VII. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade: note by the Secretariat*

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1. The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade was adopted on 17 April 1991 and was opened for signature on 19 April 1991 by a universal diplomatic conference at Vienna. The Convention is based upon a draft prepared by UNCITRAL and an earlier preliminary draft Convention elaborated by UNIDROIT.

2. The Convention establishes a uniform legal regime governing the liability of an operator of a transport terminal (referred to herein also as "terminal operator" or "operator") for loss of or damage to goods and for delay in handing goods over. Terminal operators are commercial enterprises that handle goods before, during or after the carriage of goods. Their services may be contracted for by the consignor, the carrier or the consignee. Typically, an operator performs one or more of the following transport-related operations: loading, unloading, storage, stowage, trimming, dunnaging or lashing. The terms used in practice to refer to such enterprises are varied and include, for example: warehouse, depot, storage, terminal, port, dock, stevedore, longshoremen's or dockers' companies, railway station, or air-cargo terminal. The applicability of the Convention is determined on the basis of the transport-related services such enterprises perform, irrespective of the name or designation of the enterprise.

A. Policies underlying the Convention

Need for mandatory liability rules

3. Under many national laws the parties are in principle free to regulate by contract the liability of terminal operators. Many operators take advantage of this freedom and include in their general contract conditions clauses that considerably limit their liability for the goods. In some national laws the freedom of terminal operators to limit their liability is subject to mandatory restrictions.

4. The limitations of liability found in general contract conditions restrict, for example, the standard of care owed by the operator, exclude or limit responsibility for acts of employees or agents of the operator, place on the claimant the burden of proof of circumstances establishing the operator's liability, stipulate short limitation periods for actions against the operator, and set low financial limits of liability. The financial limits of liability are often so low that for most types of goods the maximum recoverable damages amount to a small fraction of the actual damage.

5. Such broad limitations and exclusions of liability give rise to serious concerns. It is considered in principle undesirable to shift the risk of loss or damage from the terminal operator, who is best placed to ensure the safety of goods, to the cargo owner, who has limited influence on the causes for loss or damage. Broad exclusions and limits of liability are likely, over a longer period of time, to reduce the incentive for terminal operators to pay continuous attention to working procedures designed to avoid loss or damage to goods. Furthermore, since the cargo owner has limited access to information about the origin of the damage, placing on the cargo owner the burden of proving facts establishing the operator's liability is seen as an improper impediment to recovery of damages.

6. Those concerns may become even more serious when transport-related services for a particular transport route are provided by only one or a limited number of operators.

Gaps in liability regimes left by international conventions

7. When the consignor hands over goods for carriage to a terminal operator, the carrier's liability may not yet begin; at the place of destination, the carrier's liability may end when the carrier hands the goods over to a terminal operator, which is usually before the goods are handed over to the consignee or to the next carrier. While the carrier's liability is through various transport conventions to a large degree subject to harmonized and mandatory rules, there may exist periods during which the goods in transit are not subject to a mandatory regime. The negative consequences of those gaps in the liability regime are serious because, according to statistics, most cases of lost or damaged goods occur not during the actual carriage but during transport-related operations before or after the carriage.

Need for harmonization and modernization

8. The rules in national legal systems governing the liability of terminal operators differ widely, as to both their source and content. The rules may be contained in civil or commercial codes or in other bodies of law governing the deposit or bailment of goods. As to the standard of liability, in some legal systems the terminal operator is strictly liable for the goods, and he can be exonerated only if certain narrow exonerating circumstances are established. In other

* This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes; it is not an official commentary on the Convention.

systems the operator is liable for negligence, i.e. if he did not take reasonable care of the goods. Further differences concern the burden of proving the circumstances establishing the operator's liability. Under many systems a limited quantum of evidence put forward by the claimant is sufficient to establish a presumption of the operator's liability, and it is then up to the operator to prove exonerating circumstances. There are, however, also legal systems in which it is up to the claimant to prove circumstances establishing the operator's liability. Disparities exist also in respect of financial limits of liability. In some legal systems the operator's liability is unlimited, while in others limits are established. Further differences concern limitation periods. In some legal systems these periods may be very long. The disparities may be complicated by the fact that in some legal systems operators are subject to different liability rules depending upon the nature of services rendered. For example, storing goods in the operator's warehouse and loading of goods into the vessel's hold may be subject to different sets of rules.

9. Such disparity of laws causes problems in particular to carriers and other users of transport-related services who are in contact with terminal operators in different countries.

10. Furthermore, many national laws are not suited for modern practices in transport terminals. For example, national laws may not accommodate the use of containers or computerized communication techniques or may not deal adequately with the question of dangerous goods.

Consequences and benefits of the Convention

11. The Convention was prepared in order to eliminate or reduce the above described deficiencies in the legal regimes applicable to the international carriage of goods. The solutions adopted bear in mind the legitimate interests of cargo owners, carriers and terminal operators.

12. The Convention benefits cargo owners in that it provides a certain and balanced legal regime for obtaining compensation from the operator. This is significant for the cargo owner in particular when goods are damaged or lost by the operator before the carrier has become responsible for the goods or after the carrier has ceased to be responsible for the goods. In such a situation, in which the terminal operator is normally the only person from whom compensation for the damage can be sought, the non-mandatory national liability rules may offer a limited possibility for the cargo owner to obtain compensation from the terminal operator.

13. The Convention also benefits carriers when goods are damaged by the terminal operator during the period in which the carrier is responsible for the goods. In such a case, in which the carrier is often liable to the owner of the goods under a mandatory regime, the carrier will be able to base the recourse action against the terminal operator on the mandatory regime of the Convention.

14. Improvement and harmonization of liability rules brought about by the Convention also benefits terminal operators. The Convention provides a modern legal regime appropriate to the developing practices in terminal operations. Rules on documentation are liberal and harmonized, and they allow the operator to make use of electronic data interchange (EDI). Among other rules in the interest of the terminal operator are those establishing rather low financial limits of liability and those giving the operator a right of retention over goods for costs and claims due to the operator.

B. Preparatory work

15. The Convention has its origins in work by UNIDROIT on the topic of bailment and warehousing contracts, which led to the adoption in 1983 by the UNIDROIT Governing Council of the preliminary draft Convention on the Liability of Operators of Transport Terminals.[1]

16. By agreement between UNIDROIT and UNCITRAL, the preliminary draft Convention was placed before UNCITRAL in 1984 with a view to preparing uniform rules on the subject. The UNCITRAL Working Group on International Contract Practices, to which the task of preparing uniform rules was assigned, devoted four sessions to the preparation of the uniform rules,[2] and recommended the adoption of the uniform rules in the form of a convention. The draft Convention was transmitted to all States and to interested international organizations for comments. In 1989, after making various modifications to the text,[3] UNCITRAL adopted the draft Convention on the Liability of Operators of Transport Terminals in International Trade. The United Nations General Assembly, on the recommendation by UNCITRAL, decided to convene a diplomatic conference to conclude a Convention.

17. The United Nations Conference on the Liability of Operators of Transport Terminals in International Trade was held at Vienna from 2 to 19 April 1991. Forty-eight States were represented at the Conference as well as intergovernmental organizations and international non-governmental organizations interested in the topic. The Conference thoroughly reviewed all issues, including views that were considered and rejected during the preparatory work within UNCITRAL. The Convention was adopted on 17 April 1991.[4] Until 30 April 1992, the deadline for signing the Convention, the following States signed it: France, Mexico, Philippines, Spain and United States of America.

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[1]The preliminary draft Convention and the explanatory report are published in UNIDROIT, Study XLIV—Doc. 24, Rome, September 1983.

[2]Report of the Working Group on International Contract Practices on the work of its eighth session (A/CN.9/260), reproduced in *United Nations Commission on International Trade Law: Yearbook* (hereafter referred to as *"Yearbook"*), vol. XVI: 1985, part two, IV, A; report of the Working Group on its ninth session (A/CN.9/275) (*Yearbook,* vol. XVII: 1986, part two, III, A); report of the Working Group on its tenth session (A/CN.9/287) (*Yearbook,* vol. XVIII: 1987, part two, III, A); and report of the Working Group on its eleventh session (A/CN.9/298) (*Yearbook,* vol. XIX: 1988, part two, II, A).

[3]The discussion in the Commission is reflected in the report of the Commission on its twenty-second session (A/44/17), reproduced in *United Nations Commission on International Trade Law Yearbook,* vol XX: 1989, part one, A), paras. 11-225.

[4]The documents of the diplomatic conference have been compiled in A/CONF.152/14 (United Nations publication, Sales No. E.93.XI.3).

C. Salient features of the Convention

Definitions

18. For the Convention to apply, the transport-related services must be performed by a person who falls within the scope of the definition of the "operator of a transport terminal". The operator of a transport terminal is defined in article 1*(a)* as "a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to 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 is not considered an operator whenever he is a carrier under applicable rules of law governing carriage".

19. *"In the course of his business"*. The Convention applies only if the transport-related services constitute a commercial activity. This does not mean that a particular transport-related service must be subject to the payment of a fee. For example, in some terminals short-term storage at the place of destination may be "free of charge" and the charges would start to accrue after the second or third day.

20. *"Goods involved in international carriage"*. If transport-related services are performed with respect to goods involved in domestic carriage, the Convention does not apply. In order to provide certainty as to the applicable regime, article 1*(c)* provides that the places of departure and destination must be "identified" as being located in different States already at the time when the goods are taken in charge by the operator.

21. *"Transport-related services"*. The Convention provides in article 1*(d)* a non-exhaustive list of services that fall within the category of transport-related services governed by the Convention. The examples given (storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing) indicate that those services include only physical handling of goods and not, for instance, industrial processing such as repacking or cleaning of goods, or financial or commercial services.

22. *"Area under his control or in respect of which he has a right of access or use"*. At an early stage of the preparatory work within the UNCITRAL Working Group it was considered that the draft Convention should apply only if the safekeeping of goods was part of the operator's services. That approach would exclude, for example, those stevedoring companies that limited their services to loading and unloading of goods without themselves storing the goods. In order to express more clearly that approach, the Working Group included in the definition the criterion that the operator should perform his services "in an area under his control or in respect of which he has a right of access or use". The scope of application of the draft Convention was subsequently broadened to include the performance of various transport-related services even if no safekeeping of goods is involved. In light of the broadened scope of application, the criterion relating to the area in which the services are performed also has a broader meaning. It means, for example, that stowing or trimming of goods in the hold of a vessel would be considered a service performed in an area to which the operator has a right of access; a wharf on which the operator moves goods and which is used by various enterprises would be an area of which the operator has a right of use; the operator's warehouse would be an area under his control.

23. *"A person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage"*. The Convention excludes from its scope of application the cases when a person performs transport-related services while he is responsible for the goods under the rules of law governing carriage. For example, if a particular carriage of goods by sea is subject to the Hamburg Rules, and the carrier takes the goods in charge at the port of loading and stores them until the commencement of the voyage, or keeps the goods in his charge for some time at the port of discharge, the Hamburg Rules, and not the Convention on terminal operators, will govern the carrier's liability for the goods held by him in the port.

Period of responsibility

24. The operator's responsibility for goods begins when the operator has taken them in charge, and ends when the operator has handed them over to, or has placed them at the disposal of, the person entitled to take delivery of them (article 3). The concept of "taking goods in charge" should be seen in the light of the types of services that an operator might perform and in the light of the fact that an operator may perform the services while another person, usually a carrier, is responsible for the goods. When the operator takes goods over in order to put them in a warehouse, he would be in charge of the goods from the time he has custody of or control over the goods. When, however, the operator commences to handle goods by performing services such as loading, unloading, stowage, trimming, dunnaging or lashing, the operator's services may be performed while the goods are "in charge" of the carrier. During the performance of these services, the operator may not be considered to have assumed the custody of or full control over the goods. Being "in charge" of the goods in these cases may be considered to commence when the operator comes in physical contact with the goods.

25. Similarly, the meaning of the concept of "handing goods over or placing them at the disposal of the person entitled to take delivery of them" depends on the circumstances of the case. If "handing over" is done by releasing goods from the operator's warehouse and putting them in the custody of the carrier or the consignee, the relevant moment would be the one when the operator relinquishes his custody of or control over the goods. If the operator's services were limited, for example, to stowage, trimming, dunnaging or lashing, which are often performed while the goods are in the charge of the carrier, the operator's period of responsibility would end when the operator completes his manipulation of the goods.

26. The purpose of the concept of placing goods "at the disposal of the person entitled to take delivery of them" is to allow the operator to terminate his responsibility under the Convention when he has fulfilled all of his obligations even if the person entitled to take delivery of the goods fails to take them over. For the responsibility under

the Convention to be terminated, the placing of goods at the disposal of the entitled person must be done in accordance with the contract and the usages applicable to the situation.

Issuance of document

27. The Convention in principle leaves it up to the operator whether to issue a document acknowledging receipt of goods (article 4). However, if the customer requests such a document, the operator must issue it. Such a solution is necessary in order to take into account practices in various types of terminal operations. For example, when the operations are limited to lashing containers, stowing or trimming cargo, or dunnaging, it may be customary not to issue a document. When the operations include warehousing, operators usually issue a document acknowledging receipt of the goods.

28. The Convention provides that a document may be issued "in any form which preserves a record of the information contained therein". It is further provided that a signature can be a "handwritten signature, its facsimile or an equivalent authentication effected by any other means". This provision is not qualified by a requirement that a particular means of authentication must be permitted by the applicable law. The expression "equivalent authentication" should be understood as a requirement that the method used must be sufficiently reliable in the light of the usages relevant to the situation.

29. The Convention refers in several places to notices and requests (articles 4(1); 5(3)(4); 10(4); 11(1),(2),(5); 12(2), (4),(5)). Article 1*(e)* and *(f)* specifies that a notice or a request may be given "in a form which preserves a record of the information contained therein". The purpose of the provision, which parallels the provision on the form of a document issued by the operator and is modelled on equivalent formulations in several international legal texts, is to make it clear, on the one hand, that a notice or request under the Convention cannot validly be made orally, and, on the other hand, that a notice or request may be given in the form of a written paper or may be transmitted by the use of electronic data interchange (EDI). Since the use of EDI requires that both parties use suitable and compatible equipment, the use of electronic transmission techniques presupposes previous agreement by the parties.

Basis of liability

30. The Convention deals with the operator's liability for loss resulting from physical loss of or damage to goods as well as from delay in handing over the goods (article 5). The question whether the concept of "loss" includes lost profits is left to the applicable law.

31. The liability of the operator under the Convention is based on the principle of presumed fault or neglect. This means that, after a claimant has established that the loss or damage occurred during the operator's period of responsibility, it is presumed that the loss or damage was caused by the operator's negligence. The operator can be relieved of his liability if he proves that he, his servants or 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 loss or damage.

32. Reservations were expressed about the principle of presumed liability on the ground that in some terminals people who deposited goods in the terminal may come in the terminal in order to inspect the goods, take samples or show the goods to prospective buyers, and that, as a result, the terminal operators could not exercise full control over goods. Those reservations were not accepted since it was considered that placing the burden of proof of negligence on the owner of goods would in practice often mean that the owner would not be able to establish liability for losses arising from pilferage, theft and poor organization of work. Moreover, it is reasonable to expect that operators should organize proper supervision over goods and that the principle of presumed liability was a suitable stimulus therefor.

Limits of liability

33. The Convention provides two different financial limits for the operator's liability, depending upon the mode of transport to which the terminal operations relate (articles 6 and 16). The lower limits are applicable to terminal operations relating to the carriage of goods by sea or inland waterways, and the higher limits apply to other terminal operations; this distinction reflects the fact that the value of goods carried by sea or inland waterways tends to be lower than in other modes of transport. Furthermore, those lower limits, which are close to the limits set in conventions dealing with carriage of goods by sea or inland waterways, are designed to treat sea and inland-waterways terminals in a similar way as the sea and inland-waterways carriers.

34. The limits for loss of, or damage to, goods are based exclusively on the weight of goods. The Convention does not provide an alternative limit based on the package or other shipping unit as, for example, do the Hamburg Rules and the Hague Rules. This will mean that, the lighter and smaller the packages, the lower will be the operator's limits compared to the sea carrier's limits. A reason for not providing a per-package limit was a desire to avoid difficulties in interpreting the limits based on the package or other shipping unit.

35. The Convention does not provide an overall limit of liability when damage is caused by a single event to goods pertaining to a number of different owners. For example, a fire in a terminal can give rise to an extensive liability of the operator despite the limitation applicable to each claimant. Such a "catastrophic" limit was not adopted because a single limit would likely be too low for large terminals and would not represent a real limitation of liability for the smaller ones. No satisfactory criterion could be found for providing different overall limits depending on the size of the terminal. Furthermore, it was considered that insurance can be a solution for liability arising from such catastrophic events.

Application to non-contractual claims

36. Article 7(2) and (3) deals with defences and liability limits enjoyed by the operator's servants, agents or independent contractors. The provisions do not establish a right

of action against those persons. The provisions merely extend to those persons the defences and liability limits if a right of action exists against them under the applicable law.

37. The Convention does not expressly address the question whether an agreement between the operator and a customer to increase liability limits or to waive defences binds the operator's servants, agents or independent contractors.

Loss of right to limit liability

38. The operator loses the benefit of the financial limits of liability if it is proved that he himself or his servants or agents acted in a reckless manner defined in article 8. The operator does not lose the benefit of liability limits if an operator's independent contractor acted in such manner.

39. During the preparation of the Convention, it was proposed that the operator should lose the benefit of the liability limit only if he himself acted with qualified fault and that he should not lose that benefit if his servants or agents so acted. The prevailing view, however, was that the operator has a duty to supervise his servants and agents and that he should bear the risk for their reckless actions.

Rights of security in goods

40. Article 10, which gives the operator a right of retention over goods for claims due to him, does not itself establish a right of sale of retained goods. The right of sale is dealt with in the Convention only to the extent such a right exists under the law of the State where the retained goods are located.

Limitation of actions

41. In providing a two-year limitation period for actions against the operator (article 12), the drafters of the Convention wanted to avoid a situation in which it would be difficult or impossible for a carrier to institute a recourse action against the operator. This would be the case when the carrier is sued or held liable close to or after the expiration of the two-year limitation period. Article 12(5) allows a claim against the operator even after the expiration of the limitation period if the action is instituted within 90 days after the carrier has been held liable in an action against himself or has settled the claim upon which such action was based.

Final clauses

42. Despite proposals for permitting reservations to the Convention, it was decided not to allow reservations (article 21).

43. The desire for the Convention to enter into force soon is reflected in article 22, according to which the Convention enters into force when five States have adhered to it.

Further information about the Convention may be obtained from the UNCITRAL secretariat.