UNIDROIT 1981
Study XLIV - Doc. 9 Add. 2
(Original: English)

U n i d r o i t

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, June 1981

INTRODUCTION BY THE SECRETARIAT

Since the publication of Study XLIV - Doc. 9 and Add. 1 thereto, which contain the observations of Governments and International Organisations on the UNIDROIT preliminary draft Convention on the liability of international terminal operators, the Secretariat has received comments on the preliminary draft Convention from the Government of Yugoslavia which are reproduced hereafter.

1. General considerations

1.1 It is acknowledged that the liability of the international terminal operator should be regulated by the international convention.

The reasons for such a solution are as follows:

(a) Though the absence of uniform provisions governing the liability of persons to whom the goods are entrusted before, during or after international carriage, was noted quite a long time ago, this situation is no longer acceptable to customers. Quite big differences exist today between the solutions provided in particular countries concerning the liability of warehousemen and other persons taking part in the international carriage of goods (loading, discharging, etc.) in respect of their liability (system of liability, general conditions, exonerations, etc.). Since there is no justification that such differences should remain, the Convention would improve the position of the shipper and other customers.

(b) The Convention would complete the unification of international transportation law.

1.2. Contents of the Convention

(a) The Convention should contain the minimum number of provisions concerning the activities and liability of the international terminal operator; due attention should however be paid to the legal protection of the contracting parties involved.

(b) The meaning of "international terminal operator" should be determined by closer description in the Convention's provisions.

1.3. Mandatory application of the Convention's provisions.

The Convention should contain a number of mandatory provisions such as those concerning the system of liability of the international terminal operator, limitation of liability, etc. The solutions which are provided in this respect in the Preliminary Draft are acceptable since such a degree of jus cogens has also been accepted in other conventions in the field of transportation law.

1.4. Issues that warrant further study

(a) Acceptance of the Convention will probably require the meaning of "international terminal operator" to be defined more clearly (that is of the person who appears to be in charge (under contract) of port services, services of cargo terminals and similar services). It is noted that these issues may warrant further additional clarification.

(b) A question might be raised whether the Convention might on the one hand have the effect that goods will bypass particular terminals, or, on the other hand, bring the foreign international terminal operator to another country. It is felt that this issue is a complex one, features of which might be interesting from the standpoint of developing countries.

1.5. "Conflict of laws" should be understood as representing a real possibility. Therefore, this should be considered as a good reason for proposing that when drafting the Convention, the work should proceed from solutions already accepted in the United Nations Convention on Carriage of Goods by Sea and the United Nations Convention on International Multimodal Transport of Goods with a view to effecting appropriate adjustments. In this connection it should be noted that it would be dangerous to leave "gray zones" which might cause unnecessary disputes.

2. The wording of the Preliminary Draft Convention

2.1. Preamble

The Convention's Preamble should be enlarged in order to take into consideration the Convention's objectives. Thus particular attention should be paid to the development of combined transport (transport integration) as one of the main objectives of economic development. It is necessary to recall the provisions of the United Nations Convention on International Multimodal Transport of Goods in this respect.

2.2. It should be noted that terminological difficulties were encountered when examining the Preliminary Draft.

2.3. Liability of the international terminal operator

(a) The definition of the international terminal operator should include not only the person who performs the activities of an international terminal operator as his basic activity but also the person who performs these activities as ancillary ones. In this manner, unnecessary misunderstandings would be avoided and the customer would be protected more adequately.
Referring to Article 1 of the Preliminary Draft, it is proposed herewith that the definition of the international terminal operator should be widened so as to include operators who do not undertake safekeeping of goods against payment. If this solution were to be accepted, it would further be necessary to provide a possibility for the customer and the international terminal operator to conclude a contract modifying the liability determined in Article 6 of this Preliminary Draft, that is, to reduce the operator's liability.

(b) Activities of the international terminal operator

No rigid provisions should be concluded in respect of the international terminal operator's activities. Therefore, it should not be necessary to regulate in more detail the activities of the international terminal operator but it should be left to practice to come to some useful results.

(c) System of liability of the international terminal operator

Bearing in mind that the liability system of any person (as might be the case with the carrier), represents the mechanism for sharing risks of the loss of, and damage to, goods in any international convention on transportation law, it should be necessary to pay particular attention to this issue.

Taking into consideration the building of new economic international relations and the belief that the above-cited conventions represent a contribution to that order, the liability system of the international terminal operator should be brought into line, to the greatest possible extent, with the liability of the international transport operator or carrier under the Hamburg Rules.

Referring to the points outlined in the preceding paragraph, the regulation of the international terminal operator in accordance with the network liability system - that is, conecting his liability with the liability of the preceding carrier - should not be considered.

A uniform liability system should be preserved for the liability of the international terminal operator.

(d) Limitation of liability of the international terminal operator

Concerning limitation of liability of the international terminal operator, the solution proposed in the Preliminary Draft should be accepted since it was adopted in the Hamburg Rules.

Referring to the proposal stated in Article 6 (1) (b) of the Preliminary Draft, the proposed solution concerning the liability limitation is considered to be ambiguous.

(e) Normal minor loss - damage to goods

Having in view the features of the international terminal operator's activities, it is believed that sufficient attention was not given to some particular kinds of damage to goods which are incidental to cargo handling operations (for example "usual high shrinkage" and "normal minor loss") performed by the international terminal operator. It appears that such kinds of damage to goods should be excluded from the liability of the international terminal operator.

(f) It should be noted that there are no objections to the provisions of the Preliminary Draft concerning notice periods and time limitations.

3. Issues concerning the right of retention over goods of the international terminal operator

It is not necessary perhaps to underline that issues concerning the operator's right of retention over goods for obtaining compensation for his counterclaim against the customer, which might legally be founded on various grounds, represent a complex problem. The elaboration of a uniform solution will meet with particular difficulties since the subject matter examined has up to now been exclusively within the domain of national legislation. Various solutions in national laws (of a substantive nature) and at the same time add difficulties relating to terminology.

Referring to the points set out in the preceding paragraph, it is stressed that Article 4 of the Preliminary Draft should be clarified in the following manner:

3.1. It should be provided that the international terminal operator should have, as a right, a statutory lien as well as a general lien over goods. Greater emphasis should be laid on the statutory lien of the operator. In the case of short and long term warehousing of goods, as well as in all other cases of the operator's activities, the statutory lien should be granted to him.

3.2. Referring to Article 4 para. 1 of the Preliminary Draft, it is believed that the wording of this provision should be made more precise in order to clarify whether the "other claims" relate to the goods for which the warehousing rent was not paid, or, to all other goods of the customer which came into the possession of the international terminal operator.

3.3. Referring further to Article 4 para. 1 of the Preliminary Draft, it is suggested that the wording of the provision should be made more precise, and provide that the statutory lien relates also to all other services undertaken by the international terminal operator in the course of his activities.

3.4. Referring to Article 4 para. 1 of the Preliminary Draft, it is suggested that the alternative provided there should not be retained. The first proposed solution should instead be developed in more detail.