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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Observations of the Institute of International Container Lessors
on the preliminary draft Convention on the liability of international
terminal operators and the explanatory report thereto (Study XLIV -- Doc. 14)

Rome, March 1983

The following is a response to your letter of October 1, 1982 in which you requested our observations on the most recent Preliminary Draft Convention on the Liability of International Terminal Operators. The Institute of International Container Lessors is the trade association for the international container leasing industry. The container leasing industry owns more than one-half of the world's marine cargo containers. Consequently, any convention dealing with liability of international terminal operators is of great importance to container lessors whose equipment will be warehoused by the ITO.

Article 1, titled "Definitions", subsection 3, includes in the definition of "goods" any container. Where a conflict arises between the ITO and any customer, Article 5 gives the ITO a right of retention over any goods he has taken in his charge for costs and claims relating to such goods. Therefore, under the Convention an ITO may assert a right of retention over the container itself. This presents a problem to the innocent third party container lessor who, while not a party to the agreement between the ITO and its customer, may suffer the sale of its container without having been at fault and possibly without having even had notice of the sale or of the indebtedness of the lessee.

This unfortunate result could be avoided by redrafting the convention in one of the following ways: First, the definition of "goods" could be modified to exclude containers which clearly bear evidence in the nature of markings or otherwise of the ownership of a lessor or other third party. In the alternative, if the drafters chose not to redefine the term "goods", the ITO's right of retention over any goods could be modified to exclude any containers marked to indicate ownership by a third party. Both of these suggestions seek to protect the rights of the innocent third party container lessor while at the same time avoiding comment on any rights an ITO might have over any goods held in the container itself.

Article 10, paragraph 1, indicates that it is the obligation of the customer to give written notice to the ITO within twenty-four hours after the goods are handed over to the person entitled to take delivery of the goods. According to the Convention, lack of such notice will be prima facie evidence that the goods were delivered in good condition. Given the fact that the container lessor is unlikely to be present at the time the goods are handed over to the customer or to some other individual designated to receive the goods by a customer, the container lessor will be unable to respond in the prescribed twenty-four hour period if any damage to the container were discovered. We suggest that the fifteen

day period in paragraph 2 of Article 10 be applied rather than the twenty-four hour period. Further, we suggest that the fifteen day period begin to run from the date the container lessor regains possession of its container.

The same modifications could be made to paragraph 2 of Article 10 which deals with loss or damage of a variety not readily apparent and which provides for a fifteen day period in which notice can be given to the ITO. Again, upon regaining possession of its container, the container lessor will have a similar fifteen day period in which to notify the ITO of any damage. In any event, we suggest that at some point in the Convention itself it be noted that the Convention does not presume to define, limit or in any way control any rights which a third party unrelated to the contract between the ITO and the customer might have against either of those parties.

Article 9, paragraph 6, of the 1979 Preliminary Draft Convention stated that notice given to a person acting on an ITO's behalf would be deemed to have been given to the ITO as well. This provision has been eliminated from the equivalent of Article 9 which is Article 10 of the 1982 draft. It is unlikely that the container lessor will have agents or representatives present at every international terminal. Therefore, the possibility exists that the container lessor could notify an agent of the ITO more readily than he might be able to contact the ITO."