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Joseph Sweeney  
*Fordham University School of Law*

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## *The Uniform Rules on the Liability of Operators of Transport Terminals*

PAUL B. LARSEN\*  
JOSEPH C. SWEENEY\*\*  
AND PATRICK J. FALVEY\*\*\*

### INTRODUCTION

The Working Group on Transport Terminal Operators' Liability of the United Nations Commission on International Trade Law (UNCITRAL) has proposed draft Uniform Rules on the liability of such operators. The functions of the Working Group are now at an end, and the draft will next be considered in detail at the UNCITRAL Plenary Session in May of 1989. While the Plenary will examine all issues anew, it will use the Working Group's draft as a basis for this examination. The discussions in the Plenary will not duplicate those in the Working Group because more countries and international organizations will participate in the Plenary.

It is not relevant to consider the issue of U.S. adoption of the Uniform Rules at this stage, since the final content of the Rules is not yet known. The only objective of the Working Group was to assist UNCITRAL in shaping the best possible legal instrument. Because all issues can be reopened at the Plenary it is important that they be

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\*Attorney, U.S. Department of Transportation; U.S. Representative on the UNCITRAL Working Group on International Contract Practices.

\*\*Professor of Law, Fordham University; Alternate U.S. Representative on the Working Group; Member, Board of Editors, Journal of Maritime Law and Commerce.

\*\*\*General Counsel and Deputy Director, Port Authority of New York and New Jersey; Adviser to the U.S. Delegation to the Working Group.

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.

The entire text of the draft Convention is reproduced in this article, with the authors' comments following each article.

Because it may ultimately be decided to recommend uniform rules regulating terminal operators' liability, rather than a convention, the draft approved by the Working Group is sometimes referred to herein as the "Uniform Rules."

Comments on this article 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.

studied thoroughly within the United States, so that the U.S. Delegation will be better able to represent U.S. interests in the Plenary discussions.

The report on which this article is based describes nearly all of the issues that were raised during the Working Group's discussions. The following list of issues is illustrative but not exhaustive:

1. Should the Uniform Rules apply only to those operators who undertake to operate under the Rules and are recognized as terminal operators?
2. Should stevedores be included or excluded from the application of the Uniform Rules?
3. What regime should govern the terminal operator's liability?
4. What should be the limits on liability of the terminal operator?
5. Should the liability limits be breakable in the case of intentional torts?
6. To what extent should servants and agents be entitled to limit liability?
7. To what extent should servants and agents lose their rights to limit liability?
8. Should the terminal operator have the right to recover damages from shippers for improperly packaged dangerous goods?
9. Should terminal operators be precluded from selling leased containers?
10. How should liability limits be adjusted for inflation?
11. Should the Uniform Rules be made paperless *i.e.*, should computerized notices, requests, and other documentation be accepted?

## BACKGROUND OF THE DRAFT CONVENTION

At its sixteenth session (1983) UNCITRAL decided to place the subject of the liability of operators of transport terminals (OTT) on its work program. Following the offer of the International Institute for the Unification of Private Law (UNIDROIT) to do so, UNCITRAL requested UNIDROIT to submit its preliminary draft Convention on the Liability of International Terminal Operators to UNCITRAL for further work in its more diverse and global forum. At its seventeenth session (1984) UNCITRAL decided to assign the work to its Working Group on International Contract Practices. The seventeenth session also decided that the Working Group could consider other relevant issues in addition to those raised in the UNIDROIT draft. The seventeenth session scheduled the Working Group's first meeting for December 3-14, 1984 in Vienna. The eighteenth session of UNCI-

TRAL (1985) approved the Group's first report and requested the UNCITRAL Secretariat to prepare a study of the liability of transport terminals,<sup>2</sup> and prepare draft Uniform Rules governing such liability.<sup>3</sup> This comment is based on the U.S. Delegation's report on the fourth and final meeting of the Working Group.

While the United States did not participate in the preparation of the preliminary draft convention by a group of experts under the auspices of UNIDROIT the United States has traditionally participated in all of UNCITRAL's work. The Departments of State and Transportation believe that the United States should participate in UNCITRAL's work on this project to ensure that U.S. legal and commercial interests are given full consideration, whether or not the United States ever adopts the end product. Because of the interest in this project in Europe it is quite likely that U.S. trade will eventually be affected.

In conformity with past practice in preparing for UNCITRAL work projects, a Study Group of the Secretary of State's Advisory Committee on Private International Law was formed in 1984. The Group is made up of practicing lawyers, house counsel for corporations, law professors with expertise in the field, and representatives of insurance, business and trade associations having a direct interest in the carriage and warehousing of goods in international trade. The Group met for the first time on December 13, 1985, and a second meeting was held on December 11, 1987 to develop guidance for the January 1988 session of the UNCITRAL Working Group.<sup>4</sup> The Study Group will meet again to prepare for the 1989 UNCITRAL Plenary Meeting, which will review and reconsider all issues. The Study Group will consider the report of the UNCITRAL Working Group, *inter alia*, to provide further guidance for the U.S. Delegation.

The purpose of a convention on terminal operators' liability is to promote world-wide uniformity of law in order to facilitate international trade. One purpose of this project to unify the law is to close gaps in the liability systems outside of the existing transportation conventions. Such conventions have been adopted widely; for example, the Warsaw Convention on air carriers' liability has been adopted by more than 100 countries including the United States; maritime bills

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<sup>2</sup>Liability of Operators of Transport Terminals, A/CN.9/WG.II/WP.55 (All documentation is UNCITRAL's, unless otherwise indicated).

<sup>3</sup>A/CN.9/WG.II/WP.56.

<sup>4</sup>See Minutes of the Study Group's Meeting of Dec. 11, 1987, Annex I to this article.

of lading are governed by the Brussels Convention of 1924,<sup>5</sup> to which the United States is also a party; and most European countries have adopted international conventions on road and rail carriers' liability.<sup>6</sup> A multimodal convention on liability of multimodal operators<sup>7</sup> was adopted in 1980, but has not yet entered into force. These conventions govern carriage but leave open the subject of liability of non-carrying intermediaries for loss of and damage to goods before and after carriage. While shippers would be able to recover from multimodal operators (MTOs) when and if the Multimodal Convention entered in force, the transport terminal operators' liability to the MTO would be governed by different local laws. Therefore it was thought desirable to establish an international uniform legal regime for terminal operators in order to protect such operators, and to permit recourse actions by carriers, multimodal operators, freight forwarders and other interested parties.

Prior to the January 1988 Working Group session the UNCITRAL Secretariat had prepared a revised text of draft Uniform Rules on the liability of operators of transport terminals, based on discussions and decisions at the previous session of the UNCITRAL Working Group.<sup>8</sup> The Working Group reviewed and redrafted all of the articles and prepared a draft convention which was placed before the 21st session of the UNCITRAL Plenary in April, 1988. That Plenary decided to consider the draft Convention at its next (22nd) session, and to send the draft to all States and interested international organizations for comments. The Secretariat will prepare a compilation of comments received and will also draft final clauses for the 22nd session.

## THE DRAFT CONVENTION

### *Article 1—Definitions*

In the text of this Convention:

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<sup>5</sup>The International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155 (The Hague Rules), implemented by the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-15.

<sup>6</sup>Convention Concerning International Carriage By Rail (COTIF), Berne, 1980, (Cmd. 8535), and Convention on the Contract for International Carriage of Goods by Road (CMR), 1956, 399 U.N.T.S. 189.

<sup>7</sup>United Nations Convention on the International Multimodal Transport of Goods, reprinted in Appendix II to Driscoll & Larsen, *The Convention on International Multimodal Transport of Goods*, 57 Tul. L. Rev. 193 (1982)

<sup>8</sup>Liability of Operators of Transport Terminals, A/CN.9/WG.II/WP.60.

- (a) "Operator of a transport terminal" hereinafter referred to as "Operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person shall not be considered an operator to the extent that he is responsible for the goods as a carrier or multimodal transport operator under applicable rules of law governing carriage;
- (b) "Goods" includes a container, pallet or similar article of packaging or transport if the goods are consolidated or packaged therein and the article of packaging or transport was not supplied by the operator;
- (c) "International carriage" means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;
- (d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;
- (e) "Notice" means a notice given in a form which provides a record of the information contained therein;
- (f) "Request" means a request made in a form which provides a record of the information contained therein.

### *Comment*

Paragraph (a) defines the term "operator" without referring solely to his safekeeping functions. The reference to "goods involved in international carriage" in the same paragraph may be duplicative of the scope provision in Article 2(1); however, the January 1988 Working Group meeting reviewed it as a convenient reminder that the Convention applies only to goods in international carriage. Stevedores are presently included within the definition of a transport terminal operator. The UNCITRAL Plenary will probably revisit and discuss this issue. It should be noted that the U.S. Study Group is not in agreement on this issue. Shippers and insurers favor inclusion of stevedores, because, in their view, it does not make sense to exempt 90% of all terminal operational functions which do not involve storage from the application of the Uniform Rules. Such an exemption would eliminate approximately 90% of the functions covered by the proposed draft Convention. In the U.S. Study Group the representative of the stevedores favors exclusion of stevedores from the Rules. There is agreement, however, that stevedores should be treated no less favorably than carriers.

The UNCITRAL Working Group was of the view that exclusion of stevedores would leave a large gap in rules designed to fill gaps. The

Group experienced great difficulty in separating stevedoring operations and terminal operational functions. This definitional dilemma is, in part, caused by changes in the traditional functions of terminal operators. They now perform a multitude of functions, the storage function being one of the less important.

The Group believed that the stevedores should receive "comparable protection under the uniform rules"<sup>9</sup> as they would under the liability rules applicable to the carriers under transport conventions.

It should be noted that articles of packaging or transport are not included within the definition of goods in Paragraph (b) if they are used only for the purpose of transporting the goods. Transport conventions, either specifically or by interpretation, have extended the definition of "goods" to include packaging and its exclusion here created the substantial problem subsequently dealt with under Article 10, concerning the right of the terminal operators to sell the very valuable containers—usually leased—in which the goods are packed, to satisfy the operator's unpaid charges. Such containers, to be excluded, must be used for the purpose of consolidation or packaging of the goods. This limitation will eliminate many means of transport, such as barges, railway wagons, trailers and chassis from the application of the Uniform Rules on terminal operators' liability.

Paragraph (c) evidences the Working Group's adoption of the U.S. proposal to define international carriage as carriage in which the places of departure and destination are identified as being located in different States when the goods are taken in charge by the terminal operator.

Paragraph (d) defines transport-related services as including storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing. It should be noted that "operator of a transport terminal" is defined in Paragraph (a) as a person performing "transport-related services," which, in turn, would include stevedores' services. However, services which are not related to the transportation of the goods are not included. For example, financial services related to the movement of goods are not included, nor is the manufacture or repackaging of the goods.

Paragraph (e) resulted from the Working Group's attempt to define "notice." The U.S. Delegation sought to establish that a record of the notice of loss, damage or delay and of other notices should be made

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<sup>9</sup>Report of the Working Group on International Contract Practices on the Work of its Eleventh Session, New York, 18-29 January 1988, A/CN.9/298, at 5 (hereinafter referred to as "Working Group Report").

to facilitate the handling of subsequent claims.<sup>10</sup> U.S. insurers have particularly emphasized the need for maintaining such records. This effort was successful, so that Paragraph (e) now would require that any notice "must be given in a form which provides a record of the information contained therein." The view prevailed that the fact that notice was given and the contents of such notice should be recorded.

The U.S. Delegation also made a major successful effort to permit paperless records. Therefore Paragraph (e) would permit computer-to-computer communication.

Likewise Paragraph (e) provides that any request may be "made in a form which provides a record of the information contained therein." For example, Article 5(3) provides that "delay" in handing over the goods occurs when the operator fails to hand them over within a reasonable time after receiving a request from the person entitled to the goods. Such a request would be subject to Paragraph (e).

### *Article 2—Scope of Application*

(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

(a) When the transport-related services are performed by an operator whose place of business is located in a contracting State, or  
(b) When, according to the rules of private international law, the transport-related services are governed by the law of a contracting State.

(2) If the operator has more than one place of business, the place of business is that which has the closest relationship to the transport-related services as a whole.

(3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence.

### *Comment*

Article 2 raises the issue whether States could apply the Uniform Rules only to those operators who undertake to operate under the Rules and who are recognized as being terminal operators. Determination of this matter may influence States in deciding whether or not to adopt the Rules. The U.S. Study Group did not support such an approach, because it would result in lack of uniformity and predictability of the applicable legal regime.<sup>11</sup>

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<sup>10</sup>Id. at 9.

<sup>11</sup>Annex I.



Earlier drafts reflected experiments with various rules of private international law (*lex loci contractus*, *lex loci rei sitae*, and others), but no traditional formula was satisfactory, especially since in Europe terminals are frequently located on both sides of an international border. Accordingly the model chosen was taken from the 1980 Vienna Convention on the International Sales of Goods (in force since January 1, 1988).

Paragraph (1) also reflects the changes made by the Working Group in the definitions in Article 1. The Uniform Rules would apply to transport-related services performed by an operator whose business is located in a contracting State or when, under private international law, the services are subject to the law of a contracting State. It was noted that the Uniform Rules do not require the services to be performed at a transport terminal, nor do the Rules define a "terminal."

Paragraph (2) deals with the problem of an operator who has more than one place of business. The draft Uniform Rules prefer the place of business with the closest relationship to the transport-related services. The approach used derives from Article 10 of the 1980 Convention on Contracts for the International Sale of Goods (to which the United States is a party).<sup>12</sup>

Under Paragraph (3) the operator's habitual residence is to be considered as the operator's place of business if he has no other.

UNCITRAL may revisit the issue of whether it is necessary to provide further protection for the terminal operator who does not know that goods are in international carriage. Earlier drafts attempted to do this, but there was difficulty in settling on reasonable rules for the burden of proof. The question will be whether the operator knew that the goods were in international carriage without looking at the bill of lading or waybill.

### *Article 3—Period of Responsibility*

The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed them over or made them available to the person entitled to take delivery of them.

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<sup>12</sup> 1982, XI V.B. UNCITRAL at 151, U.N. Doc. A/CONF.97/18, Annex I.

*Comment*

This provision corresponds to a similar provision in Article 4(2)(b)(ii) of the Hamburg Rules,<sup>13</sup> except that a slightly different phrasing is used. The UNCITRAL Working Group decided against conformity with the Hamburg Rules' language "placed them at the disposal of" and, instead, decided on the phrase "made them available to" in order to include other modes of carriage in addition to carriage by water.

*Article 4—Issuance of Document*

(1) The operator may, and at the customer's request shall, without reasonable delay, either:

(a) Acknowledge his receipt of the goods by signing a document produced by the customer identifying the goods and stating their condition and quantity, or

(b) Issue a signed document acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.

(2) If the operator fails to act in accordance with either subparagraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparently good condition.

(3) The document referred to in subparagraph (b) of paragraph (1) may be issued in any form which preserves a record of the information contained therein.

(4) The signature on the document under paragraph (1) may be in handwriting, printed, in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means.

*Comment*

Paragraph (1) recognizes the current practice that terminal operators most often follow, which is to use the documentation of their carrier customers. The operators do not usually issue their own documentation. Under the wording of this paragraph the terminal operator may acknowledge receipt of the goods either by using the customer's documentation or by issuing his own document.

The Working Group was of the view that the text of Paragraph (1) provides adequate flexibility for the operator to deal with customers

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<sup>13</sup>United Nations Convention on the Carriage of Goods by Sea (hereinafter referred to as "Hamburg Rules"). 1978, U.N. Doc. A/CONF.89/13. The Hamburg Rules provisions (Art. 4) drew on the earlier wording and interpretation of the 1893 Harter Act, 46 U.S.C. §§ 190-96 (1982).

to their mutual satisfaction. The U.S. Delegation proposed and the Working Group accepted the understanding that the operator can satisfy the requirements of Paragraph (1) "by delivering to the customer a document issued by a third party, such as a carrier, signed on behalf of the operator by the third party."<sup>14</sup>

One delegation suggested that the operator should be able to enter reservations on the documentation regarding the condition of the goods and their quantity. Such a reservation would be desirable in those situations where the operator does not have adequate opportunity to check the goods and is asked to accept documentation issued by a third party. It is the understanding of the Working Group that an operator is permitted to enter such reservations. With this understanding specific language in the text was not considered necessary.<sup>15</sup>

Some delegations urged that the language of the text be sufficiently flexible to permit acceptance of goods without documentation being issued at all if the terminal operator and the customer so agree. The U.S. Delegation supported this point of view and the current draft follows it. However, several other delegations favored the issuance of a document under all circumstances.

The paragraph does not define what would be "unreasonable delay" in acknowledging or issuing documentation. The Working Group assumed that the customary practice of the terminal operators would be taken into consideration in determining what is unreasonable delay.<sup>16</sup>

The U.S. Delegation was able to achieve acceptance of the principle that the phrase "reasonable means of checking" in Article 4(1)(b) would not require a terminal operator to open a sealed container in its charge.<sup>17</sup>

Paragraph (2) was accepted by the Working Group without discussion.

Paragraph (3) provides that the operator may issue the document referred to in Paragraph 1(b) "in any form which preserves a record of the information contained therein." Again the U.S. Delegation advocated paperless documentation and this language assures that paper documentation is not required; electronic data processing is

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<sup>14</sup>Working Group Report, *supra* note 9, at 9.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 8.

<sup>17</sup>*Id.* at 9. A similar understanding applies to the same phrase in the Hamburg Rules, Art. 16(1).

satisfactory. The Working Group noted that this paragraph does not state how long the operator must preserve a record.<sup>18</sup>

It should be noted that Paragraph (4) no longer requires a handwritten signature by the operator. This development will also facilitate paperless documentation. However, if the operator does not sign the document the operator is presumed to have accepted the goods in apparent good order.<sup>19</sup> The U.S. Delegation had proposed a paragraph stating that the absence from the document of information required in Paragraph (1) should not affect the existence or validity of the contract between the customer and the operator. They argued that other legal instruments, such as the Warsaw Convention on air carriers' liability, contain such a provision. The Working Group was, however, of the view that the documentation under the Warsaw Convention has a more vital role in the liability regime of that convention than does the document under the Uniform Rules on terminal operators' liability. Such a provision was therefore not included.<sup>20</sup> However, the issue may be raised again at the UNCTRAL Plenary Session.

#### *Article 5—Basis of Liability*

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as for delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

(2) Where a failure on the part of the operator, his servants, agents or other persons of whose services the operator makes use for the performance of transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.

(3) Delay in handing over the goods occurs when the operator fails to hand them over or make them available to a person entitled to take delivery of them, within the time expressly agreed upon or, in the

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<sup>18</sup>Id.

<sup>19</sup>See Article 4(2).

<sup>20</sup>Working Group Report, *supra* note 9, at 9-10.

absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

(4) If the operator fails to hand over the goods or make them available to a person entitled to take delivery of them within a period of 30 consecutive days after the date agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, the goods may be treated as lost.

### *Comment*

In regard to Paragraph (1) there was general agreement within the Working Group on the existing text. A liability system of presumed liability of the terminal operator is consistent with the legal systems of most transportation legal regimes.<sup>21</sup> A question exists whether the reference to "loss" in the first sentence includes consequential loss. It is noted that this phrasing is well established in the Multimodal Convention and the Hamburg Rules.<sup>22</sup> Furthermore, the loss is subject to limitation of liability. Consequently, the word "loss" was retained.

Paragraph (2) provides a uniform system for exculpating the operator to the extent that the loss is attributable to faults of carriers, shippers, or other parties. In line with Paragraph 1, the burden is on the terminal operator to show the amount of loss not attributable to him.

Paragraph (3) would establish a uniform regime for loss from delay. Without such a provision delay would be subject to varying and inconsistent national laws. This provision would protect carriers and shippers who might otherwise have difficulty recovering from those terminal operators who under their national laws can restrict their liability for delay.

Reference is made to the definition of "request" in Article 1(f); it may be made in any form which preserves a record of the request.

Paragraph (4) reflects the fact that most members of the Working Group favored a fairly short time limit after which the goods may be treated as lost. A time period of 30 days was adopted. Again the definition of "request" in Article 1 is relevant.

### *Article 6—Limits of Liability*

(1) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount

<sup>21</sup>Id. at 10. (See Hague Rules, Art. IV(2)(q).)

<sup>22</sup>Supra note 7, at Art. 16, and supra note 13, at Art. 5.

not exceeding [2.75] units of account per kilogram of gross weight of the goods lost or damaged. However, if the goods are involved in international carriage which does not, according to the contracts of carriage, include carriage of goods by sea or by inland waterways, the liability of the operator shall be limited to an amount not exceeding [8.33] units of account per kilogram of gross weight of the goods lost or damaged.

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred.

(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3).

### *Comment*

The Working Group did not negotiate the amount of the limit of liability; such issues have traditionally been negotiated at the diplomatic conference. The figure in brackets in paragraph (1) is for purpose of illustration and was accepted by the Working Group as a compromise. However, the French Representative observed that this limit would result in inadequate compensation for goods carried by air.<sup>23</sup> The French Delegation proposed reservations which would enable them to apply Warsaw Convention limits to air terminal operations. Another delegation proposed a reservation permitting States to apply the Convention only to sea terminals.<sup>24</sup> The Working Group was of the view that it could not engage in a discussion of whether reservations should be permitted.<sup>25</sup> This subject will be discussed at a later time.

Some delegations still prefer a single limit, whereas others would tie the amount of the applicable limit to the mode of transportation. The Representative of the Federal Republic of Germany made a proposal to reintroduce a limitation based on the number of packages or shipping units. The package concept had been deleted in the previous session of the Working Group.<sup>26</sup> The German Delegate

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<sup>23</sup>Working Group Report, *supra* note 9, at 10.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 19.

<sup>26</sup>*Id.* at 11.

argued that the per package limit would be beneficial in the case of high value goods, because limitation by weight would not provide adequate compensation for such goods. However, the prevailing view in the Working Group was that a package limitation would make documentation under Article 4 difficult.<sup>27</sup> Many practical problems have arisen in connection with the per package limit in ocean transport and it is the source of much litigation in the United States. This issue will be reviewed in UNCITRAL's request for comments of Governments and will probably be discussed at the next Plenary meeting.

Since a limit per package was not adopted, the Working Group did not specify whether a container is or is not a package.

Paragraph (2) concerns the liability of the operator for delay in handing over the goods. The presently stated limit of liability is that of the Hamburg Rules, *i.e.*, two and a half times the charges of the operator. It was agreed that liability should not exceed the total charges for the consignment.

The Working Group noted that it would be difficult to calculate liability limits for delay under some circumstances. One example of such difficulty would be when the operator maintains a public terminal where the services are free because the Government requires the goods to pass through it. However, the Group believed that courts could resolve such difficulties by constructive application of the Rules.

Under Paragraph (3) the aggregate liability of the operator would not exceed his liability for total loss. There was no significant dissent from this concept.

Under Paragraph (4) the operator may agree to higher limits than those provided in this Article. Similar provisions are found in the Visby Amendments and the Hamburg Rules.

#### *Article 7—Application to Non-Contractual Claims*

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, 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 operator, or another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his

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<sup>27</sup>*Id.*

employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

### *Comment*

Paragraph (1) is based on similar provisions in the Hamburg Rules and the Visby Amendments.<sup>28</sup>

Paragraph (2) raises the issue whether the servants, agents or other persons of whose services the operator makes use should be entitled to the defenses and limits of the Uniform Rules, regardless of whether they acted within the scope of their employment. This language accepts the Working Group's view that scope of employment must be proved. It was not considered worthwhile to address the issue whether a minor deviation by the servant, agent or other person of whom use is made would deprive such person of the liability limits and defenses. This issue has been left to applicable national law.<sup>29</sup>

Paragraph (3) was considered useful, although a question may be raised whether it is strictly necessary because its essence is implicit in Paragraphs (1) and (2). Another question is whether this paragraph should make specific references to Articles 6(4) and 13(2). The current text follows the wording of the Hamburg Rules and the Multimodal Convention and omits such additional references.<sup>30</sup>

### *Article 8—Loss of Right to Limit Liability*

(1) The operator is not entitled to the benefit of the limit of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding the provision of paragraph (2) of article 7 a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limit of liability provided in article 6 if it is proved that the loss, damage or delay resulted from an

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<sup>28</sup>Supra note 7, at Art. 20, and supra note 13, at Art. 7.

<sup>29</sup>Working Group Report, supra note 9, at 11 and 19.

<sup>30</sup>Supra note 7, at Art. 20, and supra note 13, at Art. 7.



act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

### *Comment*

Paragraph (1) was the subject of considerable discussion in the Working Group.<sup>31</sup> One view was that the operator should not lose the right to limit liability if a servant acted intentionally or recklessly and that the reference to servants in this paragraph should be deleted. In support it was argued that the Hamburg Rules and the Multimodal Convention provide that only the operator's acts or omissions should be considered in determining loss of the right to limit liability. This view was not adopted, but it may be urged again.

It was argued that relatively unbreakable limits enable insurers to predict their risks and thus result in lower insurance costs than when the limits may be broken more easily. Furthermore, it was suggested that the customer, rather than the operator, can more efficiently insure against risks that exceed the liability limits. It was suggested that because a significant amount of additional loss, damage or delay is caused by the intentional or reckless acts of servants, agents and other persons used by the operators, if breakable limits were allowed, unlimited recovery would be a frequent occurrence, with the consequence that the Uniform Rules would be less attractive.

On the other hand, it was argued that the liability limits in Article 6 are low, and therefore they should be breakable. It was pointed out that the employees and other persons would be subject to unlimited liability under Article 8(2) but that they often are uninsured and would not have the financial resources to pay compensation; therefore the operator should be liable without limitation for their reckless or intentional acts.

It was also suggested that the approach in the Hamburg Rules was a package deal, the focus of which was the elimination of the nautical fault defense, which does not exist for the terminal operator, plus the low limit of liability and its virtual unbreakability.<sup>32</sup> Finally, it was pointed out that an incorporated operator acts only through servants and that such an operator could avoid loss of a right to limit liability for intentional or reckless acts if the reference to servants were removed.

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<sup>31</sup>Working Group Report, *supra* note 9, at 11-12.

<sup>32</sup>*Id.* at 12.

As currently drafted, this paragraph provides that the operator will be liable for the intentional and reckless acts of employees, but not for the acts of independent contractors used by the operator. The Working Group was of the view that "servants and agents" should not be interpreted so as to include independent contractors.<sup>33</sup> The Working Group agreed to examine the issue of the operator's unlimited liability for reckless and intentional acts of agents and servants at the UNCITRAL Plenary Session in 1989. The Working Group considers it important that governments review the extent to which economic efficiency and preferences of insurance interests should determine whether liability limits should not be breakable.

One delegation proposed that a claimant should be required to prove that employees acted within the scope of their employment before subjecting the operator to unlimited liability under Article 8(2).<sup>34</sup> Reference was made to a similar provision in the Warsaw Convention. Other delegates were of the view that such additional language was superfluous because it is implied that employees must be acting within the scope of their employment in order to be considered employees. However, another view was that Article 5(1) contains an ambiguity regarding whether the reasonable measures which will excuse the operator from liability refer only to reasonable measures taken by servants and agents within the scope of their employment. At the end of the discussion the Working Group could not agree to adopt this proposal.<sup>35</sup> However, the issue will probably be raised again.

Paragraph (2) provides that servants and agents and other persons of whose services the operator makes use may also forfeit the benefit of limited liability if they cause loss, damage or delay intentionally or recklessly. This provision could result in unlimited liability of the operator in those cases in which servants, agents, or other persons of whose services the operator makes use intentionally or recklessly cause loss, damage or delay. The reason is that a recourse action against the operator could result in unlimited liability of the operator in situations where he would not otherwise be held to unlimited liability. On the other hand Paragraph (2) will rarely be used, because actions are practically always brought against the operator, and not

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<sup>33</sup>Id. (This is consistent with similar discussions on the Visby Amendments and the Hamburg Rules.)

<sup>34</sup>Id.

<sup>35</sup>Id. at 13.

against servants, agents or other persons of whose services the operator makes use.

It may be argued that Paragraph (2) should be retained because of the relationship between Articles 7 and 8, *i.e.*, the servants and agents and other persons of whose services the terminal operators make use are entitled to the defenses and limits of the Uniform Rule the same as the operator. Consequently, Paragraph (2) is necessary to complete the legal scheme under which operators and their servants, agents and other persons of whose services they make use can benefit from the defenses and limits of the Uniform Rules, but with the possibility of loss of limitation of liability when their acts are intentional or reckless. This arrangement is identical to that found in the Hamburg Rules and the Multimodal Convention.<sup>36</sup>

#### *Article 9.—Special Rules on Dangerous Goods*

If dangerous goods are handed over to an operator without being marked, labeled, packaged or documented in accordance with any applicable law or regulation relating to dangerous goods, and if, at the time the goods are handed over to him, the operator does not otherwise know of their dangerous character, he is entitled:

- (a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and
- (b) To receive reimbursement for all costs to the operator of taking the measures referred to in subparagraph (a),

#### *Comment*

There was agreement within the Working Group that the Uniform Rules should deal with terminal operators' responsibility for dangerous goods. The operators should be informed of the dangerous nature of the goods; they should be permitted to take all precautions necessary to avoid danger to property and to persons, and should receive reimbursement for the cost of taking those precautions.

Often there is no contractual relationship between the shipper and the operator. Thus the Working Group agreed on a formula for Article 9 that imposes obligations generally, without identifying the specific person. The U.S. Study Group considered whether terminal opera-

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<sup>36</sup>Supra note 7, at Art. 21, and supra note 13, at Art. 8.

tors should have the right to recover damages from shippers for improperly packaged dangerous goods.<sup>37</sup> It appears that the Hamburg Rules formula,<sup>38</sup> under which carriers may obtain reimbursement from shippers for damage caused by improperly packaged dangerous goods, provides an acceptable analogy for the terminal operators' reimbursement from shippers for such damage.

The lack of reference in Subparagraph (a) to compensation for other types of losses does not imply that there is no compensation. It merely indicates that this issue is governed by other applicable law.

#### *Article 10—Rights of Security in Goods*

(1) The operator has a right of retention over the goods for costs and claims relating to the transport-related services performed by him in respect of the goods during the period of his responsibility for them. However, nothing in this Convention shall affect the validity under any applicable law of any contractual arrangements extending the operator's security in the goods.

(2) The operator is not entitled to retain the goods 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 operator has his place of business.

(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled to sell the goods over which he has exercised the right of retention provided in this article to the extent permitted by the law of the State where the operator has his place of business. The preceding sentence does not apply to containers which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of repairs of or improvements to the containers by the operator.

(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in other respects be exercised in accordance with the law of the State where the operator has his place of business.

#### *Comment*

Under Paragraph (1) the operator would have a right of retention, of the goods (*i.e.*, a possessory lien) to obtain compensation for the

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<sup>37</sup>See Attachment 1.

<sup>38</sup>*Supra* note 13, at Art. 13.

cost of services rendered. The operator and a customer would also be able to extend that security interest to cover other goods if such an extension was permitted under local law.

Paragraph (2) was accepted by the Working Group without much discussion. The operator may not retain possession of the goods "if a sufficient guarantee 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 operator has his place or business."<sup>39</sup> It may be difficult to find such an "official institution" in the United States; however, such arrangements are common in other countries.

Paragraph (3) provoked considerable discussion. The Working Group was in agreement that the operator should, as a last resort, have the right to sell the goods to satisfy a lien or other security interest, if permitted by the local law. Questions were raised concerning selection of the law of the place where the operator's services were performed as the governing local law. One delegation expressed a preference for application of the law of the State where the goods were located. The Working Group discussion returned to the questions raised in Article 2 and the resolution was again to use the Vienna Convention on the International Sale of Goods<sup>40</sup> as the model. The Group finally decided to select the law of the State where the operator has his place of business as the law applicable to the sale of the goods. Some terminals straddle borders between States and operators could be tempted to place the goods in the section of the terminal with the most favorable local law. For that reason application of the law of the location of the goods was objectionable. While the Working Group agreed that application of the law of the operator's place of business seemed the better solution, it was noted that this might establish a right to sell the goods when the law of the place where the goods are located does not permit such a sale.

The U.S. Delegation succeeded in obtaining a provision that while operators may sell goods to satisfy unpaid claims, they may not sell containers in which goods are stored if such containers belong to third parties, such as leasing companies. There was considerable discussion about this right of sale and an exception to the exception would continue the operator's sale of leased containers for costs and operators' repairs or improvement to the containers.<sup>41</sup> This question may be raised again at the UNCITRAL Plenary in 1989.

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<sup>39</sup>Working Group Report, *supra* note 9, at 19-20.

<sup>40</sup>*Supra* note 12.

<sup>41</sup>Working Group Report, *supra* note 9, at 14 and 20.

Which categories of people should be entitled to receive notice of sale? Should they include not only the owners of the goods but also the persons from whom the operator received the goods, and possibly others? Under the current text the operator's obligation to give notice is limited to the owner of the goods, the person from whom the operator received them, and the person entitled to receive them from the operator. Relevant is the definition of "goods" in Article 1(e), according to which provision notice must be given not only to the individual owners of the goods but also to the owners of separately owned "containers, pallets or similar articles of packaging or transport if the goods are consolidated or packaged therein and the article of packaging or transport was not supplied by the operator."

A rather nebulous phrasing is used regarding distribution of the proceeds of a sale, *i.e.*, that the operator shall account "appropriately" for the balance in excess of the sum due the operator, plus the reasonable cost of the sale. The reason is that in some countries sales are conducted by judicial authorities.

Finally, the Working Group decided that the right of sale should in other respects be conducted in accordance with the law of the place where the services were rendered by the operator. It was thought necessary to select the choice of law rule which would determine the governing legal system.

#### *Article 11—Notice of Loss, Damage or Delay*

- (1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator 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 handing over is *prima facie* evidence of the handing over by the operator of the goods as described in the document signed or issued by the operator pursuant to article 4 or, if no such document was signed or issued, in good condition.
- (2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given within 7 consecutive days after the day when the goods reached their final destination, but in no case later than 45 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.
- (3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.
- (4) In the case of any actual or apprehended loss or damage to the goods, the operator and the person entitled to take delivery of the goods

must give all reasonable facilities to each other for inspecting and tallying the goods.

(5) No compensation shall be payable for loss resulting from delay in handing over the goods unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

### *Comment*

The Working Group deleted a provision in Paragraph (1) for oral notice of apparent damage. While paper notice is not required by the new general definition of "notice" in Article 1(e), such notice "must be given in a form which provides a record of the information contained therein."<sup>42</sup>

Paragraph (2) raises the question of whether the notice period for non-apparent loss or damage should begin to run from the time of receipt of the goods by the person entitled to take delivery, or whether it should run from the time when the goods reach their final destination. It is generally thought that non-apparent damage will not ordinarily be discovered until the goods reach their ultimate destination. Notice would then have to be given within seven days. In no case may the notice period exceed 45 consecutive days from the day when the goods are handed over to the person entitled to receive delivery. The latter provision will protect the operator in those cases where the goods do not reach their ultimate destination for a long time after leaving the terminal. The 45-day notice period will establish certainty as to when the *prima facie* effect of failure to give notice begins. A question remains whether a different notice period should apply to claims against terminal operators than against air carriers under the Warsaw Convention and to ocean carriers under the Hamburg Rules.

A question was raised regarding the ambiguity of the phrase "final destination." It could refer to an inland container terminal where the container is left, or it could refer to the consignee's place of business. The Working Group agreed that the term "final destination" refers to "the final recipient of the goods who would be in a position to inspect them."<sup>43</sup>

A proposal to eliminate the seven-day notice period and instead to rely only on the 45-day period was not adopted.

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<sup>42</sup>See comment on Art. 1(e), *supra*.

<sup>43</sup>Working Group Report, *supra* note 9, at 15.

Paragraph (3) would make it unnecessary to give notice of loss or damage discovered during a joint survey by the person entitled to receive the goods and by the operator.

Paragraph (4) would require the operator and the persons entitled to take delivery of the goods to provide opportunity for each other to inspect the goods.

Paragraph (5) would entitle the operator to 21 days notice of loss from delay, commencing from the day when the goods were delivered. This notice period is shorter than the notice periods of the Warsaw Convention and the Hamburg Rules.<sup>44</sup> It was suggested during the Working Group discussions that a 21-day time period would be too long; however this suggestion was not adopted.

The Working Group agreed<sup>45</sup> that the time periods in Article 11 may be found too short in specific cases, and that the parties would be free to agree on longer time limits; however, such agreements would be subject to the constraints of Article 13(1), which nullifies all contractual stipulations which derogate from the provisions of the Uniform Rules.<sup>46</sup>

#### *Article 12—Limitation of Actions*

(1) Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

(2) The limitation period commences on the day on which the operator hands over the goods or part thereof to a person entitled to take delivery of them, or, in cases of total loss of the goods, on the day the operator notifies the person entitled to make a claim that the goods are lost, or, if no such notice is given, on the day that person may treat the goods as lost in accordance with article 5.

(3) The day on which the limitation period commences is not included in the period.

(4) The operator may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or declarations.

(5) A recourse action by a carrier or another person against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim

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<sup>44</sup>Supra note 7, at Art. 24, and supra note 13, at Art. 19.

<sup>45</sup>Working Group Report, supra note 9, at 14.

<sup>46</sup>See comment on Art. 13, *infra*.



against a carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator.

### *Comment*

Paragraph (1) would establish a 2-year limitation of time for suit. The Working Group agreed that the time when "judicial or arbitral proceedings have been instituted" refers to "the time when the proceedings were legally considered to have come into being, which depended on the applicable legal system."<sup>47</sup> The view was also expressed that the 2-year limitation period might be extended as provided by local law, but this view was not adopted.

Paragraphs (2)–(4) would establish the time when the limitation period would begin. The operator could extend the limitation period "in writing." It is possible that the reference to written extensions of time should be changed to provide for possible paperless communication. For example, any form of writing which provides a record of the information<sup>48</sup> might be deemed satisfactory. This issue may be raised during the UNCITRAL Plenary Session. However, these paragraphs were approved without significant discussion.

Paragraph (5) would provide that recourse actions against the terminal operator could be instituted after the 2-year limitation period had expired if instituted within 90 days after the original defendant (*e.g.*, a carrier) had been held liable or had settled the claim and if such defendant had given notice to the operator of the possibility of a recourse claim. In the Working Group a proposal was made and rejected that such an opportunity should also exist in those cases where the original defendant had settled a claim without an action having been brought.<sup>49</sup> Concern has been expressed that the terminal operator could be exposed to liability for too long a period of time if the original defendants waited to bring a recourse action until the original claim was settled. However, this concern was resolved by requiring that a reasonable period of notice of the potential recourse action be given to the terminal operator.

### *Article 13—Contractual Stipulations*

(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued

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<sup>47</sup>Working Group Report, *supra* note 9, at 15.

<sup>48</sup>See definition of "notice" in Art. 1(e), *supra*.

<sup>49</sup>Working Group Report, *supra* note 9, at 15.

by the operator pursuant to article 4 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 the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention.

### *Comment*

Article 13 was approved without change by the Working Group. At its previous session the Group had heard with interest the comments of the International Air Transport Association (IATA). The airlines have been concerned with the possible effect of the Uniform Rules on their ground-handling contracts, because airlines often contract with other airlines or with local ground-handlers for local terminal services. However, the IATA representative stated that the Uniform Rules would not clash with airline ground-handling contracts. The liability limits of the ground-handling contracts are identical to those of the Warsaw Convention. The IATA representative noted that the higher limits of the Warsaw Convention would prevail according to Article 13(2) of the Uniform Rules.<sup>50</sup>

### *Article 14—Interpretation of This Convention*

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.

### *Comment*

This article is similar to corresponding provisions in other liability conventions. Efforts were made at Working Group sessions to use the more lengthy formula of the Convention on the International Sales of Goods, but this simple formula, similar to that in the Hamburg Rules, seems to be adequate.<sup>51</sup>

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<sup>50</sup>Report of the Working Group on International Contract Practices on the Work of its Tenth Session, A/CN.9/287 at 21–22.

<sup>51</sup>Working Group Report, *supra* note 9, at 21.

*Article 15—International Transport Convention*

This Convention does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods.

*Comment*

The provision that the Convention shall not modify rights and duties arising under other transportation conventions, or under the laws of States "giving effect to or derived from a convention relating to the international carriage of goods" was included because some States have adopted the provisions of international transportation conventions by national legislation, without ratifying the conventions (as the United States did in 1936, in the case of The Hague Rules, which it did not ratify until 1937. The Federal Republic of Germany urged adoption of this formula, although some States doubted its wisdom). The Uniform Rules frequently defer to local law and this is merely another example of such deference, although the objective is to preserve the uniformity of international transportation law. This is not unlike a similar deference to mandatory national law in Article 19 of the 1980 Multimodal Convention.<sup>52</sup> This issue will probably be revisited.<sup>53</sup>

*Article 16—Unit of Account*

(1) The unit of account referred to in article 6 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 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 operation 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.

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<sup>52</sup>Supra note 7, at Art. 19.

<sup>53</sup>Working Group Report, supra note 9, at 21–22.

(2) The calculation mentioned in the last sentence of the preceding paragraph 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 6 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.

### *Comment*

Article 16 is consistent with similar provisions in other transportation conventions. It is in the interest of States to express limits of liability in SDRs in order to preserve international uniformity, but some formula is necessary to deal with States not members of the International Monetary Fund, so that eventual world-wide adoption of the Rules is not foreclosed by the problem of units of account.

### *Article 17—Revision of Limits of Liability*

- (1) The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6:
- (a) upon the request of at least one-quarter of the contracting States, or
  - (b) when an amendment of a limit of liability in respect of loss, damage or delay of goods set forth in one of the Conventions hereinafter named is adopted. The Conventions are:\*
- (2) The meeting of the Committee shall take place on the occasion and at the location of the session of the United Nations Commission on International Trade Law immediately following the event giving rise to the convocation of the meeting.
- (3) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:
- (a) the amount by which the limits of liability in a convention referred to in paragraph (1)(b) have been amended;
  - (b) the value of goods handled by operators;
  - (c) the cost of transport-related services;
  - (d) Insurance rates, including *inter alia*, cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;
  - (e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and
  - (f) The costs of electricity, fuel and other utilities.

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\*The Conventions will be listed in an Annex II when they are selected.—Eds.

(4) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

(5) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.

(6) Any amendment adopted in accordance with paragraph (4) shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one-third of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the Depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States 18 months after its acceptance.

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

(8) When an amendment has been adopted in accordance with paragraph (4) but the 18-month period for its acceptance has not yet expired, a State which becomes a Contracting State to this Convention during that period shall be bound by the amendment if it comes into force. A State which becomes a Contracting State after that period shall be bound by any amendment which has been accepted in accordance with paragraph (6).

(9) The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay.

### *Comment*

Article 17 would establish a way to up-date liability limits that have become distorted by inflation or deflation. It was decided that the liability limits should not be adjusted by an automatic procedure based on a price index. This result conformed with the U.S. position expressed at the twelfth session of the UNCITRAL Working Group on International Negotiable Instruments (1982). In the U.S. view reference to a price index is undesirable because it contributes to inflation and distorts commodity factor prices. The United States has consistently opposed such a concept in other U.N. bodies.<sup>54</sup>

According to Paragraph (1) the Working Group instead favored a system which would establish liability adjustment committees. Such

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<sup>54</sup>Larsen, *New Work in UNCITRAL on Stable, Inflation-Proof Liability Limits*, 48 J. Air L. & Com. 665, 679.

committees would be convened by the Depositary at the request of a minimum of one-fourth of contracting States, or when certain relevant transportation conventions' liability limits are amended. Which conventions are relevant will be determined at the UNCITRAL Plenary. The UNCITRAL Secretariat has prepared for that meeting a list of transportation conventions.<sup>55</sup> Chief among those are other liability conventions such as the Warsaw Convention, The Hague, Visby, and Hamburg Rules, the Multimodal Convention, the Convention Concerning International Carriage by Rail, and the Convention on the Contract for the International Carriage of Goods by Road. UNCITRAL is expected to review whether, for example, changes in conventions on inland water transport, oil pollution, and hazardous materials should also be considered.

Clearly, the conference which finalizes the Uniform Rules will consider those conventions that are in existence at the time of the conference.<sup>56</sup>

The Working Group agreed that the reference to when the liability limits of the transportation-related conventions are adopted refers to the time when the revision was adopted by the relevant revision conference or committee.<sup>57</sup>

For the purpose of reducing costs and promoting efficiency Paragraph (2) provides that meetings of the review committee shall take place immediately after an UNCITRAL session, at the location of such session.<sup>58</sup> Whether the UNCITRAL Secretariat will be able to service such a meeting will depend on the approval of appropriate U.N. administrative bodies.

Paragraph (3) provides that certain criteria, for example changes in other liability conventions mentioned in Paragraph 1, the value of goods handled by operators, the cost of services related to transportation, insurance rates, the average level of damages, and the cost of utilities, would be considered by a committee convened by the Depositary. Proposals were made to eliminate items on the list of criteria, for example the cost of services related to transportation, insurance covering job-related injuries to workers, and the cost of utilities.<sup>59</sup> Only minor revisions were made in the text.

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<sup>55</sup>Working Group Report, *supra* note 9, Annex II.

<sup>56</sup>*Id.* at 16.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

Article 9 of the 1977 Oil Pollution Convention<sup>60</sup> suggests additional criteria which deserve consideration, *e.g.*, information concerning events which may cause damage, increases and decreases in the cost of goods and services, and the availability of insurance coverage. Furthermore, the application of criteria could be mandatory or could be provided to the revision committee as a guide.

Paragraph 4 would require adoption of changes in the liability limits by a two-thirds majority of the review committee. The United States and other countries would be able to participate in any discussion of revised liability limits even if they did not ratify a convention on terminal operators' liability, but they would not be able to vote if they did not adopt the Convention. An amendment to the limits could be adopted by a two thirds majority of *Contracting States* present and voting.

Paragraph (5) provides that amendment of the liability limits could not be undertaken before the Convention had been opened for signature for at least five years. Thus a period of *status quo* would be required. Furthermore, it would also be possible that the review committee could be convened by the Depositary before entry into force of the Convention; however, the legal status of the committee prior to entry into force may need to be examined.

A proposal was made that further revisions of the liability limits could not take place less than five years after the previous revision. The objective of the proposal was to promote stability of liability limits. However, the prevailing view was that liability limits should be adjusted whenever required by the circumstances (except for the initial five-year period).<sup>61</sup>

Paragraph (6) provides that an amendment would be deemed to have been adopted at the end of 18 months after a State had been notified, unless at least 1/3 of the *Contracting States* notified the Depositary that they did not accept the amended limit.

The expedited adoption procedures in Paragraphs (6)–(8) are generally based on similar amendment procedures in the 1980 Convention Concerning International Transport by Rail (COTIF). This procedure assures universal adoption of the adjusted liability limits. As illustrated in Paragraph (7), this procedure provides for denunciation by any State which does not accept a revised liability limit. However, a State which fails either to accept or denounce may

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<sup>60</sup>Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, London, 1977.

<sup>61</sup>Working Group Report, *supra* note 9, at 17.

become bound by the amendment. This amendment procedure raises the issue of tacit amendment of conventions, a procedure which exists in a number of transportation treaties negotiated in IMO and other U.N. bodies.<sup>62</sup>

Finally, a U.S. proposal that the applicable liability limit should be that in effect on the date of the occurrence of the loss, damage or delay was adopted as Paragraph (9). This provision corresponds to a similar provision in Article 42 of the Guatemala Protocol to the Warsaw Convention. A proposal was made that this provision should appear in Article 6 on limits of liability, but it was not adopted.<sup>63</sup>

## CONCLUSION

Whether the Uniform Rules should be in the form of model legislation or a new international convention may be discussed again at the 1989 UNCITRAL Plenary. The U.S. Study Group favored the convention approach because it would most effectively promote uniformity of law.<sup>64</sup> Also, a model law on terminal operators' liability would not fill gaps already present in the fabric of transportation conventions. A large majority of the UNCITRAL Working Group favored the convention approach for the same reasons.<sup>65</sup> Their feeling was that if this project deserves UNCITRAL's attention it should be prepared in the most effective form.

The draft Transport Terminal Operators' Liability Convention is intended to fill a gap in the legal regimes governing the users of transport terminals. The Convention reflects the influence of the other legal regimes. However, it is increasingly apparent that the unique subject of terminal operation requires different rules than those applicable to the users. The special rules governing air, marine, road, and rail carriers do not appear in the terminal operators' draft Convention. Thus the draft should be evaluated purely on the basis of whether it would improve the law applicable to international trade.

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<sup>62</sup>Larsen, *supra* note 54, at 658.

<sup>63</sup>Working Group Report, *supra* note 9, at 17 and 22.

<sup>64</sup>See Annex I.

<sup>65</sup>Working Group Report, *supra* note 9, at 17.



## *Annex I*

### MINUTES OF THE MEETING OF THE STUDY GROUP ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS OF THE SECRETARY OF STATE'S ADVISORY COMMITTEE ON PRIVATE INTERNATIONAL LAW

December 11, 1987

The subject meeting was convened at 10:00 a.m. at the Department of Transportation in order to obtain advice for the forthcoming meeting of the United Nations Commission on International Trade Law (UNCITRAL) Working Group on International Trade Practices to be held in New York on January 18–29, 1988. The Working Group meeting will continue its consideration of uniform liability rules for transport terminal operators.

The meeting was chaired by Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State, and Vice-Chairman of the Advisory Committee. . . .

The group focused its attention on the US Delegation report on the last meeting of UNCITRAL's Working Group (December 1–12, 1986), which included draft uniform rules prepared by the Working Group.

The following issues were considered by the study group:

1. Whether the uniform rules should be in the form of model legislation or a new international convention? The study group tended to favor the treaty approach because it would promote greater uniformity of law. The representative from the insurance industry noted that related legal instruments, e.g., the Hamburg Rules and Warsaw Convention, are in treaty form and that model legislation for terminal operators would not fit as well into the context of legal regimes for transportation. It was noted that only a treaty would result in predictable law. Mr. Pfund noted that there were substantial financial implications in the convening of a conference to adopt a convention. It was expected that the UNCITRAL working group will first seek agreement on the substance of the uniform rules before proceeding to the question of the form of such rules.

2. Should terminal operators have an option regarding whether or not to use the uniform rules? The representative from the insurance industry stated that such an option would result in lack of uniformity

and predictability. The study group did not favor the optional approach.

3. Should stevedores be excluded from the application of the uniform rules? The stevedores' representative favored such exclusion. However, he stated that the proposed draft exclusion of stevedores would exempt 90% of all terminal operations from the application of the uniform rules. Representatives of shipper and cargo insurance interests stated that such an exclusion would be too broad and they, in fact, favored inclusion of stevedores. The group agreed that the Department of Transportation should provide policy guidance on this issue.

4. What form of documentation, if any, should be provided by terminal operators to their customers? The study group was of the view that terminal operators should use either their own documentation or carriers' documentation. The terminal operators should have discretion to decide which documentation to use. It was noted that the weight of the cargo may be difficult to ascertain but the group was reminded that liability limits are based on weight. The shippers informed the group that tampering with sealed cargo is also a problem and should be discussed in UNCITRAL.

5. What should be the regime governing the terminal operators' liability? No objection to the draft uniform rules on this point was expressed. The group discussed the current non-uniform law of bailments as it applies to terminal operators.

6. What should be the limits on liability of the terminal operator? The study group did not object to the present draft proposal. Specific limits will be further discussed in future.

7. How should liability limits be adjusted for inflation? The group favored a clause which would adjust liability limits for erosion by inflation. The representative of the airline industry strongly favored such a clause, while insurers were less enthusiastic.

8. Should servants and agents be entitled to the benefits of the uniform rules? The group favored such entitlement.

9. Should there be provision for forfeiture of limitation of liability? It was agreed that policy guidance should be obtained from the Department of Transportation on whether limits of liability should be unbreakable. It was suggested by an admiralty professor that unbreakable limits would help to avoid punitive damages.

10. Should the terminal operator have the right to recover damages from shippers for improperly packaged dangerous goods? It was generally agreed that the Chemical Manufacturers Association should be consulted in this regard.

11. Should the uniform rules define the form of notice required under the rules? The group agreed that written notice of damage should be provided to terminal operators. This point was particularly emphasized by a member representing insurance interests.