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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

Synoptic table of the 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, August 1981

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. The Secretariat has received observations from the Governments of Australia, Austria, Czechoslovakia, the Federal Republic of Germany, the German Democratic Republic, Madagascar, the Netherlands, Norway, Spain, Sweden, Switzerland, Turkey, the United Kingdom, Uruguay and Yugoslavia 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. These observations have already been published in Study XLIV - Doc. 9, and in two addenda thereto but with a view to facilitating the work of the Study Group on the Warehousing Contract at its 3rd session the Secretariat has regrouped the various observations by subject-matter and by article.

4. In order further to expedite the work of the Study Group, the Secretariat has also prepared the following list, which does not however claim to be exhaustive, of the major points raised in the comments of States and international Organisations:

- the need for unification in this field at the present time and in particular the economic effects of such unification;
- the concept of the future Convention as laying down minimum rules to be completed by general conditions;
- the concept of the "warehousing contract";
- 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 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 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 possibility of drawing a satisfactory distinction between warehousing stricto sensu and warehousing connected with international carriage operations, as well as the definition of such operations;
- 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;
- the need to specify in more detail the contents of the document referred to in Article 3;
- clarification of the ITO's right of retention under Article 4 and the need possibly to delimit the scope of the lien (a) vis-à-vis that of the carrier for payment of freight which may exist under certain national laws and (b) to claims relating to the goods retained;
- suitability of the taking over in Article 5 of some corresponding provisions of Article 5 of the Hamburg Rules;
- length of the period within which claims may be made under Article 5, paragraph 3;
- possible deletion of paragraph 4 of Article 5;

- deletion of any reference to the operator's liability for delay in Articles 5 to 8;
- possible need for a provision similar to that in Annex II to the Hamburg Rules expressing the principle of presumed fault or neglect;
- possible introduction of provisions regarding liability for damage caused to persons by the goods in the terminal;
- exclusion of the operator's liability for some kinds of damage incidental to cargo handling operations;
- 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 and whether reference might not be made to the corresponding provisions of the new Convention on multimodal transport;
- the possibility of a modification of the limitation figure permitted by Article 6, paragraph 3;
- calculation of the limitation on liability in the event of delay (Article 6, paragraph 1 (b));
- restriction of the scope of application of Article 7;
- limitation of the operator's liability when wilful act or omission or gross negligence committed by his servants or agents (Article 8);
- 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;
- substitution of "the person entitled to take delivery of the goods" for the "customer" in Article 9, paragraph 1;
- the need to complete Article 10 by provisions relating to interruption and suspension of the limitation period;
- time from which the limitation period should run under Article 10, paragraph 2;

- mandatory character of the provisions of Article 10;
- introduction in Article 11 of a provision similar to Article 23, paragraph 3 of the Hamburg Rules;
- possible deletion of Article 14;
- increase in the number of ratifications for the entry into force of the Convention (Article 15);
- the restriction of the applicability of the future Convention to licensed ITOs (Article 17);
- future work on the preliminary draft Convention.

PART ONE

OBSERVATIONS OF A GENERAL CHARACTER

A. DESIRABILITY OF A CONVENTION AND ITS RELATIONSHIP WITH EXISTING CONVENTIONS

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."

FEDERAL REPUBLIC OF GERMANY

"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 and 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.

GERMAN DEMOCRATIC REPUBLIC

"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."

NETHERLANDS

"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."

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 practise 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.

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."

SWEDEN

"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.

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 practise 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.

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."

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."

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."

YUGOSLAVIA

"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.

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.

"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."

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."

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."

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."

IAPH

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

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.

.....

In principle, it is right to use as 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."

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."

B. CONCEPT OF THE CONVENTION AS LAYING DOWN MINIMUM RULES TO BE COMPLETED BY GENERAL CONDITIONS

NETHERLANDS

"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."

NORWAY

"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."

SWEDEN

"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."

YUGOSLAVIA

"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."

IAPH

"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."

C. CONCEPT OF "THE WAREHOUSING CONTRACT"

MADAGASCAR

"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."

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."

D. FUTURE WORK ON THE CONVENTION

GERMAN DEMOCRATIC REPUBLIC

"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."

PART TWO

OBSERVATIONS ON SPECIFIC ARTICLES

PREAMBLE

YUGOSLAVIA

"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."

ARTICLE 1

A. Territorial scope of application

AUSTRIA

"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."

GERMAN DEMOCRATIC REPUBLIC

"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."

B. Concept and definition of the "international terminal operator" (paragraph 1)

FEDERAL REPUBLIC OF GERMANY

"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.

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.

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.

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.

.....

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."

NETHERLANDS

"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 could be desirable in such a case for the liability of the salvor to be regulated by the ITO Convention."

NORWAY

"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."

SPAIN

"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.

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.

.....

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

SWEDEN

"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."

YUGOSLAVIA

"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.

.....

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 misunderstanding 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."

CIT

"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"

FIATA

"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.

OCTI

"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 hereafter concerning the definition of "international carriage".

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.

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."

C. Definition of "customer" (paragraph 2)

FEDERAL REPUBLIC OF GERMANY

"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 a declaration himself should be a party to the contract."

NETHERLANDS

"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."

CIT

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..."

D. Definition of "goods" (paragraph 3)

CZECHOSLOVAKIA

"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."

CIT

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

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

E. Definition "of international carriage" (paragraph 4)

OCTI

"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". 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."

F. Additional definition

URUGUAY

"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."

Article 2

CZECHOSLOVAKIA

"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."

FEDERAL REPUBLIC OF GERMANY

"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.

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."

MADAGASCAR

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."

NETHERLANDS

"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."

NORWAY

"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."

SPAIN

"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."

SWEDEN

"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."

YUGOSLAVIA

"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."

CIT

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 si-

milar services, as well as for the due performance of those operations".

OCTI

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 safekeeping, 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".

Article 3

FEDERAL REPUBLIC OF GERMANY

"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 checking to be made in accordance with Article 3 paragraph 2 should be imposed on the customer for whose benefit such checking is made."

GERMAN DEMOCRATIC REPUBLIC

"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 paragraphs 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".

MADAGASCAR

"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."

NORWAY

"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."

CIT

"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."

FIATA

"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."

Article 4

CZECHOSLOVAKIA

"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."

FEDERAL REPUBLIC OF GERMANY

"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."

"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."

MADAGASCAR

"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."

NORWAY

"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."

SPAIN

"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."

SWEDEN

"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."

YUGOSLAVIA

"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) 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:

- 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.
- 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.
- 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.
- 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."

FIATA

"Another matter which calls for further thought is the terminal operator's right 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."

OCTI

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."

Article 5

AUSTRIA

" (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."

CZECHOSLOVAKIA

"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."

MADAGASCAR

"Reservations: these should be made by the "customers" or by their forwarders or agents.

.....

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.

.....

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

NETHERLANDS

"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."

SPAIN

"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."

SWEDEN

"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 II to the Hamburg Rules.

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

URUGUAY

"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.

.....

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."

YUGOSLAVIA

"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, connecting 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.

.....

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 "

CIT

"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 "damage".

IAPH

"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."

OCTI

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."

Article 6

AUSTRIA

"(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."

CZECHOSLOVAKIA

"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."

FEDERAL REPUBLIC OF GERMANY

"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."

GERMAN DEMOCRATIC REPUBLIC

"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."

NETHERLANDS

"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."

NORWAY

"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."

SWEDEN

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

SWITZERLAND

"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."

URUGUAY

"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 safe-keeping 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."

YUGOSLAVIA

"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."

CIT

Paragraph 1 (a)

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

IAPH

"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."

Article 7

NORWAY

"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 Article 6. Article 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."

URUGUAY

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

Article 8

AUSTRIA

"(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 helpers (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 workers' protection)."

CZECHOSLOVAKIA

"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."

FEDERAL REPUBLIC OF GERMANY

"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."

NORWAY

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

URUGUAY

"Under Article 8, 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."

Article 9

FEDERAL REPUBLIC OF GERMANY

"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.

Paragraph 6 should be deleted."

NETHERLANDS

"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."

SWEDEN

"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."

URUGUAY

"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."

YUGOSLAVIA

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

CIT

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".

OCTI

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."

Article 10

AUSTRIA

"(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."

FEDERAL REPUBLIC OF GERMANY

"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."

MADAGASCAR

Paragraph 2:

"The limitation period should run from the time when the customer ought to have taken delivery of the goods."

SWEDEN

"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."

YUGOSLAVIA

(See observations on Article 9).

OCTI

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."

Article 11

FEDERAL REPUBLIC OF GERMANY

"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."

CIT

"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."

Article 13

URUGUAY

"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".

Article 14

NETHERLANDS

"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 16

FEDERAL REPUBLIC OF GERMANY

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

Article 17

CZECHOSLOVAKIA

"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."

FEDERAL REPUBLIC OF GERMANY

"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"."

GERMAN DEMOCRATIC REPUBLIC

"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 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."

NETHERLANDS

"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 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."

YUGOSLAVIA

"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."

Article 20

OCTI

Paragraph 3:

"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."

AUSTRALIA

"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."