

III. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS

A. Report of the Working Group on International Contract Practices on the work of its tenth session (Vienna, 1-12 December 1986) (A/CN.9/287)

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INTRODUCTION

1. At its sixteenth session in 1983, the Commission decided to include the topic of liability of operators of transport terminals in its programme of work, to request the International Institute for the Unification of Private Law (UNIDROIT) to transmit its preliminary draft

Convention on that topic to the Commission for its consideration, and to assign work on the preparation of uniform rules on that topic to a working group.¹

¹Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17)*, para. 115.

2. In response to the request at the sixteenth session, UNIDROIT transmitted its preliminary draft Convention to the Commission. At its seventeenth session, the Commission decided to assign to the Working Group on International Contract Practices the task of formulating uniform legal rules on the subject. It further decided that the mandate of the Working Group should be to base its work on the UNIDROIT preliminary draft Convention and the Explanatory Report thereto prepared by the secretariat of UNIDROIT, and on the study of the UNCITRAL secretariat on major issues arising from the UNIDROIT preliminary draft Convention, which was before the Commission at its seventeenth session (A/CN.9/252), and that the Working Group should also consider issues not dealt with in the UNIDROIT preliminary draft Convention, as well as any other issues that it considered to be relevant.²

3. The Working Group commenced its work on the topic at its eighth session by engaging in a comprehensive consideration of the issues arising in connection with the liability of operators of transport terminals (A/CN.9/260). At its ninth session, the Working Group engaged in an initial discussion of all of the draft articles of uniform legal rules on the liability of operators of transport terminals that had been prepared by the secretariat (A/CN.9/WG.II/WP.56). It also prepared texts of draft articles 1, 2, 3 and 4, with accompanying notes, to serve as a basis for further consultations by delegations and for the future work of the Working Group (A/CN.9/275). The Working Group has decided to settle the form that the uniform rules should take after it establishes the substance and content of the rules (A/CN.9/260, paragraph 13).

4. The Working Group consists of all 36 States members of the Commission: Algeria, Argentina, Australia, Austria, Brazil, Central African Republic, Chile, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Hungary, India, Iraq, Iran (Islamic Republic of), Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Yugoslavia.

5. The Working Group held its tenth session at Vienna from 1 to 12 December 1986. All members were represented except Algeria, Australia, Central African Republic, Chile, Cuba, Cyprus, Hungary, Iraq, Lesotho, Libyan Arab Jamahiriya, Sierra Leone, Singapore, United Republic of Tanzania and Uruguay.

6. The session was attended by observers from the following States: Canada, Colombia, Democratic People's Republic of Korea, Germany, Federal Republic of, Guatemala, Holy See, Indonesia, Oman, Poland, Republic of Korea, Switzerland and Thailand.

²Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 113.

7. The session was also attended by observers from the following international organizations:

(a) *Specialized agency*

United Nations Industrial Development Organization

(b) *Intergovernmental organizations*

Central Commission for the Navigation of the Rhine

Commission of the European Communities

Hague Conference on Private International Law

International Institute for the Unification of Private Law

League of Arab States

Central Office for International Railway Transport

(c) *International non-governmental organizations*

International Air Transport Association

International Chamber of Commerce

International Civil Airports Association

International Forest Products Transport Association

International Law Association

International Maritime Committee

International Road Transport Union

International Union of Marine Insurance

8. The Working Group elected the following officers:

Chairman: Mr. Michael Joachim Bonell (Italy)

Rapporteur: Mr. Suresh Chandra Chaturvedi (India)

9. The following documents were placed before the session:

(a) Provisional agenda (A/CN.9/WG.II/WP.57);

(b) Liability of operators of transport terminals: revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals (A/CN.9/WG.II/WP.58).

10. The Working Group adopted the following agenda:

1. Election of officers

2. Adoption of the agenda

3. Formulation of uniform legal rules on the liability of operators of transport terminals

4. Other business

5. Adoption of the report.

DELIBERATIONS AND DECISIONS

I. Method of work

11. The Working Group decided to commence its work at the current session by considering revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals, which had been prepared by the secretariat

(A/CN.9/WG.II/WP.58), and, thereafter, to return to a consideration of draft articles 1 to 4, for which texts had been prepared by the Working Group at its ninth session.³

II. Consideration of draft articles of uniform rules on the liability of operators of transport terminals

12. A view was expressed that the rules being formulated by the Working Group should not be too complex. Legal texts designed to achieve harmonization of law were more successful if they were simple in structure and did not attempt to deal with every conceivable question that might arise in connection with the issues addressed by them.

13. The following paragraphs reflect the substance of the discussion with respect to each of the draft articles considered by the Working Group.

Article 5

Paragraph (1)

14. The Working Group generally agreed with the approach taken by paragraph (1), which was based on the principle of presumed fault or neglect. That approach was appropriate as it was consistent with the basis of liability established in the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)⁴ (hereinafter referred to as the "Hamburg Rules") and the United Nations Convention on International Multimodal Transport of Goods (1980)⁵ (hereinafter referred to as the "Multimodal Convention"), and reflected the current trend in the field of transport law. A view that the basis of liability under the uniform rules should be aligned with the basis of liability under the international convention governing maritime transport that, at the time of adoption of the rules, had the most parties was not accepted.

15. There was general agreement with the provision of article 1 that the liability of an operator should not be absolute. Examples given were that an operator should not be liable for loss, damage or delay resulting from *force majeure*. He should also not be liable to the extent that the acts or omissions of a person for whom he was not responsible contributed to the loss, damage or delay. It was also suggested that the provision concerning the basis of the operator's liability should take into account the existence, if any, of insurance covering the goods. However, it was stated that the effect, if any, of insurance on the liability of the operator would be resolved by applicable rules of national law.

³A/CN.9/275, paras. 16-58.

⁴A/CONF.89/13, annex I. See *Official Records of the United Nations Conference on the Carriage of Goods by Sea*, United Nations publication, Sales No. E.80.VIII.1.

⁵TD/MT/CONF/16.

16. A view was expressed that the word "loss" in its first use in the opening words of paragraph (1), "The operator is liable for loss resulting from loss of or damage to the goods . . .", could be interpreted to include consequential loss. Exposure of the operator to liability for consequential loss would render the extent of his liability uncertain. Therefore, that usage of the word "loss" should be deleted. According to another view, the meaning of the word should be clarified. It was pointed out, however, that, whether or not the word was deleted, the question of whether a claimant could recover consequential loss in a particular case would be resolved by the rules of the applicable legal system. It was also noted that the wording in question appeared in the Hamburg Rules and in the Multimodal Convention, and it was stated that it was not desirable to change it. Finally, it was observed that the operator's liability for consequential loss would, in any case, be subject to limits under draft article 6. Accordingly, the prevailing view was to retain the word.

17. A view was expressed that it was unclear to whom the phrase "other persons of whose services the operator makes use . . ." referred, and it was questioned whether the reference to such persons, in addition to servants and agents of the operator, was necessary. It was pointed out that, in some legal systems, certain categories of persons engaged by the operator for the performance of the operations undertaken by him, e.g. stevedores, might not be categorized as either servants or agents, and that such persons should also be included within the requirements of paragraph (1). It was generally agreed to retain the reference to such persons.

18. A view was expressed that the operator should not be liable for loss, damage or delay that arose from acts of persons engaged by him (i.e., his servants or agents, or other persons of whose services he made use) performed outside the scope of their employment. It was stated that the operator would be able to insure at lower rates if he was not responsible for loss, damage or delay that arose from such acts. Furthermore, such an approach would be consistent with the approach taken in the Multimodal Convention. The prevailing view, however, was that the operator should be liable for loss, damage or delay caused by persons engaged by him, even if they acted outside the scope of their employment. It was observed in that connection that, even if the uniform rules did not expressly exclude the operator's liability when persons engaged by him acted outside the scope of their employment, such a result might nevertheless be achieved in legal systems that recognized such an exclusion.

Paragraph (2)

19. There was general agreement that paragraph (2) was superfluous, and should be deleted. According to a contrary view, however, the paragraph was useful and should be retained, perhaps in an amended form, in order to ensure that the liability of the operator was not absolute.

Paragraph (3)

20. It was generally agreed that paragraph (3) should be retained in its current form. It was noted that the paragraph provided a uniform solution for the situation when loss, damage or delay was caused by factors for which the operator was responsible, as well as by other factors, a situation that was treated differently in different national legal systems. In further support of the paragraph, it was pointed out that the paragraph required the operator to prove the amount of loss not attributable to him or to persons engaged by him, which was consistent with the principle of presumed fault or neglect reflected in paragraph (1). A view was expressed, however, that the paragraph should not require the operator to prove the amount of loss not attributable to him or to persons engaged by him, since he might find it difficult to do so.

Paragraph (4)

21. It was generally agreed that the uniform rules should deal with the liability of the operator for delay in handing over the goods, and that paragraph (4) should be retained in its current form. It was stated that if the rules did not deal with delay, an operator would be subject to differing liability régimes for delay under national legal systems. Dealing with liability for delay in the rules could protect operators whose liability for delay was extensive under national legal systems. It would also protect carriers seeking recourse against operators who, under national law, could greatly restrict their liability for delay. Another view, however, favoured deleting paragraph (4), since operators sometimes found it difficult to insure against liability for delay and since delay in handing over goods was not a significant problem in practice.

Paragraph (5)

22. The Working Group agreed with the general approach of paragraph (5). A view was expressed, however, that the phrase, "a person entitled to make a claim for the loss of the goods" was unclear, and the paragraph should be amended so as to avoid the use of that phrase, perhaps by substituting the words "the claimant", or by deleting the reference to such a person and stating, simply, that the goods may be treated as lost.

23. With respect to the period of time after which the goods may be treated as lost, the prevailing view favoured a period shorter than 60 days, e.g. 30 days. A view was expressed, however, that the time period should reflect the circumstances existing in some countries with respect to the storage and handling of goods that, in some cases, might make a period such as 60 days appropriate.

*Article 6**Paragraph (1)*

24. The Working Group considered the four alternatives for paragraph (1) presented in A/CN.9/WG.II/WP.58. Views were expressed in favour of a single limit

of liability (i.e., alternative 1), rather than either having one limit apply to goods that were carried to or from the terminal by sea and another limit apply to goods that were not so carried (i.e., alternative 2), or linking the limit to the limit applicable to the carrier of the goods to or from the terminal (i.e., alternatives 3 and 4). In support of a single limit, it was stated that alternatives 2, 3 and 4 would create uncertainties as to which limit would apply in particular cases since the operator might not always know by what mode of transport the goods had been carried to the terminal or would be carried from it. In addition, if a claim were brought before the goods left the terminal, it would be difficult to apply alternative 2 or 3, which referred to the mode of transport by which the goods had been carried from the terminal. Furthermore, goods that were carried to a terminal in a unitized manner (e.g., in a container or on a pallet) might be broken into smaller units and carried from the terminal by different modes of transport, with the result that different limits might apply to the different units. It was also pointed out that, under many international conventions and national laws relating to the carriage of goods, parties to a contract of carriage could agree upon higher limits than those contained in the convention or law, thus increasing the uncertainty as to which limits were to apply to the operator. It was stated that uncertainties such as those could lead to higher insurance costs.

25. The views favouring a single limit of liability also favoured fixing the amount of that limit at or slightly higher than the limit contained in the Hamburg Rules. That would be the simplest and most appropriate approach, particularly in view of the fact that most goods were carried by sea.

26. A view was expressed that the uniform rules should apply only to sea terminals. In that event, a single limit, based upon the Hamburg Rules, should apply.

27. Views were also expressed in favour of alternative 2. It was stated that it was appropriate to distinguish, as that alternative did, between cases where the goods were involved in carriage by sea and cases where they were carried by modes of transport other than by sea carriage. In addition, a single limit equal to or slightly higher than the limit contained in the Hamburg Rules would result in inadequate compensation to persons with interests in goods lost or damaged in an air terminal, or to air carriers who were held liable to shippers and sought recourse against air terminals, since goods carried by air were usually of a high value. Alternative 2 would take that into account. In that connection, however, it was noted that, under paragraph (5), an operator could agree to higher limits of liability. Therefore, even if the rules were to provide a single limit, air carriers and shippers of goods by air might be able to negotiate a higher limit with the operator of the terminal if the single limit was inadequate.

28. Proponents of alternative 3 stated that subjecting the operator to the same limits as those applicable to the carrier of the goods to or from the terminal would benefit carriers in recourse actions against terminals. It

was also stated that, in some countries, it was customary for terminals to apply the limits that were applicable to the modes of transport they served. In those situations, when the goods were carried to and from the terminal by two different modes, it was not difficult for an operator to determine when the goods ceased to be governed by a régime applicable to one mode and fell under the régime governing the other.

29. After a discussion of alternatives 1, 2 and 3, a proposal was made to adopt a solution along the following lines:

“The liability of the operator for loss resulting from loss of or damage to goods under this [Law] [Convention] is limited to an amount not exceeding [920] units of account per package or other shipping unit or [2.75] units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. However, if the goods are involved in international carriage which does not, according to the contract 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 kilogramme of gross weight of the goods lost or damaged.”

It was noted that the proposal generally corresponded with the approach taken in the Multimodal Convention. (See, however, paragraphs 34 and 35, below.)

30. Support was expressed for that proposal as an acceptable compromise. In opposition, it was stated that the limits that would apply when carriage by sea was not involved would result in inadequate compensation for carriers or persons with interests in goods carried by air. It also was observed that, under the proposal, the limit applicable to the operator would depend upon the contract of carriage, to which the operator was not a party. In addition, the operator would, in many cases, not know whether or not the goods had been or would be carried by sea and, therefore, would not know whether he was subject to the lower or higher limit. In response to that point, it was stated that the question of whether the lower or higher limit was to apply in respect of a particular consignment of goods would arise only after damage had occurred and a claim was brought. The question would not arise in connection with the operator's insurance, since he would obtain blanket insurance covering his overall liability, rather than his liability in respect of each particular consignment. When damage occurred and a claim was brought, it would be for the claimant to prove that the goods were not involved in carriage by sea and that the higher limit should apply.

31. At the close of the discussion on that issue, some delegations preferred a single limit, others supported the proposal set forth in paragraph 29, above, and still others held the view that the limit applicable to an operator should depend to a greater degree upon the mode of transport by which the goods were carried to or from the terminal, e.g. by providing, in addition to the limits contained in the proposal, a separate limit to apply when the goods were involved in carriage by air.

32. The decision of the Working Group was to adopt provisionally the proposal set forth in paragraph 29, above. It was agreed, however, that the decision would not preclude the Working Group from returning to a consideration of that issue at a later time. It was also agreed that the amounts of the limits set forth in the proposal were to be regarded as provisional, and would be kept in square brackets. The forum that adopted the uniform rules would consider those amounts, and their adequacy for carriers of various modes and for persons with interests in goods carried by those modes.

33. In subsequent discussion, a view was expressed that, in cases where loss of or damage to goods in a consignment impaired the value of other goods in the consignment that were not lost or damaged, the limit of liability should be based on all of the goods, and not only on the goods that were lost or damaged. Article 22(2)(b) of the Convention for Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929) as amended by the Hague Protocol of 1955 was suggested as a model. It was observed, however, that the desired result could be reached under the wording suggested in paragraph 29, above, which corresponded with that of other transport conventions.

34. During its consideration of paragraph (4), the Working Group considered whether the limit of liability based upon the number of packages or shipping units should be retained in the provision set forth in paragraph 29, above. It was observed that the question of what constituted a package or shipping unit raised considerable problems in practice. While paragraph (4) attempted to address some of those problems, such a provision, in itself, might not be sufficient. It might also be necessary to include in the uniform rules certain provisions with respect to the document to be issued by the operator, e.g. provisions dealing with such issues as including in the document a statement concerning the number of packages or shipping units, and the legal effects of including such a statement. It was also pointed out that an operator would not know and would not be able to verify how many packages were in a container. Therefore, the uniform rules might also have to contain provisions dealing with the legal effects of reservations included by the operator in the document when the statement concerning the number of packages and shipping units was based on information given to the operator by his customer that the operator could not verify. Including such provisions would complicate the document to be issued by an operator, which should be kept as simple as possible. In addition, it was stated that the practical importance of a limit based on the number of packages or shipping units was not that great.

35. Accordingly, it was generally agreed not to retain the limit based on the number of packages or shipping units, and to delete the references to such a limit from the provision set forth in paragraph 29, above.

Paragraph (2)

36. According to one view, before deciding on the amount of the limit of the operator's liability for delay,

further consideration should be given to commercial factors relevant to the question in order to arrive at an acceptable and appropriate amount. It was noted, however, that the scope and extent of loss resulting from delay was different from that of loss resulting from loss of or damage to the goods, and that the choice of a particular limit for loss resulting from delay would of necessity be relatively arbitrary. Moreover, the amount of the limit of liability for delay was not of great importance, particularly since, after delay for a specified period of time, the operator would be liable for the loss of the goods. Nevertheless, it was desirable to set some limit to liability for delay. The view was expressed that it would be satisfactory to set the limit at the same level as that of a carrier under the Hamburg Rules and the Multimodal Convention, i.e., 2 1/2 times the charges payable to the operator for his services in respect of the goods delayed. After discussion, that limit was accepted by the Working Group as a basis for its further work.

37. The Working Group considered whether the operator's liability for delay should be subject to the further limitation that it should "not [exceed] the total of such charges payable to the operator pursuant to his contract or agreement with his customer". According to one view, such a limitation was unnecessary and could result in complications in application. According to another view, such a limitation was desirable, and it might be based on the total charges payable to the operator by his customer. It was noted that, in some cases, an operator's contract with his customer covered several independent consignments of goods over a relatively long period of time. It was generally agreed that the overall limitation should not be based upon the total charges under such a contract; rather, it should be based on the charges in respect of goods more immediately connected with the delay. A proposal was made to express the overall limitation by deleting the last phrase currently appearing in paragraph (2) ("but not exceeding the total of such charges payable to the operator pursuant to his contract or agreement with his customer"), and replacing it with a phrase such as, "but not exceeding the total of such charges relating to the goods requested for delivery." It was observed, however, that the delay in delivery of part of a consignment might impair the value of the entire consignment. A view was expressed, therefore, that the limit should be based on the charges in respect of the entire consignment. After discussion, the prevailing view was to replace the phrase in paragraph (2) referred to above with a phrase such as "but not exceeding the total of such charges in respect of the consignment of which the goods were a part."

Paragraph (3)

38. Paragraph (3) was found to be acceptable.

Paragraph (4)

39. It was agreed that, in view of the decision not to retain a limit based on the number of packages or shipping units, paragraph (4) was unnecessary.

Paragraph (5)

40. A view was expressed that the idea that the operator could agree to higher limits of liability was also implicit in article 13(2), and that paragraph (5) should be deleted. According to another view, however, there would be value in stating separately the idea expressed in paragraph (5). Accordingly, it was decided to retain paragraph (5).

Paragraph (6)

41. The Working Group agreed that, in view of article 16, paragraph (6) was unnecessary.

Article 7

Paragraph (1)

42. The Working Group found paragraph (1) to be acceptable.

Paragraph (2)

43. A view was expressed that a person engaged by the operator (i.e., a servant, agent or other person of whose services the operator made use) should be able to avail himself of the defences and limits under the uniform rules even if he did not act within the scope of his employment. The prevailing view, however, was that he should be able to do so only if he proved that he acted within the scope of his employment.

44. An observation was made that it might not be appropriate to describe the relationship between an operator and a person other than a servant or agent, of whose services the operator made use, as "employment". It was suggested that the reference in the paragraph to the scope of employment might be changed to read, for example, "if he proves that he acted within the performance of his contract."

Paragraph (3)

45. A question was raised as to whether paragraph (3) was needed, since the result sought to be achieved by it was implicit in paragraphs (1) and (2). The prevailing view, however, was that the paragraph was useful and should be retained.

46. A view was expressed that the reference to the exceptions to paragraph (3) should mention not only the situations dealt with in article 8 of the uniform rules, but also the situations dealt with in articles 6(5) and 13(2). According to another view, however, the current wording of paragraph (3) followed closely the wording of the Hamburg Rules and the Multimodal Convention, and should not be changed. It was not necessary to refer specifically to articles 6(5) and 13(2). Accordingly, it was generally agreed to retain paragraph (3) as it stood.

Article 8

Paragraph (1)

47. A view was expressed that an operator should lose the benefit of the limits of liability under the uniform

rules only if it was proved that the operator himself acted intentionally or recklessly; therefore the reference to the operator's servants in paragraph (1) should be deleted. In support of that view, it was stated that the operator was often not in a position to prevent intentional or reckless acts by people in his employment and that, therefore, he should not be exposed to unlimited liability for those acts. Moreover, the limits of liability should be relatively certain and should be breakable only in restricted cases. Double insurance could result from uncertainty in the application of the limits of liability, since the operator would have to cover his possible liability in excess of the limits, and the cargo interest would have to insure the goods for possible losses exceeding the limits. It was also noted that enabling the limits to be broken only if the operator himself acted intentionally or recklessly would conform to the approach taken in the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924) as amended by the Protocol done at Brussels on 23 February 1968 (the Hague-Visby Rules), the Hamburg Rules and the Multimodal Convention.

48. According to a second view, the operator should lose the benefit of the limits of liability not only if he acted intentionally or recklessly but also if his servants did so. In support of that view, it was stated, firstly, that an operator was usually organized as an independent legal entity. In such a case, only the acts of senior management of the operator would be regarded as acts of the operator. In most cases, however, loss or damage was caused by acts of employees who actually performed handling operations. Therefore, a provision that the limits could be broken only if the operator himself acted intentionally or recklessly would be of no effect. In opposition to that view, it was stated that there were cases in which loss or damage could arise from intentional or reckless acts of senior management. Secondly, it was stated that the international conventions dealing with maritime transport in which the carrier did not lose the benefit of the limit of liability due to acts of his servants should not be followed in the uniform rules, since a sea carrier could control the acts of the master of the ship and other servants to a much lesser degree than a terminal operator could control the acts of his servants. Thirdly, it was stated that if the operator were to lose the benefit of the limit of liability due to the acts of his servants, he would be encouraged to exercise greater care in the choice of servants.

49. According to a third view, the operator should lose the benefit of the limit of liability not only if his servants acted intentionally or recklessly but also if his agents and other persons of whose services he made use did so. If a distinction were made between servants and other persons engaged by the operator, the claimant would have the difficult task of proving which person had acted intentionally or recklessly.

50. A majority of the views expressed were in accordance with the second or third view. Due to the importance and complexity of the question, it was decided not to take a final decision at the current session, but to leave paragraph (1) as it stood, and to consider the question again at the next session.

Paragraph (2)

51. A view was expressed that paragraph (2) should be deleted. It was stated that the paragraph could expose the operator to unlimited liability in the case of intentional or reckless acts of persons engaged by him, which would not be appropriate if it were ultimately decided in connection with paragraph (1) to enable the limit of liability to be broken only where the operator himself acted intentionally or recklessly. That would occur, for example, where an action was brought against a person engaged by the operator for damage caused by intentional or reckless acts of that person, who would therefore not be entitled to limit his liability, and the operator indemnified the person for damages he was required to pay. It was observed, however, that, in some legal systems, a person who acted intentionally or recklessly would not have recourse against his employer and such conduct would not affect the right of the employer to limit his liability. Furthermore, it was stated that paragraph (2) was unnecessary since, in most cases, a claimant brought his action against the operator, rather than against a person engaged by him.

52. According to another view, paragraph (2) should be retained. It was stated that the paragraph was necessary in view of the overall relationship between article 7 and article 8. In an action by a claimant against the operator, the operator could limit his liability pursuant to articles 6 and 7(1). However, article 8(1) allowed the limits of liability to be broken in certain cases. If an action were brought directly against a person engaged by the operator, article 7(2) entitled him to the limit of liability and to the defences available to the operator under the uniform rules. Article 8(2) was necessary in order to complete that scheme, by allowing the limits of liability available to that person to be broken in certain cases.

53. According to an additional view, the provisions of article 8 should be merged with article 7. In opposition, it was observed that the structure of articles 7 and 8 was consistent with that of the Hamburg Rules and the Multimodal Convention. However, in rebuttal, it was noted that article 8 of the Hamburg Rules resulted from a package of compromises resulting in the elimination of the defence of negligent navigation for carriers and the approach taken in that article might not be appropriate in the uniform rules on the liability of operators of transport terminals; thus, it would be necessary to review the entire policy of unbreakable limits before a decision could be taken on article 8 of the uniform rules.

54. A further view was expressed that the decision with respect to paragraph (2) depended upon what was ultimately decided with respect to paragraph (1). That is, to the extent that servants, agents and other persons of whose services the operator made use were excluded from paragraph (1), they should be covered in paragraph (2).

55. Yet another view was expressed that, since the operator was responsible for acts of persons engaged by him, the uniform rules should enable a claim to be brought only against the operator.

56. The Working Group decided to maintain paragraph (2) as it stood. It noted, however, that, due to the interrelationship between paragraphs (1) and (2), it might become necessary to reconsider paragraph (2), depending upon the decision that was ultimately taken with respect to paragraph (1).

Article 9

57. The Working Group generally agreed that the uniform rules should contain provisions dealing with dangerous goods. Moreover, it agreed in principle that, if dangerous goods were handed over to an operator without his being properly informed of their dangerous character, he should be able to take any precautions the circumstances might require in order to prevent the goods from endangering property or persons, including providing special handling or storage facilities, and destroying or disposing of the goods in an emergency. In such a case, the operator should not be required to pay compensation for the damage or destruction of the goods. In addition, he should be compensated for his losses resulting from the dangerous goods, including his costs in taking those precautions. Views were divided, however, as to the extent to which the uniform rules should deal with those matters.

58. The Working Group considered the two alternative versions of article 9 contained in document A/CN.9/WG.II/WP.58. Support was expressed for alternative 1, because it was compatible with many international transport conventions, and corresponded closely with analogous articles in the Hamburg Rules and the Multimodal Convention. According to another view, however, alternative 1 was not acceptable, because it imposed various obligations on the shipper, including obligations with respect to the marking, labelling, packaging and documentation of dangerous goods. It also provided that the shipper was to be liable to the operator for all his losses resulting from the dangerous goods. Imposing obligations and liability on the shipper was not appropriate because, in many cases, there existed no contractual relationship between the shipper and the operator, and they were often factually remote from each other in the chain of transport. Moreover, it was not necessary for the uniform rules to deal with those matters. Obligations of a shipper with respect to the marking, labelling, packaging and documentation of dangerous goods were imposed by international conventions dealing with transport and with dangerous goods; the liability of a shipper for loss resulting from dangerous goods was also dealt with by such conventions, as well as by national law.

59. The general preference of the Working Group was for the approach taken in alternative 2, since it was less complex than alternative 1 and it did not impose obligations or liability on the shipper. It had the advantage of inducing the shipper properly to mark, label, package and document dangerous goods without directly obligating him to do so.

60. A suggestion was made that the substance of paragraph (2) of alternative 1 should be incorporated

into alternative 2. In that connection, the Working Group considered the following proposal:

"If dangerous goods are handed over to an operator without being marked, labelled, packaged or documented in accordance with any applicable international, national or other rule of 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 actual 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 compensation for all loss resulting from such goods including, but not limited to, damage to property of the operator, costs to the operator of taking the measures referred to in sub-paragraph (a), and any liability of the operator to another person arising from loss or damage caused by the dangerous goods."

61. A view was expressed that the proposal was too imprecise in that it referred to obligations to mark, label, package and document dangerous goods and to compensate the operator for loss resulting from those goods, without specifying to whom those obligations applied. The prevailing view, however, was that the general approach followed by the proposal was acceptable.

62. With respect to subparagraph (a) of the proposal, it was generally agreed that the words within square brackets should be retained. With retention of those words, the right of the operator to destroy or dispose of the goods without paying compensation will be limited to those situations when such measures were necessary.

63. It was suggested that the words "any applicable international, national or other rule of law" should be reconsidered. In the context of the proposal the usage of those words conflicted with the usage of the words "applicable law" elsewhere in the uniform rules, since the latter usage referred to rules applicable to the relationship between the operator and his customer. A further suggestion was that the words in the proposal should be changed to, "any law applicable to the parties". However, subject to changing the words "actual danger" to "imminent danger", subparagraph (a) was found to be acceptable in its current form.

64. A view was expressed that subparagraph (b) should be deleted, since the question of compensation payable to the operator should be left to be settled by national law. The prevailing view, however, was that the subparagraph should be retained, perhaps in an amended form.

65. After discussion, it was generally agreed that the subparagraph should only entitle the operator to receive "reimbursement for all costs to the operator of taking the measures referred to in subparagraph (a)", and that the reference to compensation for other types of losses should be deleted. It was emphasized, however, that the deletion did not imply that the operator should not be compensated for those losses; rather that question should be settled by the applicable law. Opposition was expressed to the deletion of the reference to compensation for other types of losses incurred by the operator.

Article 10

Paragraph (1)

66. It was generally agreed that the uniform rules should give the operator a right of retention over the goods for costs and claims relating to the services performed by him in respect of those goods. A view was expressed that the right of retention should extend only to the goods to which the costs and claims related and not to other goods of the same customer to which those costs and claims did not relate. Another view was that extension of the right of retention to those other goods should be permitted with the agreement of the customer. It was observed, however, that an agreement by the parties to extend the operator's right of retention could conflict with national laws that restrict such an agreement, such as laws dealing with contracts of adhesion. The prevailing view was that the operator and his customer should be able to extend by agreement the operator's right of retention if such an agreement was valid under the applicable national law. Accordingly, it was agreed that the second sentence of paragraph (1) should be amended along the following lines: "However, nothing in this Convention shall affect the validity under national law of any contractual arrangements extending the operator's security in the goods."

Paragraph (2)

67. Paragraph (2) was found to be acceptable.

Paragraph (3)

68. It was generally agreed that the operator should have a right to sell goods over which he exercised the right of retention. A view was expressed that, in order to achieve uniformity, the uniform rules should give that right to the operator in all cases. It was observed, however, that the right of sale did not exist in some national legal systems. The prevailing view was that the operator should have the right of sale only to the extent permitted by the law of the place where his services were performed. In that connection, mention was made of problems that could arise in federal States where competence over the regulation of commercial matters was divided between the national government and the federal units.

69. It was observed that the definition of goods contained in the text of article 1 prepared by the

Working Group at its ninth session⁶ included containers, trailers, chassis, barges and similar articles of transport or packaging. Such articles were frequently owned by parties other than the owners of the goods transported in the articles. For example, a large proportion of the containers used in transport were owned by private leasing companies. It was also observed that railway wagons were sometimes taken over by operators, and a question was raised whether they were covered by the definition of goods and therefore subject to the right of sale.

70. It was generally agreed that the owners of articles of transport or packaging should be protected when the right of sale was exercised by the operator. According to one view, those articles should be excluded from the operation of article 10. According to another view, the operator should not be permitted to exercise the right of sale in respect of an article unless its owner consented to the sale. The prevailing view, however, was that the operator should be required to give the owner of the article notice of the intended sale, in order to enable the owner to take steps to protect his interests. In that connection, it was suggested that the second sentence of paragraph (3), which required the operator to make reasonable efforts to notify the owner of goods intended to be sold, should be amended so as to require the operator also to make reasonable efforts to notify the owner "of the article of transport or packaging, such as a container, in which the goods are transported or stored." A view was expressed, however, that it was not necessary to refer specifically to the owner of the article in addition to the owner of the goods, since the article was included in the definition of "goods" as drafted by the Working Group at its ninth session. Rather, it was sufficient to change the word "owner" which currently appeared in the second sentence of paragraph (3) to "owners". That suggestion, however, was not accepted.

71. It was observed that it might not always be possible for the operator to identify and give notice to the owner of goods intended to be sold. In addition, in many cases, there might be persons other than the owner who had economic interests in the goods. Therefore, a view was expressed that the operator should be required to give notice of the intended sale not only to the owner of the goods, but also to the person from whom the operator received the goods. According to a further view, the operator should also be obligated to notify the person who had a right to receive the goods from the operator. Concern was expressed, however, that expanding the categories of persons to whom notice must be given would increase the burden to the operator, as well as increase the risk that he might fail to notify a person who should have been notified, thus inhibiting the operator from exercising the right of sale. After discussion, it was generally agreed that the operator should be required to make reasonable efforts to notify the owner of the goods, the person from whom the operator received them, and the person entitled to receive them from the operator.

⁶A/CN.9/275, para. 30.

72. It was generally agreed that the operator should account for the proceeds of the sale. It was pointed out, however, that, in some legal systems, sales were conducted by judicial authorities, and it was those authorities, rather than the party for whose benefit the goods were sold, who distributed the proceeds. With respect to the question of the persons to whom the operator must account, a view was expressed that that question should be left to be settled by national law. After discussion, it was decided that the third sentence of paragraph (3) should be amended to read along the following lines: "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."

73. With respect to the final sentence of paragraph (3), a question was raised whether the uniform rules should provide for the right of sale to be conducted in accordance with procedures under national law. A view was expressed that, if the rules did not so provide, they would have to set forth detailed procedures for the conduct of a sale, which was not desirable. It was preferable for the rules merely to establish, as in the final sentence of paragraph (3), a choice-of-law rule for determining the legal system whose rules were to govern the procedures for the exercise of the right of sale. A view was expressed that that result had already been achieved in the first sentence, which provided that the right of sale was to be exercised "in accordance with" the law of the place where the operator's services were performed, and that the final sentence should be deleted. After discussion, it was decided to retain the final sentence, and to delete the words "and in accordance with" from the first sentence.

74. In accordance with the foregoing discussion, it was generally agreed that the square brackets around paragraph (3) should be removed, and that the paragraph should read along the following lines:

"(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 place where the [safekeeping and operations] were performed. 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 receive 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 place where the [safekeeping and operations] were performed."

Article 11

Paragraph (1)

75. A view was expressed that the time specified in paragraph (1) by which notice of apparent loss or

damage must be given to the operator (i.e., not later than the working day after the day when the goods were handed over to the person entitled to take delivery of them) might be too short in some cases, and that a period of three working days was preferable. The Working Group, however, found paragraph (1) to be acceptable in its current form.

Paragraph (2)

76. A view was expressed that the period of time for notifying the operator of non-apparent loss or damage should commence on the day when the goods were handed over to the person entitled to take delivery of them. That would enable the operator to know when the notice period expired and the *prima facie* effect of a failure to give notice became effective. That certainty would not exist if the notice period commenced on the day when the goods reached their final destination, since the operator would not always know when that occurred.

77. The prevailing view, however, was that the notice period should commence on the day when the goods reached their final destination. In support of that view, it was stated that it was only then that the goods would be inspected, and that loss or damage could be discovered and notified to the operator. It was agreed that the length of the notice period should be seven days.

78. In order to protect the operator in cases where the goods did not reach their final destination until a considerable time after they left the operator's terminal, notice should, in any case, be given within a longer period of time, e.g., 45 days, commencing on the day when the goods were handed over to the person entitled to receive them. That would provide the operator with some certainty as to when the *prima facie* effect of a failure to give notice became effective. However, opposition was expressed to providing such an overall notice period.

79. The Working Group agreed to delete the final sentence of paragraph (2), contained within square brackets.

80. The text of paragraph (2) as agreed to by the Working Group was as follows:

"(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given within seven 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".

81. It was observed that the length of the notice periods agreed to did not correspond with the notice periods in the Warsaw Convention as amended by the Hague Protocol.

Paragraphs (3) and (4)

82. Paragraphs (3) and (4) were found to be acceptable.

Paragraph (5)

83. It was generally agreed that the uniform rules should require that the operator be given notice of delay in handing over the goods. It was also generally agreed that the rules should provide that no compensation for loss resulting from delay was to be payable by the operator unless notice of the delay was given to him within the required period of time.

84. A view was expressed that the period of time within which notice of delay must be given should commence on the day when the goods reached their final destination, in order to be consistent with the approach taken in paragraph (2). The prevailing view, however, was that the period should commence on the day when the goods were handed over to the person entitled to take delivery of them. In support of that view, it was observed that it was logical for the notice period for delay in handing over the goods to begin at the time of handing over, and not when the goods reached their final destination.

85. With respect to the length of the notice period for delay, a view was expressed that the 60 day period contained in the Hamburg Rules and the Multimodal Convention should be adopted in the uniform rules. The prevailing view, however, was that, due to the static nature of goods in a terminal, a shorter period of 21 days was justified.

Paragraph (6)(a)

86. The Working Group agreed that the provision of paragraph (6)(a) concerning the form of notice should be made applicable to all notices to be given and requests to be made under the uniform rules, and that a provision of such general application should be included in article 1. However, that decision was reconsidered when the Working Group discussed article 1 (see paragraphs 136 to 140, below).

Paragraph (6)(b)

87. The Working Group agreed to delete the provision of paragraph (6)(b) since it dealt with issues that were beyond the scope of the uniform rules.

*Article 12**Paragraph (1)*

88. It was observed that, in some legal systems, a limitation period could be interrupted by means other than the initiation of judicial or arbitral proceedings. Accordingly, it was suggested that the uniform rules should provide for the limitation period provided in paragraph (1) to be interrupted in accordance with the applicable national law. The prevailing view, however, was that the paragraph should be retained in its current form so that a uniform rule would be established with respect to the means by which the limitation period could be interrupted.

Paragraphs (2),(3) and (4)

89. Paragraphs (2), (3) and (4) were found to be acceptable.

Paragraph (5)

90. A view was expressed that paragraph (5) was unnecessary and should be deleted. The prevailing view, however, was that, since a carrier or other person might remain exposed to actions by cargo interests after the limitation period provided in paragraph (1) for actions against the operator had expired, the paragraph was necessary in order to permit him to institute a recourse action against the operator notwithstanding the lapse of that limitation period.

91. A view was expressed that the 90 day period referred to in paragraph (5) should commence when the carrier or other person seeking recourse was served with process in the action against himself. That would give the carrier or other person time to initiate a separate recourse action against the operator, or to include the operator in the action brought against him, if either was permitted under applicable procedural rules of national law. If the 90 day period did not commence until the person seeking recourse had been held liable, the operator could remain exposed to recourse actions for too long a period of time. According to another view, however, it would be acceptable for the 90 day period to commence when the carrier or person seeking recourse was held liable in the action against him, or settled the claim upon which the action was based, if the operator was given reasonable notice that the action had been instituted against the person seeking recourse. In opposition to such a notice requirement, it was observed that non-specialist lawyers representing a carrier or other person against whom a claim was brought and who might seek recourse against an operator might not be aware of the necessity to notify the operator of the claim.

92. After discussion, it was agreed to retain paragraph (5), including the words within square brackets, to change the words "or person" to "or other person", and to add language along the following lines to the end of the paragraph:

"... provided that reasonable notice shall be given to the operator whenever any claim is filed against a carrier or other person that may result in a recourse action against the operator."

93. The Working Group agreed that the reference in paragraph (5) to the time of settlement of the claim upon which the action against the person seeking recourse was based referred to a settlement of the claim after the action had been initiated.

Article 13

94. Article 13 was found to be acceptable.

95. It was observed that ground handling operations were often performed for airlines by other airlines or by

ground handlers at an airport under contracts in which the party performing the ground handling operations indemnified the airline in the event of a claim against the latter by a cargo interest. Under those contracts, the limits of liability of the party giving the indemnity were the same as the limits in the Warsaw Convention system. It was noted that such arrangements would not conflict with the uniform rules. Even if the party performing the ground handling operations would, under article 6 of the uniform rules, be subject to lower limits of liability than the limits set forth in his contract with the airline, he would be permitted under article 13(2) to subject himself to higher limits.

96. In connection with paragraph (2), it was observed that the operator could not reduce any of his obligations or liabilities under the rules, even if he increased other obligations or responsibilities.

97. A view was expressed that paragraph (2) should be deleted because, by not also permitting a carrier to increase his responsibilities, the paragraph did not treat operators and carriers equally. It was pointed out, however, that carriers could increase their responsibilities under the international conventions applicable to them.

Article 14

98. A view was expressed that article 14 was not a sufficient means to pursue uniformity in the interpretation of the uniform rules. It was stated that the article should also provide that the reports of the Working Group and the Commission dealing with the elaboration of the uniform rules should be used as a guide to their interpretation. In opposition, it was stated that the *travaux préparatoires* of a legal text constituted only one guide to interpretation, and their role varied among legal systems. After discussion, it was generally agreed that article 14 was acceptable in its current form if the uniform rules were to be adopted in the form of a convention.

99. A view was expressed that it would also be desirable to devise a mechanism to promote uniformity if the uniform rules were adopted in the form of a model law. It was generally agreed that the report of the session of the Commission at which the model law was adopted should recommend that, in implementing the model law, States should have regard to its international character and to the desirability of promoting international uniformity with respect to the treatment of the issues dealt with in the model law.

Article 15

100. A view was expressed that, if the uniform rules were adopted in the form of a convention, the words "or any law of [this State] [such State] relating to the international carriage of goods" should be deleted, since, if a conflict existed between a provision of the convention and national law, national law should be subordinate to the convention. In opposition, it was stated that the words should be retained, since, in some legal systems, the provisions of international conven-

tions on the limitation of liability of sea carriers were incorporated into national law by legislation, and those provisions should prevail over the uniform rules. The Working Group decided to place the words within square brackets.

Article 16

101. Article 16 was found to be acceptable.

Article 17

102. It was suggested that the uniform rules should not only provide a procedure for amending the limits of liability but should also contain a general revision clause. The Working Group generally agreed, however, that, for the time being, the rules should only provide a procedure for amending the limits of liability.

103. It was generally agreed not to retain the version of article 17 that was designed for inclusion in a model law, since national legislatures adopted different approaches to the amendment of limits of liability. Nevertheless, it was suggested that, if adopted as a model law, the rules should in some manner draw the attention of States to the desirability of adjusting the limits periodically.

104. It was generally agreed that, if the uniform rules were adopted as a convention, the limits of liability should be amended by a revision procedure, and not by means of an automatic price index. Therefore, alternative 1 of the version of article 17 designed for a convention should be deleted. In considering how to structure a revision procedure, the Working Group took account of the approaches adopted in alternative 2 of the provision of article 17 designed for a convention, as well as the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. The features of the revision procedure agreed to by the Working Group are set forth in the following paragraphs.

105. The Commission should serve as the organ within which the procedures for amending the limits of liability would take place. The Secretary-General should place upon the agenda for the following session of the Commission a proposal to amend the limits of liability upon the request of one-fourth of the Contracting States, or when the limits of liability in an international transport convention specified in the uniform rules (e.g. the Hamburg Rules, Multimodal Convention, Warsaw Convention, and conventions dealing with rail and road transport) were revised. A concern was expressed, however, that the latter criterion might result in the limits in the uniform rules being revised too frequently. It was generally agreed that the provision contained in paragraph (1)(b) of the version of alternative 2 of article 17 designed for a convention should not be adopted.

106. In addition to members of the Commission, Contracting States who were not members should be entitled to participate in the meetings to amend the limits. However, only Contracting States should be allowed to vote on the proposal to amend the limits.

107. The uniform rules should contain a non-exhaustive list of criteria to be taken into account in determining the amount by which the limits should be adjusted. Those criteria should include, for example, the amount by which the limits in an international transport convention had changed; the value of goods handled by operators; the cost of labour and relevant services; insurance rates, including rates for insurance covering job-related injuries to workmen; the average level of damages awarded against operators and the costs of electricity, fuel and other utilities. The costs referred to should be determined on an international basis. Assistance in that regard might be obtained from relevant international organs or trade organizations.

108. A proposal to amend the limits should be adopted if supported by a two-third majority of the Contracting States present and voting.

109. An amendment adopted by the foregoing procedure should be deemed to have been accepted at the end of a period of 18 months after it had been notified to Contracting States by the Secretary-General 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 communicated to the Secretary-General that they did not accept the amendment. It was stated that the 18 months time period was necessary in order for the amendment to be considered by national Parliaments. An amendment deemed to have been accepted in that manner should enter into force for all Contracting States 18 months after its acceptance.

110. The Working Group also accepted paragraphs (5) and (6) of alternative 2 of the version of article 17 designed for a convention, with 12 months substituted for the six months which appeared within square brackets in paragraph (6).

111. No amendment of the limits should be considered less than five years from the date on which the Convention was opened for signature.

112. The Secretary of the Commission stated that he would consult with the appropriate authorities within the United Nations to ensure that no problems arose from the role to be played by the Commission under the foregoing revision procedure, and that he would report to the Working Group at its next session.

Article 1

Definition of "operator"

113. A view was expressed that the definition of "operator" should not be based upon concepts such as "safekeeping" or "care, custody and control", as were the three alternative formulations of the definition drafted by the Working Group at its ninth session.⁷ Firstly, the meaning of those concepts was unclear. Secondly, they tended to describe the legal régime applicable to an operator, and it was unsatisfactory to define the subject of a legal régime by reference to the

regime itself. Rather than incorporating such concepts, the definition should be based upon the factual characteristics of a terminal operator and the functions performed by him.

114. According to another view, however, while the definition of operator should not refer to safekeeping or care, custody and control as the primary obligations of an operator, it should indicate that such concepts were implied in the transport-related services performed by the operator.

115. Yet another view was that the definition should refer to care, custody and control as the primary obligation of the operator, and to the provision or procurement of transport-related services as a secondary obligation. In opposition, it was stated that the definition should not refer to primary and secondary obligations. Moreover, if the concept of care, custody and control implied storage of the goods, it was inaccurate to regard that as a primary obligation of an operator. Modern transport terminals often performed services that did not primarily involve storage of the goods.

116. A view was expressed that the definition of an operator should refer to the contractual relationship between the parties, for example, by referring to an agreement or undertaking by the operator with respect to the goods.

117. It was suggested that the definition should include the notion that an operator took goods into his charge, and also refer to the place where the operator provided his services; otherwise, the scope of the uniform rules would be too broad. That should include an area under the operator's control. According to a further view, it should also include an area in respect of which the operator had a right of access or use, since an operator sometimes provided services in an area over which he did not have control, such as where he undertook to perform services for his customer, and entered into a sub-contract with another person who would actually perform the services.

118. A view was expressed that the definition of "operator" should exclude the mere transfer of the goods between a carrier and another person or between two carriers. Opposition to that view was expressed.

119. It was stated that the uniform rules should apply only in respect of goods involved in international carriage. Such a restriction should be included in the definition of "operator". According to another view, however, the rules should apply whether or not the goods were involved in international carriage. In that connection, it was noted that, when goods were deposited in a terminal to await their sale, it might not be known whether or not they were to be transported to another country. In addition, in some areas, the originally anticipated destination might be changed while the goods were in transit, changing the international character of the carriage. Those cases illustrated the undesirability of regarding the question of

⁷A/CN.9/275, para. 30.

whether or not the goods were involved in international carriage as a criterion for the application of the rules.

120. It was noted that the requirement that the goods must be involved in international carriage was contained in article 2(1)(b). Opinions were divided as to whether the requirement needed to be included both in the definition of "operator" in article 1 and in article 2. A view was expressed that it was not desirable to include the requirement twice. In favour of including it in article 1, it was stated that it was useful for the definition of "operator" to include the essential factors relating to the scope of application in the uniform rules. It was preferable for the requirement to appear in article 1 rather than in article 2, in order to separate it from the territorial requirement expressed in article 2(1)(a). According to another view, whether or not the requirement was included in article 1, it should be included in article 2, since it would be more clearly expressed in article 2. Yet another view was that the requirement should appear only in article 2.

121. It was suggested that, in the definition of "operator", the intention to refer only to persons who performed terminal operations as a professional or commercial activity should be made clear.

122. The Working Group convened a drafting group, composed of the representatives of France; Germany, Federal Republic of; China and the United States of America, for the purpose of drafting a definition of "operator", taking account the views that had been expressed. The drafting group submitted the following proposed definition to the Working Group:

"Operator" means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to provide or to procure 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 [:

"(a) In respect of goods that he transfers between a carrier and another person or between two carriers, without storage; or

"(b)] To the extent that he is responsible for the goods as a carrier or multimodal transport operator under applicable rules of law governing carriage."

123. In view of the differences of opinion as to whether the requirement that the goods be involved in international carriage should be included in article 1 or in article 2, it was decided to place square brackets around the words "involved in international carriage", and to add a footnote to those words to the effect that the existence of the brackets was intended only to call attention to the question as to the most appropriate location for those words.

124. It was agreed to retain subparagraph (a) in square brackets, due to the difference of opinion as to whether or not the persons referred to in that subparagraph should be excluded from the definition of "operator". It was also agreed to add the words, "or from one means of

transport to another", after the words "between two carriers", in order to cover the case where goods were transferred from a mode of transport belonging to a person to another mode of transport belonging to the same person.

125. It was understood by the Working Group that, under subparagraph (a), the transfer of goods without interruption would be excluded from the operation of the rules. Several delegations were of the view that the rules should not apply in the case where goods were unloaded from a means of transport and placed on the ground for a short period of time, merely to await the arrival of the means of transport to which they were to be transferred, if "storage" was not involved. According to another view, however, the direct trans-shipment (transfer) of goods without interruption should be included in the operation of the rules.

126. The purpose of subparagraph (b) was to exclude a person from the definition of "operator" to the extent that his services were subject to legal rules governing carriage. A view was expressed that the reference to a multimodal transport operator should be deleted. It was generally agreed, however, to retain that reference, since a multimodal transport operator who was subject to legal rules governing that form of carriage should not be subject to the uniform rules.

127. The Working Group otherwise found the proposal to be acceptable.

Definition of "transport-related services"

128. It was generally agreed that the definition of "transport-related services" should be as follows:

"Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing."

Definition of "goods"

129. It was generally agreed that the definition of "goods" should be as follows:

"Goods" includes any container, trailer, chassis, barge, pallet, railway wagon or similar article of transport or packaging, if not supplied by the operator."

130. A suggestion to change the words "if not supplied by the operator" to "if supplied by the customer" was not accepted. According to another suggestion, the words should be changed to "which are not the property of the operator", since operators sometimes supplied for use by their customers containers owned by container leasing companies; the words "if not supplied by the operator" could be interpreted so as to prevent the rules from applying in respect of those containers. The Working Group did not accept that suggestion.

Definition of "international carriage"

131. The Working Group considered the following definition of "international carriage", which was prepared by the Working Group at its ninth session:⁸

"'International carriage' means any carriage in which the place of departure and the place of destination are located in two different States [; however, if and to the extent that the carriage of the goods is to be performed in separate stages which are the subject of individual transport contracts, 'international carriage' shall cover only those parts of the carriage in respect of which the place of departure and the place of destination are situated in different States]."

132. Differing views were expressed as to the meaning of the words "any carriage in which the place of departure and the place of destination are located in two different States". Under one interpretation, carriage was international if the actual place of destination was in a different State from the place of shipment. It was stated that, so interpreted, the words were not acceptable. It would not be known whether the carriage was international until the goods arrived at their destination and, therefore, the operator would be uncertain as to whether or not he was subject to the uniform rules.

133. Under another interpretation, carriage was international if, under the contract of carriage, the place of departure and the place of destination were situated in two different States. A view was expressed that, so interpreted, the definition could conflict with the definitions of "international carriage" under international transport conventions. It was preferable for the uniform rules to refer to those definitions rather than to set forth its own definitions.

134. A view was expressed that the portion of the definition contained within square brackets should be retained in order to clarify that, in the case of segmented transport, goods in a terminal would be regarded as involved in international carriage only if, according to the individual contract for the segment by which the goods were carried to or from the terminal, the place of departure and the place of destination for the segment were located in two different States. According to another view, that portion should be deleted, as it unnecessarily complicated the definition. Moreover, the operator would in many cases not know what places of departure and destination were provided in the contracts of carriage for each segment. The prevailing view was to delete that portion of the definition.

135. A suggestion was made that the definition might be clarified and made more acceptable by providing only that goods were to be regarded as involved in international carriage if the operator could determine when he took the goods over that the places of departure and destination were located in two different States. It was observed that, in the majority of cases, the destination of the goods would be known by the time they arrived at the terminal, and the operator would

usually be able to determine from the documents accompanying the goods or from markings on the goods whether or not goods were involved in international carriage. The Working Group generally agreed with that approach, and decided to adopt a definition along the following lines:

"'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."

Form of notice or request

136. The Working Group considered the following provision proposed for inclusion in article 1:

"Any notice given or request made pursuant to this [Law] [Convention] may be given or made in any form which provides a record of the information contained therein."

137. A view was expressed that the requirement concerning the form of a notice and request should apply to all notices and requests under the uniform rules and that the proposed provision was acceptable. According to another view, however, no particular form should be required for certain notices and requests, such as notice of apparent loss of or damage to the goods under article 11(1), and a request for delivery of the goods, referred to in article 5(4). It should be possible for those notices to be given orally. Other notices should be subject to the requirement as to form, such as a notice of the sale of the goods under article 10(3) and a notice of delay under article 11(5). Accordingly, it was suggested that, rather than including in article 1 a requirement of general application as to the form of notice and request, each reference to a notice or request in the uniform rules should indicate whether it must be given in a particular form. According to another view, the question of the form of notice was relevant only to notices under article 11, and it should be dealt with in that article; no particular form should be required for any other notice or request under the uniform rules.

138. It was observed that the wording used to refer to notices should be consistent throughout the uniform rules.

139. A suggestion was made to consider the possibility of including in the uniform rules a provision establishing whether a notice was considered to have been given upon dispatch or upon receipt.

140. After discussion, the Working Group decided to retain the proposed provision for article 1, but to change the words "may be given or made in any form" to "shall be given or made in a form", and to provide that the provision was not to apply to notice of apparent loss or damage under article 11(1). It also decided to place the provision within square brackets, with a view towards considering the matter further. The secretariat was requested to consider the possibility of amending article 11(1) in order to clarify that oral notice was sufficient for apparent loss or damage, if it was given immediately.

⁸A/CN.9/275, para. 30.

Article 2

141. There was a general preference for alternative 2 of article 2 as prepared by the Working Group at its ninth session.⁹ It was observed that a question arose under alternative 1 as to the time when the goods had to be located within the territory of a Contracting State.

142. The question was raised whether there was to be discussion of a provision whereby a State would undertake to recognize and enforce the uniform rules only against those of its terminal operators who undertook to abide by the rules and were recognized as international terminal operators. It was pointed out that if such a mechanism were adopted it might influence States' thinking on some of the substantive rules. It was agreed that such a provision would be discussed at a later stage.

Paragraph (1)

143. A suggestion was made that, if the uniform rules were adopted as a convention, the convention should apply only if both the operator and his customer were from Contracting States. That suggestion was not adopted.

144. The Working Group's discussion with respect to subparagraph (b) is contained in paragraphs 120, 122, and 123, above. In the light of that discussion, it was decided to place square brackets around subparagraph (b).

Paragraph (2)

145. In view of the decision of the Working Group that, for the uniform rules to apply, the goods must be involved in international carriage when they were taken in charge by the operator, it was generally agreed that the portion of paragraph (2) dealing with the case where goods became involved in international carriage after they were taken over should not be retained.

146. A view was expressed that the presumption provided in paragraph (2) for the case where goods in a terminal ceased to be involved in international carriage was useful. It would help resolve the problems that would arise if it was not clear whether the loss or damage occurred before or after the goods ceased to be involved in international carriage. Moreover, a presumption broadly of the nature provided in paragraph (2) was also contained in the Warsaw Convention.

147. The prevailing view, however, was that paragraph (2) should be deleted in its entirety. It was stated that, if goods were subject to the uniform rules when taken in charge by the operator, they should remain subject to the rules, even if they later ceased to be involved in international carriage. If the paragraph was retained, a customer would be able to change the legal régime to which the goods were subject by changing the

destination of the goods. Moreover, the matter dealt with by the paragraph should be resolved by national courts and not by the uniform rules.

Paragraph (3)

148. A view was expressed that paragraph (3) should be deleted. It was not needed, in light of the decision taken with respect to the definition of "international carriage". Moreover, in the usual case of an operator organized as an independent legal entity, it raised questions as to which personnel's knowledge was relevant in determining whether or not the operator had knowledge that the goods were involved in international carriage.

149. According to another view, the paragraph should be retained in order to protect an operator who could not have known that the goods were involved in international carriage.

150. After discussion, it was decided to retain paragraph (3), amended to read along the following lines:

"However, this [Law] [Convention] shall not apply where the operator proves that he did not know and could not have known that the goods were involved in international carriage."

Article 3

151. The Working Group considered article 3 as prepared by the Working Group at its ninth session.¹⁰

Paragraph (1)

152. It was stated that an operator who undertook to perform services for his customer and subcontracted for the performance of those services would be covered by the words "has taken [the goods] in charge".

153. It was agreed that paragraph (1) should read as follows:

"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."

Paragraph (2)

154. A question was raised as to whether paragraph (2) was necessary in view of the definitions of "operator" and "transport-related services" adopted by the Working Group.

155. After discussion, it was agreed to delete paragraph (2).

Article 4

156. Due to a lack of time, the Working Group was unable to consider article 4.

⁹A/CN.9/275, para. 41.

¹⁰A/CN.9/275, para. 45.

III. Other business and future work

157. The Secretary of the Commission recalled the decision reached by the Commission at its nineteenth session, that the eleventh session of the Working Group "should be held in 1987 at a date to be set by the secretariat that would enable the transmission to Governments for their comments of the text of the uniform rules on the liability of operators of transport terminals expected to be finalized at that session and the receipt of the comments in sufficient time to be placed before the Commission at its twenty-first session, in 1988".¹¹ The Secretary noted that, in order to conform to that mandate, the eleventh session of the Working Group could be held no later than October 1987.

158. A view was expressed that the eleventh session should be held in May or June, 1987. Opposition was expressed to holding the session during those months since it would not give sufficient time for delegations to

¹¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 272.

engage in necessary consultations with Government and industry circles.

159. Stronger support was expressed for holding the session in September or October 1987. It was stated, however, that, if the session were held then, Governments would not be able to formulate and submit comments on the text finalized by the Working Group in time for consideration by the Commission at its twenty-first session.

160. The strongest support was expressed for holding the eleventh session in January 1988. It was noted that, in such a case, the Commission could not consider the text finalized by the Working Group until its twenty-second session in 1989. It was observed that the lapse of such a long period between the time when the text was finalized and the time when it was considered by the Commission was not desirable.

161. After discussion, the Working Group decided to recommend to the Commission that the eleventh session of the Working Group should be held in January 1988, in New York.

B. Revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals: note by the secretariat (A/CN.9/WG.II/WP.58)

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INTRODUCTORY NOTE

1. At its ninth session (1986), the Working Group on International Contract Practices engaged in an initial discussion of the draft articles of uniform rules on the liability of operators of transport terminals, which had

been prepared by the secretariat (A/CN.9/WG.II/WP.56; see Report of the Working Group on International Contract Practices on the work of its ninth session, A/CN.9/275). The Working Group prepared texts of draft articles 1 to 4 of the uniform rules with comments to serve as a basis for future consultations by