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Article 9

New U.N. Convention on Liability of Terminal Operators in International Trade

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New U.N. Convention on Liability of Terminal Operators in International Trade

Joseph C. Sweeney

Abstract

This Article examines the completion of the new United Nations Convention on the Liability of Operators of Transport Terminals in International Trade at a diplomatic conference in Vienna. This conference terminated an eight-year process of international legislation that began with a recognition of the problem of the gaps in international transport law by the International Institute for the Unification of Private Law ("UNIDROIT"), a complete study of the terminal operations industry and a lengthy review of the legal problems in the Working Group on International Contract Practices (the "Working Group") of the United Nations Commission on International Trade Law ("UNCITRAL"), the preparation of a draft convention by the Plenary Meeting of UNCITRAL, and review by the Sixth (Legal) Committee of the U.N. General Assembly leading to the call for the Diplomatic Conference.

RECENT DEVELOPMENT

NEW U.N. CONVENTION ON LIABILITY OF TERMINAL OPERATORS IN INTERNATIONAL TRADE

*Joseph C. Sweeney**

The new United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (the "O.T.T. Convention")¹ was completed at a diplomatic conference in Vienna, which concluded on April 19, 1991. This conference terminated an eight-year process of international legislation that began with a recognition of the problem of the gaps in international transport law by the International Institute for the Unification of Private Law ("UNIDROIT"),² a complete study of the terminal operations industry and a lengthy review of the legal problems in the Working Group on International Contract Practices (the "Working Group") of the United Nations Commission on International Trade Law ("UNCITRAL"),³ the preparation of a draft convention by the Plenary

* Professor of Law, Fordham University School of Law. The Author served on U.S. delegations to the meetings of the UNCITRAL Working Groups on the proposed draft, to the Plenary Session of UNCITRAL in June, 1989, and to the Diplomatic Conference on the Liability of Operators of Transport Terminals in International Trade at Vienna in April 1991. The views expressed are those of the Author and not the U.S. government or any international organization to which he has been accredited.

1. U.N. Doc. A/CONF. 152/13 at 5-16 (1991) [hereinafter O.T.T. Convention]. The entire Convention is reproduced as an Appendix to this Article.

2. The International Institute for the Unification of Private Law ("UNIDROIT"), originally established in 1926 under the League of Nations, continues at its headquarters in Rome under its intergovernmental agreement to which fifty-three nations, including the United States, are parties. UNIDROIT's principal function is the preparation of draft texts harmonizing international commercial law. Its most recent completed projects at the Diplomatic Conference in Ottawa in May 1988 were the Convention on International Financial Leasing and the Convention on International Factoring. The terminal operator work began in 1960 with a study of warehousing contracts, in the context of combined transport, leading to a 1982 preliminary draft convention that stressed the safe-keeping aspects of terminal operations.

3. The United Nations Commission on International Trade Law was established in 1966 by General Assembly Resolution 2205 (XXI), 21 U.N. GAOR Supp. (No. 16) at 99-100, U.N. Doc. A/6316 (1966), *reprinted in* [1970] 1 UNCITRAL Y.B. at 65-66,

Meeting of UNCITRAL,⁴ and review by the Sixth (Legal) Committee of the U. N. General Assembly leading to the call for the Diplomatic Conference.⁵ The United Nations conference was held at the Austria Center of the United Nations Headquarters in Vienna. Fifty nations and nineteen non-governmental organizations and specialized agencies attended the conference.

The 1989 draft convention and the 1991 completed convention include twenty-five articles, constructed in a scheme typical of modern transport conventions:⁶

U.N. Doc. A/CN.9/SER. A/1970 [hereinafter UNCITRAL]. Its purpose is to remove obstacles to international trade caused by conflicts and divergences in the laws of different states and to attain broader participation in a process of harmonization and unification of international trade law. Preliminary investigation of terminal operations began with sessions of UNCITRAL in 1982 and 1983, and the topic was finally included in UNCITRAL's Programme of Work in 1983. Four two-week meetings of the Working Group were necessary to prepare the draft convention for consideration by the Commission in 1989.

4. Draft Convention on the Liability of Operators of Transport Terminals in International Trade, U.N. Doc. A/CONF. 152/5 (1990), *reprinted in* [1989] 20 UNCITRAL Y.B. at 255-59; *see* Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Second Session (1989), U.N. GAOR Supp. No. 17 (A/44/17) (1990), *reprinted in* [1989] 20 UNCITRAL Y.B. at 37-39 [hereinafter U.N. International Trade Commission Report]. Prior to the plenary session, the draft text was submitted to governments for comments. *See* U.N. Doc. A/CN. 9/319 (1989). Again, before the Diplomatic Conference, the draft convention was submitted to governments for comments. *See* U.N. Doc. A/CONF. 152/7 (1990). The drafting history is reviewed in two articles to which the Author contributed. Larsen, Sweeney & Falvey, *The Uniform Rules on the Liability of Operators of Transport Terminals*, 20 J. MAR. L. & COMM. 21 (1989); Larsen, Sweeney, Falvey & Davies, *The 1991 Diplomatic Conference on Uniform Liability Rules for Operators of Transport Terminals*, 21 J. MAR. L. & COMM. 449 (1990).

5. *See* U.N. International Trade Commission Report, *supra* note 4.

6. *See, e.g.*, Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]; Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 190 [hereinafter CMR Convention]; Revision of the International Convention concerning the Carriage of Goods by Rail (CIM), Oct. 25, 1952, 241 U.N.T.S. 336 [hereinafter CIM Convention]; United Nations Convention on the Carriage of Goods by Sea, 1978, *reprinted in* 17 I.L.M. 608 [hereinafter Hamburg Rules]; United Nations Convention on International Multimodal Transport of Goods, U.N. Doc. TD/MT/CONF./16 (1980) [hereinafter Multimodal Convention].

Definitions
 Scope of Application⁷
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 Issuance of Document
 Basis of Liability⁹
 Limits of Liability
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 Limitation of Actions¹⁰
 Unit of Account¹¹
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Consideration of the problems of terminal operators did not take the form of an international convention until the 1988 session of the Working Group, which concluded after four years of study that neither a model law nor contractual clauses could deal adequately with the perceived problem of the gaps between carrier liability regimes, since all those regimes were expressed in the form of international conventions.¹³

The purpose of the new convention is uniformity of law. The convention is thus intended to govern the liability for loss of and damage to goods while they are in the charge of the terminal operator (and therefore not subject to the carrier liability rules of a particular mode of transportation).¹⁴ The con-

7. O.T.T. Convention, *supra* note 1, art. 2(1). The Convention "applies to transport-related services performed in relation to goods which are involved in international carriage." *Id.* Further, goods in international carriage are determined objectively, not subjectively, when they are *identified* as such when taken in charge. See *id.* art. 1(c).

8. *Id.* art. 3. "The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them." *Id.*

9. *Id.* art. 5(1). "The operator is liable . . . if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility . . . unless he proves that he . . . took all measures that could reasonably be required to avoid the occurrence and its consequences." *Id.*

10. *Id.* art. 12(1). "Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years." *Id.*

11. *Id.* art. 16. The unit of account is the Special Drawing Right ("SDR") of the International Monetary Fund. The value of one SDR was US\$1.32679 on May 1, 1991.

12. *Id.* arts. 17-25. These clauses consist of nine articles on deposit of ratifications, entry into force, reservations, revision, and denunciation.

13. U.N. Doc. A/CN. 9/298 paras. 10 & 84 (1988).

14. O.T.T. Convention, *supra* note 1, art 1(a). Article 1(a) states:

Operator of a transport terminal . . . means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-

vention also applies to losses caused by delay in handing over the goods.¹⁵ The liability is based on fault or failure to perform, but it is a presumed fault with the burden of exoneration on the operator.¹⁶ The liability, however, is limited to an amount based on the weight of the goods.¹⁷

Because of the widely different limits of liability between sea transport¹⁸ and the air and road conventions,¹⁹ it proved to

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.

Id.

15. *Id.* art. 5(3). Article 5(3) explains that [d]elay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

Id.

16. *Id.* art. 5(1). For the text of this article, see *supra* note 9. Similar liability formulas in the rail, road, and air conventions led to the following language in article 5 of the Hamburg Rules on Carriage of Goods by Sea:

The carrier is liable . . . if the occurrence which caused the loss, damage or delay took place while the goods were in his charge . . . unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

Final Act of the United Nations Conference on the Carriage of Goods by Sea, art. 5, U.N. Doc. A/CONF. 89/13 (1978). To that formula, however, a Common Understanding was added as Annex II:

It is the common understanding that the liability of the carrier . . . is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

Id. Annex II. The Hamburg formula is also found in article 16 of the 1980 Multimodal Convention, *supra* note 6. A similar, but limited, rule appears in the "Q" Clause of the 1924 Hague Rules, International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, *entered into force* June 2, 1931, *for the U.S.* Dec. 29, 1937, 51 Stat. 233, art. IV(2)(q), T.S. 931, 120 L.N.T.S. 155 [hereinafter *Hague Rules*]; 46 U.S.C. § 1304(2)(q) (1988) (quoting *Hague Rules*).

17. O.T.T. Convention, *supra* note 1, art. 6.

18. Under the 1893 Harter Act, there is no unit limitation of liability. 46 U.S.C. §§ 190-96 (1988). The unit limitation in the 1924 Hague Rules is U.K.£ 100 sterling in gold, while the 1936 Carriage of Goods by Sea Act ("COGSA") has a unit limitation of US\$500 per package. 46 U.S.C. app. § 1304(5) (1988). In the 1968 Visby Amendments to the Hague Rules as modified by the 1979 Amendment, the unit limit is 2 SDR per kilogram or 667 SDR per package, while the 1978 Hamburg Rules fix the unit limitation of liability at 2.5 SDR per kilogram and 835 SDR per package.

19. Under the 1929 Warsaw Convention, *supra* note 6, the limit is 250 Poincaré francs per kilogram, while Montreal Protocols 3 and 4 to the Convention fix the

be impossible to agree on a single limitation amount. As a result, where immediate sea transport has been or is about to be used to transport the goods, the liability limit is low,²⁰ while in those situations where sea transport is not involved the liability limit is higher.²¹

The most controversial aspect of the conference concerned the effect of "Himalaya" clauses²² in ocean bills of lading on stevedore liability, as the consequences of the clause widely differ throughout the world. Thus, in some nations, stevedores are *completely exculpated* from any liability for damage to goods as the result of a Himalaya clause, because the cargo interests' rights against stevedores are made subject to the maritime bill of lading under the Hague Rules which *excludes* carrier liability *before* and *after* the ocean voyage (the tackle to tackle rule).²³ In other nations, the Himalaya clause is *not* ef-

amount at 17 SDR per kilogram. Montreal Protocols 3 and 4 Providing Higher Liability Limits, Sept. 25, 1975; see S. EXEC. REP. NO. 1, 98th Cong., 1st Sess. 21-37 (1983) (reprinting protocols), *reprinted in* 22 I.L.M. 13 (1983). The protocols are still unratified. The limit under the 1952 CIM Convention, *supra* note 6, is 100 francs germinal per kilogram, changed to 17 SDR by the 1980 Amendments to the Convention Concerning International Carriage by Rail, May 9, 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), while the limit under the 1956 CMR Convention, *supra* note 6, is 25 francs germinal per kilogram. The 1978 Protocol to CMR changed the amount to 8.33 SDR.

20. 2.75 SDR per kilogram. O.T.T. Convention, *supra* note 1, art. 6(1)(b). The 2.75 SDR figure comes from the 1980 Convention on International Multimodal Transport, not yet in force. See Multimodal Convention, *supra* note 6, art. 18, U.N. Doc. TD/MT/CONF./16 (1980); Driscoll & Larsen, *The Convention on International Multimodal Transport of Goods*, 57 TUL. L. REV. 193 (1982). Sea carriage includes pick up and delivery within a port.

21. 8.33 SDR per kilogram. O.T.T. Convention, *supra* note 1, art. 6(1)(a). The 8.33 SDR figure comes from the 1978 Protocol to the CMR Convention.

22. The bill of lading is evidence of the contract of carriage between shipper and carrier. "Himalaya Clauses" protecting stevedores and other maritime parties against cargo interests' claims for loss or damage began to be added to maritime bills of lading following the English decision in *Adler v. Dickson*, [1955] 1 Q.B. 158, [1954] 2 Lloyd's Rep. 122 (Q.B. 1954), *appeal dismissed*, [1954] 2 Lloyd's Rep. 267. That case involved a *passenger* on the ship *Himalaya* who sued in tort the master and bo'sn of the ship on which she was injured rather than the contractual carrier. As a result of the court's failure to extend the exculpatory contract provisions to the master and the bo'sn, they were held liable to the injured passenger. Thereafter, elaborate exculpatory provisions to benefit servants, agents, and stevedores were added to ocean bills of lading and the Himalaya Clause doctrine was recognized by the House of Lords under an agency theory in *Midland Silicones, Ltd. v. Scruttons Ltd.*, [1962] App. Cas. 446, [1961] 2 Lloyd's Rep. 365.

23. Hague Rules, *supra* note 16, art. 1(e); see 46 U.S.C. § 1301(e) (1988). This provision is popularly known as the "tackle to tackle" rule. Statements at the Confer-

fective to exculpate stevedores from all liability but may shield the stevedore from unlimited liability.²⁴ In the United States, stevedore liability may not be completely exculpated.²⁵ Under state law, terminal operator liability may be determined by bailee status²⁶ or by contractual exculpation.²⁷

At the conference, the situation in the United States appeared to be unique in that complete exculpation is against public policy, but narrowly-drawn clauses in the ocean bill of lading might extend the carrier's defenses such as the US\$500 per package limitation of liability and the one year statute of limitations to the stevedore. The goal of the U.S. delegation was to preserve maximum flexibility for shippers and stevedores to use either the O.T.T. Convention or the negotiated

ence by delegates from Australia, Canada, Germany, Italy, and Japan indicated that stevedores are completely exonerated from liability to the shipper for damage to cargo.

24. See generally W. TETLEY, *MARINE CARGO CLAIMS* 757-79 (3d ed. 1988).

25. *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959). A dictum in that case, however, noted that the petitioner, a stevedoring company, was "not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract." *Id.* at 308.

Thereafter, some cases have upheld stevedore protection under the Himalaya Clause. See, e.g., *B. Elliott v. John T. Clark & Son*, 704 F.2d 1305 (4th Cir. 1983); *Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266 (11th Cir. 1982); *Brown & Root v. M/V Peisander*, 648 F.2d 415 (5th Cir. 1981); *Bernard Screen Printing Corp. v. Meyer Line*, 464 F.2d 934 (2d Cir. 1971), *cert. denied*, 410 U.S. 910 (1973). Other decisions have rejected Himalaya Clause protection of stevedores because of lack of specificity in identifying the protections or the protected parties. See, e.g., *LaSalle Machine Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56 (4th Cir. 1979); *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518 (2d Cir. 1975); *De Laval Turbine Co. v. West India Industries*, 502 F.2d 259 (3rd Cir. 1974); *Rupp v. Int'l Terminal Operating Co.*, 479 F.2d 674 (2d Cir. 1973); *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476 (2d Cir.), *cert. denied*, 404 U.S. 855 (1971). See generally Zawitoski, *Federal, State, and International Regulation of Marine Terminal Operators in the United States*, 64 TUL. L. REV. 439 (1989); Hooper, *Legal Relationships: Terminal Owners, Operators, and Users*, 64 TUL. L. REV. 595 (1989); Palmer & DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 TUL. L. REV. 281 (1989); Zawitoski, *Limitation of Liability for Stevedores and Terminal Operators under the Carrier's Bill of Lading and COGSA*, 16 J. MAR. L. & COMM. 337 (1985); Note, *Carriage of Goods by Sea: Application of the Himalaya Clause to Subdelees of the Carrier*, 2 MAR. LAW. 91 (1977).

26. *Colgate Palmolive Co. v. S.S. Dart Canada*, 724 F.2d 313 (2d Cir. 1983) (applying New Jersey law), *cert. denied*, 466 U.S. 963 (1984); *Baer v. Slater*, 261 Mass. 153, 158 N.E. 328 (1927); *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372 (1980); *Suzuki v. Small*, 243 N.Y. 590, 154 N.E. 618 (1926).

27. *Ferrex Int'l, Inc. v. M/V Rio Chone*, 718 F. Supp. 451 (D. Md. 1989); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 529 A.2d 822 (Md. App. 1987).

ocean bill of lading for these limited purposes, while the goal of other nations such as Australia, Germany, Italy, and Japan was to terminate the possibility of total stevedore exculpation by forcing the stevedore into the O.T.T. Convention without the possibility of protection from the ocean bill of lading.

The battleground for this issue was the definition of the terminal operator in article 1(a) of the O.T.T. Convention. At the 1989 Plenary Meeting, the text had provided that "a person shall not be considered an operator . . . to the extent that he is responsible for the goods as a carrier or multimodal transport operator under applicable rules of law governing carriage."²⁸ Noting that stevedores are *not* carriers (*e.g.* they are not regulated as ocean carriers by the Federal Maritime Commission), the U.S. delegation was able to persuade the 1989 Plenary Meeting to delete the words "as a carrier" to preserve flexibility for shippers and stevedores to use ocean bill of lading defenses to regulate a portion of their relations as it concerns liability for damage to goods.²⁹ Nevertheless, some states objected to the new formulation being reviewed at the 1991 Diplomatic Conference because it did not draw a clear, bright line between terminal operators and carriers. After extensive redrafting and several votes, new language to identify stevedores as terminal operators, and not as carriers, was drafted and adopted. U.S. stevedores objected to the "whenever" language of the new text as a prohibition on the continued use of the Himalaya clause to limit liability to US\$500 per package.³⁰

Consistent with its efforts to maintain the existing stevedore flexibility, the U.S. delegation next sought a reservation to the Convention concerning this very narrow issue. In view of the principle that there should be no reservations to the Convention, however, it was not possible to obtain the two-thirds majority needed to insert a reservation at that late stage

28. U.N. Doc. A/CN. 9/298 para. 29 (1988). *See generally* Larsen, Sweeney, Falvey & Davies, *supra* note 4.

29. [1989] 20 UNCITRAL Y.B. 265-68. The attraction of the flexible approach for shippers is the elimination of triple insurance on the same goods (Carrier's P & I insurance, O.T.T.'s liability insurance, and Shipper's Cargo insurance) with consequent cost savings for customers.

30. O.T.T. Convention, *supra* note 1, art. 1(a). Article 1 states that "a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage." *Id.*

of the proceedings.³¹

Finally, using an approach to the flexibility problem *not* based on the definition of terminal operator, the U.S. delegation stated, without any objection from any other state in attendance, that in accordance with the preamble to the O.T.T. Convention³² and article 15 of the O.T.T. Convention,³³ the flexibility of using the O.T.T. Convention or the maritime bill of lading had been preserved on behalf of shippers and stevedores.³⁴

There were abstentions on the roll call vote by Belgium, Indonesia, Libya, the Netherlands, Saudi Arabia, Turkey, and the United Kingdom. All other participating states voted in favor of the new Convention.

The work of the Conference was done in two committees of the whole ("Committee One" and "Committee Two"), a drafting committee and a credentials committee. Committee One, which considered substantive legal issues, was skillfully chaired by Mr. Jean-Paul Beraudo of France. Committee Two,

31. *See id.* art. 21.

32. O.T.T. Convention, *supra* note 1, preamble, para. 3. According to paragraph 3,

INTENDING to facilitate the movement of goods by establishing uniform rules concerning liability for loss of, damage to or delay in handing over such goods while they are in the charge of operators of transport terminals and are *not covered by the laws of carriage arising out of conventions applicable to the various modes of transport.*

Id. (emphasis added).

33. *Id.*, art. 15. Article 15 says:

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

Id.

34. The unchallenged statement explaining the U.S. vote on the entire convention noted that

[w]e voted in favor of the Convention as a whole since Article 15 states that the Convention does not modify rights or duties which may arise under any international carriage of goods convention or under any national law giving effect to that Convention. Since stevedores may be entitled to certain rights of the carrier arising under the Hague Rules, Article 15 therefore preserves the option to seek the benefits of the carrier under the Hague Rules.

Notes of U.S. Delegation to O.T.T. Convention, *supra* note 1, Apr. 17, 1991. It is hoped that the eventual adoption of a uniform legal regime governing *carrier* liability before and after the ocean voyage may eliminate the differences between the O.T.T. Convention and the protections offered under ocean bills of lading.

which considered the Final Clauses, was patiently chaired by Professor Jelena Vilus of Yugoslavia. The drafting committee was chaired by Mr. P.C. Rao of India, and the credentials committee was chaired by Mr. Ross Hornby of Canada. The President of the conference, who performed his functions with tact, understanding, and efficiency was Professor José Maria Abascal of Mexico. The smooth and correct working of the conference was in the charge of Professor Eric Bergsten,³⁵ secretary of UNCITRAL, who served as executive secretary of the conference. He was ably assisted by Mr. Stephen R. Katz, secretary of Committee One, and Mr. Simeon Sahaydachny, secretary of Committee Two.

This was a highly successful diplomatic conference on a narrow, technical problem that had been prepared over an eight-year period. There was a thorough review of all issues, even those that had been previously reviewed and rejected. The conference was free of political and ideological confrontations. The Convention may become a reality relatively soon, because only five ratifications are required for entry into force.³⁶

35. Professor Bergsten has served as Secretary of UNCITRAL since 1985, and has been associated with UNCITRAL in various capacities since 1974. After his retirement in the summer of 1991, he will become the distinguished Bacon-Kilkenny Professor of Law at Fordham University School of Law for the 1991-92 academic year.

36. O.T.T. Convention, *supra* note 1, art. 22.

APPENDIX

UNITED NATIONS CONVENTION ON THE LIABILITY
OF OPERATORS OF TRANSPORT TERMINALS
IN INTERNATIONAL TRADE

PREAMBLE

THE CONTRACTING STATES:

REAFFIRMING THEIR CONVICTION that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples;

CONSIDERING the problems created by the uncertainties as to the legal regime applicable with regard to goods in international carriage when the goods are not in the charge of carriers nor in the charge of cargo-owning interests but while they are in the charge of operators of transport terminals in international trade;

INTENDING to facilitate the movement of goods by establishing uniform rules concerning liability for loss of, damage to or delay in handing over such goods while they are in the charge of operators of transport terminals and are not covered by the laws of carriage arising out of conventions applicable to the various modes of transport,

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

In this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or 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;

(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if it was not supplied by the operator;

(c) "International carriage" means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;

(d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein;

(f) "Request" means a request made in a form which provides a record of the information contained therein.

Article 2

Scope of application

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

(a) When the transport-related services are performed by an operator whose place of business is located in a State Party, or

(b) When the transport-related services are performed in a State Party, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

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

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

Article 3

Period of responsibility

The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them.

Article 4

Issuance of document

(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or

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

(2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is presumed to have received the goods in apparent good condition, unless he proves otherwise. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

(3) A document referred to in paragraph (1) may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message.

(4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means.

Article 5

Basis of liability

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as from delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants 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 occurrence and its consequences.

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

(3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

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

Article 6

Limits of liability

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

is limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

(c) When the loss of or damage to a part of the goods affects the value of another part of the goods, the total weight of the lost or damaged goods and of the goods whose value is affected shall be taken into consideration in determining the limit of liability.

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

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

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

Article 7

Application to non-contractual claims

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-re-

lated services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

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

Article 8

Loss of right to limit liability

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

(2) Notwithstanding the provision of paragraph (2) of article 7, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9

Special rules on dangerous goods

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

(a) To take all precautions the circumstances may require,

including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

(b) To receive reimbursement for all costs incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

Article 10

Rights of security in goods

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

(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in the State where the operator has his place of business.

(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled, to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. This right to sell does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging.

(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the op-

erator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in all other respects be exercised in accordance with the law of the State where the goods are located.

Article 11

Notice of loss, damage or delay

(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over by the operator to the person entitled to take delivery of them, the handing over is prima facie evidence of the handing over by the operator of the goods as described in the document issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was issued, in good condition.

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

(4) In the case of any actual or apprehended loss of or damage to the goods, the operator, the carrier and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods.

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

Article 12

Limitation of actions

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

(2) The limitation period commences:

(a) On the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or

(b) In cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier.

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

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

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

Article 13

Contractual stipulations

(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of

such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

(2) Notwithstanding the provisions of the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention.

Article 14

Interpretation of the Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 15

International transport conventions

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

Article 16

Unit of account

(1) The unit of account referred to in article 6 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be expressed in the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The equivalence between the national currency of a State Party which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a State Party which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

(2) The calculation mentioned in the last sentence of the pre-

ceding paragraph is to be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for amounts in article 6 as is expressed there in units of account. States Parties must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

FINAL CLAUSES

Article 17

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 18

Signature, ratification, acceptance, approval, accession

- (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade and will remain open for signature by all States at the Headquarters of the United Nations, New York, until 30 April 1992.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 19

Application to territorial units

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature,

ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, this Convention shall be applicable only if

(a) The transport-related services are performed by an operator whose place of business is located in a territorial unit to which the Convention extends, or

(b) The transport-related services are performed in a territorial unit to which the Convention extends, or

(c) According to the rules of private international law, the transport-related services are governed by the law in force in a territorial unit to which the Convention extends.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 20

Effect of declaration

(1) Declarations made under article 19 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under article 19 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the

first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 21

Reservations

No reservations may be made to this Convention.

Article 22

Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article 23

Revision and amendment

(1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

(2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 24

Revision of limitation amounts

- (1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.
- (2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.
- (3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.
- (4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:
 - (a) The amount by which the limits of liability in any transport-related convention have been amended;
 - (b) The value of goods handled by operators;
 - (c) The cost of transport-related services;
 - (d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;
 - (e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and
 - (f) The costs of electricity, fuel and other utilities.
- (5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.
- (6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.
- (7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were

States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph enters into force for all States Parties 18 months after its acceptance.

(8) A State Party which has not accepted an amendment is nevertheless bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.

(9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period is bound by the amendment if it enters into force. A State which becomes a State Party after that period is bound by any amendment which has been accepted in accordance with paragraph (7).

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

Article 25

Denunciation

(1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) Subject to paragraph (8) of article 24, the denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this nineteenth day of April one thousand nine hundred and ninety-one, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.