement. This question would be of particular relevance in connection with dangerous goods.

Article 3, paragraph 1 - Written form should be necessary in the shape of a simple receipt for the goods.

Articles 5 to 8 - Delete any proposal relating to "delay in delivery by the ITO".

Article 10, paragraph 2 - The limitation period should run from the time when the customer ought to have taken delivery of the goods.

Articles 9 and 11 to 22 - No observations."

NORWAY

"The Norwegian Government recognizes the general need for uniform rules in connection with international carriage of goods.

In some cases the carrier will also undertake the safekeeping of the goods before or after the carriage. In some of these cases, the carrier's liability for the safekeeping comes within the scope of the relevant international convention on carriage of goods. In other cases, however, no existing international convention is applicable to the liability for the safekeeping in connection with international carriage of goods. The UNIDROIT draft convention will fill in this gap in the liability régime of the international carriage of goods. The draft convention will also apply to the carrier's rights of recourse to the terminal operator in cases where the carrier is liable for safekeeping according to an existing international convention on carriage of goods.

The 1978 Hamburg Rules seem to have served as a model for the draft convention. As safekeeping is in practice to a great extent connected with carriage of goods by sea, we think that the working group has chosen the right basis for its work in this respect.

The draft convention contains only minimum rules on the terminal operator's liability, and no detailed regulation of his obligations. We think that the working group has made a good choice also in this respect.

In our opinion the UNIDROIT draft convention is a suitable basis for further discussions to achieve uniform rules on liability for safekeeping of goods in connection with international carriage.

In addition to these general comments, we have some brief comments on some of the articles of the draft convention.

Article 1

The draft convention is applicable only if the safekeeping takes place "before, during or after international carriage", (Art. 1 para. 1). In many cases, it may be difficult, however, to determine whether the safekeeping is connected to or independent of international carriage. We have no solution to this problem, but we feel that the problem should be given further consideration.

Article 2

The scope of the draft convention is restricted to safekeeping and some specified additional services such as loading, stowage, discharging "or other similar services". It is not obvious which services are included, and a clarification might be considered.

On the other hand, the description of the scope of the draft convention does not fill in all gaps in the liability régime of the international carriage of goods. For instance, other forwarding services than those mentioned in Article 2, will - if undertaken by another person than the carrier - remain outside the scope of the international conventions on carriage of goods. Such gaps, however, are probably inevitable.

Article 3

This article should in our opinion expressly state that the document is to contain a sufficient description of the goods (according to necessary particulars furnished by the customer). See also the Hamburg Rules, Article 15 para 1 (a). This clarification would in our opinion bring the first two paragraphs more in accordance with each other.

Article 4

We support the idea that the ITO shall have a right of retention over the goods he has taken in charge. But we think this right should be restricted to claims relating to the goods retained, and that the words in square brackets should therefore be deleted.

Article 6

According to para 1 (a), the liability for loss of or damage to the goods is limited to 2,5 SDR per kilogramme of the goods lost or damaged. This amount equals the corresponding amount in the Hamburg Rules, see the Hamburg Rules, Art. 6 para 1.

In our opinion, this amount is too small. If the amount to which the ITO is entitled to limit his liability is raised, it would also justify making the limitation as "unbreakable" as possible, see our comment on article 8.

According to para 1 (b), the liability for delay is limited to an amount proportional to the price payable for the safekeeping. The corresponding criterion in the Hamburg Rules is the freight. - We are not convinced that these two criteria should be made equal in this sense. The potential loss resulting from delay is the same in the two situations, but the price payable for the safekeeping will in most cases be much lower than the freight. A possible solution to this is to leave out the separate limit of liability for delay.

The draft convention has no minimum limit of liability per package of goods. The Hamburg Rules have such a package limitation, see Art. 6 para 1 (a). - For reasons mentioned in the explanatory report, we recognize the motives for excluding the package limitation. The result is, however, that the limits of liability seem too low in cases where only a small quantity of goods is safekept. This problem should in our opinion be given further consideration. One possible solution would be to keep the package limitation based on the number of packages at the time of the arrival of the goods at the warehouse.

Article 7

To this article, we have a comment on its scope of application.

According to Art. 5 of the convention, the ITO is liable for the performance of his obligations under Art. 2. This liability is subject to limitation according to Art. 6. Art. 7 enlarges the scope of the limitation provisions to non-contractual claims, but also to claims resulting from acts or omissions absolutely outside the scope of the convention, for instance to claims for damages resulting from the ITO's failure to perform an undertaken obligation to arrange for further transportation.

We are not convinced that this result is intended, and we therefore raise the question for further consideration. One might argue that the scope of Art. 7 should be restricted so that the defences and limits of liability provided for in the convention should apply in any action against the ITO in respect of loss, damage or delay in delivery of the goods caused by any act or omission within the scope of the ITO's obligations under art. 2 of the convention, whether the action is founded on contract, in tort or otherwise.

Article 8

Provided that the limits of liability are increased, the word "personal" should, in our opinion, be kept."

TURKEY

"The Turkish Government finds the work of codification regarding the liability of international terminal operators to be extremely useful and the preliminary draft Convention has, in general, met with the approval of the competent Turkish authorities.

The Turkish ministries concerned must now proceed to a detailed analysis of the Convention before embarking upon the task of bringing national legislation into line with the content of the Convention and Turkey will communicate at a later date the results of the work in question."

URUGUAY

A. The draft Convention deals only with those cases of liability for damage which may be suffered by goods entrusted to terminal operators. We believe that it would be eminently preferable to cover the whole field of liability for damage caused to persons by such goods, especially during the period in which they are in the terminal.

B. Since Article 1 seeks to provide definitions of terms which will be used throughout the Convention, it would be desirable to add further definitions, for example of what is meant by a "container", and to indicate the minimum requirements necessary for the vehicle in which the goods are carried.

C. We do not believe it to be appropriate to separate the texts of Article 2 and of Article 5. According to the former, the ITO shall be responsible for the safekeeping of the goods. Under Article 5, he is not liable when he has taken all measures that could reasonably be required to avoid the damage. In practice, this would mean that in almost all cases the ITO would seek to prove that he had not been at fault, which would lead to interminable legal proceedings.

We wonder whether it might not be preferable to institute a strict liability regime in respect of such activities.

Even if it is not expressly stated, it is to be supposed that if there is exoneration of liability in the absence of fault, then "cas fortuit" and force majeure should likewise constitute defences.

D. The rule laid down in Article 6 which makes provision for specific limitation figures is in contradiction with that established in Article 11 which provides for the possibility in certain cases of the ITO increasing his responsibility beyond that established in Article 5. In practice, in each case and according to the type of goods, another sum for loss or damage will be agreed upon.

In Article 6, paragraph 1 (b), which determines the form of compensation for damage caused by delay in delivery of the goods, the limitation on liability is determined in accordance with the price payable for the safekeeping of the goods. Account is not taken of the consequences which such delay may have on non-performance of a contract which occurs precisely because the goods have not been delivered on time.

We do not understand which criteria are to be employed for the purpose of limiting the excess liability in those cases where there is both damage to the goods and loss resulting from delay, especially if one thinks of those instances where the delay is in itself the cause of damage to the goods.

E. We think it appropriate to limit liability for loss even in the case of extracontractual liability.

F. Under Article 3, the liability of the ITO is unlimited if the damage is caused intentionally or recklessly and with knowledge that such damage would probably result. The consequence is that the sum payable by way of compensation will vary according to the behaviour of the persons involved. This suggests that the article is dealing not so much with damage arising under the contract as with punitive damages.

G. It seems to us that the requirement under Article 9 that only one day is allowed to establish the condition of the goods is too restrictive, especially for some categories of goods.

H. In the light of the provisions of Article 13 of the draft, when considered in connection with our legal system, it would be necessary to enquire into the possibility of conflict with the TIR Convention, which has recently been ratified by our country (Law 15.064, published in the Diario Oficial, 12 January 1981), in particular with respect to the use of "sheeted vehicles".