MARITIME LAW ASSOCIATION

OF

AUSTRALIA AND NEW ZEALAND

ELEVENTH ANNUAL CONFERENCE

Christchurch - Queenstown

12 to 19 October 1984

LIABILITY OF THE INTERNATIONAL TERMINAL OPERATOR - CURRENT TRENDS

(BEING A DISCUSSION AND COMMENTARY ON THE PRELIMINARY DRAFT CONVENTION ON OPERATORS OF TRANSPORT TERMINALS)

by

BRIAN MAKINS and PETER McQUEEN

LIABILITY OF THE INTERNATIONAL TERMINAL OPERATOR - CURRENT TRENDS

INTRODUCTION

In the context of the international carriage of goods, whether by sea or by other modes of transport, questions relating to the liability of the carrying and non-carrying intermediaries, through whose possession and control goods pass, are rarely capable of easy resolution. This is particularly true of the container terminal operator and the container depot operator who may be involved in one or more stages of the carriage of goods in a combined transport operation. In this paper references to "terminal operator" include those entities operating container terminals (which are adjacent to the sea and which provide loading, discharging and storage facilities for carriers) and entities operating container depots (which are often inland and at which storage and container consolidation and de-consolidation facilities are provided).

It is the terminal operator who acts as the sub-contractor on behalf of either a vessel operating carrier or a non-vessel operating carrier, both of whom normally have primary liabilities to cargo interests under contracts of carriage whose conditions usually seek to protect the sub-contractor in relation to claims by cargo interests. It has become typical practice for the terminal operator either to publicise the conditions of offer upon which his services are provided or, alternatively, to enter into a specific contract with the carrier for various services which he undertakes to provide. In Australasia (and elsewhere) the trend has been for the terminal operator in the conditions of offer or contract ("the conditions") to provide for a liability regime in

which he is liable up to specified amounts in defined circumstances where it can be shown that he (or his servant or agent) has been negligent in providing the contracted services or is in breach of contractual obligations.

It is also usual for the conditions to specify circumstances beyond the control of the terminal operator in which he excludes liability absolutely; to identify the responsibilities of the user and to include undertakings and indemnities by users in respect of liabilities of the terminal operator to third parties. Conditions including these features are now extensively used by terminal operators, whether State-owned or privately owned.

For some time increasing international interest has been shown in regulating the liability of the terminal operator involved in the transportation of goods by the various modes, although particularly with regard to carriage by sea. It is that trend which has prompted this paper.

In May 1983, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) adopted a Preliminary Draft Convention on Operators of Transport Terminals ("the draft Convention").(1) The draft Convention was then transmitted to the United Nations Commission on International Trade Law (UNCITRAL) which, at its sixteenth session held in Vienna in June 1983, decided to include the topic of liability of international terminal operators in its own work programme. The seventeenth session of UNICTRAL, held in New York last June, agreed that its present working group on international contract practices should prepare uniform legal rules on the liability of

transport terminal operators. The working group, of which Australia, along with all other members of UNICTRAL, is a member (and also the observer for New Zealand), will meet for its first working session in Vienna in December 1984 and it is expected that there will be further working sessions in 1985. It is anticipated that the final draft instrument will be submitted subsequently by UNICTRAL to a Diplomatic Conference.

This paper is divided into the following parts:

Part I - A history of the development of the draft Convention and an overview of its major features.

Part II - A critical commentary on the substantive Articles of the draft Convention.

Part III - Conclusions on the further development, impact and acceptance of the draft Convention.

PART I - HISTORY AND OVERVIEW

With the introduction of containerisation and combined transport operations in the 1960's, it became apparent that there was a lack of uniformity in rules relating to the liability of non-carrying intermediaries into whose possession and control goods, particularly containerised goods, came before, during or after carriage. At this time UNIDROIT had included within its work programme the subject of bailment and warehousing contracts in the context of combined transport operations. After the submission of a preliminary report on the subject of warehousing contracts prepared by Professor Le Gall in 1966, UNIDROIT, upon its own inquiry, discovered that governments and other

international organisations were similarly interested in the subject, following the revisions on the International Convention for unification of certain rules of law relating to Bills of Lading, 1924 (the Hague Rules), which led to the 1968 Protocol amending the Hague Rules (the Visby Rules) and the development by the United Nations Commission on Trade and Development (UNCTAD) and UNCITRAL of the Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). In these revisions the absence of a liability regime governing non-carrying intermediaries became apparent.

In 1974 UNIDROIT arranged for the late Dr. Donald Hill of Queen's University, Belfast to update the earlier report. In 1977 UNIDROIT established a study group under the chairmanship of Professor Kurt Gronfors of Gothenburg University to draw up uniform rules on the subject. Dr. Hill's 1976 report, which relates to the desirability and feasibility of the preparation of uniform rules, was generally supported by governments and interested international organisations. The study group between 1978 and 1983 held three sessions and prepared various texts for a "Preliminary Draft Convention on the Liability of International Terminal Operators". By May 1983, when the draft Convention was put to the UNIDROIT Governing Council for adoption, the title had changed to "Preliminary Draft Convention on Operators of Transport Terminals". This suggests that the scope of the draft Convention may be widened beyond issues of liability and may embrace domestic as well as international operations.

The several reports prepared by the study group were referred for comment to governments and interested international

organisations and the observations received from these interests were responsible for a number of substantial amendments to the text of the draft Convention. Replies received from fifteen governments and four international organisations were generally supportive of the UNIDROIT initiative. A notable dissentient was the United Kingdom which took the view that a convention on this subject was neither necessary nor practicable.(2) In a very short response the Australian government expressed support for the initiative but did not proffer any detailed comment. It did, however, register a concern that "the liability regime established under any International Terminal Operators Convention should be consistent with those of the UNCTAD Multimodal Transport Convention and the United Nations Convention on the Carriage of Goods by Sea".(3)

The draft Convention may be seen as the third part of a three part package intended to cover inter alia liability aspects of the international carriage of goods. The three parts are the liability regimes of the sea carrier set out in the Hamburg Rules, of the multimodal transport operator in the United Nations Convention on International Multimodal Transport of Goods ("Multimodal Convention") and of the terminal operator in the draft Convention. There can be seen in the essential facets of each liability regime a measure of consistency, with the use of the same or similar terminology, where appropriate.

Although the draft Convention was intended originally to fill a gap in international liability regimes and thereby be part of the Hamburg Rules/Multimodal Convention package, the acceptance and implementation of the draft Convention does not require

necessarily the acceptance and implementation of either of the other two parts and can stand alone quite comfortably. Accordingly, if and when the Hamburg Rules and/or the Multimodal Convention gain sufficient international acceptance, it may be that a convention governing terminal operators will already be implemented.

Initially UNIDROIT encountered difficulties in persuading governments to promote the draft Convention and accordingly enlisted the assistance of the Comité Maritime Internationale (CMI) in order to advance its ideas in respect of the liability regime of the international terminal operator. CMI decided that it would promote draft standard conditions of contract which embodied the major provisions of the draft Convention for voluntary adoption by terminal operators. The draft standard conditions of contract prepared by CMI and circulated amongst its members for comment were intended to pave the way for the draft Convention. It was thought that if and when terminal operators in the major States voluntarily adopt the draft CMI conditions, UNIDROIT (and now UNCITRAL) would be in a better position to promote the draft Convention and to facilitate its acceptance and implementation.(4)

Comments on the CMI draft standard conditions have been received from the maritime law associations of USSR, United Kingdom, Portugal, France, Australia and the German Democratic Republic. The comments, although welcoming the initiative, point to the need for substantial further work to be done to bring the draft conditions to a suitable form for acceptance and implementation.

It is suggested that, in light of the impetus now given by UNCITRAL to the further development of the draft Convention, the CMI would provide a useful forum for informed debate on the draft Convention at the various stages leading to the Diplomatic Conference.

The subject of warehousing in the context of international carriage has not been considered previously, principally because it has been recognised that warehousemen and terminal operators have different practices and because their operations are governed either by domestic legislation or by private contract or by a combination of both. It was recognised that, although there were several conventions imposing liability upon carriers in the various modes of international carriage of goods (5), there was no convention governing non-carrying intermediaries - those who provide services before, during or after international carriage during which time, it has been suggested, most damage to or loss of goods occurs.(6) The draft Convention is intended to fill this gap and to allow for recourse by the carrier against the non-carrying intermediary in situations where it can be established that such loss or damage occurred during the period of responsibility of such intermediary.

As it is a major objective of the draft Convention to introduce a liability regime upon the terminal operator in international carriage, a clear expression of the scope of the application of the draft Convention is essential. It is a requirement for the application of the present draft Convention that the operations of the terminal operator in respect of the goods must relate to international carriage. Further, the draft Convention applies

irrespective of the mode of transport which either precedes or follows the warehousing or safekeeping. It has been pointed out that the application of the draft Convention is of less relevance to carriage by road and rail than to carriage by sea (7). This paper does not consider the implications of the draft Convention for modes of transport other than by sea.

The central figure in the draft Convention is the terminal operator who is referred to as the "operator of a transport terminal (OTT)" and who is defined in Article 1.1 as follows:

> "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, or forwarder or any other person, with a view to their being handed over to any person entitled to take delivery of them."

The OTT's period of responsibility, which covers the period from taking of goods in charge until their handing over to the person entitled to take delivery of them is extended to cover certain additional services which the OTT provides. For the draft Convention to apply to the OTT he must provide the services of safekeeping. Further the OTT who undertakes safekeeping will find himself bound by the draft Convention when providing these additional services. These extend to the performance or procurement by the OTT of discharging, loading or storage of the goods, all of which may take place before or after the safekeeping. This approach reflects a compromise between a liability regime to cover all services provided by the OTT

(whether or not these services relate to a primary obligation of safekeeping) and a regime restricted to services solely related to safekeeping. It was thought to be too ambitious to attempt to seek to have the draft Convention apply also to domestic safekeeping services because of varying national legislation. Furthermore, it was thought that such an attempt could prejudice the effectiveness of the draft Convention and its international application.

Important articles in the draft Convention relate to the issuance of documentation by the OTT and his rights of retention and sale over goods (Article 4 and 5). The remaining articles of the draft Convention (Article 6 to 15) are similar to the provisions of the Hamburg Rules and the Multimodal Convention, as they relate to the liability regime of presumed fault with the burden of proof reversed, limitation of liability, availability of various defences and loss of the right to limit, notice of loss and the prescription period, the nullity of provisions derogating from the full effect of the draft Convention and the unit of account - the Special Drawing Right or SDR.

As it was the intention of UNIDROIT that the draft Convention would be a preliminary exposition of a liability regime for the OTT which would establish a set of minimum rules, various matters which one might otherwise have expected to see covered were not included. For example, there is no reference to the obligations of the customer, particularly as regards payment for the services of the OTT and the tender of dangerous goods. Further the draft Convention does not deal with the liability of the OTT for his failure to accept goods for safekeeping in default of an existing

obligation to do so. It may be that UNCITRAL will seek to include such matters. Alternatively, it may be considered that they would be better governed by standard conditions of contract, like those which have been proposed by CMI. It will obviously be important for standard conditions to be compatible with the liability regime and other provisions of the draft Convention.

An important question for consideration by UNIDROIT related to whether the draft Convention should be mandatory or semi-mandatory in its application by participating States.(8) The existence of a uniform international liability regime in respect of OTTs would be attractive to users of international transport systems. To induce the OTT's acceptance of the draft Convention a number of incentives were offered. These include what has been described as a moderate liability regime,(9) the right to a limit of liability which is difficult to break, a lien over goods deposited with the OTT coupled with a power of sale and, importantly, the confidence that the liability regime will be upheld by national courts in the face of developing "consumerism". UNIDROIT did not wish to complicate the position in this regard and accordingly the draft Convention in its present form is silent on this question. It is likely, however, that UNCITRAL will not be satisfied with anything less than a traditional, mandatory convention.

PART II - COMMENTARY ON ARTICLES OF DRAFT CONVENTION

ARTICLE 1 : DEFINITIONS

Text:

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.

Commentary:

1.1 It is perhaps surprising that the draft Convention contains only two definitions. At least one member of the study group did not favour an extensive set of definitions and it appears that her view has prevailed.(10) It is suggested, however, that "carrier" as used in Article 1.1 should be defined, because he who can call himself "carrier" is by definition excluded from the application of the draft Convention. Without this definition there is no clear answer to such questions as - is the terminal operator a "carrier" when he is engaged with his straddle carrier or forklift truck in carrying a container between the stack and the vessel or from one stack to another within the terminal? In the Hamburg Rules there are eight definitions, one of which is "carrier".

1.2 The "operator of a transport terminal (OTT)" is an entity specially created for the draft Convention. The primary obligation of the OTT is "the safekeeping of goods . . . with a view to their being handed over to any person entitled to take

delivery of them". That emphasis should be placed on "safekeeping" may be explained by the fact that, as previously stated, the draft Convention had its genesis in the subject of bailment and warehousing contracts in relation to combined transport operations. Today, the modern terminal operator performs many operations of varying degrees of sophistication and, although cargo care is a paramount consideration, the fact is that "safekeeping" is frequently an ancillary function. The concept of safekeeping was a natural one in the original context of the warehousing contract. It has not survived comfortably the transition to modern day terminal operations and it may well prove an inadequate criterion on which to base the draft Convention.

1.3 The phrase "against remuneration" was included to indicate that the draft Convention should apply only to operations conducted by OTTs for consideration, though not confined to payment of money.(11) However, it may be possible for an OTT to avoid his obligations by undertaking in his contract gratuitous safekeeping as an ancillary function, on the basis that his remuneration will be derived from performance of his primary function.

1.4 The safekeeping of goods with which the draft Convention is concerned is that which occurs "before, during or after carriage". The use of this expression raises the questions "how long before? - how long after?". Moreover, there will be times before carriage when the OTT simply does not know that the goods

which he has taken in charge are destined for international carriage thereby making his liability governed by the draft Convention.

1.5 The choice of the expression "person entitled to take delivery of (the goods)" is not a happy one. Under the Hamburg Rules and the Multimodal Convention such a person is by definition the consignee.(12) As the expression is used here, the person will simply be the next link in the transport chain; only at the last link will it be the consignee. It is undesirable that the expression as used in the draft Convention should have a meaning different from that given to it by definition in the other two Conventions in the package.

1.6 The definition of "goods" is based on Article 1.7 of the Multimodal Convention. "Goods" includes a container if supplied by anyone other than the OTT. The per-kilogramme limit provided for in Article 7 does not seem appropriate to containers. Typically the OTT's liability for loss of or damage to containers is limited under the OTT's conditions to a specified amount, which may vary with the type of container.

1.7 It has been suggested that "terminal" should also be defined.(13) It is clear that "carriage" as used in the definition of OTT means carriage by any mode of transport - sea, air, road or rail. A terminal might therefore be associated with any transport mode. It has been pointed out that, for practical purposes, there is a distinction between, on the one hand, storage of goods in a warehouse (which is generally used for longer-term storage during which the goods are usually under

the sole custody of the OTT) and, on the other hand, storage of goods in wharfside sheds or in open air storage yards (which is short-term and to which other intermediaries may have access to the goods for inspection, checking, or other purposes). Permitted access by other intermediaries to wharfside sheds and open air storage yards results in the OTT having only limited control over the goods. Accordingly, it has been argued that it is inappropriate to introduce a uniform liability regime to these widely differing types of safekeeping.(14) It is a good point and it may be argued that "OTT" should be redefined so as to delimit the types of safekeeping to which the draft Convention applies.

ARTICLE 2 : SCOPE OF APPLICATION

Text:

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.

Commentary:

2.1 Article 2 deals with the geographical application of the draft Convention. Two conditions must be fulfilled before the Convention applies. Paragraph (a) requires that the operations must be performed in the territory of a Contracting State and paragraph (b) introduces the international element, namely that the place of departure and the place of destination must be situated in two different States.

2.2 Not all members of the study group shared the view that the application of the Convention should be limited to international carriage.(15) Some members considered that it would be a worthwhile task to unify the law relating to all contracts for the safekeeping of goods throughout the world - an ambitious project.(16)

ARTICLE 3 : PERIOD OF RESPONSIBILITY

Text:

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.

Commentary:

3.1 Article 3.1 relates back to Article 1.1 by referring to the primary obligation of the OTT - the safekeeping of the goods. In fixing the period during which the OTT is responsible - from taking in charge to handing over to the person entitled to take delivery - the preliminary draft Convention excludes the liability of the OTT for failure to accept the goods when he has undertaken to do so by prior agreement. The study group considered that this and a number of other matters concerning non-performance of contractual obligations would more suitably be regulated by general conditions and dealt with under the applicable national law.(17) Again, the "person entitled to

take delivery of the goods" will be the next link in the transport chain, not necessarily the consignee.

3.2 Article 3.2 extends the OTT's responsibility beyond the period fixed in Article 3.1 by providing that the OTT shall also be responsible for specified additional operations if he has undertaken to perform them or procure the performance of them. The additional operations are limited to discharging, loading or stowage of the goods. The extent to which handling operations should be governed by the draft Convention was the subject of much discussion within the study group.(18) Some members argued that the draft Convention should govern all handling operations performed before, during or after carriage operations, irrespective of whether the OTT had undertaken the primary obligation of safekeeping. Others wanted to restrict the application of the draft Convention solely to warehousing. (19)

3.3 Intermediaries who handle the goods before, during or after carriage but for whom safekeeping does not form part of their undertaking are not covered by the draft Convention. Thus, whilst the draft Convention would apply to a stevedore handling containers through a container terminal, it would appear not to apply to a conventional stevedore who performs discharging, loading or stowage operations on goods (sometimes containerised) but who does not also undertake their safekeeping. Given that a primary objective of the draft Convention is to fill in the gaps left in the liability regime established by existing conventions dealing with the international carriage of goods, it would seem logical that the draft Convention should apply to all

handling operations. This would, of course, be a major undertaking and was considered by the study group to be unrealistic at the present time. (20) The reason given for not pursuing this ambitious solution was that "there could be strenuous resistance on the part of the interested professional circles (the intermediaries whose operations it was sought to regulate) to an extension of the (draft) 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".(21) Another reason, not given, may lie in the origin of the draft Convention in the subject of bailment and warehousing contracts. The study group - which was designated "The Study Group on the Warehousing Contract" -may have felt constrained by its terms of reference. As previously stated, the scope of the draft Convention may yet be widened under the auspices of UNCITRAL.

3.4 It has been pointed out that Article 3.2, when read with Article 6.1, 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 additional operations specified in Article 3.(22) Thus, if faulty stowage of goods resulted in their damage during the sea leg, the OTT's liability for such damage would not be governed by the draft Convention, because the damage did not occur during his period of responsibility. In this case, the liability of the OTT would be governed by the applicable national law, having regard to the OTT's conditions. With containerised goods, it is sometimes difficult to determine

when damage actually occurred. The need to make this distinction is likely to give rise to problems in the practical application of the draft Convention and to detract from its effectiveness.

3.5 The position of the freight forwarder under the draft Convention needs to be clarified. A freight forwarder acting in the capacity of a carrier (for example under a combined transport document) would be excluded by the definition of OTT in Article 1. In other cases, the question will depend upon whether the freight forwarder has undertaken against remuneration the safekeeping of goods as contemplated in that Article. However, even if the freight forwarder is covered by the draft Convention, it will only be in respect of loss of or damage to the goods incurred during the period of responsibility provided for in Article 3 and extending under Article 3.2 to the additional operations of discharging, loading or stowage. These operations are not usually performed by the freight forwarder, but they are sometimes procured by him before the goods are taken in charge or after they are handed over by him. Where this is the case, the procurement alone, coupled with an element of safekeeping, would be sufficient to bring the freight forwarder within the ambit of the draft Convention.

ARTICLE 4 : ISSUANCE OF DOCUMENT

Text:

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 contact 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.

Commentary:

4.1 The questions of whether the OTT should be obligated to issue a document in respect of the goods taken in charge by him and, if so, what should be the nature and contents of the document, were considered at length by the study group and Article 4 represents a compromise between the various solutions proposed. It has been suggested that to require a further document, in addition to the documentation already required in international carriage, would unnecessarily hinder the efficient movement of goods. (23) Against this view, it has been argued that there is no value in establishing a liability regime for OTTs if there is no document available to prove that the goods have been taken in charge. (24)

4.2 Moreover, a document issued under Article 4.1 may be useful in determining claims for loss of or damage to the goods. The study group chose to require the OTT to issue a document only upon request, on the ground that the need for the document would

vary according to the circumstances.(25) However, given the liability regime of presumed fault and reversed burden of proof, it would seem to be in the OTT's interest for him to issue such a document, even without request, where on checking there is found to be any inaccuracy or inadequacy of any particular. The standing of a document issued under Article 4.1 on the initiative of the OTT but without request requires clarification.

4.3 The function of the document to be issued in accordance with Article 4.1 is more than as a mere receipt. This is reflected by Articles 4.2 and 4.3 which deal respectively with the content and the evidentiary effect of the document. Article 4.1 requires only that the document be dated, that it acknowledge receipt of the goods and that it state the date on which the goods were taken in charge by the OTT. Surprisingly, there is no requirement that the document contain a sufficient description of the goods or that it indicate the quantity or condition of them. However, Article 4.2 provides that the document must 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". By Article 4.3, the document is given prima facie evidentiary effect but only as to the contract for safekeeping and the taking in charge of the goods, not in relation to their condition. The requirements of Article 4.2 have prompted an Association representing a group of Continental OTTs to comment:

> "The (OTT's) legal obligation stated in Article 4, Item 2, to note 'any inaccuracy or inadequacy of any particular

concerning the description of the goods' is going too far. It would mean that the (OTT) would have to establish the quantity (number, dimension, weight), type of cargo, quality and other characteristics on receipt of the goods. There are not only the demands of practice that make an obligation to inspect the goods in such an extensive manner practically indefensible; it would also cause considerable expenditures which would finally be charged to the goods to be stored". (26)

Another OTT, who commented on the practical aspects of the implementation of the draft Convention, expressed similar concern at the ultimate cost of the OTT complying with the draft Convention's requirements, in addition to taking procedures to protect himself against the liability regime laid down in Articles 6 and 7. (27)

4.4 Where goods are containerised, an OTT will usually be unable to examine the goods inside the container. It has been suggested that, in such cases, his obligation might therefore be limited to indicating the condition of the container. (28) However, the obligation to effect "reasonable means of checking" should not be taken to require the OTT to examine all six faces of the container, the cost of which would be prohibitive.

4.5 Article 4.4 seeks to deal with the question whether the document acknowledging receipt of the goods should be of a negotiable character or not. The study group, being unsure of the commercial need for a negotiable document, decided to include Article 4.4 merely for the purpose of stimulating discussion on

the issue of negotiability. (29) The text provides that the document may be negotiable if the parties so agree and the applicable national law so permits.

4.6 The UNCITRAL Secretariat, in its report on the draft Convention, has identified various arguments against the requirement that the OTT issue a negotiable document, namely: "There are many cases in which it is not necessary for the document to be negotiable. The existence of a negotiable transport document may in some cases obviate the need for a negotiable OTT document. The problem of fraud in connection with negotiable transport documents is becoming increasingly serious. . . . Difficulties could arise if two documents of title for the same goods were to be in effect at the same time. There is a growing body of opinion that the speed of modern international transport makes negotiable transport documents, and the costs, time and risks associated with them, unnecessary, and makes non-negotiable documents preferable." (30)

4.7 In warehousing, there is no doubt advantage in having an OTT issue a negotiable document (the warehouseman's warrant) in cases where goods may be sold whilst in storage and there is no other document of title relating to the same goods. However, the possibility of documentary fraud merits the closest consideration. In commenting on Article 4, the UNCTAD Secretariat has stressed the importance of asssessing the extent to which the risk of maritime fraud might be increased if two documents of title - the OTT's document issued under Article 4 and the carrier's bill of lading - were to exist simultaneously covering the same goods. The UNCTAD Secretariat states: "The

concurrent existence of two negotiable instruments covering the same goods may well be considered to increase the risk that the goods could be sold twice on receipt of the two documents separately. In this respect, UNIDROIT might well wish to investigate other means of preserving commercial flexibility while at the same time enhancing the security of cargo interests".(31) It is unlikely that a satisfactory system can be devised that will allow both documents of title to exist separately and still adequately protect the security of cargo interests.

ARTICLE 5 : SECURITY RIGHTS IN THE GOODS

Text:

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.

Commentary:

5.1 Article 5 grants the OTT a security interest in goods taken in charge by him for his costs and claims relating to the goods and gives him the right to retain the goods and the right to sell

them to satisfy this claim. The right is therefore characterised as a particular lien, coupled with a power of sale.

5.2 It was initially contemplated that a right of general lien might be included in the draft Convention so as to operate as an incentive to OTTs to accept the provisions of the draft Convention as a whole. It was noted by the study group that many OTT's conditions provided for a general lien but it was not clear that such liens were recognised in all States. Thus the availability of a general lien under an international convention could be of real benefit to OTTs in those States where the exercise of such a lien is not permitted or where it is doubtful whether it would be upheld by the courts. (32)

5.3 Ultimately, however, the study group came to the view that it was not realistic, at the present time, to attempt to unify the widely differing national laws governing the warehouseman's lien. It was also suggested that the wide right of retention afforded by a general lien would reduce the value of any negotiable document that may be issued under Article 4, while possible conflicts were also seen between the OTT's right of retention and his duty to surrender goods on production of a bill of lading or other carriage document. (33) Nevertheless, it was considered desirable that the draft Convention should not deny availability of a general lien where permitted under national law.(34) To this end, the second sentence was inserted in Article 5.1

5.4 If the rights provided for in Article 5 are exercised by an OTT, they may conflict with the rights of other parties.

For example, in combined transport operations, competing liens may arise where the carrier seeks to assert a lien for freight unpaid by the consignor over goods which are held by the OTT in his capacity as a sub-contractor of the carrier and, at the same time, the OTT exercises his rights over the goods under Article 5 for charges relating to the goods outstanding under a storage contract made between the OTT and the consignor immediately before the carriage commenced. Such conflicts are probably best left for resolution under national law.

5.5 Articles 5.2 and 5.3 are based on the UNIDROIT draft Convention on the hotelkeeper's contract.(35) The questions of "official institution" (paragraph 2) and "timely and adequate notice" (paragraph 3) are left to be dealt with according to national law.

ARTICLE 6 : BASIS OF LIABILITY

Text:

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.

Commentary:

6.1 The basic liability regime laid down in Article 6 - one of presumed fault or neglect with the burden of proof reversed - is the same as that in the Hamburg Rules and in the Multimodal Convention.(36)

6.2 The choice of the liability regime established by Article 6 represents the preference of the study group as a whole. It is interesting that no member spoke in favour of a regime based on the principle that the claimant is called on to prove that the loss or damage had been caused by the fault of the OTT, his servants or agents, as a pre-condition of recovery, as exemplified in the liability regimes of the Hague Rules and the Hague-Visby Rules.(37)

6.3 The following considerations have been put forward by the UNCITRAL Secretariat as relevant to the choice of the liability regime in the draft Convention (presumed fault with the burden of proof reversed): "First, the evidence and the means of determining the circumstances relating to loss of or damage to the goods are likely to be within the knowledge and control of the OTT. It may therefore be appropriate for him to bear the burden of proving that the loss or damage was not due to his fault, rather than requiring the claimant to prove that the loss or damage resulted from the fault of the OTT. Second, the presumed fault standard is the lowest standard employed in most of the major (modern) existing international transport conventions (including those not yet in force). If the uniform rules were to adopt a lower standard than this, recourse by

carriers against OTTs would not be fully assured. Third, since in some modes of transport other than carriage by sea it is customary for carriers to store goods in their own facilities, rather than to employ OTTs, the uniform rules will more frequently apply to OTT operations connected with carriage by sea, or with multimodal transport, than to operations connected with other modes of transport. It may therefore be appropriate to employ in the uniform rules governing the operations of OTTs the same standard as that applicable to carriage by sea and multimodal transport".(38)

6.4 The legal justification for a liability regime based on presumed fault might run along the following lines. Under Article 4, the OTT has issued a 'clean receipt' for the goods taken into his charge (or, alternatively, has noted shortages or damage on the receipt). Under Article 10, notice in writing specifying the nature of the loss or damage has been given to the OTT within one working day (for apparent loss or damage or 15 consecutive days if non-apparent) after the OTT has handed over the goods following his safekeeping of them. In these circumstances, fault on the part of the OTT is presumed. The OTT, if he is to succeed, must then show that he took all measures that could reasonably be required to avoid the occurrence which caused the loss or damage and its consequences. Article 6.1 states that the OTT is liable for loss resulting from loss of or damage to the goods "for which he is responsible under this Convention". Thus, it seems that the initial onus is on the claimant to show that the loss or damage occurred during the

period of the OTT's responsibility and it is only then that fault is presumed and the burden of proof becomes reversed. Query, however, whether such a liability regime is appropriate where no document has been issued under Article 4 (because it has not been requested) and where notice of loss or damage is not given until (say) after the goods have been outturned at their place of destination.

6.5 Moreover, the appropriateness of a liability regime based on presumed fault in a combined transport operation where goods are in sealed containers, where the containers are handled by a succession of intermediaries in addition to the carrier and where it is generally impossible for the OTT to determine the condition of the goods when he takes them in charge and impractical for him adequately to inspect all six container faces for damage, is questionable. An Australian OTT commenting on Article 6 of the draft Convention has stated:

> "This (Article 6) is quite onerous on the (OTT). In the first instance the manner in which the article is drafted, the (OTT) is guilty of loss or damage to goods until the (OTT) proves otherwise. This would require the (OTT) to scrutinise each container in detail, at the point of receival and despatch - to record damage. Taken to the n'th degree, this would require a damage report being prepared for almost every container arriving into the Terminal, since without that report, the owner of a container could claim repair costs for even the most minor damage. As the article reads at present, if the (OTT) is to prove damage was not caused by the terminal, then an almost photographic record of each container could be

required. The time and cost to obtain this type of record would be awful to contemplate". (39)

The same OTT concludes his comments with the following:

> "I admire the obvious effort that has gone into preparing this Draft Convention but I can only assume that before anything of its nature is implemented, the shipping Lines themselves are given the opportunity to assess their savings in insurance premiums versus the additional costs incurred at their nominated (OTTs)". (40)

The point merits consideration. Preparation of the draft Convention appears to have proceeded on the assumption that it was in the carrier's interest to have an effective recourse action against the OTT in circumstances where the carrier was liable to the consignee for loss of or damage to the goods caused whilst they were under the responsibility of the carrier's sub-contractor, the OTT. It seems to have been further assumed that carriers would therefore want the Convention. From examination of the UNIDROIT Study documents, it is not clear that vessel operating carriers either individually or as a class have ever been asked the question; surprisingly, the documents do not record any comments on the draft Convention made by such carriers. The attitude of the vessel operating carrier may be that he would support the draft Convention only if the costs of its implementation pointed to above were absorbed by the OTT.

6.6 The statement has been made that statistics show that most cases of damage to or loss of goods arise before and, more

especially, after carriage, at least in the maritime sector.(41) The actual statistics are not given in the report but, in the Australian experience of containerised shipments, the statement is probably correct. Comparatively little loss of or damage to containerised goods occurs on the sea leg; more occurs at container terminals and container depots. And, of course, there is always the road carrier who drives an overheight container under a low level bridge with predictable consequences (and who, being a carrier, is by definition excluded from the application of the draft Convention).

One member of the study group expressed concern that, in the end result, the Convention would increase costs by duplicating insurance cover of goods.(42) The study group does not seem to have directed close attention to the question of insurance. Rather, it adopted the approach that, while insurance considerations were important, the view had prevailed at the Diplomatic Conference for the adoption of the Hamburg Rules (and by implication should prevail here) that the determination of the liability regime should precede the consideration of insurance questions.(43) Assuming that the liability regime has now been determined, it may be appropriate within UNCITRAL to have an analysis undertaken of the insurance implications. It will be appreciated that the OTT and the carrier do not insure the actual goods, they insure their liability in respect of them. The OTT generally does this through a specialist liability insurer and the carrier through his P & I Club.

6.7 The draft Convention does not deal with the liability of the OTT for delay, on the ground that the question of delay is relevant essentially to the movement of goods rather than to the static deposit of goods in a terminal.(44) On the other hand, it has been argued that the intended recipient of goods in transit will be affected by delay in an OTT's handing them over, just as he would be affected by delay in the carriage itself; that, as under international transport conventions a carrier is responsible for delay in delivery, he may be liable even if the OTT is responsible for such delay; and that the question of the delay of an OTT is therefore relevant to the carrier having regard to his potential recourse against the OTT where the carrier is held liable for the delay.(45) On balance, it is considered that liability for delay should be covered specifically in Article 6 and that a financial limit of this liability should be established.

6.8 Failure to produce goods can often be attributed to the fact that the OTT no longer has them. To avoid any claim by the OTT that the goods are simply misplaced, Article 6.2 provides that if the OTT does not hand over the goods within 60 days following a request by the person entitled to take delivery of them, the goods may be treated as lost. The period of 60 days is based on Article 5.3 of the Hamburg Rules. The corresponding period in the Multimodal Convention (Article 16.3) is 90 days but the study group did not see any justification for adopting the longer period.(46) It does not seem appropriate to apply the presumption of loss in cases where, to the knowledge of both the OTT and the person otherwise entitled to make a claim, the goods

are not lost but delivery is delayed through other known causes, such as prolonged industrial disputation.

ARTICLE 7 : LIMIT OF LIABILITY

Text:

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.

Commentary:

7.1 Article 7 is closely based on Article 6 of the Hamburg Rules and Article 18 of the Multimodal Convention, with references to liability for delay and the package limitation omitted.

7.2 The draft Convention has adopted the limit of liability of 2.75 units of account per kilogramme of gross weight of the goods lost or damaged contained in the Multimodal Convention (Article 18.1) because this limit was considered to be the most recent expression of the will of the international community.(47) The limit is lower than limits established under some international transport conventions and a number of States have criticised the Hamburg Rules limit of 2.5 units of account as being too low.(48) On the other hand, the limit is higher than the limits provided for in the Hague Rules, the Hague-Visby Rules and the Hamburg Rules and is significantly higher than the limits

customarily accepted by OTTs in many States. Indeed, the Association representing a group of Continental OTTs has commented that the limit is more than double the present maximum limit accepted by those OTTs and has added that "one cannot expect the operators to accept this (the increased limit) and it would entail grave economic burdens for the companies concerned".(49) Resistance from other OTTs may be expected. This attitude on the part of various OTTs highlights the need to include meaningful incentives to encourage OTTs to accept the draft Convention as a whole.

7.3 As indicated above, adoption of the 2.75 units of account limit would enable full recourse against OTTs by transport operators subject to the Multimodal Convention, as well as by carriers subject to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

7.4 Article 7.3 allows the OTT, by agreement, to increase the limits of liability provided for in Article 7.1. There is a similar provision in the Hamburg Rules (Article 6.4) and in the Multimodal Convention (Article 18.6). The ability of the OTT to agree to increase his limits to those to which the carrier is subject would enable the carrier to obtain full compensation from the OTT in a recourse action. However, OTTs may find this capability unattractive if they are exposed to pressure from carriers to increase their limits. It has been suggested that it is undesirable in principle to stimulate competition between OTTs, not on the ground of price and efficiency, but on that of the most favourable limitation amounts on offer. (50)

7.5 The study group has left for further consideration the question whether, in addition to the per-kilogramme limit, a total 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 practicable to insure. (51) No international convention should place a commercial entity in a position where it cannot adequately protect the risk exposures inherent in its business. It is suggested, therefore, that the question should be resolved in the affirmative.

7.6 The Hamburg Rules (Article 6.1(a)) and the Multimodal Convention (Article 18, paragraph 1) both contain a package limitation. One Australian OTT has observed, "a limit of liability calculation, based solely on a rate per kilogramme of gross weight, doesn't seem equitable bearing in mind that 'goods' means containers and contents and the intrinsic value of the two could be poles apart". (52) Nevertheless, the majority of the study group was opposed to the inclusion of a package limitation, a perceived difficulty 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. (53) The difficulty may be more apparent than real. OTTs in Australia often include a package limitation in their conditions and, in practice, this seems to give rise to few problems.

ARTICLE 8 : NON-CONTRACTUAL LIABILITY

Text:

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.

Commentary:

8.1 Article 8 follows Article 7 of the Hamburg Rules, with minor drafting changes. A similar provision appears in Article 20 of the Multimodal Convention.

8.2 In combined transport operations, the liability regime is typically structured so as to protect the OTT and other sub-contractors of the carrier from claims brought by consignors, consignees and other third parties. This protection is achieved through a Himalaya Clause and the use of circular indemnities. At first blush, Article 8.1 appears to render circular indemnities unnecessary in that it allows the OTT to limit his liability in tort against all comers. However, notwithstanding Article 8.1, if circular indemnities are dispensed with, the way would be open for actions by third parties directly against the OTT. There is a provision in the French carriage by sea legislation which

protects the OTT against actions in tort by third parties by providing that the OTT acts for the account of the party who requests his services, and his liability is only to the latter who alone can bring action.(54) The French model is attractive and should be followed.

8.3 Article 8.2 seeks in part to give the force of statute to the principle underlying the Himalaya Clause commonly found in bills of lading. However, it does not expressly extend to sub-contractors of the OTT. It should be noted that, in any event, a servant or agent cannot obtain the protection afforded by Article 8.2 if it is shown that he acted outside the scope of his employment.

ARTICLE 9 : LOSS OF THE RIGHT TO LIMIT LIABILITY

Text:

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.

Commentary:

9.1 Article 9 is based closely on Article 8 of the Hamburg Rules and Article 21 of the Multimodal Convention, except that there is no reference to liability for delay.

9.2 By Article 9.1 the OTT is subjected to damages in full if the loss or damage "resulted from an act or omission of the OTT done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result". It will be noted that recklessness alone is not sufficient; it must be accompanied by the requisite knowledge.

9.3 As a general rule, insurers prefer limits that are difficult to break since this enables them to assess their risks more accurately. Moreover, many members of the study group wished to make the limit of liability as "unbreakable" as possible, thereby inducing the OTT to agree to a more stringent standard of liability than that to which he was accustomed and giving him further incentive to accept the provisions of the draft Convention as a whole. (55)

9.4 However, there is a tendency of courts in some States whenever possible to break the limits applicable under international conventions.(56) It has been argued that there is little purpose in introducing any limitation system if the OTT could be held fully liable for the wilful misconduct of his servants or agents, as in the case where they stole goods in the safekeeping of the OTT. (57)

9.5 Some members of the study 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. (58)

Theft of goods by servants employed in the different phases of international carriage of goods is a longstanding concern and can never be eradicated completely. It is certainly not within the power or the responsibility of the OTT alone to control it. Accordingly, it should appear clear on the face of the draft Convention that the limits are not to be broken as against the OTT in a case where goods are stolen by a servant or agent of the OTT.

ARTICLE 10 : NOTICE OF LOSS OR DAMAGE

Text:

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.

Commentary:

10.1 Article 10 is based on Article 19 of the Hamburg Rules and Article 24 of the Multimodal Convention. The text omits

references to liability for delay and seeks to take account of the differences between carriage and safekeeping.

10.2 There is, however, an important textual difference in Article 10.1 which speaks of notice being 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". The corresponding provisions in both the Hamburg Rules and the Multimodal Convention refer to the goods being handed over to the "consignee".

10.3 In combined transport operations, practical difficulties regarding the evidentiary value of the notice and the protection of the consignee's interest in the goods are likely to arise under Articles 10.1 and 10.2 because the "person entitled to take delivery" of the goods is in fact the next link in the transport chain; as previously mentioned, it is only at the last link that such person is the consignee. The Hamburg Rules and the Multimodal Convention allow the consignee one working day after the goods have been handed over to him to notify loss or damage that is apparent and 15 days (Hamburg Rules) or six days (Multimodal Convention) where the loss or damage is not apparent. These periods are not unreasonable where the goods are handed over to the consignee. However, they may not be appropriate in Article 10, where the handing over by the OTT is to another intermediary in the chain (who, perhaps, has no incentive to notify any loss or damage of which he becomes aware).

10.4 It is interesting that the shorter six day period provided for in Article 24.2 of the Multimodal Convention for the giving

of notice where the loss or damage is not apparent was considered to be justified on the ground that the transport operator might himself have to pass on notice to his sub-contractor. (59) It may be noted that, on occasions, OTTs also sub-contract their work, in which event it may be argued that similar considerations should apply.

10.5 As a general principle, where notice is to have evidentiary value against the OTT, the period within which the notice is to be given should be as short as reasonably practicable. There is otherwise the danger that the OTT may be held liable for loss or damage which in fact has occurred at the hands of some later intermediary or the carrier.

10.6 Article 10.3 provides that notice in writing need not be given of loss or damage to the goods ascertained during joint survey or inspection. The provision is based on Article 19.3 of the Hamburg Rules and Article 24.3 of the Multimodal Convention, both of which speak of a joint survey or inspection "by the parties", meaning the carrier (or transport operator) and the consignee. In the case of a joint survey or inspection by those parties (or their authorised representatives), it is not unreasonable to dispense with the need to give notice in writing. However, Article 10.3 has carefully avoided unnecessary reference to "the parties" because, whilst one party is the OTT, the other party will vary. That party will be the next link in the transport chain and not necessarily the consignee. Thus, the joint survey may be carried out by the OTT and the carrier (or a non-carrying intermediary) whose interests may be quite different

from those of the consignee. The OTT, the carrier and such intermediary are under no obligation to give the consignee copies of their respective survey or inspection reports and probably would not wish to do so. It would, therefore, seem appropriate that a notice in writing specifying the general nature of the loss or damage should be brought into existence even where there is a joint survey or inspection (unless the consignee is a party to it). This assumes particular importance if the consignee is to be given recourse directly against the OTT.

10.7 It will be appreciated that in the case of containerised goods, it is often not possible to detect loss or damage for which the OTT may be responsible until the container is unpacked. Article 10 does not recognise this difficulty. The 15-day provision in Article 10.2 may be of no assistance where damage occurs at (say) the OTT's terminal in the State of departure and is discovered only later on unpacking the container in the State of destination.

10.8 The position of the international container lessor merits consideration in relation to the notice requirements and evidentiary aspect of Article 10 because "goods" are defined in Article 1.2 to include containers if not supplied by the OTT. Given that the international container lessor does not retrieve his container until some time after the goods have been delivered to the consignee, the comments in 10.3 above apply a fortiori to his position.

ARTICLE 11 : LIMITATION OF ACTIONS

Text:

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.

Commentary:

11.1 Article 11, which is modelled closely on Article 20 of the Hamburg Rules, prescribes a limitation period of two years from the day on which the goods are handed over by the OTT or from when they may be treated as lost under Article 6.2. Two-year limitation periods are also provided for in the Multimodal Convention (Article 25) and in the Warsaw Convention (Article 29). Under the Hague Rules (Article 3(b)) and Hague-Visby Rules (Article 3(b)) the limitation period is one year.

11.2 The study group came under pressure from some governments and others to reduce the limitation period. It was argued that proceedings became more difficult the further back in time the loss or damage occurred. However, the study group was reluctant to depart from the model in the Hamburg Rules and noted that even a two-year period would represent a substantial improvement in the position of OTTs in some States where a general limitation period of 30 years is at present applicable to actions against them. (60)

11.3 It has been pointed out that the two-year limitation period applicable to an action against an OTT may in some cases bar a recourse action by a carrier against an OTT. This arises where the limitation period applicable to an action by a cargo interest against the carrier commences at the end of the transport, while the period applicable to the recourse action by the carrier against the OTT commences earlier when the goods are handed over to the carrier by the OTT. (61) The recourse action against the OTT would thus be barred before the action against the carrier. It is considered that Article 11 should include a provision effectively preserving the carrier's recourse action against the OTT in these circumstances.

11.4 The comment has also been made that Article 11.2 provides that the limitation period commences even if part only of the goods have been handed over and that it is not appropriate in such a case to let the prescription period start to run also against claims in respect of goods not yet delivered. (62)

11.5 Article 11, following the Hamburg Rules, does not provide for interruption or suspension of the limitation period. The study group decided to adhere to the formulation of the Hamburg Rules without prejudice to the matter being reviewed in the final stages of the drafting of the future instrument. (63) It has been pointed out that, under some legal systems, the silence of the draft Convention on this question may be interpreted to mean that the limitation period is not to be interrupted or suspended, notwithstanding the existence of national legal rules; in other legal systems rules of national law may be applied.(64) In the circumstances, it would seem desirable that Article 11 should either provide detailed rules for the operation of the limitation period or provide that questions relating to the interruption and suspension of the period be determined by national law. The need for careful drafting is highlighted by the difficulties which have arisen in the interpretation of the limitation provision of the Warsaw Convention.(65)

ARTICLE 12 : CONTRACTUAL STIPULATIONS

Text:

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.

Commentary:

12.1 This Article is based on Articles 23.1 and 23.2 of the Hamburg Rules and Articles 28.1 and 28.2 of the Multimodal Convention. Article 12.1 seeks to establish the principle that the parties may not derogate from the provision of the draft Convention. It is assumed that the contract between the parties will be a "contract for the safekeeping of goods". Whilst this is appropriate for warehousing, it has already been noted that, in combined transport operations, "safekeeping" is rarely the primary purpose of the contract made between the carrier and the OTT.

12.2 Again, in combined transport operations it is usual for the OTT's conditions to stipulate that the OTT shall have the benefit of the immunities, exemptions and limitations contained in the carrier's bill of lading. It is also customary for the OTT to discourage trivial liability claims by imposing a small excess. Such practices would be caught by Article 12.1.

12.3 Article 12.2 allows the OTT, by agreement, to increase his responsibilities and obligations under the draft Convention and is broader in its scope than Article 7.3 which is concerned only with the OTT increasing his limits of liability.

12.4 A noticeable omission from Article 12 is a provision, similar to Article 23.3 of the Hamburg Rules, to the effect that where a document evidencing the safekeeping of goods is issued under Article 4, it must contain a statement that the safekeeping

is subject to the provisions of the draft Convention. There is a like provision in Article 28 of the Multimodal Convention. Nevertheless, UNIDROIT took the view, without giving reasons, that it was not necessary to include such a provision in the draft Convention. (66) The omission might be justified on the grounds that the provision is certainly not essential, that it may operate as a disincentive to acceptance of the draft Convention by the OTT and that, in any event, the extent to which issuance of documents will be requested under Article 4 is uncertain.

ARTICLE 13 : UNIT OF ACCOUNT AND CONVERSION

Text:

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.

Commentary:

13.1 The Article follows the model provision for a universal unit of account approved by UNCITRAL. It is less complex than the unit of account provisions contained in Article 26 of the Hamburg Rules and Article 31 of the Multimodal Convention.

13.2 It has been pointed out that the different modes of assessment of national currencies, depending on membership or non-membership of the International Monetary Fund as provided for in Article 13.1, could favour those States which are not members of the IMF.(67)

ARTICLE 14 : OTHER CONVENTIONS

Text:

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

Commentary:

14.1 This Article appropriately 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 draft Convention.(68)

14.2 The addition of the words "acting in a capacity other than that of a carrier" in the definition of OTT in Article 1.1 itself prevents a carrier from claiming that he is subject to the liability regime established by the draft Convention where it

is less rigorous than the regime imposed on the carrier, either under another international convention or under national law.

ARTICLE 15 : INTERPRETATION OF THE CONVENTION

Text:

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.

Commentary:

15.1 Article 15 is an extension of Article 3 of the Hamburg Rules and corresponds to Article 7 of the 1980 United Nations convention on contracts for the international sale of goods. It is a provision increasingly to be found in international conventions dealing with private law matters adopted within the United Nations.(69)

15.2 One government has expressed the view that this Article should be deleted because its meaning is "unclear".(70) The evolutionary process by which an international Convention comes into existence is tortuous and is the product of forged compromise. It therefore does not seem inappropriate to remind those charged with the interpretation of the draft Convention of its international character and of the need for observance of good faith in international trade.

PART III - CONCLUSIONS

The future of the draft Convention and its further development is now the responsibility of the UNCITRAL working group on international contract practices. The draft report of UNCITRAL's seventeenth session suggests that the working group, prior to the commencement of drafting of any uniform rules, may begin by considering possible approaches to the various issues arising out of the major thrust of the draft Convention.(71)

There are various major issues which will require the working group's close attention. These include the scope and effect (mandatory or otherwise) of the application of uniform rules governing the OTT, the types of operations to be covered by those rules, whether issuance of a document by the OTT should be compulsory and whether that document should be negotiable, the nature of the security over the goods given to the OTT balanced against the rights of those persons entitled to receive the goods, the liability regime to be imposed upon the OTT and an evaluation of the incentives offered to the OTT to encourage acceptance of the uniform rules. Also, the working group will consider the adoption of various matters presently not included in the draft Convention.

Central to the purpose of the draft Convention is the concept of the OTT. Drafting of the definition of "OTT" requires further thought. He is defined presently by reference to the operation of safekeeping. The criterion of safekeeping coupled with the limited extension of responsibility to the operations of discharging, loading or stowage places a narrow application on the scope and, therefore, the effectiveness of the draft Convention.

In filling the gaps in the international transport system, it is suggested that the uniform rules should be applied broadly rather than narrowly so as to govern a wider range of operations conducted by non-carrying intermediaries, without being over expansive and thereby jeopardising the acceptance and implementation of such rules.

The operations which can be governed realistically are those which have an international element. It is difficult to envisage how domestic operations could be effectively covered having regard to differences in national laws and practices. There is also need to clarify the type of operator who is to be covered, in particular the freight forwarder.

Matters relating to the issuance of a document by the OTT and its negotiability must be considered having regard to the position of the OTT, the person to whom he is providing the service, and the cargo interests. Questions of potential fraud and possible unnecessary duplication of documents require careful re-examination.

The balance between rights and liabilities will determine the OTT's perception of the value of the incentives offered to encourage his acceptance of the uniform rules as a whole. To strike the right balance is no easy task having regard to the differences of national laws. It is suggested that a right to exercise at least a particular lien should be maintained. Further, the quid pro quo for a liability regime based on presumed fault with the burden of proof reversed should include "unbreakable" limits of liability and a total limitation of liability per event.

In order to secure uniform rules that will be acceptable to the international transport industry and that will be capable of effective implementation, it is essential that there be further consultation, particularly on practical aspects with affected interests. To date, there has not been sufficient input from carriers (the major users of OTT facilities), from cargo interests, from OTTs and from all their respective insurers. It is important that the considered contribution of these interests be actively encouraged in the general debate during UNCITRAL's development of the uniform rules.

Evaluation of the insurance implications of the draft Convention was deferred by the UNIDROIT study group on the ground that determination of the liability regime should precede questions of insurance. There is the need for UNCITRAL to undertake this exercise concurrently with its development of the uniform rules. Moreover, an assessment must be undertaken to determine the likely overall costs arising from the implementation of the uniform rules and to identify who is likely to bear the burden of those costs. Certainly, the initial cost will fall on the OTT who will seek to pass it on to the carrier through increase in his tariff rates. It is indeed possible that this increase will be greater than the saving (if any) in the carrier's liability insurance premiums. The carrier, for his part, would seek to recover the net increase from the shipper by increase in freight rates. In the final result, it may be that much of the burden will flow through to the cargo interests. Hence, the international trading community -whose needs the uniform rules are intended to serve - may find itself with a burden that it would prefer not to bear.

These matters are of keen interest to those concerned with the international transportation of goods and require the closest consideration. The creation of a liability regime to fill a perceived gap in international transport conventions is an academic exercise unless it can be demonstrated also that such a regime fulfills a practical need and provides, at acceptable cost, real benefits to the international trading community. Subject to the results of an appropriate cost analysis of the implementation of the uniform rules, it is suggested that the practical need fulfilled and the real benefit provided lie in the establishment of a uniform liability regime governing the operations of OTTs in the multitude of terminals through which goods pass in the course of international trade thereby facilitating commerce between States.

Substantial work has been undertaken within UNIDROIT on the draft Convention, the issues for further consideration have been identified clearly, debate on those issues is recorded in the UNIDROIT Study documents and the draft Convention has been the subject of comment by some interested parties. The timely transmission of the draft Convention by UNIDROIT has given UNCITRAL the opportunity to promote the initiative and to bring it to a successful conclusion. The work of UNCITRAL is followed with interest by those involved in international trade who should welcome the opportunity of participating in the further debate.

FOOTNOTES

(1) The authors gratefully acknowlege the assistance of Mr. Malcolm Evans, Deputy Secretary General of UNIDROIT in making available documents relating to UNIDROIT Study XLIV by which the draft Convention was developed. These documents have formed the basis of the authors' research and have been drawn on substantially in the preparation of the paper, acknowledgements being made in the text by specific footnotes. The authors would also like to record their appreciation for assistance given by Professor Kurt Grönfors, Professor of Maritime Law and Transportation Law of Gothenburg University, Sweden and Chairman of the UNIDROIT study group and Dr. T.M. Remé, Chairman of the International Sub-Committee, CMI, in answering the authors' various enquiries on the draft Convention and the CMI draft standard conditions.

(2) UNIDROIT Doc.9, p.23.

(3) UNIDROIT Doc.9, p.4.

(4) Letter dated 2 May 1984 from Dr. T.M. Remé to MLAANZ.

(5) In addition to the international conventions relating to carriage by sea, refer to the following:

Air - Convention for the unification of certain rules relating to international carriages by air, 1929 (The Warsaw Convention) as amended.

Road - The Convention on the Contract of International Carriage of Goods by Road, 1956 (CMR) as amended.

Rail - The International Convention dealing with the carriage of Goods by Rail, 1970 (CIM) as amended.

(6) UNIDROIT Doc.24, p.11.

(7) UNIDROIT Doc.24, p.12.

(8) The character of the draft Convention was the subject of lengthy discussion by the study group. Some members favoured a traditional convention of mandatory character. However, most members supported a convention whereby those States which wished to do so might apply its provisions to all terminals operating in their territory whereas others might declare that they would give effect to the rules contained in the convention only in respect of those operators who expressly or impliedly undertook to apply the rules. The advocates of this semi-mandatory solution considered that voluntary acceptance of the convention by operators might be encouraged by the inclusion of incentives. UNIDROIT Doc.24, pp.12-13.

(9) UNIDROIT Doc.8, p.15.

(10) UNIDROIT Doc.4, p.17.

(11) UNIDROIT Doc.10, p.11. In commenting on an early revision of the draft Convention which used the expression "against payment", one State pointed out that consideration may be given other than by payment of money and suggested that the draft Convention should not be applied only if the safekeeping was gratuitous. See also UNIDROIT Doc.13, p.7 where it is noted that the study group decided that the draft Convention should not apply to gratuitous safekeeping of goods.

(12) See Hamburg Rules, Article 1.4 and Multimodal Convention, Article 1.6.

(13) UNIDROIT Doc.10, pp.12 and 14.

(14) UNIDROIT Doc.21, first attachment, p.3.

(15) UNIDROIT Doc.4, p.16 et seq.

(16) UNIDROIT Doc.24, p.18.

(17) Ibid. p.19.

(18) See UNIDROIT Doc.4, pp.16-19 which records the debate in the study group on the extent to which handling operations should be governed by the draft Convention.

(19) UNIDROIT Doc.7, p.1 and Doc.4, p.19.

(20) UNIDROIT Doc.24, P.20.

(21) Ibid. p.20.

(22) UNIDROIT Doc.24, p.21.

(23) Debate within the study group on the document to be issued under Article 4 is recorded in UNIDROIT Doc.4, pp.22-23 (first session) Dec.7, pp.7-8 (second session) and Doc.13, pp.11-12 (third session). One member expressed the opinion that Article 4 was the single most important article of the draft Convention.

(24) UNIDROIT Doc.4, p.22.

(25) UNIDROIT Doc.24, p.22.

(26) UNIDROIT Doc.21, first attachment, p.5.

(27) UNIDROIT Doc.21, sixth attachment, pp.2 and 3.

(28) UNIDROIT Doc.22, p.2.

(29) UNIDROIT Doc. 8, p.24.

(30) UNCITRAL Report of the Secretary-General dated 19 March, 1984 on the draft Convention Ref. A/CN 9/252 ("UNCITRAL Report"), p.9.

(31) UNIDROIT Doc.18, p.1. The UNCTAD Secretariat, in brief observations on the draft Convention made in March 1983, expressed its appreciation to the study group for the valuable work it had done and suggested that any further work on the project by UNIDROIT should continue to be conducted in consultation with UNCTAD in view of the relevance of the subject to the mandate of its organisation.

(32) UNIDROIT Doc.24, p.24. For authority in English law for the effectiveness of the exercise of a general lien given by contract, see K. Chelleram & Sons (London) Ltd. v. Butlers Warehousing and Distribution Ltd. (1977) 2 Lloyds Rep.192.

(33) Ibid. p.25.

(34) Ibid. P.25.

(35) Ibid. p.25.

(36) See Hamburg Rules, Article 5 and Multimodal Convention, Article 16.

(37) UNIDROIT DOC. 24, p.26. Given the liability regime established by the Hamburg Rules and followed in the Multimodal Convention, it is understandable that the regime in the draft Convention should adhere to the same model. However, the question of the suitability of that liability regime to the draft Convention warrants careful consideration.

(38) UNCITRAL Report, p.11.

(39) UNIDROIT Doc.21, sixth attachment, pp.1-2.

(40) Ibid. p.3.

(41) UNIDROIT Doc.24, p.11.

(42) UNIDROIT Doc.7, p.2 where the member of the study group representing the International Federation of Freight Forwarders Associations (FIATA) is reported as expressing concern that "the end-result of the exercise upon which the study group was engaged would be to increase costs by covering two or three times the risks to goods which were already covered by insurance".

(43) Ibid, p.2, from which it appears that, at the preparatory meetings which led up to the adoption of the Hamburg Rules, CMI may have taken the view that it was desirable to come to grips with the insurance implications first.

(44) UNIDROIT Doc.24, p.27.

(45) UNCITRAL Report, p.11.

(46) UNIDROIT Doc.24, pp.27-28,

(47) Ibid. p.29.

(48) See UNIDROIT Doc.10, pp.29-32. States which criticised the Hamburg Rules limit as being too low include Austria, Czechoslavakia, Norway and Switzerland. International transport conventions which have limits higher than the limit of 2.75 SDR's incorporated in the draft Convention include the Warsaw Convention, the CMR and the CIM, all as amended.

(49) UNIDROIT Doc.21, first attachement, p.6.

(50) UNIDROIT Doc.24, p.29.

(51) Ibid. p.29.

(52) UNIDROIT Doc.21, sixth attachment, p.2.

(53) UNIDROIT Doc.24, p.29.

(54) UNIDROIT Doc.2, p.13.

(55) UNIDROIT Doc.24, p.30.

(56) Ibid. p.31.

(57) Ibid. p.31.

(58) Ibid. p.31.

(59) UNIDROIT Doc.24, p.32.

(60) Ibid. p.33.

(61) UNCITRAL Report, p.14.

(62) UNIDROIT Doc.10, p.36.

(63) UNIDROIT Doc.24, p.33.

(64) UNCITRAL Report, p.15.

(65) UNIDROIT Doc.24, p.33.

(66) Ibid. p.34.

(67) UNIDROIT Doc.21, first attachment, p.7.

(68) UNIDROIT Doc.24, p.34.

(69) Ibid. p.35.

(70) UNIDROIT Doc.10, p.38.

(71) UNCITRAL Draft Report Addendum Chaper IV dated 6 July 1984, Ref.A/CN.9/XVII/CRP.1./Add.8,p.2.