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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PRELIMINARY DRAFT CONVENTION ON OPERATORS OF TRANSPORT TERMINALS

AS ADOPTED BY THE GOVERNING COUNCIL OF UNIDROIT ON 4 MAY 1983

DURING ITS 62<sup>nd</sup> SESSION

with

EXPLANATORY REPORT

(prepared by the Secretariat of Unidroit)

Rome, September 1983

PRELIMINARY DRAFT CONVENTION

ON OPERATORS OF TRANSPORT TERMINALS (OTTs)

Preamble

THE STATES PARTIES TO THE PRESENT CONVENTION,

HAVING RECOGNISED the desirability of determining by agreement certain rules relating to the rights and duties of operators of transport terminals and in particular to their liability;

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

Article 1

DEFINITIONS

For the purposes of the application of this Convention:

1. "Operator of a transport terminal (OTT)" 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 carriage, either by agreement or by 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. "Goods" includes any container, pallet or similar article of transport or packaging, if not supplied by the OTT.

Article 2

SCOPE OF APPLICATION

This Convention applies whenever the operations for which the OTT is responsible are:

- (a) performed in the territory of a Contracting State, and
- (b) related to carriage in which the place of departure and the place of destination are situated in two different States.

Article 3

PERIOD OF RESPONSIBILITY

1. The OTT 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. If the OTT has undertaken to perform or to procure performance of discharging, loading or stowage of the goods, even before their taking in charge or after their being handed over, the period of responsibility shall be extended so as to cover such additional operations also.

Article 4

ISSUANCE OF DOCUMENT

1. The OTT shall, at the request of the other party to the contract, issue a dated document acknowledging receipt of the goods and stating the date on which they were 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 OTT may, if the parties so agree, and the applicable national law so permits, contain an undertaking by the OTT 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 place where the document is issued.

Article 5

SECURITY RIGHTS IN THE GOODS

1. The OTT 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 OTT's security in the goods.

2. The OTT 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 in the State where the operations for which the OTT is responsible under this Convention are performed.

3. The OTT may, after giving timely and adequate notice, sell or cause to be sold all or part of the goods retained by him so as to obtain the amount necessary to satisfy his claim.

Article 6

BASIS OF LIABILITY

1. The OTT is liable for loss resulting from loss of or damage to the goods for which he is responsible under 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 OTT does not hand over the goods at the request of the person entitled to take delivery of them within a period of 60 consecutive days following such request, the person entitled to make a claim for the loss of the goods may treat them as lost.

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

#### Article 7

##### LIMIT OF LIABILITY

1. The liability of the OTT 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. The OTT may, by agreement, increase the limits of liability provided for in paragraph 1 of this article.

#### Article 8

##### NON-CONTRACTUAL LIABILITY

1. The defences and limits of liability provided for in this Convention apply in any action against the OTT in respect of loss of or damage to goods caused by any act or omission within the scope of the OTT's obligations provided for under this Convention, 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 OTT, 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 OTT is entitled to invoke under this Convention.
3. Except as provided in Article 9, the aggregate of the amounts recoverable from the OTT 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 OTT 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 the OTT 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 Article 8, paragraph 2, a servant or agent of the OTT 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 OTT not later than the working day after the day when the goods were handed over to the person entitled to take delivery of them, such handing over is prima facie evidence of the delivery by the OTT of the goods as described in the document issued by the OTT 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 them.

3. If the state of the goods at the time they were handed over to the person entitled to take delivery of them has been the subject of a joint survey or inspection, 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 OTT 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 OTT has handed over the goods or part thereof or, in cases where no goods have been handed over, on the last day of the period referred to in Article 6, paragraph 2.

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. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention 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 OTT 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, the OTT may, by agreement, increase his responsibilities and obligations under this Convention.

Article 13

UNIT OF ACCOUNT 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 expressed in 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 equivalence between the national currency of a Contracting State which is a member of the International Monetary Fund and the Special Drawing Right 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 equivalence between the national currency of a Contracting State which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

2. The calculation mentioned in the last sentence of paragraph 1 is 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 amounts in Article 7 as is expressed there in units of account. Contracting States must communicate to the Depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

Article 14

OTHER CONVENTIONS

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

Article 15

INTERPRETATION OF THE CONVENTION

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.



Article V

REVISION OF THE LIMITATION AMOUNTS AND UNIT OF ACCOUNT

1. The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in Article 7 :

(a) Upon the request of at least 1 2 Contracting States, or

(b) When five years have passed since the Convention was opened for signature or since the Committee last met.

2. If the present Convention comes into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it comes into force.

3. Amendments shall be adopted by the Committee by a 1 2 majority of its members present and voting.

4. Any amendment adopted in accordance with paragraph 3 of this article shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of 6 months after it has been notified, unless within that period not less than one-third of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the Depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States 12 months after its acceptance.

5. A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment has entered into force. Such denunciation shall take effect when the amendment enters into force.

6. When an amendment has been adopted by the Committee but the 6 month period for its acceptance has not yet expired, a State which becomes a Contracting State to this Convention during that period shall be bound by the amendment if it comes into force. A State which becomes a Contracting State to this Convention after that period shall be bound by any amendment which has been accepted in accordance with paragraph 4.

## 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 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 persons into whose custody goods are entrusted, whether before, during or after the transport operation or operations, had made itself particularly felt. A preliminary report on this aspect of the topic was submitted by Professor Le Gall (1) in 1966 and the Governing Council of Unidroit requested the Secretariat to conduct an enquiry among Governments and the appropriate organisations for the purpose of assessing their interest in the subject and of giving greater precision to its scope.

2. The outcome of these enquiries led the Secretariat to the conclusion 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 independent contractors used by maritime carriers, especially warehousemen and storekeepers. A wish was, therefore, expressed by some Governments that Unidroit resume its study of the subject and at its 53<sup>rd</sup> session, held in Rome in February 1974, the Governing Council decided to instruct the Secretariat to update Professor Le Gall's report.

3. In accordance with these instructions, the Secretariat commissioned a preliminary report on the warehousing contract from the late Dr Donald J. Hill of the Queen's University, Belfast (2). Dr Hill outlined his report to the Council at its 55<sup>th</sup> 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 rules in this connection.

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

(2) Study XLIV - Doc. 2. UNIDROIT 1976. This report is also reproduced in the Uniform Law Review 1973, 1, 55.

4. The bulk of the observations received (3) favoured continuance of work by Unidroit and at its 56<sup>th</sup> 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 (4). At the first session (5), 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 (6) which was considered by the Study Group at its second session, held in Rome from 23 to 26 January 1979 (7).

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

7. At its 58<sup>th</sup> session (September 1979) the Council decided to transmit the text of the preliminary draft Convention to Governments and to 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 (8) was submitted to the Study Group at its third session, held in Rome from 19 to 21 October 1981 (9). In the light of these comments a substantial number

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

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

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

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

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

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

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

of amendments were made to the text of the preliminary draft Convention, the revised version of which (Study XLIV - Doc. 14) was, in accordance with a decision of the Governing Council taken at its 61<sup>st</sup> session in April 1982, submitted to Organisations for a final round of observations.

8. These observations were considered by a restricted group of members of the Council, chaired by Professor Grönfors, which met on 2 and 3 May 1983 in Rome. The text of the preliminary draft Convention on operators of transport terminals as drawn up by this group was approved by the Governing Council on 4 May 1983 in the course of its 62<sup>nd</sup> session.

## II

### GENERAL CONSIDERATIONS

9. 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 Unidroit Study Group recognised from the outset that its task was one of particular difficulty, the complexity of the problem having already been clearly illustrated in Dr Hill's preliminary report. Not only was there the distinction between long-term and transit warehousing but in addition customs and practices differed widely among warehousemen and terminal operators, 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 opposition to the introduction of rules designed to bring about uniformity.

10. Notwithstanding these difficulties, a general feeling prevailed 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.

11. 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. 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 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, then it might be wise to consider attempting to delimit its scope of application more strictly, for example by restricting it to operations related to carriage by certain modes of transport only.

12. Although the regulation of international warehousing operations was seen as the main objective of the preliminary draft Convention, the Study 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 future 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.

13. 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 a number of compromise solutions were considered. That enjoying most support was one whereby those States which wished to do so might apply the provisions of the future instrument to all terminals operating in their territory whereas others might

make a declaration to the effect that they would give effect to the rules relating to the operators of transport terminals contained in the Convention only in respect of those operators who expressly or impliedly undertook to apply the 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 those rules in general conditions would be recognised by the courts of Contracting States, whereas they might otherwise be exposed to the risk of being struck down in the face of the growing pressure of consumer and users' lobbies. In the opinion, however, of the restricted group of members of the Governing Council which finalised the text of the preliminary draft Convention, it would be preferable to avoid undue complication at this stage of the elaboration of the uniform rules, the final form of which could not be foreseen at present. The uniform rules are therefore presented as a preliminary draft Convention, as is customary in Unidroit, but without prejudice to the ultimate form which the instrument containing them will assume.

14. As to the general structure of the preliminary draft Convention, it may be stated that it is built around the concept of the "operator of a transport terminal (OTT)", 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 carriage, either by agreement or by 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".

15. For the uniform rules to apply, however, Article 2 lays down two further requirements, namely that the operations for which the OTT is responsible are performed in the territory of a Contracting State and that they are related to carriage in which the place of departure and the place of destination are situated in two different States, thus providing the international element referred to above in paragraph 11.

16. Article 3 lays down the general statement of the responsibility of the OTT 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 extends the responsibility of the OTT to the time before the taking in charge of the goods or after their handing over in respect of operations of discharging, loading or stowage of the goods which the OTT has undertaken to perform or the performance of which he has procured.

17. Two key articles of the preliminary draft are Articles 4 and 5. Article 4 is concerned with the issuance by the OTT of a dated document acknowledging receipt of the goods and stating the date on which they were taken in charge. Such a document, however, need only be issued if requested by the other party to the contract for the safekeeping of the goods. Article 5, which is modelled to a certain extent on corresponding provisions of the Unidroit draft Convention on the hotelkeeper's contract, deals with the OTT's rights of retention and sale over goods.

18. Articles 6 to 15 of the preliminary draft Convention are based in very large measure on corresponding provisions of the Hamburg Rules and of the Geneva Convention of 1960 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 and nullity of stipulations contrary to the provisions of the Convention. As regards the question of the unit of account the draft contains the text of the model provisions worked out by UNCITRAL (Article 13) while Article 14 provides that the Convention does not modify any rights or duties which may arise under any international Convention relating to the international carriage of goods.

19. During the final revision of the text, the restricted group of members of the Governing Council reached the conclusion that it would be premature at this stage to insert a set of draft final clauses although it considered that it would be desirable to include a provision, Article Y, relating to the revision of the limitation amounts and unit of account and based on the UNCITRAL model.

20. It is necessary to realise that the preliminary draft Convention does not deal with a number of important aspects of contracts concluded by OTTs. 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 OTT for handling or safekeeping, that of giving the necessary instructions. Neither does it deal with the OTT's right to dispose of or to sell dangerous goods nor with the obligations of the person tendering the goods for safekeeping or of the OTT 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 essentially the liability of OTTs, and many points of detail have been omitted which might be included at a later stage 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 was considered essential was to avoid any incompatibility between such conditions and the prospective Convention on operators of transport terminals.

III

ARTICLE BY ARTICLE COMMENTARY ON THE PRELIMINARY DRAFT CONVENTION

Article 1

21. The text adopted by the Governing Council contains only two definitions of terms which recur throughout the preliminary draft Convention, although it should be noted that the first of these definitions, that of the "operator of a transport terminal (OTT)" to some extent determines the scope of application of the future instrument. For the purposes of the Convention the OTT 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 carriage, either by agreement or by 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".

22. Now, it will readily be seen that this definition of a legal figure, the OTT, 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 that it also specifies the safekeeping of goods with which the preliminary draft Convention is concerned, namely that which occurs "before, during or after carriage" as well as the manner in which the OTT undertakes such safekeeping, that is to say "either by agreement or by taking /the goods/ in charge". 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.

23. In the first place then, why speak of "an operator of a transport terminal" rather than of a warehouseman in English and of an "exploitant de terminal de transport" instead of an "entrepotitaire" in French? The reason for the choice of terminology is that, on the one hand, it was felt that the very concept of a "warehouse", with its implication of shelter, was becoming increasingly outmoded as new techniques of storing goods are 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 35 et seq.), it could be positively misleading to use the terms "warehouseman" or "entrepotitaire", 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 "operator of a transport terminal".



24. Some criticism was levelled by members of the Group and in governmental observations at the language used in Article 1, paragraph 1, in particular in relation to the circumscribing of the OTT's obligation of safekeeping under the prospective Convention to the period "before, during or after carriage" and it was in particular suggested that the words "during ... carriage" might be taken as referring to the carrier's obligations in respect of the goods during actual carriage. It has however been pointed out that such an interpretation cannot stand alongside Article 14 and that the clear intention of the drafters must be to cover cases of safekeeping during transshipment and not the carriage itself. To make the matter absolutely clear however the Study Group decided to introduce at the beginning of paragraph 1 the words "acting in a capacity other than that of a carrier".

25. The view was also expressed by one participant in the work of the Study Group that, as a rule, and 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 would be to increase costs by duplicating insurance cover of goods. 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.

26. 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 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 arise 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.

27. This view was shared by the majority of the Group, who also considered that if the definition of the OTT 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 would not be necessary to define the contract for the safekeeping of goods. This approach was reinforced once the Group had agreed that the OTT 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.

28. As mentioned above in paragraph 22 of this explanatory report, the definition of the OTT also indicates the manner in which he assumes the obligation of safekeeping of the goods and, although it was recognised that in a great majority of cases the contract would be concluded by his physically 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 taking in charge, without prejudice to the theoretical question of whether taking in charge itself constitutes an agreement. In this connection the Group also rejected a proposal the effect of which would have been to clarify the cases in which a person could be deemed to be an OTT for the purposes of the prospective Convention by deleting the words "or by taking in charge such goods" and by introducing a provision to the effect that the operator would only be considered to be an OTT 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.

29. Two other points should be mentioned in connection with the definition of the OTT. 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 OTT, the Group felt however that it would be desirable to leave this to be regulated in the context of the operator's general conditions.

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

31. The second definition, that of "goods" in paragraph 2 of Article 1, is based on that to be found in 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.

#### Article 2

32. This article is concerned with the geographical scope of application of the Convention. Paragraph (a) recognises the essentially "static" nature of the operations performed by the OTT, as opposed to the dynamic character of transport which involves the movement of goods, and it consequently provides that the connecting factor for the application of the Convention is that the operations for which the OTT is responsible are performed in the territory of a Contracting State. Paragraph (b), on the other hand, defines the international element which is necessary for the future instrument to apply, namely that the operations for which the OTT is responsible must be related to "carriage in which the place of departure and the place of destination are situated in two different States". The reason for the limitation of the sphere of application of the draft to international operations has already been given in paragraph 10 et seq. of this report but it should be noted that this view was not shared by all members of the Study Group.

33. In particular, some participants considered that it would be a worthwhile task to unify the law relating to all contracts for the safe-keeping 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. Moreover, hesitations were voiced in this connection as regards the precise circumstances in which the OTT 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 OTT? 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 OTT's undertaking the safekeeping of goods in connection with international carriage and to define this notion by reference to whether the OTT knew or ought to have known that the safekeeping was to take place before, during or after international carriage. 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 and accordingly it retained the objective criterion to be found in Article 2 (b).

### Article 3

34. Paragraph 1 of this article reverts to the primary obligations of the OTT 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 OTT is liable for the safekeeping of goods excludes his liability under the draft 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 rights and duties of OTTs, but rather be left to be regulated by general conditions, as also should a number of other matters connected with non-performance of contractual obligations.

35. As mentioned above in paragraph 16 of this explanatory report, paragraph 2 of the article provides that the OTT 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 discharging, loading or stowage or when he 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 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.

36. A majority of the members of the Group considered however that the future instrument should, as far as possible, fill in the gaps left in the liability regime established 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 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 handling operations. On the other hand, it was felt that there could be 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 carriage, principally because the liability regime proposed under Article 6 might not prove to be suitable for all such operations.

37. 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. It was 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 discharging, stowage and loading, 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.

38. 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 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 OTT 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.

39. It should be noted that paragraph 2 establishes a certain parallelism with paragraph 1 in that whereas the former states that the period of responsibility in relation to the safekeeping of goods runs from the time the OTT takes them in charge until their handing over to the person entitled to take delivery of them, the period of responsibility is extended under paragraph 2 to cover the duration of the additional operations performed, even before the taking in charge of the goods or after their handing over. The language of paragraph 2, when read in conjunction with Article 6, paragraph 1, makes it clear that the OTT 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, for example, if faulty stowage of goods were to result in damage to goods during the voyage, the OTT 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.

#### Article 4

40. This article was the subject of lengthy discussion by the Group and represents a compromise solution between the various solutions proposed. 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 OTT 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 OTT were always to have to issue a document when taking the goods in charge. In addition, one participant considered that if the OTT 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.

41. Against this view, one member of the Group argued that there was no value in laying down an elaborate liability regime for OTTs 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 OTT, or the cargo interest with

a direct action against him if no document 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 warehouses. 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 a customer and the OTT were to refuse to issue the document, 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 an express request to be made, while provision should in addition be allowed for sanctions in the event of the OTT failing to observe his duty to issue a document acknowledging receipt of the goods. In such cases, as also in those where the OTT 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 had taken delivery of the goods in the circumstances appearing from the documentary evidence provided by the other party to the contract, i.e. the last document in the latter's possession relating to the goods, including his own exit certificate.

42. The prevailing view was however 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 the goods having been taken 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 when the goods were not of any great value. Moreover, on the question of refusal by the OTT to issue a document on request, it was suggested that the matter could best be left for determination 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.

43. In these circumstances, it was agreed that Article 4, paragraph 1 of the preliminary draft should provide merely for the issuing on request by the OTT of a document acknowledging receipt of the goods, it being understood that signature by the OTT 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 taken in charge. The question of the legal consequences of failure to issue such a document is therefore left to national law.

44. 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 it was considered 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 OTT 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 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 OTTs.

45. With respect to the evidentiary value of the document to be issued by the OTT, 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".

46. Paragraph 4 of Article 4 seeks to deal with a question which was discussed at considerable length by the Study 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 that with a view to stimulating discussion on the question within the interested circles provision be made 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 OTT'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, where appropriate, handling operations are performed, so permits.

47. 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 a 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, 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 Convention.

#### Article 5

48. 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 OTT 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 OTT to grant credit to his customers, thus speeding up the flow of goods, and that it would also be important in those situations where there was a dispute over the price of the agreed services, for in such cases there could be a risk of the OTT's delay in delivery of the goods being converted into a liability for physical loss (see below, paragraph 55). 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 so that the availability of a right of general lien under an international Convention could be of real benefit to operators in those countries where the exercise of such a lien is not permitted or where it is doubtful whether it would be upheld by the courts.

49. Other members of the Group were however 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 OTT 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, while possible conflicts were also seen between the OTT's right of retention and his duty to surrender goods on production of a carriage document.

50. 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 OTT 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 OTT'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 OTT's security in the goods", thereby seeking to uphold, inter alia, provisions in the general conditions of OTTs 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 OTT and for which he is responsible under Article 3, paragraph 2.

51. Paragraph 2 of the article which, like paragraph 3, 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 person entitled to them 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 OTT 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 in the State where the operations for which the OTT is responsible under the Convention are performed.

52. Paragraph 3 asserts the principle that the OTT, in addition to his right of retention of the goods, may also "sell or cause to be sold all or part of the goods retained by him so as to obtain the amount necessary to satisfy his claim" after giving adequate and timely notice, a notion to be interpreted according to the applicable law.

#### Article 6

53. This article lays down the basic liability regime to which the OTT 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, namely that referred to in basic principle (d) of 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.

54. Broadly speaking, the choice of the liability regime established by Article 6 represents the preference of the Group as a whole as no participant spoke in favour of a system under which the customer could be called upon to prove that the loss or damage had been caused by the fault of the OTT or his servants and agents as a pre-condition for recovery. Although some doubts were expressed as to whether a regime based on that of the Hamburg Rules and founded on the presumed fault of the OTT, 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 of the States and organisations which commented on the preliminary draft, as being dictated by a number of considerations. In the first place, it was recalled that the present legal position of warehousemen, as Dr Hill's report had 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, it was hoped 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 would have to be established. It was this concern for laying down a uniform liability for OTTs, 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 OTT'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 considerations based on grounds of practicality caused it to dismiss a similar suggestion that the OTT'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.

55. After lengthy discussion, the Group decided, as mentioned above in paragraph 53, in principle not to make provision for the OTT'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 OTT 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 OTT 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 OTT 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 in the preliminary draft with the OTT's possible liability for delay 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 OTT 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 could be settled in the general conditions of the operators who might, 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 essentially with the case where the OTT 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 could be attributed to the fact that the OTT

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 person entitled to the goods may treat them 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. 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.

56. In view of the decision not to deal with delay as such in Article 6, the provisions of that article are concerned only with those cases where the goods have been damaged or lost as a result of the defective performance of the OTT's obligations under 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 their being taken in charge, as it was felt that such questions could best be dealt with in standard conditions (see above, paragraph 20). Similarly, the wording of Article 6 is such that the OTT will not be liable thereunder where the customer suffers financial loss as a result, for example, of the OTT's failing to clear out old invoices.

57. To the extent that Article 6 closely follows, where appropriate, the corresponding articles of the Hamburg Rules and the Geneva Convention, its provisions do not call for any detailed comment, except for one point, relating to the use of the words "servants and agents". A number of participants in the Study Group 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 might 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.

Article 7

58. 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 a majority of the members of the Study Group was opposed to the application to the liability of OTTs 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, it was considered 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 for the purpose of establishing different limitation figures in the two situations.

59. 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 it was considered 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 considered it advisable to reserve 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.

60. While paragraph 2 of Article 7 calls for no comment, it should be mentioned that some hesitations were expressed in connection with the inclusion of a provision in paragraph 3 similar to Article 6, paragraph 4 of the Hamburg Rules, under which the OTT may, by agreement, increase the limits of liability provided for in paragraph 1 of Article 7. It was, in particular, argued that by making provision for such an alteration of the limit on compensation payable by the OTT, the future instrument might prove less attractive to the operators in question, some of whom are exposed to pressure by large shipping companies, and that it was in principle undesirable to stimulate competition between them on the basis of the most favourable limitation

amounts on offer rather than on the ground of price and efficiency. Indeed, it was suggested that the existence of such a provision would go so far as to deny the OTT 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 organisations, would strengthen the bargaining position of terminal operators, although of course the latter would not be entirely protected against pressure being exerted on them to raise their limitation figures by strong shipping lines. It has also been 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 amounts.

#### Article 8

61. 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 minor drafting changes.

#### Article 9

62. This provision is almost entirely modelled on Article 8 of the Hamburg Rules and on Article 21 of the Geneva Convention. As regards paragraph 1, it differs from those mentioned above in that it contains no reference to liability for delay. Originally the text contained a further amendment to the Hamburg and Geneva texts, namely the addition of the word "personal" before "act or omission" which sprang from the desire of many members 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 OTTs and 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 OTT 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 OTT.

63. 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 OTT 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.

64. In these circumstances the Study Group decided by way of compromise to include the word "personal" in square brackets so as to permit full debate on the matter during the next stage of the work, but in view of the strong objections to its presence raised by some members of the restricted group of members of the Governing Council it was deleted.

65. Finally, it should be noted that the same objections to the word "agent" were made in this connection as had been levelled against its use in Article 6 (see above, paragraph 57).

#### Article 10

66. 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.



67. Paragraph 1 of Article 10 follows very closely the language of the corresponding provisions of the Hamburg Rules and of the Geneva Convention although it should be noted that the wording of the French text has been altered with a view to obtaining greater clarity. It was however 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.

68. 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

69. 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 operations of OTTs, and given that some had also insisted on its semi-mandatory character, it was not deemed appropriate at this stage to include provisions dealing with such procedural questions as jurisdiction, enforcement of judgments 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 OTT, who might institute proceedings against him under the future Convention. It was recognised that this was an important and complex question but it was thought preferable to follow the precedents established by the transport law Conventions, especially the Hamburg Rules and the Geneva Convention, and not to deal specifically with the matter in the preliminary draft Convention.

70. In these circumstances the draft only contains an article dealing with limitation of actions based on provisions contained in Article 20 of the Hamburg Rules and Article 25 of the Geneva Convention. Although some participants considered the two year limitation period provided for in paragraph 1 to be too long, and suggested an alternative of one year, it was considered 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.

71. 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 givesrise 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.

72. 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 has 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.

Article 12

73. This article, concerned as it is with certain contractual stipulations, is inspired by Article 23, paragraphs 1 and 2 of the Hamburg Rules and, more particularly as regards the French text, by 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 OTT's responsibilities 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 OTT's increasing the limitation figures laid down by the preliminary draft, Article 12, paragraph 2 goes further and would, for example, permit the OTT 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.

74. Finally in connection with Article 12, it was not considered 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 OTT would be obliged to make a statement that the safekeeping of the goods is subject to the provisions of the Convention.

Article 13

75. As mentioned in the general considerations (paragraph 18 above) the text of this article follows the model provision for a universal unit of account approved by UNCITRAL.

Article 14

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

Article 15

77. 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 7 of the 1980 United Nations Convention on contracts for the international sale of goods.

Article Y

78. As already mentioned above in paragraph 19 of this report, the introduction of this provision, which is of course closely related to Articles 7 and 13 and which follows the new UNCITRAL model, constitutes the one exception to the decision of the Governing Council of Unidroit not to include any final provisions in the text of the preliminary draft Convention.

COMITE D'ETUDESTUDY 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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