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The 1991 Diplomatic Conference on Uniform Liability Rules for Operators of Transport Terminals

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I. INTRODUCTION

The United Nations General Assembly in Resolution 44/33 (1989)¹ decided to convene a diplomatic conference on the draft convention on the liability of operators of transport terminals in early 1991. This is a report on the status of the draft convention, the UNCITRAL

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Except where otherwise indicated, the views expressed in this article are the authors' and should not be attributed to any organization with which they are associated.

This article is based upon the Report of the U.S. Delegation to the United Nations Commission on International Trade Law's 22nd Session.

The text of the draft convention is reprinted in the Documents section of this issue of the Journal.

Comments on this article and the draft convention will be appreciated, and may be submitted to Paul B. Larsen, Office of the General Counsel, U.S. Department of Transportation, Washington D.C. 20590. A copy should be sent to Peter H. Pfund, Assistant Legal Adviser for Private International Law, U.S. Department of State, Suite 402, 2100 K Street, N.W., Washington D.C. 20037-7180.

¹A/CONF.152/1, 13 March 1990, paragraph 5. The United Nations General Assembly "Decides that an international conference of plenipotentiaries shall be convened at Vienna from 2 to 19 April 1991 to consider the draft convention prepared by the Commission and to embody the results of its work in a convention on the liability of operators of transport terminals in international trade."

negotiations and the work of the U.S. Delegation in preparation for that conference.²

Since 1984 an UNCITRAL working group has been developing a draft convention as the basis for the diplomatic conference discussion.³ All issues are open for reexamination at the diplomatic conference; however, time constraints will inevitably limit discussion.

In 1984 a study group of the Secretary of State's Advisory Committee on Private International Law was established to advise the U.S. Delegation.⁴ Members of the private sector study group are drawn from port authorities, law firms, transportation companies, trade, insurance and business associations and academia. The study group has met several times in meetings open to the public. The study group may meet again before the diplomatic conference to discuss preparations for the conference. The written comments of the U.S. Government will be distributed, with those received from other countries, by UNCITRAL to other countries invited to participate in the diplomatic conference as part of a general, preliminary exchange of views to facilitate the negotiations.⁵

II. ISSUES

Article 1: Definitions

A. "Operator"

The operator of a transport terminal is defined as a person who undertakes to take charge of goods in international transportation to perform or procure performance of "transport-related services" in an area under the operator's control or subject to the operator's access or use.⁶ Nevertheless, "a person shall not be considered an operator

²The United Nations Commission on International Trade Law (UNCITRAL) is composed of 36 states which represent the various geographic regions and the major economic and legal systems of the world. The members of UNCITRAL are elected by the U.N. General Assembly for six-year terms. The United States is a member of UNCITRAL. (All documentation cited in this article is UNCITRAL's, unless otherwise indicated.) For background and history of the negotiations see Larsen, Sweeney and Falvey, *The Uniform Rules on the Liability of Operators of Transport Terminals*, 20 J. Mar. L. & Com. 21 (1989).

³Id at 22 - 24.

⁴Id. Annex 1.

⁵UNCITRAL invitation to comment, LA/TL 133(5-10-1), 11 April, 1990.

⁶Text of a Draft Convention on the Liability of Operators of Transport Terminals in International Trade, approved by the United Nations Commission on International Trade Law,

whenever he is responsible for the goods under applicable rules of law governing carriage."⁷ The definition of the operator is very important because it tends to define the scope of the convention. The initial questions are: what does it mean that the goods are in the charge of the operator? When are they in the operator's charge? The term describes how and when the operator assumes responsibility for the goods. It is further clarified in Article 3 of the draft convention.⁸ Therefore, while the phrase "in charge" may be vague when seen textually in this paragraph, it is clarified by Article 3. It is further clarified by reference to the negotiating history of Article 4 of the Hamburg Rules, and, in the U.S. context, by the interpretation given by the U.S. courts to the Harter Act.⁹

Deleted from the definition are those operators who are covered by "applicable rules of law governing carriage." This is a direct consequence of the U.S. Delegation's efforts to accommodate the strong recommendations of U.S. stevedores.¹⁰ The stevedores argue that they have achieved a certain degree of uniformity of liability law as bailees of carriers under the maritime bill of lading. The U.S. case law is not entirely consistent;¹¹ however, when clearly defined as bailees of a maritime carrier, the terminal operators have the benefit of defenses available to a carrier under maritime bills of lading at ports of loading and discharge of cargo moving under a port-to-port bill of lading; and those terminal operators, plus others at inland points for cargo handled under through intermodal bills of lading, are all covered by or subject to the same liability rules.

This modification of the definition of a terminal operator was considered by most countries to be a clarification rather than a change

Article 1(a), A/CONF.152/5, 13 March 1990. (Hereinafter all references to articles will be to articles of the March 1990 draft convention, unless otherwise indicated.)

⁷Id.

⁸Compare United Nations Convention on the Carriage of Goods by Sea (hereinafter referred to as the Hamburg Rules), 1978, U.N. Doc. A/CONF.89/13, Article 4, stating that the carrier's responsibility for the goods "covers the period during which the carrier is in charge of the goods."

⁹See *Leather's Best, Inc. v. The Mormaclynx*, 451 F. 2d 800 (2d Cir. 1971).

¹⁰A/CN.9/319, 24 Jan. 1989, at 13 - 14.

¹¹*Herd v. Krawill Machinery Corp.*, 359 U.S. 298 (1959); *Colgate Palmolive Co. v. S.S. Dart Canada*, 724 F. 2d 313 (1984). For an excellent recent discussion of this issue see Palmer, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 *Tul. L. Rev.* 281, 343 - 352 (1989); Zawitoski, *Federal, State and International Regulation of Marine Terminal Operators in the United States*, 64 *Tul. L. Rev.* 439, 453-465 (1989); Hooper, *Legal Relationships: Terminal Owners, Operators, and Users*, 64 *Tul. L. Rev.* 595 (1989).

in the existing meaning of the definition of the operator.¹² However, the modification of the definition assures U.S. stevedores that they are treated no less favorably under the proposed convention than are carriers, when stevedores handle goods under maritime bills of lading which extend to them the benefits possessed by the carriers. The change permits U.S. stevedores a clear option: they can handle goods under maritime bills of lading extending to them the defenses possessed by the carriers; or they can use the new uniform rules on transport terminal operators' liability.¹³

B. "Goods"

"Goods" includes any container, pallet or similar article of transport used for consolidation of the goods as well as packaging of the goods if such articles or packaging are not supplied by the transport terminal operator.¹⁴ This is not strictly a definition, but only a provision which makes sure that these articles of transport and the packaging are included and subject to the convention's liability regime.

The term "goods" may be broadly construed and may include live animals or non-commercial items such as medicine and disaster relief supplies.¹⁵

There was discussion about whether empty containers in a storage yard would be subject to the convention.¹⁶ The U.S. interpretation is that empty containers, in a storage yard for empty containers, would not be subject to the convention.¹⁷ Such an interpretation is permissible because the convention concerns goods and only includes containers and packaging within the convention to the extent they are used for consolidation or packaging of goods. However, it is possible that the issue of whether shipped empty containers may be construed as "goods" will be debated at the diplomatic conference, because a number of delegations favor such a construction.¹⁸

¹²Report of the United Nations Commission on International Trade Law on the work of its twenty-second session, 16 May - 2 June 1989, UNGA official records: forty-fourth session, Supplement No. 17 (A/44/17) (hereinafter referred to as "UNCITRAL plenary report").

¹³The National Association of Stevedores expressed support for this position in a letter from Thomas D. Wilcox, Executive Director and General Counsel to Paul B. Larsen, March 3, 1989.

¹⁴Article 1(b).

¹⁵UNCITRAL plenary report at 9.

¹⁶*Id.*

¹⁷A/CN.9/319 at 14.

¹⁸UNCITRAL plenary report at 9.

C. "International Carriage"

Goods are subject to the convention when they are in international carriage.¹⁹ Whether the goods are in international carriage is established objectively; it means any carriage which is identified, at the time when the goods are taken in charge, as being between two different States. Such determination is made based on identification of the place of departure and the place of destination.

Arguments were made at the UNCITRAL plenary for changing the definition from an objective to a subjective standard, that is, to narrow the scope to an identification of international carriage by reference to the operator only; however, this was rejected.²⁰ The definition of international carriage was originally advanced by the U.S. Delegation as a compromise to a difficult problem. Therefore, most delegations, including that of the United States, support this definition as being the best achievable.²¹

D. "Transport-Related Services"

The stated examples of transport-related services (storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing) are not exhaustive. The term "transport-related services" is circumscribed by the qualifications in the definition of "operator"; that is, such services as are performed for goods under the control of the operator or are performed in an area to which the operator has right of access or use.

Some flexibility is left for the operator to decide the nature of transport terminal operations. However, the UNCITRAL plenary did agree that the transport-related services would include only physical activities and would, for example, exclude financial services.²²

E. "Notice" and "Request"

The definitions of these two terms have in common with each other (and with the document issued by the operator to customers under Article 4) an intended form of notice or request which provides a record of the information.²³ Such a record may be on paper, or

¹⁹Defined further in Article 2.

²⁰UNCITRAL plenary report at 9.

²¹Id.; see Larsen, Sweeney and Falvey, *supra* note 2 at 26.

²²UNCITRAL plenary report at 36.

²³The definition is similar to the record of documentation in Article 4(3).

equally importantly, it may be paper-less, that is, it may be recorded in a computer. The record is the objective; thus it would be possible to give oral notice to the operator of perceived loss or damage,²⁴ and then to record it in a computer as soon as possible after oral notice. The record-keeping is not incompatible with oral notice. It is complementary to oral notice. Such record-keeping is in the interest of operators and carriers, as well as insurance companies, to aid in the determination of compensation for loss, damage or delay.

F. "Writing"

The definitions of the draft convention do not really define "writing".²⁵ The term is used in the convention, for example in Article 12(4). It would be an improvement if electronic writing could be recognized as an acceptable form of writing. This recognition could best be made in the definitions in Article 1.²⁶

Article 2: Scope of Application

The convention would apply to transport-related services provided to goods in international carriage, when: (1) the terminal operator's place of business is located in a country which is a party to the convention; or (2) performed in a country which is a party to the convention; or (3) the transport-related services, under the rules of private international law, are subject to the law of a country which is a party to the convention.²⁷

Second, when the operator has more than one place of business, the relevant place of business is the one which has the closest relationship to the transport-related services.²⁸

Third, the operator's habitual residence is deemed to be the place of business whenever the operator does not have a regular place of business.²⁹

Views were expressed in the UNCITRAL plenary that the convention should apply if the services were performed in a contracting state

²⁴See Article 11.

²⁵For example Article 1(f) states that a request "means a request made in a form which provides a record of the information contained therein."

²⁶Issuance of a paper document should not be required for the operator to limit liability exposure, A/CN.9/333 at 6. See note 52 *infra*.

²⁷Article 2(1).

²⁸Article 2(2).

²⁹Article 2(3).

rather than be tied to the state in which the operator has his place of business. In view of the discussion, the plenary decided to broaden the scope of application to include both situations; however, some states view the addition of the state where the services are performed as creating an ambiguity because the services may be performed in several states, some of which are parties to the convention and some of which are not.³⁰

Article 3: Period of Responsibility

The operator's period of responsibility for the goods commences at the time when the goods are taken into his charge and terminates at the time when they are handed over to or placed at the disposal of a person entitled to delivery.³¹

The U.S. Delegation proposed that the operator should be held responsible for the goods whenever other liability regimes do not apply.³² The purpose of this proposal was to clarify that the operator's period of responsibility could begin prior to taking them into charge, to make possible the operator's responsibility from the "tackle" of a ship. This would be consonant with the principle of perfectly filling gaps between the carrier liability systems; it would remove any gap between liability regimes of terminal operation and of maritime carriage in those countries, such as the United States, which are parties to the Hague Rules ("tackle to tackle"). But the U.S. proposal met with opposition. Arguments were made that the application of the convention would become uncertain if it were to depend on the application of conventions or national laws of carriage. Secondly, the operator's period of responsibility would not necessarily be preceded by carriage but could begin with delivery by the owner or end with delivery directly to the owner.³³ To this may be added that the definition of operator assumes that the operator may provide services in respect of goods "of which he has a right of access or use,"³⁴ and that the transport related services clearly include

³⁰UNCITRAL plenary report at 10-11. The problem arises from air, road and rail terminals located in two or more countries, as for example Cointrin Airport in Geneva, Switzerland, and the rail terminal in Basel, Switzerland, which crosses three national boundaries.

³¹Article 3.

³²A/CN.9/319 at 13.

³³UNCITRAL plenary report at 12-13.

³⁴See Article 1(a).

services which may be performed on board a ship such as loading, unloading, stowage, trimming, dunnaging and lashing.³⁵

These definitional arguments, arising out of Article 1, bear on identification of the period of time that the operator is in charge of the goods and on the size of the gap which the convention is intended to fill. A further relevant part of the discussion is the clarification of the definition of "operator" adopted by the UNCITRAL plenary, so that the stevedores now have a clear opportunity to be subject to maritime bills of lading.³⁶

In spite of these mitigating arguments the fact remains that Article 3 of the convention may not perfectly fill the gap between the liability systems of the carriers.

Some delegations argued that the concept of the goods being "in charge" of the operator is an ambiguous basis on which to define the period during which the operator is responsible. However, most delegations agreed that the concept of the operator being responsible while "in charge" was the best possible under the circumstances.³⁷

Termination of the operator's period of responsibility is made somewhat clearer by terminating the period at the point in time when the goods are handed over or placed at the disposal of the person entitled to take delivery. "Placed them at the disposal" of the consignee is intended to relieve the operator of responsibility in those cases when he has fulfilled all his duties. Hence, the consignee would not be able to make the operator responsible for the goods by failing to take delivery.

Article 4: Issuance of Document

A. The Operator's Options Under Article 4(1).

Maximum flexibility is provided under Article 4(1) because the operator may use and date the document the customer presents to

³⁵See Article 1(d).

³⁶See Article 1(a).

³⁷UNCITRAL plenary report at 13. Those who favor the Hague Rules must ignore the difficulty that the courts have had with the "tackle to tackle" period of responsibility. See *Hoegh Lines v. Green Truck Sales, Inc.*, 298 F. 2d 240 (9th Cir. 1962). Also see the Comité Maritime International study, UNIP-17, III-90 (1990), at 19, regarding the desirability of defining a maritime operator's period of responsibility according to the time period that the operator is in charge of the goods (hereinafter referred to as the "CMI study").

him; the operator may issue his own document; or the operator may issue no document at all.³⁸

In most cases the operator uses the documentation presented to him by the customer. If it is a maritime bill of lading it will have all the data customarily contained in such a document.

The operator, if it is a stevedore, will usually handle the goods only for a few minutes and have only minimal opportunity to check their condition or quantity.³⁹ This is particularly true when the goods are transferred immediately between carriers.

Therefore, U.S. stevedores have asked to be relieved of onerous documentation burdens. Inclusion of such a task would obviously be costly.

The customer is usually the controlling party in the relationship with the operator. The customer will exercise his options and may be expected to act in his self interest. At a minimum the customer may elect to present to the operator a simple goods receipt in which the operator merely acknowledges "his receipt of the goods by signing and dating" a receipt which identifies the goods. This minimum option is an important one in this time of electronic data processing. Business convenience and competitive economics favor minimal documentation to speed the progress of the transportation movement.⁴⁰

If the customer's documentation is not satisfactory and is unacceptable to the operator then the operator will have the choice of not doing business, or may issue his own document⁴¹ if that is acceptable to the customer. If he does so then the operator's document must acknowledge receipt of the goods, it must be dated, and must state the condition and quantity of the goods "as far as can be ascertained by reasonable means of checking."⁴² The conditional language about "reasonable means of checking" is linked to the speed with which goods move. The operator (who is a stevedore) may have little time to check the goods. Furthermore, the operator's customers invariably do not want the operator to open packages or break the seals on containers to check the condition and quantity of the goods inside because the goods may become lost or stolen in the process. Customs authorities will also be concerned with any breach of customs seals.

³⁸Article 4(1).

³⁹A/CN.9/319 at 15.

⁴⁰Id.

⁴¹Under Article 4(1)(b).

⁴²Id.

The U.S. Delegation participated actively in the UNCITRAL debate arguing in favor of minimal documentation burdens on operators.⁴³ From this point of view the current formulation of Article 4(1) is satisfactory. Some delegations argued strongly that the operator, under the Article 4(1)(a) option of using the document of the customer (usually the carrier), should state the condition and quantity of the goods.⁴⁴ Such an addition would be burdensome for stevedores, would increase costs, and would slow the transportation of goods.

Nevertheless, the question of whether the receipt for the goods should state the condition and quantity of the goods remains an active issue for the diplomatic conference. A significant number of delegations would like to establish such requirements. They are of the view that the present wording of Article 4(1)(a) favors the operator too much and that a greater burden of responsibility should be placed on the operator. One suggestion was to delete entirely the operator's option of acknowledging "receipt of the goods by signing and dating a document presented by the customer that identifies the goods."⁴⁵ That would not be acceptable to the U.S. Delegation which has strongly urged the need for flexibility of the operator to use documentation (usually a carrier bill of lading) presented by the customer.

Article 4(1)(a) constitutes an important option. It should be preserved because it is used in the interest of and at the choice of the customer. If the customer wants the operator to state the condition and quantity of the goods at the time of delivery, he can require the operator to issue a document (under Article 4(1)(b)).

A small working group consisting of the United States, France, India, Mexico, Morocco and the U.S.S.R. sought to resolve this tangled issue by establishment of consensus in UNCITRAL that the legal effect of the operator's signature on a goods receipt would be governed by applicable provisions of local law. However, this consensus did not develop fully.⁴⁶

While the United States opposes additional documentation requirements in article 4(1)(a), if adopted such requirements would have to be qualified by "to the extent required by local circumstances" to limit the requirements to those countries which need them. Furthermore, they should be qualified by "as far as they can be ascertained by reasonable means of checking" because the operator (if he is a

⁴³A/CN.9/319 at 15, and UNCITRAL plenary report at 13-16.

⁴⁴UNCITRAL plenary report at 36.

⁴⁵*Id.* at 14-15.

⁴⁶*Id.* at 36.

stevedore) should be free from having to delay the goods to check them. Besides, the customer wants to avoid having containers and packages opened to check the goods inside.

It should be remembered that the customer may request the operator to issue a terminal operator's document under Article 4(1)(b) if the customer wants special handling.

B. The Operator's Option under Article 4(2)

The operator may intentionally or unintentionally accept the goods without issuing any documentation at all. Such goods would still be subject to the convention. The operator would be "rebuttably presumed to have received the goods in apparent good condition."⁴⁷ The reference to "apparent" is related to the concept of "in so far as they can be ascertained by reasonable means of checking" in Article 4(1)(b); in other words, the operator would not open containers or packages to check them.

The Federal Republic of Germany proposed that no presumption of acceptance in "apparent good condition" should exist when the operator's services are limited to "the immediate transfer of goods between means of transport."⁴⁸ This proposal was accepted by UNCITRAL,⁴⁹ thereby creating an option for stevedores to operate without documentation for short transfers of goods between carriers. While the operator could still be held liable under Article 5, it would be more difficult for customers to obtain compensation because of the absence of the presumption that the operator had received the goods in apparent good condition. However, a transfer for the purpose of storage in a terminal would not come under this exception.

C. Electronic Data Processing of Documents

The Operator may issue documentation "in any form which preserves a record of the information contained therein."⁵⁰ This language parallels the "request" and "notice" provisions in Article 1 (e) and (f). Thus the possibility of paperless documentation is assured.⁵¹

⁴⁷Article 4(2).

⁴⁸UNCITRAL plenary report at 16.

⁴⁹Id.

⁵⁰Article 4(4).

⁵¹See note 26 supra. See the CMI study at 14 for a discussion of the desirability of the application of a convention when no document is issued.

It may be assumed that the documentation presented by the customer to the operator under Article 4(1)(a) may also be paperless, if so permitted by the applicable air, maritime, rail or road carrier conventions.⁵²

D. *Signature*

Article 4(4) would require a signature by the operator. The signature may be made by electronic or any mechanical means, if not inconsistent with local law. This paragraph is modeled on a similar provision in the Hamburg Rules, Article 14(3). Several delegations favored the formulation of the 1988 U.N. Convention on International Bills of Exchange and International Promissory Notes, Article 5(k), which broadly states that signature "means a handwritten signature, its facsimile or an equivalent authentication effected by any other means." This formulation does not make a qualification regarding consistency with local law. This proposal will probably be made again at the diplomatic conference because it is more in consonance with electronic data processing and with facilitation of international trade.

Article 5: Basis of Liability

A. *Presumption of Liability*

A fault system of liability would exist under the convention. The draft convention provides that the operator shall be liable for loss, damage or delay to the extent that the loss, damage or delay happened while the operator was in charge, unless the operator proved that he, his servants or other persons used for the transport-related services had taken all reasonable measures to avoid their occurrence and the consequences thereof.⁵³

The burden of proof is reversed.⁵⁴ The operator must prove that, if

⁵²For example, Montreal Protocol No. 4 to the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), Article 5, U.S. Senate, 95 Congr., 1st Sess, Executive B, at 7.

⁵³Article 5(1). The defenses to liability are included in the concept that the operator, his servants, agents and independent contractors can avoid liability by taking "all measures that could reasonably be required to avoid the occurrence and its consequences." Thus an operator can avoid liability in a strike if he takes all necessary measures to avoid loss, damage or delay as a consequence of the strike. The same outcome would pertain to any other consequence (including fire) of an occurrence. In essence, the operator is not liable if he proves that he was not at fault.

⁵⁴*Id.*

loss, damage or delay took place while the goods were in the operator's charge, it did not occur due to the fault of the operator, his servants or persons of whose services he made use in performing transport-related services. The reference to "loss resulting from" is interpreted to mean consequential loss or damage.⁵⁵

B. Comparative Negligence

When the negligent acts of the operator, his servants or independent contractors contribute to the loss, damage or delay, but such acts are combined with other causes, then the operator is only liable to the extent that his acts or those of his servants or independent contractors caused the loss, damage or delay. The burden of proof is on the operator to prove that other causes contributed to the loss, damage or delay.⁵⁶

C. Delay

Goods are considered to be delayed when the operator fails to deliver them within the agreed time or, in the absence of an agreed time, within a reasonable time after the goods are requested.⁵⁷

UNCITRAL made a minor change in the draft convention's Article 5(3) by deleting reference to the operator's failure to make the goods available and instead referring to failure to "place them at the disposal of" the person entitled to take delivery. This was done to align this paragraph with the similar idea in Article 3.

D. Point in Time When Delayed Goods May be Considered to be Lost

Goods may be treated as being lost if the operator fails to hand them over within 30 days after the agreed time for delivery or, in the absence of an agreement, within 30 days after a request for the goods has been made.⁵⁸

Several delegations requested more time than 30 days; however, most delegations viewed the circumstances of the terminal operator as being significantly different from the more uncertain circumstances

⁵⁵A/CN.9SR.410 at 2.

⁵⁶Article 5.

⁵⁷Article 5(3).

⁵⁸Article 5(4).

of the maritime carrier, who is entitled to 90 days. As said by the Finnish representative, 30 days is "quite long enough to find the goods in a terminal."⁵⁹

Article 6: Limits of Liability

The operator's liability limit for goods would be bifurcated because the average value of goods carried by sea tends to be lower as compared to the average value of goods carried by other modes of transportation. A limit harmonious with land carriage would ordinarily apply. A major exception would be that a limit harmonious with sea carriage would apply if sea carriage were involved *immediately* preceding or following the transport-related services of the operator. Sea carriage, for the purpose of definition, would include pick up and delivery within a port.⁶⁰

The liability limits would be based on the weight of the goods. Several delegations, including that of the United States, favored an additional optional measurement based on a package concept. The United States argued that stevedores should be treated the same as maritime carriers as far as a liability limit measured by the package was concerned.⁶¹ Another delegation stated that a per package option would make it possible for shippers to receive more generous compensation for loss of or damage to high value goods in small packages, such as computers. However, most delegations were of the view that the package limitation was unnecessary in the context of terminal operation. Furthermore, the package concept had proved to be troublesome to define in sea carriage and would necessitate extensive changes in the draft convention on transport terminals, particularly in relation to documentation. Thus, for the sake of simplicity, it was decided to measure liability based on weight only.

Actual liability amounts were not discussed in UNCITRAL. That discussion will take place at the diplomatic conference. Thus the figures currently listed are bracketed as follows: 8.33 SDRs per kilogram, except before or after maritime carriage when it is 2.75 SDRs per kilogram.⁶²

The special liability limit for delay of goods would be two and one half times the charges for the operator's transport-related services.

⁵⁹A/CN.9/SR.410 at 5.

⁶⁰Article 6(1). See CMI study at 24-25.

⁶¹A/CN.9/319 at 15.

⁶²See TD/B/C.4/315 at 14 for an interesting statistical graph of the effects of inflation on units of liability for the time period 1979-1987.

However, this amount could not exceed the total charges for the entire consignment of which the goods were a part.

The operator's aggregate liability would not exceed the limit for total loss of the goods. Furthermore, the parties to the contract with the operator would be allowed to enter into agreement on higher limits than those described above.⁶³

Article 7: Application to Non-contractual Parties

Article 7(1) provides that the defenses and liability limits of the convention shall apply regardless of whether the claims action is brought in tort or in contract or otherwise. This provision is caused by differences among legal systems; some characterize claims against an operator as being only in contract while others add a tort basis, and some use other characterizations. Similar provisions are found in other liability conventions.⁶⁴

Article 7(2) extends to the operator's servants, agents and independent contractors the defenses and liability limits enjoyed by the operator under the convention, but only if such servants, agents and contractors prove that they were acting within the scope of their employment. A question was raised whether this paragraph of the convention created a right of action against servants, agents and independent contractors, but it was thought that such right of action would have to exist under local law. The convention merely establishes that if such an action is brought, it will be subject to the defenses and limits of the operator under the convention.⁶⁵

Article 7(3) provides that the aggregate of compensation recoverable from servants, agents, or independent contractors shall not surpass the liability limits under the convention. A question was raised whether servants, agents and independent contractors would be bound by an operator's agreement to increase liability limits as provided under Article 6(4). The U.S. Delegation stated that it did not consider the servants, agents, and independent contractors to be affected by the operator's contractual agreements to increase liability limits, however another delegation expressed an opposite point of view.⁶⁶ Thus this issue is currently left to interpretation under

⁶³Article 6(4); also see Article 13 on permitted contractual stipulations.

⁶⁴See Warsaw Convention, *supra* note 52, Article 24; Visby Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to the Bills of Lading, Article 3, World Shipping Laws, V/1/CONV; Hamburg Rules, *supra* note 8, Article 7.

⁶⁵UNCITRAL plenary report at 20.

⁶⁶A/CN.9/SR.412 at 8.

applicable local law.

Article 8: Loss of Right to Limit Liability

Article 8(1) provides that the liability limit may be broken if it is proved that the loss, damage or delay was caused by the willful misconduct of the operator, or his servants or agents. It was agreed that the operator would not lose the benefits of limited liability if the willful misconduct was done by his independent contractors. A proposal was made that the operator should not be liable for the willful misconduct of his servants and agents; however, that proposal was not adopted because many operators are corporations which only act through their servants and agents.⁶⁷

UNCITRAL also did not adopt a proposal to limit the operator's liability for willful misconduct of servants and agents to those times when they are acting within the scope of their employment. A number of legal difficulties to this limitation were raised, among them that the operator should be responsible for the willful misconduct of his servants and agents; it would be more fair to place the responsibility for willful misconduct of servants and agents on the operator who selected them, rather than on an innocent customer-claimant. The operator would also have the choice of bringing recourse claims against his own servants and agents.⁶⁸

Article 8(2) provides that the operator's servants, agents and independent contractors shall forfeit their rights, under Article 7(2), to limit their own liability if the loss, damage or delay was caused by their willful misconduct. This provision parallels Article 7(2) and was accepted by UNCITRAL.⁶⁹

Article 9: Special Rules on Dangerous Goods

Article 9 endorses the principle that dangerous goods must be labelled as being dangerous in accordance with applicable labelling laws. If goods are not appropriately labelled at the time when they are

⁶⁷UNCITRAL plenary report at 20. One reason Article 8(1) differs from the breakability of the carrier's liability limit in Article 8 of the Hamburg Rules is that the maritime liability regime is a package deal which considers for example elimination of the nautical fault defense. A nautical fault defense is of course not considered relevant to the liability of the terminal operator.

⁶⁸UNCITRAL plenary report at 22. Such employees are unlikely to be protected by their own liability insurance, and collective bargaining agreements may limit such recourse.

⁶⁹Article 8(2).

delivered to the operator, as required by the laws and regulations of the country of delivery to the operator, then the operator may (a) take whatever reasonable measures are required under the circumstances, including destruction of the goods when they "pose an imminent danger," without payment of compensation for such destruction; and (b) receive payment for all expenses in taking such measures from the person who failed to label the goods appropriately.⁷⁰

Article 9 may be viewed as an exception to Article 5 which establishes the basis for the operator's liability to a customer for handling goods. Article 9 would permit the operator, under especially dangerous circumstances, to dispose of the goods without liability to a customer, and would furthermore entitle the operator to recover costs from the customer for failure to mark, label, package or document goods in accordance with existing laws or regulations on dangerous goods.⁷¹

In the view of some delegations a link could also be construed between failure to label goods as being dangerous and the obligation existing under Article 4, Issuance of Document, to describe the "condition" of the goods. UNCITRAL agreed, however, that the reference to "condition" of the goods in Article 4 referred to damage, whereas the duty to accurately label and describe the goods as being dangerous was a special issue to be governed by Article 9.⁷²

This is a difficult area because there may not exist a contractual relationship between the party who fails to label properly and the operator. A manufacturer may fail to label correctly unbeknownst to the carrier who contracts with the operator. On the other hand, there are extensive international rules on labelling of dangerous goods prepared by the U.N. Committee of Experts on Transport of Dangerous Goods⁷³ as well as national rules.⁷⁴ These rules identify the party required to label goods as being dangerous. UNCITRAL, therefore, did not prescribe in the draft convention the party who should mark, label, package and document goods as being dangerous.

The draft convention does not directly provide an obligation to label. These matters are left to be regulated outside of the draft convention. Article 9 of the draft convention only regulates the effects of failure to mark, label, package or document in accordance

⁷⁰UNCITRAL plenary report at 23-24.

⁷¹Id.

⁷²Id.

⁷³U.N. Doc.ST/SG/AC.10/1/Rev.5 (1988).

⁷⁴U.S. Hazardous Materials Regulations, 49 Code of Federal Regulations, Parts 106-199.

with laws and regulations on dangerous goods applicable in the country where the goods are delivered to the operator.

A. Notice of Intention to Destroy Goods

In regard to the issue of whether the operator should be obligated to give notice of his intention to destroy the goods, UNCITRAL agreed that destruction would take place "only when they posed an imminent danger; there thus would be no time to give such notice."⁷⁵ Therefore, such a notice requirement was not established.

B. Identification of Person Liable for Costs

UNCITRAL agreed to describe the person liable to pay the costs incurred by the operator for destruction and disposal of the goods as being that person who was supposed to mark, label, package or document the goods as being dangerous, according to law and regulation, but who had failed to do so.⁷⁶ UNCITRAL agreed, however, that this provision did not in any way limit any rights to reimbursement that the operator or his other customers, whose goods had been damaged by the dangerous goods, might have against the offending party under other applicable law.⁷⁷

Article 10: Rights of Security in the Goods

A. Operator's Right of Retention

The operator may retain the goods as security for charges incurred for transport-related services performed while in his charge. The operator may, however, enter into contractual stipulations to extend his rights of security in the form of a general lien, in accordance with local law.⁷⁸

UNCITRAL agreed to specify that the operator's right of retention concerns only costs and claims which are due. Furthermore, there appeared to be agreement in UNCITRAL that the right of retention should cover not only charges for services performed while in the operator's charge, but also services performed after the operator's

⁷⁵UNCITRAL plenary report at 24.

⁷⁶Article 9(c).

⁷⁷UNCITRAL plenary report at 25.

⁷⁸Article 10(1).

period of responsibility had terminated; for example storage charges could accumulate after the goods were supposed to have been collected but remained nevertheless at the terminal. The current text does not specifically state this principle, but UNCITRAL understood that the operator may charge for delayed collection of the goods and other transport-related services performed after the period of responsibility has ended.⁷⁹ This issue may be raised at the diplomatic conference.

UNCITRAL debated whether the local law where the goods are located or the law of the place of contract should govern the issue of whether the operator may extend his rights of security in the goods into a general lien. Freedom to select applicable conflicts law by stipulation varies from state to state; thus the present language is deliberately left open so that it may include both the situation in which the parties may stipulate the applicable law and the situation where they may not do so.⁸⁰

B. Security for Payment

If a bond or a guarantee for the sum claimed is posted, the goods may not be retained any longer.⁸¹ This provision expresses customary practice and is generally acceptable.

C. Operator's Right to Sell the Goods to Satisfy Charges

The operator is entitled to sell the retained goods to satisfy charges incurred by the customer. However, the operator may not sell "containers, pallets or similar articles of transport or packaging" owned by a container lessor or other third party, but only if such articles of transport or packaging are clearly identified as to ownership.⁸²

UNCITRAL debated whether to establish a uniform rule on the sale of retained goods or whether to rely on such rights under local law. While a uniform rule would provide uniform treatment, reliance on local law would closely reflect local policy. In the end it was

⁷⁹A/CN.9/SR.415 at 9-10.

⁸⁰UNCITRAL plenary report at 25-26.

⁸¹Article 10(2).

⁸²Article 10(3); UNCITRAL plenary report at 26-27; note also A/CN.9/SR.416 at 4, indicating the support of the Institute of International Container Lessors (IICL) for the text of Article 10(3) which would prevent the operators from selling leased containers which are clearly marked as to ownership by a leasing company.

decided that sale of retained goods would only be allowed to the extent permitted by the local law of the state where the goods are located. Reference to the local law of the state where the operator does business was considered because some delegations argued strongly that some operators are located on both sides of borders and might be tempted to place the goods in the country with the most favorable legal regime. This idea was rejected and instead UNCITRAL selected the usual conflict of law rule: the law of the place where the goods are located.⁸³

UNCITRAL decided that only so much of the retained goods should be sold as would satisfy the charges. Thus a reference to sale of all "or part of the goods" was added;⁸⁴ however, perfect proportionality may be difficult to achieve.

UNCITRAL agreed that containers clearly marked as being owned by third party lessors should not be subject to sale. To this provision was added "pallets or similar articles of transport or packaging." Lastly, it was decided that an exception should be made for the operator's "cost of repairs of and improvements to the containers, pallets or similar articles of transport or packaging."⁸⁵

D. Notice of Sale of Retained Goods

The operator must give notice of impending sale to the owner of the retained goods as well as the customers who delivered and who are entitled to receive delivery of the goods. Furthermore, the operator must account for money received in excess of the charges plus "reasonable cost of sale." All other aspects of the sale would be governed by local law.⁸⁶

Some delegations proposed that the operator should wait a reasonable period of time before selling the goods to provide time for notice of sale to be received and acted upon. This proposal was rejected because of vagueness and because most local law would require adequate time for notice to be received. It is understood that all procedures of the sale, not specified in the convention, will be governed by local law.⁸⁷

⁸³UNCITRAL plenary report at 26. See note 30, *supra*.

⁸⁴*Id.* at 27.

⁸⁵*Id.*

⁸⁶Article 10(4); UNCITRAL plenary report at 27.

⁸⁷*Id.*

E. Unclaimed Goods

The U.S. Delegation's written comments suggested that the operator is sometimes inconvenienced by unclaimed goods which occupy space needed for other purposes.⁸⁸ Therefore, the United States proposed that a new subparagraph be added stating that the terminal operator may consider goods in its charge abandoned if not claimed within thirty days after (1) the day until which the operator had agreed to keep the goods, or (2) the date as to which notice of availability of the goods had been given by the operator to the person entitled to take delivery of the goods. This proposal continues to be the U.S. position. But the current view in UNCITRAL is that this issue is governed by local law.⁸⁹ Thus a U.S. terminal operator may dispose of the goods as abandoned property, as permitted under local law. This issue was considered late in the session and further discussion became impractical. The opportunity exists for the U.S. Delegation to make proposals to the diplomatic conference relating to goods considered as being abandoned.

Article 11: Notice of Loss, Damage or Delay

1. Apparent Loss or Damage

Certain presumptions exist regarding the customer's acceptance of goods which are lost or damaged. Regarding loss or damage which is apparent when the goods are delivered, the customer or his representative must give notice of loss or damage to the operator within three days. If such notice is not given within three days, then the goods are presumed to have been received in good condition. This presumption may be overcome by evidence to the contrary.⁹⁰

The U.S. Delegation suggested that the provision regarding the presumption that the goods are received in apparent good condition in Article 11(1) should be made consistent with the provisions on delivery to the operator in good condition under Article 4.⁹¹ An inconsistency was thought to exist because the operator, under Article 4, is sometimes not charged with the presumption of having received the goods in apparent good condition. Under the circum-

⁸⁸A/CN.9/319 at 16.

⁸⁹UNCITRAL plenary report at 27.

⁹⁰Article 11(1).

⁹¹UNCITRAL plenary report at 27.

stance when the operator is not charged with having received the goods in apparent good condition, it may not be fair to presume that he delivered them in good condition, because the operator did not know the condition of the goods when received. Thus the operator now is only charged with handing the goods over to the customer pursuant to Article 4(1)(b) because under that provision the operator issues a document stating the condition and quantity of the goods.

2. Concealed Loss or Damage

When the loss or damage is concealed, the customer is provided a longer time period within which to examine the goods and then to give notice of loss or damage to the operator. The customer must notify the operator within 15 days after the goods have arrived at the ultimate recipient of the goods. However, under no circumstances may more than 60 days pass after the day when the goods were delivered to the person ultimately entitled to receive them.

This special provision on concealed damage is based on the assumption that concealed loss or damage is not discovered until the container or package is opened by the ultimate recipient. The 15 day period would give the recipient ample time to examine the goods, and the 60 day outer limit after the day when the goods are delivered to the person entitled to receive them establishes a final time limit in those cases in which the goods do not reach their final recipient for a long time after leaving the terminal. The U.S. Delegation supported both of these time limits.⁹²

3. Survey or Inspection of the Goods

Notice to the operator of loss or damage need not be given in those cases in which the customer and the operator join in a survey or inspection of the goods at the time when they are delivered.⁹³

4. Facility for Inspection

The operator and the consignee are required to provide reasonable facilities to each other for inspection and tally of the goods.⁹⁴

⁹²UNCITRAL plenary report at 28. See also A/CN.9/319 at 16.

⁹³Article 11(3).

⁹⁴Article 11(4).

5. *Notice of Delay*

The person entitled to receive the goods is required to give notice of delay to the operator within 21 days after delivery. Failure to give such notice will result in no compensation;⁹⁵ in other words, Article 11(5) establishes a final cutoff rather than a presumption of delay.

Article 12: Limitation of Actions

The draft convention provides a two year period of limitation for bringing action (whether through judicial or arbitral proceedings). A proposal was made to delete the period of limitation entirely and instead to rely on whatever prescriptions exist, if any, under local law. However, UNCITRAL viewed a uniform time limit as being desirable.⁹⁶

The draft convention provides that the limitation on bringing action begins when the operator delivers the goods or places them at the disposal of "the person entitled to take delivery." UNCITRAL accepted a proposal to begin the limitation period on the day the operator notifies the recipient of the loss or on the day on which the recipient may treat the goods as being lost under Article 5(4), "whichever is earlier."⁹⁷

The draft convention provides that the day on which the limitation period begins shall not be counted in establishing the period. Furthermore, the operator may, by agreement, extend the period of limitations "in writing." Possibly paperless communication would be preferable to paper communication. It is possible that the convention should define "writing" as including electronic communication.⁹⁸

Recourse actions may be brought against the operator subsequent to the 2 year time period if "instituted within 90 days after the carrier or other person has been held liable in action against himself or has settled the claim upon which such action was based." Notice of the claim must be given to the operator within a reasonable period of time after it is filed.⁹⁹

Some delegations were of the view that a "reasonable" period of time was too vague and should be replaced by a definite time period or that immediate notice should be required. These proposals were

⁹⁵Article 11(5). See Hamburg Rules, Article 19(5).

⁹⁶UNCITRAL plenary report at 28.

⁹⁷Article 12(1).

⁹⁸Text supra at note 26.

⁹⁹Article 12(5).

not adopted. UNCITRAL did, however, accept a proposal to include not only reference to situations where the operator has been held liable, but also situations in which the operator has terminated a claim by settlement. UNCITRAL also accepted that "recourse action" is understood to include judicial actions as well as actions by arbitration.¹⁰⁰

Article 13: Contractual Stipulations

The operator and his customers may not make any contractual stipulations which derogate from the convention; except that they may agree to increase the responsibilities and obligations of the operator.¹⁰¹ This is a customary provision in the liability conventions.

The United States proposed a refinement of this provision excepting extension of the maritime bill of lading to cover terminal operators from the prohibition on contractual stipulations.¹⁰² In view of the satisfactory amendments to Article 1(a) clarifying that the operators who are responsible for the goods "under applicable rules of law governing carriage" shall not be defined as operators under the draft convention, it was not considered necessary to belabor this point further.

Article 14: Interpretation of the Convention

Uniformity of its application and regard to its international character are the two objectives in interpreting the convention. These objectives in Article 14 are customary in conventions on liability and consequently do not cause controversy.¹⁰³

Article 15: International Transportation Conventions

The draft convention, Article 15, would not change any rights or obligations under other international transportation conventions which are binding on the parties to the convention on transport

¹⁰⁰UNCITRAL plenary report at 29-30.

¹⁰¹Article 13(1).

¹⁰²A/CN.9/319 at 16.

¹⁰³The delegations of some countries favor the simple formulations of the Hamburg Rules, Article 3, to have regard to "the need to provide uniformity;" other delegations favor the more elaborate formulation of the Convention for the International Sale of Goods, Article 7, The United Nations International Commission on International Trade Law, 116 at 117, which refers to the need to observe "good faith in international trade," and leaves unsettled questions to be resolved by the rules of private international law.

terminal operators' liability. Neither would it modify national laws "giving effect to or derived from a convention relating to the international carriage of goods."¹⁰⁴

As provided in the Convention on International Sale of Goods and in transportation conventions,¹⁰⁵ there is a practice to exclude matters within the scope of other conventions from the application of the convention under elaboration in order to avoid confusion, overlap and conflicts. It is a way of consciously delimiting the scope of the new convention.

The delimitation principle is already adopted by implication elsewhere in the draft convention, Article 1(a), which by definition excludes a person from being an operator "whenever he is responsible for the goods under applicable rules of law governing carriage."

The reference in Article 15 to national laws "giving effect to or derived from" transportation conventions is meant to refer to the practice of many states to establish uniformity of law, not by becoming a party to the convention which establishes uniformity, but by adopting national legislation which has provisions identical to those of such a convention. Thus, the United States originally adopted the Hague Rules in 1936 by legislation without ratification of the convention (although the convention was ratified the following year).¹⁰⁶ Likewise the Federal Republic of Germany has adopted the Visby Rules by legislation. The objective is to preserve international uniformity of law.¹⁰⁷

The United States proposed deletion of Article 15, stating that the principle of delimitation is sufficiently expressed in Article 1(a), which excludes activities governed by carrier rules of law from the scope of the convention on transport terminal operators' liability.¹⁰⁸ The United States continues to favor deletion of Article 15 lest this article be used as a means to vary provisions of this convention, designed to be uniform, by applying local laws allegedly derived from some bilateral or multilateral convention.

Linguistically this article needs to be rewritten because it may be understood to provide that national law will prevail. That is not the

¹⁰⁴Article 15.

¹⁰⁵U.N. Convention on Contracts for the International Sale of Goods, Article 90, *supra* note 103, 116 at 133. Driscoll and Larsen, *The Convention on International Multimodal Transport of Goods*, 57 *Tul.L. Rev.* 193 at 272.

¹⁰⁶The International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, 49 *Stat.* 1207; 51 *Stat.* 233.

¹⁰⁷A/CN.9/SR.419 at 3.

¹⁰⁸A/CN.9/319 at 17.

intention of the article. The intention is to delimit the scope of the convention's application.¹⁰⁹

Article 16: Unit of Account

The Unit of account used for measurement of liability limits is the Special Drawing Right (SDR) of the International Monetary Fund. States which are not Members of the Fund and which do not use the SDR are required to express liability limits in their national currency. These states are to convert liability limits into national currency in a manner which states in their national currency "the same real value" as the SDR.¹¹⁰

III.
FINAL CLAUSES

Article 17: Depositary

The Secretary General of the United Nations will be the depositary of the convention on the liability of operators of transport terminals in international trade.¹¹¹

Article 18: Signature, Ratification, Acceptance, Approval and Accession.

The draft convention contains standard language for signature, ratification, acceptance, approval and accession to the convention.¹¹²

Article 19: Application to Territorial Units

Article 19 contains a clause permitting states having political subdivisions, such as Canada's Provinces and Territories, to become a party to the convention for less than their entire territory.¹¹³ This is a much used clause in conventions and is intended particularly to

¹⁰⁹A convention by means of such an article "allows for a number of exceptions which, taken together, reduce its mandatory application," see TD/B/C.4/315 at 9.

¹¹⁰Article 16. This formula was designed in the 1975 Montreal Protocol No. 4 to the Warsaw Convention, Article VII, to accommodate centrally planned economies which are not members of the International Monetary Fund (IMF). See *infra* note 120.

¹¹¹Article 17. Vienna Convention on the Law of Treaties (hereinafter Vienna Convention), Articles 76-78, A/CONF.39/27, (1969).

¹¹²Article 18. Vienna Convention Articles 6-18.

¹¹³Article 19.

accommodate the needs of Canada. The practical effect is to permit Canada to become a party to the convention for some of its Provinces and Territories before all have adopted implementing legislation.

Article 20: Reservations

The draft convention does not permit reservations to be made.

Several delegations favored permitting various reservations. One delegation would like to permit a reservation to Article 12 on limitations of actions because this country does not have national prescription laws. Another country would like to limit the application of the convention to goods in maritime carriage. However, the vast majority of UNCITRAL's Member States favored no reservations for the sake of maximum uniformity of law.¹¹⁴

Article 21: Effect of Declarations

States may, at the time of signature, make written declarations and may confirm such declarations at the time of ratification. Declarations will come into effect when the treaty enters into force.¹¹⁵

Article 22: Entry into Force

Under Article 22 the convention would come into force one year from deposit of the fifth instrument of ratification.

Several delegations pointed to a high number of required ratifications for entry into force as being the reason why so many transportation conventions are not yet in force. The argument is that states are reluctant to ratify when they know that their ratifications will not result in entry into force until an indefinite later time and are more likely to ratify a convention which is in force than one which will enter into force at an uncertain future date. Thus, if states are serious about having a convention they should establish a low number of ratifications for entry into force.¹¹⁶

Several delegations wanted the same number of ratifications for entry into force required by the Hamburg Rules, 20 ratifications.¹¹⁷ However, most states are of the view that the transport terminal

¹¹⁴Article 20. Vienna Convention, Articles 19-23.

¹¹⁵Article 21.

¹¹⁶UNCITRAL plenary report at 34-35.

¹¹⁷Id.

operators' liability convention is not linked to and need not follow the Hamburg Rules.¹¹⁸

Article 23: Revision and Amendment

The depositary is to convene a conference to revise and amend the convention at the request of one third of the States Parties. The convention will have entered into force before such a conference may be convened.¹¹⁹

Article 24: Revision of Limitation Amounts

The draft convention, Article 24, contains a separate and specific article on revision of liability limitation amounts. The article is based on a model provision for conventions setting liability limits prepared by UNCITRAL in 1982 at its fifteenth session.¹²⁰ The sample provision was modified to suit the special circumstances of terminal operators' liability.¹²¹

A. Time of Revision

UNCITRAL rejected an automatic limitation amount revision procedure triggered by changes in related transportation conventions. Instead a revision committee will be convened by the depositary upon the request of at least one fourth of States Parties. The depositary is also required to convene the revision committee within the first year after entry into force, if the convention enters into force more than five years after the date it was opened for signature.¹²²

¹¹⁸The diplomatic conference will reconsider the number of ratifications necessary for entry into force. The 1968 Visby Protocol, *supra* note 64, required 10 ratifications for entry into force, and the 1979 Protocol to the Visby Protocol required only five ratifications for entry into force.

¹¹⁹Article 23.

Larsen, *New Work in UNCITRAL on Stable, Inflation-Proof Liability Limits*, 48 *J. Air L. & Com.* 665.

¹²¹A/CN.9S/R.419 at 4-10.

¹²²*Id.*

B. *Place*

After the depositary has given notice to the revision committee it shall meet on the occasion and at the meeting place of the next UNCITRAL plenary session.¹²³

C. *Relevant Criteria*

The revision committee is to consider all relevant factors, including (1) amendments of the liability limits of transport-related conventions, (2) value of goods processed by operators, (3) cost of services, (4) cost of insurance, (5) average level of damages, and (6) cost of utilities.¹²⁴ Thus the changes in other transport liability conventions will become a factor in determining the amount of changes in liability limits.

D. *Amendment Procedure*

Amendments of liability limits will require a two thirds majority of committee members present and voting. However, liability limits may not be amended until five years after entry into force of the convention.¹²⁵

E. *Tacit Acceptance of Amendments*

Amendments adopted by the revision committee shall be deemed to have been accepted by contracting states 18 months after contracting states have been notified by the depositary, unless at least one third of the contracting states during that time inform the depositary that they do not accept the revision. Any amendment shall enter into force 18 months after its acceptance. States which may have opposed a revision will, however, be bound by it, unless they denounce the convention at least one month before the effective date of the revision.¹²⁶

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶A/CN.9/SR.420 at 2. For a discussion of the International Maritime Organization's practice on tacit amendment of conventions, see Larsen, *supra* note 120, at 685-689.

F. *Applicable Liability Limits*

States which become parties to the convention after revised liability limits have been adopted by the committee, but before they have been accepted, will become subject to the new limits when they enter into force. States which become parties to the convention after entry into force of the new limits will become parties to the convention as revised. Finally, the applicable limits will be those which are in effect on the date of the occurrence of the loss, damage or delay of the goods.¹²⁷

IV. CONCLUSION

This article has described the developments at the 1989 UNCITRAL plenary session which approved the text of the draft convention.¹²⁸ It is clear from the text that the draft convention is uniquely adapted to the subject of terminal operation. It is not an extension of any modal legal regime governing air, marine, road or rail carriage. Nevertheless, the proposed liability system is designed to be compatible with all the existing transportation regimes. The United States has supported this approach as being most equitable and fair to all parties and also being most likely to find universal acceptance.

Consequently, the draft convention should be evaluated only as to how it would, or would not, improve the law applicable to transport terminal operation.

Comments on this article and on the draft convention are invited.¹²⁹ This article describes a number of active issues for the diplomatic conference upon which comments would be welcome. The following list of issues is illustrative but not exhaustive:

1. Should shipped, empty containers be construed as "goods" under the convention?
2. Should the convention fill the gaps between the transportation conventions more perfectly?
3. Should operators who are stevedores be required to check and state the condition and quantity of the goods in the customers' documentation presented to the operators?
4. Should electronic signatures be permitted unrestricted by local law?
5. What should be the liability limits of the operator?

¹²⁷Article 24(10).

¹²⁸UNCITRAL plenary report, Annex I.

¹²⁹See the lead footnote for the addresses to which comments should be sent.

6. Will the operator's contractual increase of liability affect the limited liability of the operator's servants, agents and independent contractors under the convention?
7. Should the operator be permitted to consider goods to be abandoned if not claimed within 30 days?
8. Should the convention define "writing" as including electronic communication?

