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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP ON THE WAREHOUSING CONTRACT

Observations of Professor Fritz Enderlein,  
member of the Governing Council of UNIDROIT,  
on the preliminary draft Convention  
on the liability of international terminal operators  
and the explanatory report thereto (Study XLIV - Doc. 14)

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### General remarks

1. It appears to me that the draft Convention deals with more questions than just the liability of ITOs. The title therefore seems too narrow. On the other hand I would advocate the more radical view mentioned in para. 41 that all handling operations should be included.

2. I don't quite understand the repeated references to the interested professional circles. Aren't there interested circles on both sides? Are the customers not interested? UNIDROIT should try to find a balanced approach taking into account the interests of all sides.

3. Questions which should be dealt with in the Convention include, for instance, the aspects of dangerous goods (para. 35) and faulty stowage of goods resulting in later damage (para. 45).

4. For some more rules on limitation (para. 83) the UNCITRAL prescription Convention could be taken as a model.

### Definitions

5. Article 1 para. 3 speaks of the "consignor". This term does not appear anywhere else. Why not speak of the "customer", who is defined in para. 2?

6. In various places the draft speaks of the "person entitled to take delivery" of the goods, thus Art. 1 para. 1, Art. 3 para. 1, Art. 10 paras. 1, 2, 3, 4. Moreover Art. 6 para. 2 speaks of the customer, but it seems the same person is meant. Would it not be possible to use a shorter name for this person? For instance: the consignee? Or: the recipient? And define this person as anybody entitled to take delivery, be it the customer itself, or a shipper, carrier, forwarder, customer's buyer or whoever.

7. Art. 6 para. 2 also refers to the "person entitled to make a claim". Is this the same person who is entitled to take delivery? Or somebody else?

Applicable law

8. Maybe the questions of applicable law could be more streamlined, both in content and (at least) in terminology. Thus far the draft uses the following expressions:

- (i) applicable national law - Art. 4 para. 4
- (ii) law of the country - Art. 4 para. 5
- (iii) national law - Art. 5 para. 1
- (iv) law of the place - Art. 5 para. 3
- (v) internal law of the place - Art. 5 para. 4
- (vi) law of the State - Art. 11 para. 5

9. In general, I don't see why we need so many references to national law. Isn't it the aim of the Convention to achieve unification of law?

10. It appears there are four different types (or cases) of applicable law:

- (a) law which limits rights under the Convention - supra. (i), (ii)
- (b) law which cannot limit rights under the Convention - supra. (vi)
- (c) law which gives additional rights - supra. (iii), (iv), (vi)
- (d) law which applies to questions not governed by the Convention - supra. (iv), (v).

11. If the Convention is to unify the law of the member States, then we don't need at least law mentioned supra. (a), and maybe law (b) is superfluous.

12. Under another aspect the various laws referred to could be classified as

- (x) law decided by the Convention itself - supra. (ii), (iv), (v), (vi)
- (y) law to be chosen by the parties or decided by the court - supra. (i), (iii).

13. If the Convention is to unify the law maybe we don't need the law mentioned supra (y).

14. Thus only references in Art. 5 paras. 3 and 4 remain and even with the former I am not sure (see infra. para. 21).

Specific remarks

15. Article 3 uses in paras. 1 and 2 two different approaches. In para. 1 it refers to time, in para. 2 it refers to operations. Are the operations in para. 2 within the time in para. 1? If so, para. 2 is superfluous.

16. Art. 4 para. 4: Is there any national law which prevents such an undertaking by the ITO? And if so, would not the Convention overrule such national law? (I presume the applicable law to be decided by any court would be the law of the State where the ITO operates, i.e. this State would fall within the scope of application according to Art. 2).

17. Art. 4 para. 5: Is there any national law prohibiting documents to be issued by mechanical or electronic means? And if so ... see para. 16.

18. Apart from the above remark: In Art. 4 para. 5, 2nd line instead of "if not inconsistent with" I would prefer "if permitted by".

19. Art. 5 para. 1: Why not unify the law? Isn't the right of retention described here enough for the ITO? And if the parties agree on extending the ITO's security in the goods, why not make such contractual agreements valid under the Convention? Why do we need the national law here?

20. Art. 5 para. 2: Shouldn't this rule be extended? The ITO also shall not be entitled to retain the goods if he has undertaken to deliver the goods against surrender of a document under Art. 4 para. 4.

21. Art. 5 para. 3: If the conditions and procedures of the sale were to be governed by the law of the German Democratic Republic, the ITO might have the right to sell the goods himself and not only cause them to be sold.

22. Art. 6 para. 2: It seems that a better place for this provision would be in Art. 10 as para. 5. Furthermore see supra. para. 7.

23. Art. 10 para. 3: Who are the parties to the contract? The ITO and the customer. Is the person entitled to take delivery (see supra para. 6) a party? Or does this person become a party at any time? If not, we should not speak of joint inspection by the parties, because it would often be a joint inspection by the ITO and the consignee.

24. The title (headline) of Art. 10 is not fully satisfactory. Para. 4 has nothing to do with notice and even paras. 1 to 3 are wider.

25. The title of Art. 12 seems also to be not entirely correct. Maybe "Derogations from the Convention"?

26. Art. 13 could possibly be simplified if the latest developments in UNCITRAL were to be taken into account.

27. Art. 18 para. 4 last two lines: "Whenever there is a change ... in the result" might be too often. Maybe a reference to Art. 21 (1) could be included. The change must be significant.

28. Art. 18 para. 1, second line: include "the depositary Government".

29. Art. 18 para. 1, last sentence: Would such use of the name not rather constitute an implied undertaking?

30. Furthermore I don't like Art. 18 at all. Firstly, any reservation runs counter to unification; secondly I don't believe the provision would work. What about an ITO who uses this name without having ever heard of our Convention?