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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

# PRELIMINARY DRAFT CONVENTION ON THE LIABILITY OF INTERNATIONAL TERMINAL OPERATORS

(approved by the Study Group at its third session, held in Rome from 19 to 21 October 1981)

with

EXPLANATORY REPORT

prepared by the UNIDROIT Secretariat

Rome, February 1982

# TEXT OF THE PRELIMINARY DRAFT CONVENTION ON THE LIABILITY OF INTERNATIONAL TERMINAL OPERATORS (ITOs) ADOPTED BY THE UNIDROIT STUDY GROUP ON THE WAREHOUSING CONTRACT AT ITS THIRD SESSION, HELD IN ROME FROM 19 TO 21 OCTOBER 1981

## Preamble

THE STATES PARTIES TO THE PRESENT CONVENTION,

HAVING RECOGNISED the desirability of determining by agreement certain rules on the liability of International Terminal Operators,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows: (1)

## Article 1

DEFINITIONS

For the purposes of the application of this Convention:

1. "International Terminal Operator (ITO)" means any person acting in a capacity other than that of a carrier, who undertakes against remuneration the safekeeping of goods before, during or after international carriage, either by agreement or by actually taking in charge such goods from a shipper, carrier, forwarder or any other person, with a view to their being handed over to any person entitled to take delivery of them.

2. "Customer" means the other party to the contract concluded by the ITO.

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

4. "International carriage" means any carriage in which the place of departure and the place of destination are situated in two different States.

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(1) It will be necessary at a later date to expand the Preamble. In the meantime, the Group has decided to include a provision corresponding to the basic principle (d) to be found in the Preamble to the 1980 Convention on International Multimodal Transport of Goods to the effect that "the liability of the multimodal transport operator under this Convention should be based on the principle of presumed fault or neglect".

## Article 2

### SCOPE OF APPLICATION

This Convention shall apply whenever the operations for which the ITO is responsible under Article 3 are performed on the territory of a Contracting State.

## Article 3

### PERIOD OF RESPONSABILITY

1. The ITO shall be responsible for the safekeeping of goods from the time he has taken them in charge until their handing over to the person entitled to take delivery of them.

2. The ITO shall also be responsible for the goods during such additional operations of loading, stowage or discharging as he has undertaken to perform or the performance of which he has procured.

## Article 4

### ISSUANCE OF DOCUMENT

1. The ITO shall, at the request of the customer, issue a dated document acknowledging receipt of the goods and stating the date on which they were actually taken in charge.

2. Such a document shall indicate any inaccuracy or inadequacy of any particular concerning the description of the goods taken in charge as far as this can be ascertained by reasonable means of checking.

3. Such a document is prima facie evidence of the contract for the safekeeping of goods and the taking in charge of the goods as therein described.

4. The document issued by the ITO may, if the parties so agree, and the applicable national law so permits, contain an undertaking by the ITO to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

5. Nothing in this Convention shall prevent the issuing of documents by any mechanical or electronic means, if not inconsistent with the law of the country where the document is issued.

## Article 5

### SECURITY RIGHTS IN THE GOODS

1. The ITO shall have a right of retention over the goods he has taken in charge for costs and claims relating to such goods, fees and warehousing rent included. However, nothing in this Convention shall affect the validity under national law of any contractual arrangements extending the ITO's security in the goods.

2. The ITO shall not be entitled to retain the goods he has taken in charge if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution.

3. The ITO may, after giving adequate and timely notice, cause to be sold the goods retained by him up to the amount necessary to satisfy his claim. The conditions and procedures of the sale shall be governed by the law of the place where the operations for which the ITO is responsible under this Convention are performed.

4. The internal law of the place where the operations for which the ITO is responsible under this Convention are performed shall determine the effects which third party rights may have on the ITO's rights of retention and sale and on the proceeds of such sale.

## Article 6

### BASIS OF LIABILITY

1. The ITO is liable for loss resulting from loss of or damage to the goods for which he is responsible under Article 3 of this Convention, unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence which caused the loss or damage, and its consequences.

2. If the ITO does not deliver the goods at the request of the customer within a period of / 60 / consecutive days following such request, the person entitled to make a claim for the loss of goods may treat them as lost.

3. The ITO is liable for securities, money or valuable articles only if a special agreement to that effect has been entered into in writing.

4. Where fault or neglect on the part of the ITO, his servants or agents combines with another cause to produce loss or damage the ITO is liable only to the extent that the loss or damage is attributable to such fault or neglect, provided that the ITO proves the amount of the loss or damage not attributable thereto.

## Article 7

### LIMITS OF LIABILITY

1. The liability of the ITO for loss resulting from loss of or damage to goods according to the provisions of Article 6 is limited to an amount equivalent to 2.75 units of account per kilogramme of gross weight of the goods lost or damaged.

2. Unit of account means the unit of account mentioned in Article 13.

3. By agreement between the ITO and the customer, limits of liability exceeding those provided for in paragraph 1 may be fixed.

## Article 8

### NON-CONTRACTUAL LIABILITY

1. The defences and limits of liability provided for in this Convention apply in any action against the ITO in respect of loss of or damage to goods caused by any act or omission within the scope of the ITO's obligations provided for in Article 3, whether the action is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the ITO, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the ITO is entitled to invoke under this Convention.

3. Except as provided in Article 9, the aggregate of the amounts recoverable from the ITO and from any person referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

## Article 9

### LOSS OF THE RIGHT TO LIMIT LIABILITY

1. The ITO is not entitled to the benefit of the exclusion or the limitation of liability provided for in Article 6, paragraph 3 and in Article 7 if it is proved that the loss or damage resulted from / an / / a personal / act or omission of the ITO done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

2. Notwithstanding the provisions of paragraph 2 of Article 8, a servant or agent of the ITO is not entitled to the benefit of the limitation of liability provided for in Article 7 if it is proved that the loss or damage resulted from an act or omission of such servant or agent, done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

## Article 10

### NOTICE OF LOSS OR DAMAGE

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing to the ITO not later than the working day after the day when the goods were handed over to the person entitled to take delivery of the goods, such handing over is prima facie evidence of the delivery by the ITO of the goods as described in the document issued by the ITO or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the person entitled to take delivery of the goods.

3. If the state of the goods at the time they were handed over to the person entitled to take delivery of the goods has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the ITO and the person entitled to take delivery of the goods must give all reasonable facilities to each other for inspecting and tallying the goods.

## Article 11

### LIMITATION OF ACTIONS

1. Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the ITO has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

## Article 12

### CONTRACTUAL STIPULATIONS

1. Any stipulation in a contract for the safekeeping of goods concluded by an ITO or in any document evidencing such a contract is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

2. Notwithstanding the provisions of paragraph 1 of this article, an ITO may increase his responsibilities under this Convention.

## Article 13

### UNIT OF ACCOUNT OR MONETARY UNIT AND CONVERSION

1. The unit of account referred to in Article 7 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 7 are to be converted into the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as 41.25 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article are to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in Article 7 as is expressed there in units of account. Contracting States must communicate to the Depositary Government the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

Article 14

OTHER CONVENTIONS

This Convention does not modify the rights or duties of a carrier which may arise under any international Convention relating to the international carriage of goods.

Article 15

INTERPRETATION OF THE CONVENTION

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

/ Article 16

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be open to signature / by all States / at ..... from ..... 19.. to ..... 19.. .

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States.

3. After ..... 19.. , this Convention shall be open indefinitely for accession by / all / States which are not signatory States.

4. Instruments, of ratification, acceptance, approval and accession shall be deposited with the Government of ....., which shall be the Depositary Government. /

/ Article 17

ENTRY INTO FORCE

1. This Convention shall enter into force six months after the date of deposit of the / fifth / instrument of ratification, acceptance, approval or accession, with the Depositary Government.

2. For each State which becomes a Contracting State to this Convention after the deposit of the / fifth / instrument of ratification, acceptance, approval or accession, this Convention shall enter into force six months after the deposit of the appropriate instrument on behalf of that State. /

Article 18

RESERVATIONS

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, declare by notification addressed to ..... that it will guarantee effect to the rules on the liability of international terminal operators contained in this Convention only in respect of operators who expressly or impliedly undertake to apply those rules. The use of the name "International Terminal Operator (ITO)" shall constitute such an express undertaking.

2. Any State may recognise operators who apply the rules of this Convention as "International Terminal Operators (ITOs)".

/ Article 19

FEDERAL STATES

1. If a State has two or more territorial units in which different systems of law apply to matters respecting the safekeeping of goods, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies. /

/ Article 20

REVISION AND AMENDMENT

1. At the request of not less than one-third of the Contracting States to this Convention, the Depositary Government shall convene a Conference for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended. /

/ Article 21

REVISION OF THE LIMITATION AMOUNTS AND UNIT OF ACCOUNT OR MONETARY UNIT

1. Notwithstanding the provisions of Article 20, a Conference only for the purpose of altering the amount specified in Article 7 and paragraph 2 of Article 13 of this Convention or of substituting either or both of the units defined in paragraphs 1 and 3 of Article 13 by other units shall be convened by the Depositary Government in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision Conference shall be convened by the Depositary Government when not less than one-fourth of the Contracting States so request.

3. Any decision by the Conference must be taken by a two-thirds majority of the participating States. The amendment shall be communicated by the Depositary Government to all the Contracting States for acceptance and to all the States signatories to the Convention for information.

4. Any amendment adopted shall enter into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance shall be effected by the deposit of a formal instrument to that effect, with the Depositary Government.

5. After the entry into force of an amendment, a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not, within six months after the adoption of the amendment, notified the Depositary Government that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended. /

/ Article 22

DENUNCIATION

1. Any Contracting State may denounce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification. /

/ Article 23

DEPOSITARY

1. The original of this Convention, in the ..... languages, each version being equally authentic, shall be deposited with the Government of ..... , which shall transmit certified copies thereof to each of the signatory and Contracting States, and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and Contracting States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance, approval, or accession;

(c) any date on which this Convention enters into force in accordance with Article 17;

(d) any declaration received in accordance with Article 18;

(e) any declaration received in accordance with Article 19, paragraph 2, and the date on which the declaration takes effect;

(f) any requests for the revision or amendment of this Convention and the convening of a Conference for such revision or amendment in accordance with Articles 20, paragraph 1 and 21, paragraph 2;

(g) any denunciation received in accordance with Article 22, paragraph 1, and the date on which the denunciation takes effect. /

/ IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorised to that effect, have signed this Convention. /

/ DONE at ..... , this ..... day of ..... one thousand nine hundred and ...../

# EXPLANATORY REPORT

prepared by the UNIDROIT Secretariat

## I

## BACKGROUND TO THE PRELIMINARY DRAFT CONVENTION

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

2. During the triennium 1972 to 1974 the Secretariat noted that a large amount of information assembled by other Organisations was becoming available and that the gap mentioned in the preceding paragraph was being fully brought out during the revision work on the 1924 Convention on bills of lading within UNCTAD and UNCITRAL. In fact, during this work some countries, in particular developing countries, suggested that a study should be made of the liability of the independent contractors used by carriers by sea, especially warehousemen and storekeepers. A wish was, therefore, expressed by some countries, such as the Federal Republic of Germany, that UNIDROIT resume its study of the subject and at its 53rd session, held in Rome in February 1974, the Governing Council decided to instruct the Secretariat to bring up to date Professor Le Gall's report and to give priority to the convening of a Study Group entrusted with the preparation, on the basis of the revised report, of draft uniform provisions on the liability of persons other than the carrier having custody of the goods before, during or after transport operations.

3. In accordance with these instructions, the Secretariat commissioned a preliminary report on the warehousing contract from the late Dr Donald J. Hill, Senior Lecturer in Law at Queen's University, Belfast (2). Dr Hill outlined his report to the Council at its 55th session, held in September 1976 and the Council instructed the Secretariat to transmit the report to Governments and to the Organisations concerned with a request for observations on the desirability and feasibility of preparing uniform provisions in this connection.

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

(2) Study XLIV - Doc. 2, UNIDROIT 1976. This report is also reproduced in the Uniform Law Review 1978, 1, 55.

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

5. The Study Group held three sessions under the chairmanship of Professor Kurt Grönfors (Sweden), member of the Governing Council of UNIDROIT. At the first session (4), held in Rome from 10 to 12 April 1978, the Group had before it Dr Hill's preliminary report, as well as the analysis of the replies to the enquiry conducted by the Secretariat. On the basis of this documentation, the Study Group gave lengthy consideration to such questions as the nature of a possible future instrument on the warehousing contract, the scope of the operations to be covered by it, the obligations of the warehouseman and the liability regime to which he should be subject, including rules on limitation of liability, the obligations of the customer, the warehouseman's lien etc. On many points a wide measure of agreement emerged and, in accordance with the instructions of the Group, the Secretariat prepared the text of a preliminary draft Convention on the liability of international terminal operators (5) which was considered by the Study Group at its second session, held in Rome from 23 to 26 January 1979 (6).

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

7. At its 58th session (September 1979) the Council decided to transmit the text of the preliminary draft Convention to Governments and the interested international Organisations with a request for observations. Replies were received from fifteen Governments and from four international Organisations, most of which expressed keen interest in the UNIDROIT initiative. A consolidated document setting out these observations (7) was submitted to the Study Group at its third session, held in Rome from 19 to 21 October 1981 (8).

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

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

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

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

(7) UNIDROIT 1981, Study XLIV - Doc. 10.

(8) The report on this session is contained in UNIDROIT 1981, Study XLIV - Doc. 13.

In the light of these comments a substantial number of amendments were made to the text of the preliminary draft Convention, the revised version of which precedes this explanatory report (9).

## II

## GENERAL CONSIDERATIONS

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

9. Notwithstanding these difficulties, there was a general feeling that there was a need for the introduction of uniform rules relating to the safekeeping of goods, especially in the context of international carriage. This latter subject had, to a very large extent, been regulated by international Conventions and yet, paradoxically perhaps, the most frequent cases of damage to, or loss of, goods could be proved statistically to occur before and after transport operations. In these circumstances it seemed important to try to fill in the gaps in the liability regime left by the existing international transport law Conventions and to ensure the availability of a recourse action to the carrier or the multimodal transport operator against non-carrying intermediaries such as the warehouseman or terminal operator.

10. Given these premises, the majority of the Group was of the opinion that it would be desirable to limit the application of the future instrument to international operations as it was felt that unification of domestic law, where there are substantial differences in conceptual approach between different legal systems, might be an unrealistic goal at the present time.

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(9) For the participants in the three sessions of the Study Group, see the Annex hereto.

A consequence of this conclusion was the decision to deal only with the safekeeping of goods linked to international carriage, as it is this dynamic element alone which would permit the delimitation of the scope of the preliminary draft Convention in such a way as to exclude from its application purely domestic operations as well as long-term warehousing per se. It was further agreed that the future instrument should be applicable irrespective of the mode, or modes, of transport preceding or following the safekeeping, although in this connection see paragraph 38 below.

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

12. Another question which was the subject of lengthy discussion by the Group was that of the character of the future instrument. While some members argued in favour of a Convention of a traditional nature, the provisions of which would be of a mandatory character, others considered that it might be difficult to overcome the pressure of the professional interests involved on States not to adopt such a Convention and in consequence a compromise solution was reached. Those States which wish to do so may apply the provisions of the future instrument to all terminals operating on their territory while others will be free, in accordance with Article 18, to make a declaration to the effect that they will guarantee effect to the rules on the liability of international terminal operators contained in the Convention only in respect of operators who expressly or impliedly undertake to apply those rules. Those pleading in favour of this semi-mandatory solution considered that the voluntary acceptance of the minimum rules by operators might be obtained if the Convention were to contain a number of incentives such as a moderate liability regime based on that of the Hamburg Rules, a limitation on liability which could be broken only in highly exceptional circumstances, the granting of a wide lien over the goods, a short prescription period, and above all the fact that the insertion of these rules in general conditions would be recognised by the courts of Contracting States, whereas otherwise such conditions would be exposed to the risk of being struck down in the face of the growing pressure of consumer protection lobbies.

13. Turning now to the general structure of the preliminary draft Convention prepared by the Study Group, it may be stated that it is built around the concept of the "international terminal operator (ITO)", who is defined in Article 1 as "any person acting in a capacity other than that of a carrier, who undertakes against remuneration the safekeeping of goods before, during or after international carriage, either by agreement or by actually taking in charge such goods from a shipper, carrier, forwarder or any other person, with a view to their being handed over to any person entitled to take delivery of them". As mentioned above, the preliminary draft is thus concerned with

terminal operations connected with international carriage which, for the purposes of the preliminary draft Convention, means "any carriage in which the place of departure and the place of destination are situated in two different States".

14. Article 2 determines the territorial scope of application of the future instrument while Article 3 lays down the general statement of the liability of the ITO in respect of the performance of his obligations for the safekeeping of the goods and also indicates the period during which he shall be liable. Paragraph 2 of the article further affirms the liability of the ITO in respect of certain services connected with the handling of the goods which he performs, or the performance of which he procures, in addition to the safekeeping of the goods.

15. Two key articles of the preliminary draft are Articles 4 and 5. Article 4 is concerned with the issuance by the ITO of a dated document acknowledging receipt of the goods and stating the date on which they were actually taken in charge. Such a document, however, need only be issued if requested by the customer. Article 5, which is closely modelled on a corresponding provision in the UNIDROIT draft Convention on the hotelkeeper's contract, deals with the ITO's rights of retention and sale over goods.

16. Articles 6 to 15 of the preliminary draft Convention are based to a very large extent on the corresponding provisions of the Hamburg Rules and of the Geneva Convention of 1980 on International Multimodal Transport of Goods (hereafter referred to as "the Geneva Convention") and this is true especially of the basic liability regime (presumed fault with the burden of proof reversed) and the rules governing limitation of liability, availability of defences, loss of the right to limit liability, notice of loss, prescription, nullity of stipulations contrary to the provisions of the Convention and unit of account. In addition, Article 14 provides that the Convention "does not modify the rights or duties of a carrier which may arise under any international Convention relating to the international carriage of goods".

17. Articles 16 to 23 contain a set of draft final clauses and, like the draft Preamble, these were not discussed at any length by the Group. The one exception is Article 18 which makes provision for a declaration by States excluding the mandatory character of the future instrument, which has been mentioned above in paragraph 12 of this report and which is discussed in detail below in paragraph 91 et seq.

18. The Group realised that the preliminary draft Convention prepared by it did not deal with a number of important aspects of contracts concluded by ITOs. In particular, it is silent on the question of the customer's obligations such as those of paying the price for the services and, in the event of his tendering dangerous goods to the ITO for handling or safekeeping, that of giving the necessary instructions. Neither does it deal with the ITO's right to dispose of or sell dangerous goods nor with the obligations of the customer to tender the goods for safekeeping or the ITO to take them in charge when a contract for their safekeeping has been concluded in advance. It is, in effect, an outline draft concerned essentially with establishing a set of minimum rules governing the liability of ITOs and many points of detail have been omitted which might be fitted in at a later state or alternatively regulated by standard conditions which, if a need for them were to

be recognised, might be prepared by the interested commercial Organisations such as the CMI, the ICC, and IAPH. Other Organisations might wish to co-operate in this task but what the Group considered essential was to avoid any incompatibility between such conditions and the prospective Convention on the liability of international terminal operators.

## III

## ARTICLE BY ARTICLE COMMENTARY ON THE PRELIMINARY DRAFT CONVENTION

### Article 1

19. Article 1 lays down a number of definitions which the Study Group considered to be useful and in some cases indispensable for the application and interpretation of the preliminary draft Convention. It should, however, be observed that some of the definitions indirectly determine the scope of application of the future instrument and this is true in particular of that of the "international terminal operator (ITO)". For the purposes of the Convention, he is defined as "any person, acting in a capacity other than that of a carrier, who undertakes against remuneration the safekeeping of goods before, during or after international carriage, either by agreement or by actually taking in charge such goods from a shipper, carrier, forwarder or any other person, with a view to their being handed over to any person entitled to take delivery of them".

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

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

22. In the first place then, why speak of a "terminal operator" rather than of a warehouseman in English and of an "opérateur de terminal" instead of an "entrepositaire" in French? The reason for the Group's choice of terminology was that, on the one hand, some members felt that the very concept of a "warehouse", with its implication of shelter, was becoming increasingly outmoded as new techniques of storing goods developed and, on the other, that in view of the decision to hold the operator liable in certain cases in respect of the performance of handling services which would not normally have been entrusted to the traditional warehouseman (see below, paragraph 41 et seq.), it could be positively misleading to use the terms "ware-

houseman" or "entrepositaire", the latter of which has fairly strict connotations in some legal systems. Moreover, warehousing unconnected with carriage operations was not dealt with by the draft. It was therefore deemed advisable to seek a more neutral term and the growing use of the concept of "terminal" in a number of modes of transport was seen as militating in favour of the expression "terminal operator".

23. In addition, the use of the adjective "international" further to define the ITO sprang from the decision of the Group referred to in paragraph 10 above to exclude from the scope of application of the future Convention purely domestic operations and therefore to link the operations to be covered by it to international transport; hence the reference in the definition of the ITO to the safekeeping of goods "before, during or after international carriage". The reason for the limitation to international operations has been given already in this report in paragraph 10, but it should be noted that the view was not shared by all members of the Group.

24. In particular, some participants considered that it would be a worthwhile task to unify the law relating to all contracts for the safekeeping of goods throughout the world and that from a practical viewpoint the limitation of the scope of the future instrument to operations connected with international carriage would deprive it of much of its interest. In this connection, it was stressed by one participant that, as a rule, in particular in the case of carriage by sea, the cargo would be covered by an insurance policy against all risks from warehouse to warehouse. Provided that such insurance had been taken out, the customer would not be interested in the liability regime applicable to the warehouse where the goods were stored, whether this be a port terminal or a state warehouse such as a customs warehouse. He feared therefore that the end result of the exercise upon which the Group was engaged would be to increase costs by covering two or three times risks to the goods which were already covered by insurance. The future instrument should therefore, he argued, deal with warehousing operations per se and not concentrate on those occurring between different legs of a transport operation, for otherwise there was a danger of impinging upon the activities of freight forwarders and combined transport operators.

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

26. This view was shared by the majority of the Group, which also considered that if the definition of the ITO were to contain a clear statement of his principal obligations, namely the safekeeping of the goods and their handing over to any person entitled to take delivery of them, it might not be necessary to define the contract for the safekeeping of goods. This approach was reinforced once the Group had agreed that the ITO should, in certain cases, also be responsible, under the terms of Article 3, paragraph 2 of the preliminary draft Convention, for the performance of other services associated with the handling of the goods, as the performance of such services could not be regarded as falling within the traditional scope of warehousing operations.

27. Some criticism was however made both by members of the Group and in governmental observations of the language used in Article 1, paragraph 1, in particular in relation to the circumscribing of the ITO's obligation of safekeeping under the prospective Convention to the period "before, during or after international carriage". In the first instance, it was suggested that the words "during ... carriage" might be taken as referring to the carrier's obligations in respect of the goods during actual carriage although it was argued that such an interpretation could not stand alongside Article 14 and that the clear intention of the drafters was to cover cases of safekeeping during transshipment and not the carriage itself. To make the matter absolutely clear however the Group decided at its third session to introduce at the beginning of paragraph 1 the words "acting in a capacity other than that of a carrier".

28. Secondly, hesitations were voiced in this connection as regards the precise circumstances in which the ITO would be responsible under the future Convention and the objection was in particular raised that goods might be stored in a terminal without it being known ab initio whether they would be the subject of international carriage. At what time therefore would an operator cease to be a simple warehouseman and instead become an ITO? One member of the Group considered that what was vital was the operator's knowledge of the international character of the carriage preceding or subsequent to the safekeeping for otherwise he would not know whether he had to take out insurance to cover his eventual liability under the Convention. In his view it would be preferable to speak of the ITO's undertaking the safekeeping of goods "in connection with international carriage" and to define this notion by reference to whether the ITO knew or ought to have known that the safekeeping was to take place before, during or after international carriage.

29. A majority of the Group however was of the opinion that it would be extremely difficult, if not impossible, to prove knowledge in such cases. It likewise rejected a proposal to clarify the cases in which a person could be deemed to be an ITO for the purposes of the prospective Convention by the deletion of the words "or by actually taking in charge such goods" and by the introduction of a provision to the effect that the operator would only be considered to be an ITO where a special agreement was concluded to that effect. Such a sweeping restriction, it was considered, would deprive the Convention of much of its importance by removing from its scope of application one of the commonest situations arising in practice.

30. The opinion of the majority of the members of the Group was therefore that the wording of paragraph 1 adequately reflected their intentions. They were of the belief that few difficulties would be encountered in practice where the goods were taken in charge by the ITO after international carriage and in those cases where pick-up and delivery operations intervene between the arrival of goods, for example, at an airport, and their reaching a terminal a short distance away, there seemed to be no objection to regarding the Convention as applicable even though the pick-up and delivery operations, for which the ITO might himself be prepared to accept liability, did not themselves constitute international carriage. Moreover, in many cases the question of whether a transport was or was not international could be determined by reference to the underlying carriage documents or to the instructions given to the ITO by the person from whom he received the goods. In addition, it was noted that the words at the end of the provision "with a view to their being handed over to any person entitled to take delivery of them" already carry the implication that the ITO would be aware to some degree at least of the original intention of the person from whom he received the goods and in consequence there seemed to be no objection to the future Convention applying in situations where goods which were originally handed over to the operator with a view to subsequent international carriage were in fact sold domestically.

31. As mentioned above in paragraph 20 of this explanatory report, the definition of the ITO also indicates the manner in which he assumes the obligation of safekeeping of the goods and, although it was considered that in a great majority of cases the contract would be concluded by his actually taking the goods in charge, it was agreed that logic dictates that reference should first be made to the situation in which an agreement is concluded for the safekeeping of the goods prior to their actual taking in charge, without prejudice to the theoretical question of whether taking in charge itself constitutes an agreement.

32. Two other points should be raised in connection with the definition of the ITO. The first of these is that the words "against remuneration" indicate that the future Convention should only apply to operations conducted by operators acting for reward and hire, the word "remuneration" having been chosen in preference to "payment" to make it clear that consideration does not necessarily consist in the payment of a sum of money. As to a statement of the customer's obligation to pay the price for the services provided by the ITO, the Group felt however that it would be desirable to leave this to be regulated in the context of the general conditions of the operator.

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

34. After lengthy consideration, the Group reversed an earlier decision to include in paragraph 2 of Article 1 a definition of "customer" based on that of "shipper" in the Hamburg Rules and of "consignor" in the Geneva Convention. Such a definition had been necessary in those Conventions which had, inter alia, imposed obligations on the "shipper" and the "consignor" and in particular liability with respect to dangerous goods. Moreover, the word

"customer" was used very rarely in the draft ITO Convention and although for this reason one member of the Group suggested that any definition of the term would be superfluous, a majority opted in favour of a form of words which was much simpler than that of the complicated formula to be found in the Hamburg Rules and in the Geneva Convention, both of which had already been the subject of criticism. Paragraph 2 therefore provides simply that ""customer" means the other party to the contract concluded by the ITO".

35. As to the question mentioned in the preceding paragraph of the possibility of dangerous goods deposited with an ITO causing damage to the terminal and to other goods, the Group recognised that this might prove to be a real problem but the majority view was that the question should not be dealt with in the preliminary draft Convention but rather settled in the context of the standard conditions to be drawn up by the interested commercial Organisations.

36. The brief definition of "goods" in paragraph 3 is taken over textually from Article 1, paragraph 7 of the Geneva Convention, and was chosen in preference to the lengthier formula contained in Article 1, paragraph 5 of the Hamburg Rules.

37. With regard to paragraph 4 of Article 1 of the preliminary draft Convention, the Group considered that it was necessary to define the international carriage to which reference is made in paragraph 1. Recognising that different definitions of "international carriage" exist in the international Conventions regulating the carriage of goods in the various modes of transport, the Group decided that it would be desirable to formulate a definition for the purposes of the present preliminary draft which would concentrate on the sole fact that the goods are to be transported from one State to another. No reference is made to the question of whether such international carriage is contemplated by the contract of carriage so as to avoid excluding from the application of the Convention those cases where goods are transported internationally under a series of national contracts of carriage.

38. Finally, in connection with paragraph 4, it will be noted that, as in paragraph 1, reference is made to international carriage without any mention being made of the different modes of transport. It should however be recalled that although the Group was of the belief that the prospective Convention should apply irrespective of the modes of transport preceding and following the safekeeping operations, some of the written observations from States and interested Organisations indicated that such a Convention might be of less relevance to the safekeeping of goods in connection with carriage by road and rail and one member of the Group suggested that if it were finally decided to adopt a fully mandatory Convention, that is to say one containing Article 12 but no Article 18, then it might be wise to consider attempting to delimit the scope of application of the Convention more strictly, for example by restricting it to operations related to carriage by certain modes of transport only.

Article 2

39. In the course of the consultation procedure whereby States and interested Organisations were requested to submit observations on the preliminary draft prepared by the Study Group at its second session, reference was made on a number of occasions to the absence of the customary provision defining the territorial scope of application of the future Convention. Accordingly, the Group decided at its third session to introduce a new article worded as follows: "This Convention shall apply whenever the operations for which the ITO is responsible under Article 3 are performed on the territory of a Contracting State".

Article 3

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

41. As mentioned above in paragraph 14 of this explanatory report, paragraph 2 of the article provides that the ITO shall also be responsible for goods which he has taken in charge for safekeeping when he undertakes to perform in relation to them additional operations of loading, stowage, or discharging or undertakes to procure the performance of such operations by an independent contractor. This solution, which reflects the view of the majority of the Group, represents a compromise between two more radical proposals. One of these recommended the application of the future instrument to all handling operations performed before, during, or after international carriage operations, irrespective of whether the operator had undertaken the primary obligation of the safekeeping of the goods, while the other would have restricted the scope of the preliminary draft to warehousing operations stricto sensu, principally on the ground that Article 3, paragraph 2 would introduce differences in the liability regime applicable to those engaged in handling operations according to whether or not such operations were linked to the safekeeping of the goods. It was also suggested that it was not clear whether paragraph 2 would apply when the safekeeping was ancillary to the handling operations, performed for example by stevedores, and that such uncertainty would be even less acceptable if the future Convention were to be fully mandatory in character.

42. The majority, however, considered that the preliminary draft Convention should, as far as possible, fill in the gaps left in the liability regime by existing international Conventions dealing with the carriage of goods and, given the tendency to reduce the period of safekeeping by means of

advanced technology with a view to cutting costs, it was in consequence agreed that regard must be had to the fact that more and more comprehensive services are provided by modern terminal operators. Such operators should not, therefore, be permitted to avoid the application of the provisions of the Convention by alleging that the damage occurred to the goods not during the period of safekeeping but in the course of the performance of other handling operations. On the other hand, it was felt that there would be most strenuous resistance on the part of the interested professional circles to an extension of the Convention to cover all handling operations before, during or after international carriage, principally because the liability regime proposed under Article 6 might not prove to be suitable for all such operations.

42. Desirable as it might be, therefore, to establish at international level a uniform liability for handling intermediaries on the model of the French law of 1966, it was considered unrealistic to seek to achieve this goal at the present time and the Group further agreed that the operations contemplated by Article 3 paragraph 2 should not extend to those, such as checking of the goods, which would fall within the French concept of "actes juridiques" as opposed to "actes matériels", and the defective performance of which, although giving rise to financial loss, does not result in actual damage to, or loss of, the goods. Similarly the handling operations covered by the provision are restricted to loading, stowage and discharging, that is to say operations directly linked to the vehicle or craft transporting the goods and do not include such services as distribution of the goods from a terminal at the end of international carriage.

44. Notwithstanding the general feeling within the Group that ancillary handling operations should be dealt with by the future instrument, some participants considered that paragraph 2 was unnecessary as in their view the handling operations mentioned therein were already covered by the wording of paragraph 1, while others were of the opinion that even if this were the case it might still be desirable to add the words "and handling" after "safekeeping" so as to make it clear that the ITO is liable in respect of such handling operations. With respect to this latter suggestion it was however pointed out that the notion of taking in charge, mentioned in paragraph 1, while perfectly compatible with the safekeeping of goods, did not perhaps fully fit in with the performance of handling operations.

45. It should be noted that paragraph 2 establishes a certain parallelism with paragraph 1 in that whereas the former states the period of liability in relation to the safekeeping of goods as running from the time the ITO takes them in charge until their handing over to the person entitled to take delivery of them, the period under paragraph 2 is that "during /the/ additional operations of loading, stowage or discharging", irrespective of when such operations take place with reference to the period of safekeeping. In the opinion of the majority of the Group, this language would, when read in conjunction with Article 6, paragraph 1, make it apparent that the ITO is liable only for damage to or loss of the goods occurring during the period of safekeeping or during the operations specified in Article 3 and not for the due performance of his obligations as such. Thus, if for example faulty stowage of goods were to result in damage to those goods during the voyage, the ITO would not be liable for such damage under the Convention, irrespective of what his position might be under his general conditions or under the applicable law.

46. Finally, in connection with this article, the Group noted at its third session the concern of oneof its members as to whether it was sufficiently clear that purely domestic operations for which the ITO would have been responsible under Article 3 had they been international in character, did not fall within the scope of application of the future Convention. While admitting the ambiguity of the language used and that the link between Article 1, paragraph 1, and Article 3 was not perhaps as clear as it might be on this point, the Group nevertheless decided that time did not permit it to embark upon a redraft of the relevant provisions. It was, however, agreed that, pending the next stage of the work, the explanatory report to be prepared by the Secretariat should expressly indicate that in no circumstances would the future Convention apply to an ITO in respect of purely domestic operations of safekeeping or of handling the goods.

## Article 4

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

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

Article 4, paragraph 2 of the preliminary draft, it should, in the absence of proof to the contrary, be presumed that he took delivery of the goods in the circumstances appearing from the documentary evidence provided by the customer, i.e. the last document in the possession of the customer relating to the goods, including his own exit certificate.

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

50. In these circumstances, the Group agreed that Article 4, paragraph 1 of the preliminary draft should merely provide for the issuing by the ITO at the request of the customer of a document acknowledging receipt of the goods, it being understood that signature by the ITO of a carriage document should be regarded as the issuance of a document for the purposes of the provision. With a view to allaying some of the fears expressed during the discussions, paragraph 1 further stipulates that the document must be dated and that it must also state the date on which the goods were actually taken in charge. The question of the legal consequences of failure to issue such a document is therefore left to national law although, as one member of the Group pointed out, if the carrier or the customer could adduce evidence that the goods had been handed over, the court would be likely to be sympathetic to his claim.

51. The document to be issued in accordance with paragraph 1 of Article 4 is not however a mere receipt as paragraphs 2 and 3 are concerned respectively with its content and with its evidentiary effect. Here the Group considered that it was unnecessary to enter into the detail to be found in the various Conventions concerning the carriage of goods, for example the provisions of Articles 15 to 18 of the Hamburg Rules. As regards the content of the document, therefore, paragraph 2 provides that it shall "indicate any inaccuracy or inadequacy of any particular concerning the description of the goods taken in charge as far as this can be ascertained by reasonable means of checking", although one member was of the opinion that the last words of the paragraph were unduly wide and that they might permit the ITO to make general reservations of a sweeping character in cases where it would be impossible to make an adequate check, thereby rendering the whole provision ineffective. In reply to these criticisms, it was however recalled that the preliminary draft under preparation was not seeking to regulate all points of detail and that one might perhaps envisage the elaboration by the interested professional Organisations of some kind of check list to assist ITOs.

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

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

54. Paragraph 5 was inserted at the request of a number of participants who considered that the future Convention should take account of the ever increasing trend away from the traditional paper documentation in favour of the use of mechanical and electronic means of communication and the provision is based on a simplified form of wording of Article 14, paragraph 3 of the Hamburg Rules (Article 5, paragraph 3 of the Geneva Convention). In this connection, it should however be pointed out that, as it stands, paragraph 5 may be taken as referring only to the document referred to in Article 4 itself and that provision might also be made elsewhere in the preliminary draft, as is the case with Article 1, paragraph 8 of the Hamburg Rules (Article 1, paragraph 10 of the Geneva Convention), to the effect that "writing" includes, inter alia, telegram and telex, which could be of relevance in particular in connection with Articles 6, 10 and 11 of the preliminary draft.

## Article 5

55. A number of members of the Group expressed the opinion throughout its meetings that the presence of a provision in the future Convention granting a right of general lien to the ITO might prove to be an incentive to operators to accept the provisions of the Convention as a whole. They considered that such a lien would permit the ITO to grant credit to the customer, thus speeding up the flow of goods, and would also be important in those situations where there was a dispute between the ITO and the customer over the price of the agreed services, for in such cases there could be a risk of the ITO's delay in delivery of the goods being converted into a liability for physical loss (see below, paragraph 64). It was, admittedly, true that many freight forwarders' and warehousemen's general conditions

provided for such a general lien but it was far from clear that such liens were recognised in all countries and so the availability of a right of general lien under an international Convention would be of real benefit to operators in those countries where the exercise of such a lien was not permitted or where it was doubtful whether it would at present be upheld by the courts.

56. Others however were of the opinion that it might not, at the present time, be realistic to attempt to unify the widely differing national laws governing the warehouseman's lien and were opposed to the granting to the ITO of a general lien, partly on the ground that such a lien was not recognised by their legal systems and partly for fear of the confusion which might be caused by the creation of unconnected liens. It was, moreover, suggested that the existence of such a wide right of retention would seriously reduce the value of any negotiable document which might be issued under Article 4, paragraph 4, and possible conflicts were also seen between the ITO's right of retention and his duty to surrender goods on production of a carriage document.

57. The same difference of opinion emerged from the written observations of States and international Organisations on the preliminary draft and in these circumstances the Group came to the conclusion that it would not be possible to accord a right of general lien to the ITO under the future Convention. On the other hand it was considered necessary to avoid giving rise to an a contrario interpretation that it did not permit a general lien. Paragraph 1 consists therefore of two sentences, the first of which makes provision for the ITO's right of retention over goods taken in charge by him for costs and claims relating to those goods. The second sentence states that "nothing in this Convention shall affect the validity under national law of any contractual arrangements extending the ITO's security in the goods", thereby seeking to uphold, inter alia, provisions in the general conditions of ITOs providing for a general lien which are not themselves contrary to the applicable law. Finally, in connection with paragraph 1, it may be questioned whether the words "fees and warehousing rent included" do not suggest that Article 5 applies not only in respect of claims relating to the safekeeping of the goods but also to the other services which may be provided by the ITO and for which he is responsible under Article 3, paragraph 2.

58. Paragraph 2 of the article which, like paragraphs 3 and 4 is based on Article 10 of the UNIDROIT draft Convention on the hotelkeeper's contract, makes provision for the operator's being obliged to release the goods if the customer provides, or obtains from another person, a sufficient guarantee for the sum claimed, as he might be willing to do so as to ensure that the goods may be moved out of the terminal and sold, pending the settlement of a dispute between the operator and himself. Similarly, the operator will not be entitled to retain the goods if a sum equivalent to that claimed by him is deposited with a mutually accepted third party or with an official institution.

59. Paragraph 3 asserts the principle that the ITO, in addition to his right of retention of the goods, may also sell them up to the amount necessary to satisfy his claim and after giving "adequate and timely notice". Although one member of the Group considered that the provision should lay down a specific time-limit, the majority felt that the precise meaning of this phrase must be determined by each legal system, and the impossibility of laying down general rules governing the conditions and procedures of the sale

led the Group to limit itself to providing that such conditions and procedures shall be governed by the law of the place where the operations for which the ITO is responsible under the Convention are performed. It should also be understood that the term "conditions and procedures" covers the repayment of any surplus proceeds realised and that the law referred to is the law of the jurisdiction in question, to the exclusion of conflicts of law rules, as such procedural matters are usually regulated by the internal law of that jurisdiction.

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

## Article 6

61. This article lays down the basic liability regime to which the ITO is subject under the preliminary draft Convention and it will readily be seen that this regime closely follows that established by Article 5 of the Hamburg Rules and Article 16 of the Geneva Convention. Indeed, with a view to stressing this fact, the Group requested the Secretariat to indicate that the Preamble to the future Convention should, when fully developed, include a provision corresponding to the basic principle (d) to be found in the Preamble to the Geneva Convention where it is provided that "the liability of the multimodal transport operator under this Convention should be based on the principle of presumed fault or neglect". Although the Group did not find it possible for technical reasons to follow precisely the language of the above-mentioned provisions of the Hamburg Rules and the Geneva Convention, its intention was however, subject to the decision not to deal in principle with liability for delay, to lay down the same liability system as that contained in those two Conventions and it is for this reason that the comma before the last three words of paragraph 1 has been inserted so as to make it quite clear that the verb "avoid" refers not only to the occurrence which caused the loss or damage, but also the consequences of that occurrence.

62. Broadly speaking, the choice of the liability regime established by Article 6 represents the preference of the Group as a whole for no participant spoke in favour of a system under which the customer would be called upon to prove that the loss or damage had been caused by the fault of the ITO or his servants and agents as a pre-condition for recovery. Although some doubts were expressed as a whether a regime based on that of the Hamburg Rules and

founded on the presumed fault of the ITO, which was less severe than that imposed upon carriers by air, road and rail, was appropriate, the choice of the "Hamburg" and "Geneva" solution was seen by the majority of the Group, as well as by the States and Organisations which commented on the preliminary draft, as being dictated by a number of considerations.

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

64. After lengthy discussion, the Group decided, as mentioned above in paragraph 61, in principle not to make provision for the ITO's liability for loss or damage resulting from delay in handing over the goods. On the one hand, some participants saw no reason why an efficient ITO should not in normal circumstances be able to hand over goods to the consignee on demand and they added that there would usually be evidence, for example the issuing of a receipt for the goods by the ITO to the carrier, which would indicate whether the delay in delivery to the consignee had been caused during the transport operations or by an event occurring while the goods were in the terminal. There did not therefore seem to be valid reasons for not holding the ITO liable for damage resulting from delay in handing over the goods. On the other hand however, a majority of members of the Group, whose view was moreover shared by a number of Governments in their written observations, were opposed to dealing with the ITO's possible liability for delay in the preliminary draft on the ground that the question of delay is one essentially tied up with the movement of goods as opposed to stationary goods, such as those deposited in a terminal. In reply to the observation that to leave liability for delay to be determined in principle by national law would be to expose an ITO who might be responsible for loss or damage resulting from delay to large claims for consequential damage which would not be subject to limitation under the future Convention, it was pointed out that such cases might be settled in the general conditions of the operators who could, for example, limit their liability to the cost of retrieving the goods. Failing this, they would be liable under paragraph 2 of Article 6, which

deals with the special case where the ITO claims that he intends to hand over the goods and that he will do so as soon as he has found them. Usually, failure to produce the goods is to be attributed to the fact that he no longer has them and to avoid his indefinitely claiming that the goods are simply misplaced, the Group decided to impose a time-limit after which the customer is entitled to treat the goods as lost. Although some criticism was made of the period of 60 days laid down in Article 6 paragraph 2 as being too long, the Group decided to retain it on the model of the corresponding provision of the Hamburg Rules, although in square brackets. It did not however see any justification in this context for taking over the longer period of 90 days referred to in Article 16, paragraph 3 of the Geneva Convention.

65. In view of the decision not to deal with delay as such in Article 6, that provision is concerned only with those cases where the goods have been damaged or lost as a result of the defective performance of the ITO's obligations as set out in Article 3 of the preliminary draft Convention. It was not the Group's intention, therefore, that he be liable thereunder for loss caused, for instance, by his failure to take the goods in charge at the agreed time in cases where the contract for the safekeeping of the goods has been concluded prior to the actual taking in charge, as it was felt that such questions could best be dealt with in standard conditions (see above, paragraph 18). Similarly, the wording of Article 6 is such that the ITO will not be liable thereunder where the customer suffers financial loss as a result, for example, of the ITO's failing to clear out old invoices.

66. To the extent that Article 6 closely follows, where appropriate, the correspondigg articles of the Hamburg Rules and the Geneva Convention, its provisions do not call for any detailed comment, except for two points, the first of which is the use of the words "servants and agents". A number of participants expressed dissatisfaction with this term, in view of the differences in interpretation to which the concept of an "agent" is open. The suggestion was therefore made that some form of words such as those to be found in Article 3 of the CMR, which speaks of the persons of whose services the carrier makes use in the performance of his obligations, might be preferable. Ultimately, however, it was decided to retain the term used in the Hamburg Rules and the Geneva Convention as it represented the most recent expression of the will of States, although here again it was agreed that the matter could be reverted to at a later stage of the elaboration of the preliminary draft Convention when a final decision could be taken as to the precise form of wording to be employed, it being understood that what the Group had in mind were the classes of persons referred to in Article 3 of the CMR.

67. Finally, the Group considered that it would be desirable to exclude the ITO's liability for securities, money or valuable articles unless a special agreement to the contrary has been entered into in writing (paragraph 3) and in the light of the objection that in the absence of such a special agreement the ITO would presumably not be liable in respect of such property even in cases where he was guilty of a wilful act or omission or of gross negligence, it was agreed to amend Article 9, paragraph 1 (see below, paragraph 72 of this report) by adding a reference to the exclusion of liability provided for in Article 6, paragraph 3.

Article 7

68. The provisions of this article are to a large extent based on an amalgam of those of Article 6 of the Hamburg Rules and of Article 18 of the Geneva Convention. The principal differences between Article 7 of the preliminary draft and the above-mentioned articles lie in the absence of any provision relating to delay, given the decision in respect of Article 6, and in the fact that the majority of the participants were opposed to the application to the liability of ITOs of the alternative between the package limitation and the limitation by kilogramme, an important practical difficulty as regards the former being that goods might arrive in a terminal in the form of a package after carriage, especially by sea, and then be broken up and sent on by other modes of transport to another destination. Furthermore, the Group considered it unnecessary in connection with the activities of terminal operators to draw the distinction to be found in Article 18, paragraph 3 of the Geneva Convention between international transport which does, and that which does not, include carriage of goods by sea or by inland waterway [redacted] for the purpose of establishing different limitation figures in the two situations.

69. It will be noted that the Group has taken as the limitation figure in paragraph 1 of Article 7 that of 2.75 units of account per kilogramme of the gross weight of the goods, based on Article 18, paragraph 1 of the Geneva Convention, rather than that of 2.50 units of account which was retained in Article 6, paragraph 1 of the Hamburg Rules as in this respect the Group considered it preferable to follow the most recent expression of the will of the international community. Finally, with regard to the amount of the limitation, the Group reserved for a future stage of the elaboration of the future Convention the question of whether a limit of liability per event should be introduced to cover those cases of excessive damage, caused for example by fire or explosion, where a simple limitation by kilogramme might still result in a limitation figure that it would not be possible to insure.

70. While paragraph 2 of Article 7 calls for no comment, it should be mentioned that some hesitations were expressed in connection with the taking over from Article 6 of the Hamburg Rules of the provision contained in paragraph 3 of this article of the preliminary draft Convention to the effect that "by agreement between the ITO and the customer, limits of liability exceeding those provided for in paragraph 1 may be fixed". It was, in particular, argued that by making provision for such an alteration of the limit on compensation payable by the ITO, the future instrument might prove less attractive to the operators in question, some of whom were exposed to pressure by large shipping companies, and that it was in principle undesirable to stimulate competition between them, not on the ground of price and efficiency, but on that of the most favourable limitation amounts on offer. Indeed, it was suggested that the existence of such a provision went so far as to deny the ITO the benefit of the limitation laid down by paragraph 1. Sympathy was expressed with this view but on the other hand it was recalled that it was only in the CMR among the international instruments dealing with the carriage of goods that a prohibition was put upon altering the limitation figure established by the Convention and that even there ingenious insurance schemes were sometimes used to get round the letter of the Convention. In addition, the fact that the limitation figures contained in Article 7 were to be found in an international Convention, which would hopefully be backed up by standard conditions to be prepared by the interested professional Organ-

isations, would strengthen the bargaining position of terminal operators, although of course the latter would not be entirely protected thereby against pressure being exerted on them to raise their limitation figures by strong shipping lines. It was also pointed out in this connection that some States might have difficulty in accepting a Convention which did not make allowance for an increase in the limitation figure.

Article 8

71. This provision, dealing with the applicability of the defences and limits of liability provided under the Convention to non-contractual claims, follows closely Article 7 of the Hamburg Rules, subject only to the necessary drafting changes.

Article 9

72. This provision is largely modelled on Article 8 of the Hamburg Rules and on Article 21 of the Geneva Convention. As regards paragraph 1, the insertion of a reference to Article 6, paragraph 3 has already been explained (see paragraph 57 of this report), while the provision differs from those mentioned above in that it contains no reference to liability for delay. One further amendment was made to the Hamburg and Geneva texts, namely the addition of the word "personal" before "act or omission" which sprang from the desire of the majority of the Group to make the limitation as "unbreakable" as possible. In the first place this addition was advocated on the ground that as a general rule insurance prefers unbreakable limits, thus permitting the calculation of realistic premiums. Secondly, it was suggested that such a limitation would be attractive to ITOs and would be an incentive for them to accept the provisions of the future Convention as a whole, and thirdly that the presence of the word "personal" would serve to indicate expressly what was implicit in the corresponding provisions of the Hamburg Rules and the Geneva Convention. It would moreover, it was argued, halt the tendency of courts in some countries whenever possible to break the limits applicable under international Conventions. In the view of some members of the Group there would be no purpose in introducing any limitation system if the ITO could be held liable in full for the wilful misconduct of his servants or agents, as would for instance be the case where they stole goods in the safekeeping of the ITO.

73. Other members of the Group however considered that the addition of the word "personal" would bring about a change in the system as conceived by the Hamburg Rules and by the Geneva Convention. It was not in their view by chance that it had not been included in Article 8, paragraph 1 of the Hamburg Rules or in Article 21, paragraph 1 of the Geneva Convention where the intention had precisely been to lay down breakable limits. On the other hand, these members of the Group considered that the case of theft of goods by a servant would not result in the breaking of the limitation, either because the servant would not be regarded as acting within the scope of his employment in such a situation, or because the court would only hold the ITO liable if the fault had been committed by a sufficiently senior

executive such as the managing director or possibly a member of the board of directors, or if there were gross negligence in the organisation of the terminal.

74. In these circumstances the Group decided by way of compromise to retain the word "personal" in square brackets so as to permit full debate on the matter during the next stage of the work. If it were ultimately decided to include that term in the final text however, then it was agreed that it would be necessary to overcome the purely technical difficulties inherent in applying the word "personal" to a legal person.

75. Finally, it should be noted that the same objections to the word "agents" were made in this connection as had been levelled against its use in Article 6 (see above, paragraph 66).

## Article 10

76. The provisions of this article, concerning the giving of notice of loss or damage, are based on those of Article 19 of the Hamburg Rules and Article 24 of the Geneva Convention. The text has however been somewhat simplified to take account on the one hand of the differences between carriage and safekeeping and on the other of the fact that the preliminary draft Convention is not concerned with liability for delay as such.

77. Paragraph 1 of Article 10 follows almost word for word the language of the corresponding provisions of the Hamburg Rules and of the Geneva Convention although it should be remarked that unlike the latter provision it does not specify by whom the notice of loss or damage is to be given. The reason for this is that the term "customer", which corresponds to "consignee" in the Hamburg Rules and in the Geneva Convention, bears a more restricted meaning in the preliminary draft and it was considered undesirable to limit too much the persons who might validly give notice under Article 10.

78. The Group decided to retain in paragraph 2 the period of 15 consecutive days, which had been taken over from Article 19 of the Hamburg Rules, as opposed to that of six days, as in Article 24, paragraph 2 of the Geneva Convention, for the reason that the shorter six day period was necessary there for the multimodal transport operator as he might himself have to pass on notice to his sub-contractors.

79. Lengthy consideration was given to the introduction of a provision similar to Article 19, paragraph 8 of the Hamburg Rules and Article 24, paragraph 8 of the Geneva Convention indicating the persons to whom, for the purpose of the article, notice may validly be given. Particular difficulties were however experienced in this connection in determining who would be those persons. Would notice to a lighterman or a docker, for example, be sufficient? The Group considered that if the word "person" were to be read as a "person authorised to receive such notice", then the provision would be acceptable and indeed paragraph 8 of Article 19 of the Hamburg Rules gave some guidance on the matter by speaking of "a person ... including the master or the officer in charge of the ship". Even this formulation was not, however, fully satisfactory as the number of persons

might be increased considerably by the application of the eiusdem generis rule. In these circumstances, the Group decided to include no such provision and to leave the matter to be determined by national law.

## Article 11

80. In view of the fact that a majority of the members of the Group saw their task as the preparation only of minimum rules relating to the liability of ITOs, and given that some had also insisted on its semi-mandatory character, it was not considered appropriate to include provisions dealing with such procedural questions as jurisdiction, enforcement of judgements and arbitration which are customarily found in international transport Conventions. The Group also considered the introduction of a provision which would indicate those persons, other than those contractually bound to the ITO, who might institute proceedings against him under the future Convention. It was recognised that this was an important and complex question but it was deemed preferable to follow the precedents established by the transport law Conventions, especially the Hamburg Rules and the Geneva Convention, by not dealing specifically with the matter in the preliminary draft Convention.

81. In these circumstances the Group restricted itself to including only an article dealing with limitation of actions, while following almost word for word Article 20 of the Hamburg Rules and although criticism of certain of the provisions of Article 11 of the preliminary draft was made by a number of Governments in their written observations, the Group was reluctant to depart from the Hamburg model. In addition, some participants considered the two year limitation period provided for in paragraph 1 to be too long, and the alternative of one year was suggested. It was, however, replied that even a two-year period would represent a substantial improvement in the position of terminal operators in some countries where a general limitation period of thirty years is at present applicable to actions brought against them.

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

83. Even if the CIM/CMR system were not adopted, one member of the Group still considered that the drafting of the article was defective in that it did not state whether the limitation period could in any circumstances be suspended or interrupted, and reference was made in particular to the difficulties which had arisen in the interpretation of Article 29 of the Warsaw Convention in respect of which the highest courts of different States had reached widely divergent decisions. Some rule regarding interruption and suspension of actions should, it was therefore recommended, be included in the article. Another member pointed out that

it was the wording of Article 29 of the Warsaw Convention and the difficulties surrounding the concept of a "délai de déchéance" which had given rise to problems of interpretation and, while he therefore saw no serious defect in the text as it stood, he proposed that a provision be inserted to the effect that questions relating to the interruption and suspension of the limitation period be left to be regulated by national law. After further discussion, however, the Group decided to adopt the formulation of the Hamburg Rules without prejudice of course to the matter being taken up again in the final stages of the drafting of the future instrument.

84. Finally, in connection with Article 11, the Group also left for consideration at a later stage of the work the objection of one Government that it would be strange if an ITO in a State availing itself of the provisions of Article 18 could thereby voluntarily subject himself to rules governing prescription which might be in conflict with corresponding mandatory provisions of domestic legislation.

Article 12

85. This article, concerned as it is with certain contractual stipulations, is inspired by Article 23, paragraphs 1 and 2 of the Hamburg Rules and Article 28, paragraphs 1 and 2 of the Geneva Convention. Paragraph 1 establishes the general rule that the parties may not derogate from the provisions of the Convention. Paragraph 2 has been subjected to the same criticism as Article 7, paragraph 3 in that it permits derogation only in the sense that the ITO's responsabilities under the Convention may be increased. It should however be borne in mind that although Article 12, paragraph 2 encompasses Article 7, paragraph 3 in that the latter provision already contemplates the possibility of the ITO's increasing the limitation figures laid down by the preliminary draft, Article 12, paragraph 2 goes further and would, for example, permit the ITO to accept a more onerous liability regime or to extend the time during which notice of loss or damage might be given under paragraphs 1 or 2 of Article 10.

86. Finally, in connection with Article 12, the Group did not consider it to be necessary to introduce a provision along the lines of Article 23, paragraph 3 of the Hamburg Rules and Article 28, paragraph 3 of the Geneva Convention under which the ITO would be obliged to make a statement that the safekeeping of the goods is subject to the provisions of the Convention.

Article 13

87. Apart from the changes necessitated by the decision of the Group not to introduce a limitation per package in respect of the ITO's liability (see above, paragraph 68) and the introduction in paragraph 2 of the limitation figure to be found in Article 31, paragraph 2 of the Geneva Convention, this article corresponds in its entirety to the unit of account provisions contained in Article 26 of the Hamburg Rules.

Article 14

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

Article 15

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

Articles 16 to 23

90. The Group did not, with the exception of Article 18, examine in any detail the final clauses of the preliminary draft Convention prepared by the Secretariat. In consequence, these provisions, like the draft Preamble, are submitted for consideration under the sole responsibility of the Secretariat and are modelled in part on those of the Hamburg Rules and in part on those contained in the draft Convention on the hotelkeeper's contract, which is one of the most recent international instruments to be worked out by a UNIDROIT Committee of Governmental Experts. It would, therefore, seem premature to make any detailed comments on them at this stage (10).

91. Article 18, on the other hand, was the subject of lengthy discussion by the Group. As indicated above in paragraph 12 of this explanatory report, there was a division of opinion among the participants as to the character of the future instrument. Some considered that it should be cast in the form of a traditional international Convention of a mandatory character which, it was argued, would be the only way of ensuring the application of its provisions by a profession whose activities had hitherto been left almost exclusively to the realm of national law and who had in many countries been accustomed to including in their general conditions restrictions on their liability and extremely low limitations on that liability. Moreover, the purpose of the

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(10) It should however be noted that in Article 17, the word "fifth" was placed in square brackets by the Group at its third session in the light of suggestions that the number of ratifications necessary for the entry into force of the Convention should be substantially increased.

proposed Convention was to cover those gaps in the transport chain left by the existing international Conventions relating to carriage of goods. All of those Conventions were mandatory in character and if it were borne in mind that most damage during international transport operations occurred while the goods were in the hands of intermediaries it would seem even stranger to allow for the Convention to be of a non-mandatory character. It was in addition suggested that the ever-greater specialisation in the safekeeping and handling of goods meant that there was often no choice for a customer between competing ITOs in the same port so that it was necessary to ensure that at least the most important provisions of the future Convention would be of mandatory application in order to protect the carrier's right of recourse against the ITO and to allow a claim on the cargo side against the ITO. These participants further suggested that the chances of obtaining a large number of ratifications of such a Convention were no less and no greater than was the case with any other Convention dealing with the international transportation of goods.

92. Other participants, however, were of the opinion that for the future Convention to be successful a new approach was necessary. They drew attention in particular to the growing disenchantment in professional circles with the classic mandatory Convention as a means of regulating and facilitating operations concerned with international trade and suggested that the commercial interests involved might exert pressure on their Governments in many countries not to adopt a Convention laying down rules of mandatory application. In these circumstances they proposed a solution not dissimilar to that envisaged in the old draft TCM Convention with the difference that, whereas there the applicability of the TCM Convention depended upon the issuance of a CT document, here the Convention would be automatically applicable once a terminal operator held himself out as an ITO applying the provisions of the Convention. Originally it was suggested that his activities would then be supervised in some way by the State, which would designate him an "authorised ITO", and permit him to use a special logotype, the form of which would be established in an Annex to the future Convention. The voluntary cooperation of terminal operators in accepting this status, it was further suggested, might be obtained by providing in the Convention a series of incentives, such as a standard level of liability, a low and virtually unbreakable limitation figure, and the certainty that general conditions reproducing the provisions of the Convention would not be struck down by the courts of States which had ratified it. Moreover such operators might benefit from the channelling to them of business from customers attracted by the guaranteed liability accepted by them. It was further claimed by the proponents of such a system that it introduced a greater degree of unification than might at first sight appear since those operators who chose voluntarily to submit themselves to the rules of the Convention would be bound by all its provisions and would, in accordance with Article 11, be unable to derogate from them except by increasing their responsibilities. It was suggested that while not establishing a fully mandatory set of rules, a Convention based on this approach would amount to something much more ambitious than the mere harmonised guidelines recommended in some quarters.

93. Ultimately, the Group devised a solution which, it was hoped, would give a measure of satisfaction to all concerned. The basic structure of the preliminary draft Convention, that is to say the substantive pro-

visions contained in Articles 1 to 15, would in principle be of a mandatory character and would be applied as such by a Contracting State to all ITOs on its territory. Article 18, however, is drafted in such a way as to permit those States which do not wish to impose the provisions of the Convention on all terminal operators on their territory handling goods involved in international carriage to make a declaration, the principal effect of which is that they will "guarantee effect to the rules on the liability of international terminal operators contained in this Convention only in respect of operators who expressly or impliedly undertake to apply those rules". The solution therefore is one which has been termed 'semi-mandatory". It will be fully mandatory for ITOs in States which choose not to apply the provisions of Article 18 while in those States which do avail themselves of this reservation clause voluntary acceptance of the rules of the Convention by an ITO will oblige him to apply them in respect of all operations conducted by him in his capacity as an ITO.

94. It will be noticed that Article 18 makes no provision for the licensing system which had originally been envisaged. This had indeed been the object of considerable criticism, on the one hand because it introduced a form of State licensing and administrative control into an area hitherto relatively untrammelled by such restrictions and on the other that operators in States which adopted the Article 18 system would, if they applied the provisions of the Convention, be entitled to receive the special seal of approval of "authorised ITO" while no such badge would distinguish ITOs in those States which applied the Convention on a mandatory basis.

95. The present text of paragraph 1 of Article 18 indicates that the only obligation of the State is to ensure that its courts will apply the prospective Convention to those ITOs who voluntarily undertake to accept its provisions. There was lengthy discussion within the Group before it decided to enunciate the principle that an operator may become an ITO by undertaking "expressly" or "impliedly" to apply the rules of the Convention. In this connection it should be observed that the most common case of a person expressly undertaking to apply the provisions of the Convention is when he calls himself an "ITO" and specific reference to this possibility is made in Article 18, paragraph 1. Among the very many other situations and examples mentioned by members of the Group were those where the operator's general conditions make a specific reference to the Convention or where the parties agree in the course of business dealings that the Convention should apply. If, however, an ITO who has regularly applied the provisions of the Convention were to decide from one day to the next not to do so and failed to inform his customers thereof then, in the opinion of some members of the Group, he would remain bound to apply the provisions of the Convention as his original undertaking to do so could be interpreted as continuing on an implied basis until notice to the contrary was given to those concerned. It was admitted that there might be a few cases where it would not be clear whether the operator had accepted the status of ITO under the Convention but this was inherent in a system which rejected the concept of State authorisation. What was above all seen as important was to ensure that an operator who undertakes to apply the rules of the Convention will in all cases be bound by them and that if he purports to do so without performing the obligations incumbent upon him, then he will be treated by the courts as having actually assumed that undertaking with all the consequences involved therein.

96. Paragraph 2 of Article 18 provides that "Any State may recognise operators who apply the rules of this Convention as "International Terminal Operators"". This provision permits States to confer, as it were, a seal of approval on ITOs without however imposing any obligation on them to do so, as was the case under the original licensing system.

ANNEXE
ANNEX

COMITE D'ETUDE

STUDY GROUP

Le Comité a tenu trois sessions à Rome

1. Du 10 au 12 avril 1978
2. Du 23 au 26 janvier 1979
3. Du 19 au 21 avril 1981

The Group held three sessions in Rome

1. From 10 to 12 April 1978
2. From 23 to 26 January 1979
3. From 19 to 21 April 1981

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LIST OF PARTICIPANTS

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