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Treaty on Terminal Operator Liability in International Trade

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*The Treaty on Terminal Operator Liability in International Trade**

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I.
INTRODUCTION

In 1989, the U.N. General Assembly received from the United Nations Commission on International Trade Law (UNCITRAL) the draft Convention on the Liability of Operators of Transport Terminals in International Trade (OTT Convention).[1] In response, the General Assembly resolved on December 4, 1989 to convene an international conference of plenipotentiaries to consider the draft. [2]

**Editor's Note*: This is the third article that the *Journal* has published by these authors dealing with the development of the Terminal Operators Convention. The earlier pieces can be found at 20 J. Mar. L & Com. 21 (1989) (discussing the UNCITRAL Working Group studies) and 21 J. Mar. L. & Com. 449 (1990) (examining the draft convention).

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[1]20 I.L.M. 1503 (1991); Official Records, U.N. Conference on the Liability of Operators of Transport Terminals in International Trade, A/CONF. 152/14 (U.N. Pub. Sales No. E. 93/XI/3) (1993) [hereinafter O.R.], Final Act, at 101–09. The O.R. contains a background document on the drafting history, the UNCITRAL draft convention, comments and proposals of governments and international organizations on the draft convention, preliminary documents of the conference, summary records of the Plenary, Committee One (the main committee), Committee Two (the final clauses), the Final Act and the Convention.

[2]UNGA Res. 44/33 (1989).

Pursuant to this resolution, such a conference was held in Vienna, Austria, in April 1991. Following eighteen days of often stormy meetings, the conference adopted the text of the OTT Convention on April 19, 1991.[3]

In a nutshell, the OTT Convention is designed to fill in the gaps left by the existing liability regimes that govern the international transportation of goods. It is believed that the OTT Convention will promote international trade by establishing a predictable, uniform liability regime covering the time period when goods are not governed by the existing maritime, road, rail, and air liability regimes.[4]

Although the terminal operator project was to have been limited to the safekeeping of goods,[5] an examination of terminal operations throughout the world revealed that terminal operators perform a variety of functions in addition to straight warehousing. As a result, by the time the OTT Convention was finalized, its scope had been broadened considerably.

The OTT Convention takes the form of an international convention because existing modal regimes worldwide are governed by international conventions.[6] It consists of 25 articles, including: definition of terminal operators; scope of application; period of responsibility; issuance of document; basis of liability; limitation of liability; special rules on dangerous goods; rights of security in goods; notice of loss, damage or delay of goods; limitation of actions; contractual stipulations; and relationship to other transportation conventions. No reservations may be made to the OTT Convention, which will enter into force after ratification by five States.

The present authors had the honor of serving on the U.S. delegation to the diplomatic conference. Accordingly, this article is designed to acquaint readers with the task that the delegation was given by the U.S. government, the obstacles that the delegation faced in pursuing its agenda, and the extent to which it was able to fulfill its assignment.

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[3]O.R. at 103–09, U.N. Doc. A/CONF. 152/13 (1991).

[4]An example of such a gap is the time period after goods are delivered to a warehouse (transport terminal) by one mode of transportation, but before they are transported further by a different mode of transportation.

[5]See Preliminary Draft Convention on the Liability of International Terminal Operators, with Explanatory Report Prepared by the UNIDROIT Secretariat (Feb. 1982); UNCITRAL Report on its 16th Session, 24 May-3 June, 1983, A/CN.9/243, at 28–29; Report of the U.S. Delegation (Larsen and Sweeney) to the 8th Session of the Working Group on International Contract Practices, Vienna, 3–13 December, 1984 (on file with the U.S. Secretary of State).

[6]See infra text accompanying note 24.

II.
"SCALING THE HIMALAYAS": APPLICATION OF THE MARITIME BILL OF LADING TO STEVEDORES

One preliminary matter must be discussed at the outset. To the surprise of many delegations other than that of the U.S., the most complex issue of the conference concerned the liability of stevedoring companies under Himalaya clauses in maritime bills of lading.[7] This issue was of *a priori* concern to the U.S. delegation because of the U.S. government's policy that stevedores should have the same legal benefits as carriers.

The U.S. delegation successfully sought to maintain in the OTT Convention the use of the liability regime provided in the Hague Rules[8] by stevedores to whom the maritime carrier has extended it through a Himalaya clause in the bill of lading. As a result, Article 15 of the OTT Convention states that the:

> 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.

Thus, when clearly defined by the maritime bill of lading as subcontracting agents or employees of the maritime carrier,[9] steve-

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[7]Himalaya clauses were developed to undo the tort liability of parties in the maritime transport of goods and people not governed by the contractual relation of shipper (or passenger) and carrier. See Adler v. Dickson, [1955] Q.B. 158, [1954] 2 Ll. L. Rep. 122 (Q.B. 1954), appeal dismissed, [1954] 2 Ll. L. Rep. 267. The case involved a passenger on the ship *Himalaya* who sued in tort the master and bosun 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 bosun, 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 Ll. L. Rep. 365. For a further discussion, see Sweeney, New U.N. Convention on Liability of Terminal Operators in International Trade, 14 Fordham Int'l L.J. 1115, 1119 (1990–91).

[8]The International Convention for the Unification of Certain Rules Relating to Bills of Lading for Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155, codified with reservations in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. §§ 1300–1315 (1988).

[9]For definitional problems, see Mikinberg v. Baltic S.S. Co., 988 F.2d 327 (2d Cir. 1993). A terminal operator is a bailee under the common law, see Colgate Palmolive Co. v. S/S Dart Canada, 724 F.2d 313 (2d Cir. 1983), cert. denied, 466 U.S. 963 (1984). It was the U.S. delegation's understanding that U.S. stevedores prefer to be clearly defined as subcontractors of maritime carriers so that they do not become subject to the diverse state laws and to the possibility of strict and unlimited liability as in *Colgate*. By the same token, stevedores wish to have the flexibility to be under the OTT Convention when they cannot have the benefits of the Hague Rules as subcontractors (bailees) of maritime carriers.

dores continue to have the benefit of all COGSA defenses available to the carrier and the liability regime of the OTT Convention does not apply.

Article 15 of the OTT Convention applies to both COGSA and the Hague Rules. U.S. case law also holds that the rights of stevedores may be governed by COGSA under certain circumstances.[10] The U.S. delegation clarified this point in the following statement for the permanent record of the conference:

> We 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.[11]

The statement of the U.S. delegation at the conference also clarified that the terminal operator, as defined in Article 1(a) of the OTT Convention,[12] retains the option to seek the benefits of the carrier under COGSA. Although briefly discussed at the working group meetings and the plenary by the U.S. delegation, the Himalaya clause issue had not been effectively explored before the diplomatic conference. As a result, many delegations, unfortunately, were unprepared to deal with its complexities until the end of the entire process.

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[10]Id. See infra text accompanying notes 58–77.

[11]O.R. at 30, paragraph 56, slightly edited by the *précis* writers. See also Report of the U.S. Delegation to the 1991 United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Cargo Liability and the Carriage of Goods by Sea, Subcommittee on Merchant Marine, Oversight Hearing on June 24, 1992, No. 102–101 at 300, 302 [hereinafter Congressional Oversight Hearing].

[12]Article 1(a) of the OTT Convention defines a terminal operator as follows:

> "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.

This policy-making definition creates the problem for the continued validity of the protection of stevedores by Himalaya clauses because of the last sentence. It is the clear position of U.S. stevedores that they are not carriers, although protected by such carrier defenses as the one year time bar (46 U.S.C. app. § 1303(6) (1988)) and the $500 per package unit limitation of liability (46 U.S.C. app. § 1304(5) (1988)).

It is important to remember that the U.S. statement at the final vote relates to the legal situation of U.S. stevedores under U.S. case law.[13] As an essential element of the OTT Convention, the statement will be included in the submission made by the Department of State and the President to the U.S. Congress. When the OTT Convention is submitted to the Senate for advice and consent, the statement and the Convention will together be subject to Senate consideration. The U.S. statement also will become an ingredient of any implementing legislation that both Houses of Congress may adopt. In this way, the U.S. understanding will be in U.S. legislation and will be applied by U.S. courts. Finally, the statement will be made known to the depositary at the time of ratification.

III.
BACKGROUND OF THE NEGOTIATIONS

During the 1970s and early 1980s, the International Institute for the Unification of Private Law (UNIDROIT) studied the issue of the liability of terminal operators and prepared a draft convention. The U.S. did not participate in this project.[14]

The work on a uniform liability regime for terminal operators was transferred from UNIDROIT to UNCITRAL in 1984 when UNCITRAL decided to assign the project to the UNCITRAL Working Group on International Contract Practices.[15] Because the U.S. takes part in all of UNCITRAL's work, the Departments of State and Transportation were of the view that the U.S. should participate in UNCITRAL's work on the liability of transport terminal operators. Both departments were particularly eager to ensure that U.S. interests were fully considered, regardless of the subsequent attitude of these interests in the eventual outcome, since U.S. export and import goods would be governed by the OTT Convention in any part of the

[13]For a discussion of U.S. case law see infra note 58. Article 15 of the OTT Convention provides:

> The 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.

For a further discussion of Article 15 see infra notes 75–77 and accompanying text.

[14]See supra note 5 and Larsen, Sweeney & Falvey, The Uniform Rules on the Liability of Operators of Transport Terminals, 20 J. Mar. L. & Com. 21, 23 (1989).

[15]A/CN.9/243, supra note 5, at 27–28.

world that adopted it.[16] The UNCITRAL negotiations thus could be the means of creating a legal instrument that would be acceptable for U.S. ratification or accession and that might eventually be considered for domestic application if a favorable consensus developed.

UNCITRAL decided to consider not only the UNIDROIT draft convention but also to study other related issues.[17] This was not terribly surprising, given UNCITRAL's considerable competence and experience in the area of uniform law for transportation and international trade. As is well known, UNCITRAL prepared the 1978 U.N. Convention on the Carriage of Goods by Sea (Hamburg Rules),[18] drafted the 1980 Convention on Contracts for the International Sale of Goods (CISG),[19] and has worked on issues affecting international bills of exchange, promissory notes, international checks and the electronic transfer of funds. All of this experience, as well as much on-site observation and study of transport terminals in many different countries,[20] was taken into consideration and became part of the draft that was submitted by UNCITRAL to the U.N. General Assembly in 1989.

The UNCITRAL Working Group, assigned to work on the liability of terminal operators, began its meetings in 1984.[21] A number of fundamental policy and technical issues were raised in the Working Group by the U.S. These issues originated from a special Study

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[16]The OTT Convention's scope of application, see infra text accompanying notes 80–84, is stated in Article 2 as follows:

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

[17]See supra note 5.

[18]U.N. Doc. A/CONF.89/13 (1978).

[19]U.N. Doc. A/CONF.97/19 (1981). For an analysis of the CISG see J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (2d ed. 1991).

[20]The Port Authority of New York and New Jersey was unusually generous in educating delegates and secretariat personnel by providing tours of the Port Authority's facilities and generally aiding the terminal operator discussions of the U.N. delegates and UNCITRAL staff during working group meetings in New York.

[21]See Report of the U.S. Delegation, supra note 5, and Larsen, Sweeney & Falvey, supra note 14, at 22–24.

Group formed under the auspices of the U.S. Secretary of State's Advisory Committee on Private International Law.[22]

The members of the Study Group were drawn largely from the private sector. This group was a primary source of information and policy guidance. On the Study Group were practicing lawyers as well as representatives of shippers, carriers and insurers. The General Counsel for the Institute of International Container Lessors (IICL), who participated in the UNCITRAL meetings as an observer, was a member of the Study Group. Other active participants included the General Counsel of the National Association of Stevedores (NAS) as well as an insurance expert representing the American Institute of Marine Underwriters (AIMU).

In order to form positions for the U.S. delegation, the Study Group considered many questions,[23] including the following:

1. Should the new liability regime for terminal operators be in the form of a model law or a treaty?

Members of the Study Group, in particular the insurance expert, tended to believe that the terminal operator project should be in the form of a treaty because model legislation could not fit into the existing international transportation context in which liability is governed by treaties.[24] Treaty law also would have the advantage of predictability. A uniformly applicable, limited liability regime would aid insurers in ascertaining the overall risk of loss of goods in the charge of terminal operators. The Department of State, the Department of Transportation and the U.S. delegation consequently favored the treaty law approach and the terminal operators' liability regime is in the form of a treaty.

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[22]Id. at 22, 52–54.

[23]Id.

[24]Id. at 52. Examples of such transportation treaties are: the Hague Rules, supra note 8; the Hamburg Rules, supra note 18; the International Convention for the Carriage of Goods by Rail (COTIF), Berne, May 9, 1980, Cmnd. 8535; and the Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189. See also Driscoll & Larsen, The Convention on International Multimodal Transport of Goods, 57 Tul. L. Rev. 193 (1982) (discussing the 1980 U.N. Convention on International Multimodal Transport of Goods [hereinafter Multimodal Convention]), and Larsen, 1989 Inter-American Convention on International Carriage of Goods by Road, 39 Am. J. Comp. L. 121 (1991) (discussing the Organization of American States' 1989 Road Convention).

2. Should terminal operators on an individual basis have the option of removing themselves from the OTT Convention in the way that parties to an international sale of goods may choose some law other than the CISG?

The result of individual opting out would have been total unpredictability of the applicable legal regime and lack of uniformity.[25] Insurers would experience difficulty in fixing the overall risk of loss while goods were in the charge of terminal operators. Insurance to cover the uncertainty of the risk would be an additional cost factor. Consequently, the Study Group[26] and, in turn, the U.S. delegation, did not favor opting out by individual businesses.

3. Should stevedores be included or excluded from the application of the OTT Convention?

In view of the fact that most transport terminal operations involve the use of stevedores, this proved to be a fundamental issue. The issue also was important to the U.S. because of the magnitude of activity and special legal status of stevedores in U.S. law and the importance of the industry in the eyes of the Department of Transportation.[27]

The special legal status of U.S. stevedores is derived from U.S. case law,[28] which provides that stevedores have the benefit of the defenses available to carriers under maritime bills of lading, in particular COGSA's $500 per package limitation of liability[29] and one year statute of limitations.[30] These benefits may be made available to U.S. stevedores through narrowly drawn clauses in maritime bills of lading; that is, when clearly defined in a maritime bill of lading as subcontracting agents or employees of the carrier. In other circumstances, stevedores are not entitled to these benefits and are subject to state laws; that is, the common law of bailments (or strict liability) or common law negligence.[31]

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[25]Article 6 of the CISG provides an example of individual opting out. See Honnold, supra note 19, § 74, at 125.

[26]See Larsen, Sweeney & Falvey, supra note 14, at 52–53.

[27]See infra text accompanying notes 58–77.

[28]Id.

[29]46 U.S.C. app. § 1304(5) (1988).

[30]46 U.S.C. app. § 1303(6) (1988).

[31]See infra note 58.

Shippers and insurers favored the inclusion of stevedores within the OTT Convention.[32] In their view, the OTT Convention could not serve their purposes unless it included stevedores. While stevedores would have preferred exclusion, they also expressed a strong wish to protect their existing COGSA benefits.[33] As a result, the U.S. delegation adopted the position that the OTT Convention should not be applicable to "stevedores who are *already covered* by applicable rules of law governing carriage."[34] This position was supported by the NAS.[35]

Consequently, the U.S. comment to UNCITRAL[36] stated that the U.S. position "would assure stevedores, when they handle goods under maritime bills of lading which extend to them the benefits possessed by the carriers, that they are treated no less favorably under the proposed convention than are the carriers."[37]

4. What should be the form of documentation used by terminal operators to reflect the contract with customers?

The Study Group was of the view that maximum flexibility should be allowed the terminal operator.[38] In other words, terminal operators should be free to use the documentation of their carrier customers or their own documentation. Furthermore, documentation should not slow the movement of the transportation chain. For example, it was noted that stevedores might not have time to weigh the goods during loading and unloading operations and therefore should not be obligated to record the weight of the goods.

Thus, the U.S. delegation adopted a position of maximum flexibility of documentation, possible conversion to paperless documenta-

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[32]See Larsen, Sweeney & Falvey, supra note 14, at 53.

[33]See supra note 9 and infra note 34. It is not inconceivable that some carriers, for competitive reasons, might be forced to abandon the $500 per package defense.

[34]A/CN.9/319, at 13; letter of Peter H. Pfund, Assistant Legal Adviser for Private International Law, Feb. 2, 1989, transmitting comments of the U.S. on the draft convention.

[35]In response to the Pfund letter, see supra note 34, Thomas D. Wilcox, General Counsel of the NAS, wrote on March 3, 1989 to U.S. delegate Paul B. Larsen: "We are most pleased with the position that the government will take in this matter, and thank all of you on your side of the U.S. table for listening to us on the other side of the table. We think that the position taken by the United States to be the correct one and one which best serves the needs of the United States interests. We hope that you are successful in getting the rest of the world to agree with you."

[36]A/CN.9/319, supra note 34, at 14.

[37]Id. See infra text accompanying notes 58–77.

[38]See Larsen, Sweeney & Falvey, supra note 14, at 53.

tion, such as electronic data interchange (EDI), and maximum adaptability to electronic data processing.

5. What should be the liability regime governing the relationship between terminal operators and their customers?

The primary concern of the Study Group,[39] and later of the U.S. delegation, was to ensure maximum uniformity of law. The shippers expressed support for presumed liability of the terminal operator, but some of the maritime bar opposed this solution. Presumed liability, however, is a feature of the international air, rail and road conventions already in force and is even found in Article IV(2)(q) of the Hague Rules.

6. What should be the limitation of liability?

Shippers preferred a liability limit based on weight only, whereas the admiralty bar favored a per package limit on liability for goods involved in maritime carriage. Liability limits in the existing air, rail and road conventions are based on weight alone and representatives of these transport modes did not favor a per package limit.

7. Should the right to limit liability be lost in cases of intentional torts by the terminal operator's servants and agents?

Shippers and the admiralty bar differed on the issue of whether terminal operators should be exposed to the risk of forfeiting their limited liability when their servants and agents commit intentional torts. Although shippers favored such a rule, some of the admiralty bar opposed it despite the fact that such a provision is built into the Visby Amendments to the Hague Rules favored by these same members of the admiralty bar. The difference was resolved as follows: because most terminal operators are corporations acting only through their servants and agents, it was thought necessary and prudent to attribute the acts of servants and agents to their employing corporations. On the other hand, the U.S. delegation adopted and expressed the view that intentional torts by independent contractors hired by terminal operators should not expose terminal operators to a loss of limited liability.[40]

[39]Id. at 52–53.

[40]Id. See A/CN.9/319, supra note 34, at 16.

8. To what extent should terminal operators have the right to recover damages due to mislabeled dangerous goods?

The terminal operator usually is able to identify the party with whom the operator contracts for services. Thus, the operator can recover under this contract for the adverse consequences of improperly labeled goods handled by the operator. However, mislabeling of goods is often done deliberately or accidentally at a stage in the chain of transportation that precedes the transport stage. The Chemical Manufacturers Association (CMA) was consulted and agreed that the usual rule should apply to damages caused by mislabeling by, for example, the manufacturer of dangerous goods prior to the contract with the terminal operator; that is, that the terminal operator should be able to recover from whichever person fails to observe applicable laws or regulations on labeling of goods and thus fails to inform the terminal operator of the dangerous nature of the goods.[41] Thus, compensation should be obtainable not only from contracting parties but also from persons in the chain of transportation preceding the contract with the terminal operator.

The Study Group agreed to accept the recommendation of the CMA,[42] and this became the position of the U.S. delegation.

9. May the terminal operator sell the goods to satisfy charges for services?

A maritime carrier representative called attention to the point that not only should the terminal operator be able to sell goods to satisfy charges for services, it is sometimes inconvenienced by unclaimed goods that occupy space needed for other purposes.[43] Consequently, the U.S. delegation proposed that a terminal operator should be able to consider goods in its charge abandoned if not claimed within a fixed period of time.[44]

In relation to the terminal operator's right to sell goods to satisfy charges, the IICL strongly urged that terminal operators should not be able to satisfy unpaid charges by selling the containers in which such goods are stored when the containers are leased and clearly marked as regards ownership.[45] The U.S. delegation strongly advanced this view.

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[41]See Larsen, Sweeney & Falvey, supra note 14, at 53.

[42]Id. See A/CONF.152/C.1/SR.12 at 4.

[43]Letter from Peter M. Klein, General Counsel, Sea-Land Corporation, Nov. 1, 1988.

[44]Id. See A/CN.9/319, supra note 34, at 16.

[45]Letter from Edward A. Woolley, IICL Secretary, Nov. 28, 1988.

10. How much notice should be given to the terminal operator of loss, damage to, or delay of the goods?

A maritime carrier representative expressed the view that where loss or damage is not apparent, the consignee may not discover any loss or damage until a considerable time after taking delivery.[46] The carrier suggested 90 days' notice and this became the U.S. position.

The Study Group served as an excellent sounding board for ideas as well as a source of practical information about the practices of terminal operators. Members of the group generously made themselves available for group meetings and for individual consultations. Another source of contributions to the U.S. delegation's work was the public response to two law review articles on the UNCITRAL project, authored by the members of the U.S. delegation to the meetings of the Working Groups in Vienna and New York.[47] These articles were read widely in the U.S. and abroad and became, in effect, working documents for the UNCITRAL conferences. They were taken into consideration and cited by other delegations during the negotiations. In fact, scholarly publications proved an excellent vehicle for explaining the need for the OTT Convention.

IV.
THE DIPLOMATIC CONFERENCE

A. Introduction

A total of 48 States were represented at the diplomatic conference in Vienna.[48] Attendance was less than hoped for in that governments from South America, Africa and Asia refrained from travel because of the Gulf War that had been raging in January and February 1991, immediately preceding the conference. Cancellation of the conference was considered for that reason; but the schedule of U.N.

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[46]Klein letter, supra note 43.

[47]See Larsen, Sweeney & Falvey, supra note 14, and Larsen, Sweeney, Falvey & Davies, The 1991 Diplomatic Conference on Uniform Liability Rules for Operators of Transport Terminals, 21 J. Mar. L. & Com. 449 (1990).

For an overview of the plenary and the diplomatic conference from the viewpoint of a Spanish delegate, see Moran, *Notas para la Historia del Convenio sobre la responsabilidad de los E.T.T.*, IX Annuario de Derecho Maritimo 89 (1991), and Moran, *La unificacion de responsabilidad de los empresarios de terminales de transporte (E.T.T.): una presentacion*, 207 Revista de Derecho Mercantil 207 (1993).

[48]O.R. at 23, A/CONF.152/13. At the time of the diplomatic conference the recent changes in the structure of the U.S.S.R. and Yugoslavia had not yet occurred.

conferences was fully booked so that the OTT conference could not have been rescheduled for either 1992 or 1993, and much of the impetus for the conference might have dissipated if it had not been held as scheduled by the U.N. General Assembly. Thus, UNCITRAL decided to hold the conference as planned despite the possibility of reduced attendance.

Nineteen specialized agencies, including U.N. and other governmental and non-governmental organizations, were represented by observers at the conference.[49] The U.S. delegation was small but the private sector was well represented.

Most of the work of the conference was done in the First Committee, in which all delegations participated. It was chaired by Judge Jean-Paul Beraudo of France, who had participated in the UNCITRAL working group meetings. The final clauses and other non-substantive work were done in the Second Committee, in which all delegations also participated. It was chaired by Professor Jelena Vilus of Yugoslavia.[50]

The conference elected as chair Professor Jose Maria Abascal of Mexico, who also had attended the UNCITRAL sessions that had prepared the draft convention. Professor Eric E. Bergsten, Chief of the International Trade Law Branch of the U.N. Office of Legal Affairs (head of the UNCITRAL secretariat), acted efficiently as executive secretary of the diplomatic conference. He was ably assisted by Stephen R. Katz of the U.N. Office of Legal Affairs.

B. International Context of the Negotiations

The absence of the U.S. from the original UNIDROIT deliberations on the liabilities of terminal operators already had caused the entire project to have a European flavor, and because of UNIDROIT's concern with the safekeeping aspect of terminal operators the transportation outlook sometimes had been sacrificed to the hotelkeeper viewpoint, although UNIDROIT also had prepared a number of transport-related conventions. Because of geographical location and the multitude of conflicting national and international liability regimes in Europe, the Europeans had particular reason to focus on the liability of terminal operators.

From the point of view of international transportation, the terminal operator's relationship with its customers is more domestic and less international in nature than are the air, maritime, rail and road

[49]Id.
[50]A/CONF.152/13.

transportation relationships. That is the reason why unification of this transportation area came subsequent in time to the unification of the law of the transportation modes.[51] That is also the reason why the terminal operators' legal regime has a more concentrated impact on domestic law than on international law.

C. National Participation

The policy and legal interests of individual countries participating in the conference merit some description.[52]

Italy had a unique role in that the project originated in UNIDROIT, located in Rome. UNIDROIT and its work receive positive support from the government of Italy. Italy also shaped the terminal operator project more than any other State because the head of the working group that drafted the OTT Convention was the well-known Professor Joachim Bonell of the University of Rome, an expert in international trade who proved to be an unusually capable and energetic chairman. As chair as well as the Italian delegate, Professor Bonell worked for an effective unification of the liability of the terminal operators.

France also played a significant part in shaping the OTT Convention, not only through active participation in the working group but also by having its delegate, Judge Jean-Paul Beraudo, play the key role of chairing the First Committee, the main working committee of the diplomatic conference.

Germany participated very actively in the working group and in the diplomatic conference. Germany had a special interest in defining stevedores' liability because, under the law of Germany, stevedores may totally exculpate themselves from liability in contracts with maritime carriers (such total exculpation, of course, is not permitted in the U.S.). Thus, Germany favored bringing its stevedores within the OTT Convention to regulate their liability.[53]

Spain's active interest in the project was different from that of other members of the European Community. Unlike the views of the U.K. and the Netherlands, Spain anticipated positive results; unlike Germany, there was no concern with the position of stevedores; and unlike France, complex conflict of laws positions were not propounded.

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[51]See supra note 24.

[52]Compare the discussion of U.S. policy formation in the private sector, supra notes 23–47 and accompanying text.

[53]O.R. at 34, A/CONF.152/7 at 5; O.R. at 132–33, A/CONF.152/C.1/SR.1 at 2. Germany co-sponsored A/CONF.152/L.5, a four nation proposal to amend Article 1(a). See infra notes 65–66 and accompanying text.

Mexico actively supported the OTT Convention. The Mexican delegate served as chair of the diplomatic conference and had an important role in shaping the product of the conference. Mexico also had particular problems during the transfer of goods from the carrier to the terminal, known as *el periodo de nadie*.[54] This is a time when the goods have been unloaded but the terminal operator has failed to take charge of them, so that no one is responsible for them under Mexican law.

Australia, like Germany, had a special interest in insuring that its stevedores' liability would be governed by the OTT Convention because Australian stevedores may totally exculpate themselves from liability in contracts with maritime carriers and bills of lading. Thus, Australia was persistent in its efforts to bring stevedores under the OTT Convention.[55]

Japan, like Germany and Australia, sought to define its stevedores' liability as being governed by the OTT Convention because Japanese stevedores may totally exculpate themselves from liability.[56]

The U.K. had participated only sporadically in the working group; further, when the U.K. did attend, the representation differed each time. The U.K. delegation already had announced at the beginning of the conference that the U.K. was unlikely to adopt the OTT Convention; it was among the six countries that abstained on the final vote on the OTT Convention. The U.K. delegation stated that, in its view, the OTT Convention would have unfavorable insurance consequences, although it did not appreciate the dangers to insurance interests of a multitude of different liability regimes, some imposing strict liability with or without limitation while others employed various types of negligence with or without limitation.[57]

V.
PROVISIONS OF THE OTT CONVENTION

Having traced the background and proceedings of the conference, it is now appropriate to examine each of the 25 articles of the OTT Convention.

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[54]O.R. at 150, A/CONF.152/C.1/SR.4 at 7.

[55]Australia co-sponsored A/CONF.152/L.5, O.R. at 99, the four nation proposal to amend Article 1(a). See infra notes 65–66 and accompanying text.

[56]Japan joined Germany and Australia, see supra notes 53 and 55, in co-sponsoring A/CONF.152/L.5, the four nation proposal to amend Article 1(a).

[57]See *Colgate*, supra note 9. Note that *Colgate* resulted in unlimited and strict liability, as described infra in the discussion of Article 1, which would affect insurance policies originating or being reinsured in the London insurance market.

1. Definitions

a. Terminal Operator

Formulation of the definition of terminal operator changed many times during the three weeks of the conference until the present definition was selected on the next to last day. It was the most controversial aspect of the negotiations. The present text of Article 1(a) of the OTT Convention reads as follows:

> "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of its 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 its 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.* [emphasis added]

Opposition of the U.S. delegation to the total divorce of carriers and terminal operators had been consistent throughout the seven year development of the project because of U.S. efforts to preserve the bill of lading option for U.S. stevedores.[58] The 1988 UNCITRAL Working Group text had provided that:

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[58]In response to the specially expressed wishes of the NAS, see supra notes 34–35 and accompanying text, the U.S. delegation had as one of its major goals maintaining in the OTT Convention the uniformity of liability law which U.S. stevedores have achieved under the Hague Rules' maritime bill of lading; that is, when clearly defined as subcontractors (bailees) of a maritime carrier, stevedores have the benefit of the same defenses available to the carrier.

The U.S. Supreme Court, in dictum, invited the use of bill of lading clauses to protect those agents who carry out the functions of carriers in Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959). Following *Herd*, a number of courts have held that narrowly drawn clauses, clearly expressed in bills of lading, will extend the Hague Rules' benefits, such as the $500 per package unit limit of liability, 46 U.S.C. app. § 1304(5) (1988), and the one year statute of limitations, 46 U.S.C. app. § 1303(6) (1988), to stevedores. See, e.g., Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285 (5th Cir. 1971); Bernard Screen Printing Corp. v. Meyer Line, 464 F.2d 934 (2d Cir. 1972), cert. denied, 410 U.S. 910 (1973); Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. 1981); Certain Underwriters at Lloyd's v. Barber Blue Sea Line, 675 F.2d 266 (11th Cir. 1982); B. Elliott (Canada) Ltd. v. John T. Clark & Son of Maryland, Inc., 704 F.2d 1305 (4th Cir. 1983); Koppers Co., Inc. v. S/S Defiance, 704 F.2d 1309 (4th Cir. 1983); Seguros Illimani S.A. v. M/V Popi P, 929 F.2d 89 (2d Cir. 1991); Taisho Marine & Fire Ins. Co. v. Maersk Line, Inc., 796 F. Supp. 336 (N.D. Ill. 1992), aff'd, 7 F.3d 238 (7th Cir. 1993).

It should be noted, however, that there are a substantial number of cases *rejecting* the carrier defenses for stevedores because of insufficient specificity in identifying the protected parties or the protections being extended. See, e.g., Cabot Corp. v. S.S. Mormacscan, 441 F.2d 476 (2d Cir.), cert. denied, 404 U.S. 855 (1971); Rupp v. Int'l Terminal Operating Co., 479 F.2d 674 (2d Cir. 1973); De Laval Turbine, Inc. v. West India Indus. Inc., 502 F.2d 259 (3d Cir. 1974); La Salle Machine Tool, Inc. v. Maher Terminals, Inc., 611 F.2d 56 (4th Cir. 1979); Mikinberg v. Baltic Steamship Co., 988 F.2d 327 (2d Cir. 1993).

> 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. [emphasis added]

Following strenuous efforts of the U.S. delegation at the UNCITRAL plenary in June 1989, the words "as a carrier" were deleted. In the first discussion at the diplomatic conference, Germany sought an oral amendment to restore the 1988 text, opposed by the U.S. delegation, at which point Italy sought to change the language while preserving the concept that the terminal operator could not act in any capacity as a carrier.[59] Because of uncertainty about the issues in the discussion, an informal drafting group was formed to attempt to resolve the problem by the use of definitions.[60] The effort to define "carrier" for the OTT Convention proved futile, however, due to the fact that each of the modal conventions has its own definition of carrier.

After several hours of discussion, the informal group could only agree that "a carrier means a person being a carrier under provisions of law." Subsequently this was changed to ". . . a person being a carrier by virtue of an international convention or paramount national law covering carriage of goods." But the definition was again changed to ". . . a person being a carrier by virtue of an international convention or relevant national law covering carriage of goods."[61] Eventually, all attempts to define "carrier" were rejected.[62]

In the meanwhile, Japan sought to reintroduce the 1988 OTT definition concept in language similar to that already rejected in 1989: "However, a person shall not be considered an operator whenever he is responsible as a carrier or multimodal transport operator for the goods under applicable rules of law governing carriage."[63] This effort was defeated with eight States in favor, eight opposed, and twelve abstentions. The 1989 text then was reinstated with twelve votes in favor, eight opposed, and eight abstentions. Although this definition was sustained against further attack in the drafting committee, during preparation of the Report of the First Committee Australia introduced another definition of carrier:[64]

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[59]O.R. at 135, A/CONF.152/C.1/SR.1 at 2.
[60]A/CONF.152/C.1/L.44/Rev. 1.
[61]Id.
[62]O.R. at 207–08, A/CONF.152/C.1/SR.16 at 3.
[63]A/CONF.152/C.1/L.19.
[64]A/CONF.152/C.1/L.56, Rev. 1.

> Carrier means a person who is a carrier by virtue of an international convention on the carriage of goods or national law implementing or [based on] [derived from] and corresponding with such a convention, but not a non-carrying intermediary unless he shares all the relevant rights and liabilities of a carrier under such a convention or national law.

These issues all resurfaced at the conference's plenary review of the texts on April 16, 1991. Australia, Germany, Italy and Japan combined their efforts to draw a hard and fast distinction between "terminal operators," including stevedores, and "carriers," excluding stevedores.[65] According to their representatives, in their countries Himalaya clauses exculpated stevedores totally from any liability for damages to cargo. In response, the U.S. delegation again explained that although U.S. stevedores may use carrier defenses, total exculpation of stevedores by Himalaya clauses is not possible under U.S. law.[66] The chair, noting the inapplicability of the Himalaya clause to civil law systems, urged the need for a new version of the definition of operator.[67]

The U.S.S.R. proposed a compromise that would have solved the problem. Under its suggestion, a definition of "stevedore" would have been included that would have distinguished U.S. stevedores (protected by some carrier defenses) from totally exculpated stevedores. Unfortunately, this solution was not acceptable to Australia, Germany, Italy and Japan.[68]

In the end, it was decided to reject the text already approved in the First Committee (and taken from the 1989 draft) on the basis that the only way to prevent total exculpation of stevedores by Himalaya clauses would be by a total exclusion of carriers and their defenses from the definition of terminal operator. Thus, the new text, now found in Article 1(a), was approved with twenty-six votes in favor, four opposed (including the U.S.) and five abstentions.[69]

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[65]See the four nation proposal discussed supra notes 53 and 55.

[66]See Zawitoski, Limitation of Liability for Stevedores and Terminal Operators Under the Carrier's Bill of Lading and COGSA, 16 J. Mar. L. & Com. 337 (1985), and Zawitoski, Federal, State, and International Regulation of Marine Terminal Operators in the United States, 64 Tul. L. Rev. 439 (1989). At this point it should be noted that while the U.S. delegation contained an expert on stevedore liability problems, there was no such expertise on the delegations of Australia, Germany, Italy and Japan, nor was it likely that stevedore interests in those countries had even been consulted prior to the efforts of their delegations to eliminate stevedore protections established by clauses in bills of lading.

[67]Unfortunately, the chair's remarks were not correct as the Himalaya clause provides total exculpation of stevedores in Australia, Germany, Italy and Japan, according to their delegates. Only Australia does not follow the traditions of the civil law.

[68]O.R. at 205, A.CONF.152/C.1/SR.15 at 7–8.

[69]O.R. at 121, A.CONF.152/SR.6 at 7.

In view of this last minute decision of the plenary, the U.S. delegation next sought to deal with the terminal operator definition exclusion of carriers by adding a reservation to the OTT Convention. The Second Committee already had agreed, however, in Article 21 that there would be no reservations. The U.S. proposed reservation stated:

> At the time of signing, ratifying or acceding to this convention, a state may declare that it will not apply the convention to non-carrying intermediaries whose rights and liabilities are determined by applicable rules of law governing carriage provided only that such non-carrying intermediaries do not thereby exclude all liability.[70]

The U.S. proposed reservation did not attain the two-thirds majority necessary at this final stage, the vote being twelve in favor, eleven against and twelve abstentions.[71] Accordingly, the next U.S. effort on this problem was a proposal to delete Article 21 entirely, but this also failed.[72]

This, however, was not to be the end of the battle. At the final vote on the text of the OTT Convention the U.S. delegation renewed its fight and ultimately obtained the flexibility desired by U.S. stevedores.[73] This can be seen by looking at the OTT Convention's Preamble and Article 15.

The Preamble states that the OTT Convention is intended to establish ". . . 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." This sentence was proposed by the U.S. delegation[74] precisely to clarify that the OTT Convention does not apply when terminal operators and stevedores are "covered by the laws of carriage" such as the Hague Rules. Thus, the OTT Convention is not intended to apply when a stevedore is covered by the maritime bill of lading as a subcontractor or bailee of the carrier.

The U.S. delegation also introduced a statement into the permanent records of the conference explaining its final vote.[75] The

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[70]O.R. at 100, A.CONF.152/L.7; O.R. at 124–25, A/CONF.152.SR.7 at 5.

[71]Id.

[72]Id. The U.S. delegation's argument was based on the fact that the Hague Rules, supra note 8, as well as some other maritime conventions have no provisions concerning reservations.

[73]O.R. at 101, A/CONF.152/13 at 5.

[74]O.R. at 130, A/CONF.152/SR.8 at 3.

[75]Id. If the OTT Convention is adopted by the U.S. then this statement will become legislative history and will be submitted with the U.S. ratification to the U.N. (the depositary of the OTT Convention) as the U.S. understanding of the OTT Convention. Only U.S. courts, of course, will be affected by the implementing legislation. The courts will have access to and will act consistently with the legislative history and the U.S. understanding.

explanation makes it clear that: 1) the OTT Convention does not modify any rights or duties that may arise under the Hague Rules or an international carriage of goods convention or any national law (including COGSA) giving effect to such a convention; and, 2) Article 15 preserves the stevedore's option to seek the benefits that the carrier enjoys under the Hague Rules.

The NAS had expressed the fear that U.S. stevedores would lose the flexibility to use either the maritime bill of lading or the OTT Convention because Article 1(a) of the OTT Convention defines terminal operator as one who takes charge of goods involved in international carriage, but such operator does not come under the convention ". . . whenever he is a carrier under applicable rules of law governing carriage." The text of Article 15, however, assures stevedores that the benefits that they enjoy under the Hague Rules will continue to exist after adoption of the OTT Convention, since the "Convention does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods [Hague Rules] which is binding on a State which is a party to this Convention or under any law of such State [COGSA] giving effect to a convention relating to the international carriage of goods."[76] Thus, the U.S. statement at the conference ensures that the definition of operator in Article 1(a) is governed by the substantive provisions of Article 15.[77]

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[76]See the text of Article 15 supra note 13. The Australian delegation was the moving force behind the four nation proposal that "a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage." This proposal to amend the Article 1(a) definition of operator was adopted over the strong objection of the U.S. delegation. However, the Australian delegate made the following statement:

> In reply to the point made by the United States representative that the Australian provision for non-carrying intermediaries would prejudice the application of the "Himalaya clause" in common law jurisdictions, he said that it was certainly not his delegation's intent to interfere with the judicial decisions taken in any other State's jurisdiction. Such decisions would be within the realm of national law, whereas the Conference was seeking to develop uniform rules, and the question at issue was to what extent national law was relevant for that purpose. In fact because of the way article 1 and 15 were drafted at present, national laws could still have an impact on how the Convention was interpreted in specific jurisdictions. It was that point which had been of concern to his delegation.

O.R. at 205–06, A/CONF.152/C.1/SR 15 at 9.

[77]For a French report on this aspect of the OTT Convention see Marguet, *Operateurs de Terminaux: Analyse du Dernier Texte de la CNUCED sur leur Responsabilité*, 512 Droit Maritime Français 71 (Jan. 1992) ("En revanche, il est specifié qu'elle [la convention] ne s'appliquera pas si une autre convention internationale applicable contient des dispositions traitant du même object. On pense naturellement aux dispositions de la Convention de Bruxelles de 1924.").

Lastly, the alternative availability of the OTT Convention is important to cover the possibility that the existing legal structure for U.S. stevedores might be eliminated in the future through an act of Congress, a U.S. Supreme Court ruling adverse to the Himalaya clause or the decision of carriers to increase or even eliminate the package limitation of liability in an intensely competitive market. Should that occur while the OTT Convention is not in force in the U.S., stevedores, carriers, shippers and insurers would be exposed to the vagaries, uncertainties and likely greater liability exposure of state and territorial laws for claims arising at transport terminals.[78]

b. Goods

The term "goods" in Article 1(b) is broad and includes not only goods but also the container, pallet or similar articles of transport used to load and ship the goods. On the other hand, there is no purpose in applying the OTT Convention when empty containers, pallets or similar articles of transport are not in a transport terminal but are in a storage yard for empty containers. The U.S. delegation maintained this view throughout the negotiations. While the U.S. proposal to make this exclusion specific in words was not accepted at the conference, the current text remains unchanged from the draft convention. It may be interpreted, however, to exclude containers in a storage yard for empty containers and the U.S. delegation stated its understanding to this effect at the end of the discussion on this issue at the conference.[79]

2. Scope of Application

The OTT Convention applies to "transport-related services" provided to goods in "international carriage." These two terms are defined in the OTT Convention.

The term "transport-related services" is defined by example in Article 1(b). It includes storage, warehousing, loading, unloading,

[78]Of course, filing a tariff with the Federal Maritime Commission (FMC) is a possible course of action for stevedores seeking to limit their liability. Such tariffs, however, are subject to protests that they are unreasonable or discriminatory. If a protest is filed, the FMC can investigate, hold hearings and ultimately reject or modify the tariff. See 46 U.S.C. app. § 816 (1988).

[79]A/CN.9/319 at 14, O.R. at 137, A/CONF.152/C.1/SR 2 at 5. On this point see also the discussion of Article 10 infra, note 157 and accompanying text (O.R. at 191–92, A/CONF.152/C.1/SR.13 at 2–3).

stowage, trimming, dunnaging and lashing. This long list of examples was adopted when it became apparent that terminal operators perform not only warehousing but many other functions. Attempts were made to narrow the scope of the OTT Convention by limiting the definition of "transport-related services" to the stated examples.[80] The conference rejected these attempts, however, and left the definition of "transport-related services" flexible and open to future kinds of services; it was clearly understood, however, that "transport-related services" do not include financial services.[81]

The term "international carriage" is defined in Article 1(c) as "any carriage in which the place of departure and the place of destination are identified as being in two different States when the goods are taken in charge by the operator." An objective standard is intended in Article 1(c), as is obvious by the use of the word "identified" to determine whether or not the origin and destination of the goods are in two different countries. Unsuccessful attempts were made at the conference to narrow the scope of the OTT Convention by using a more subjective standard (i.e., that the terminal operator knew that the goods were in international carriage). A proposal was made to insert the words "according to the contract of carriage" after the words "in which." This proposal was not adopted because the document (the contract of carriage) might not be available to the terminal operator.[82]

As can be seen, draft Article 2 of the OTT Convention was not changed by the conference.[83] The OTT Convention applies to transport-related services provided to goods in international carriage when: (a) the services are performed by a terminal operator who has a place of business in a State that is a party to the OTT Convention; (b) the services of the terminal operator are performed in such a jurisdiction; or, (c) private international law provides that the services are subject to the law of a State Party. The law applicable in the place of business that has the closest relationship to the transport-related services applies when the terminal operator has more than one place of business. The law of the place of the terminal operator's habitual residence governs if the operator does not have a place of business.[84]

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[80]A/CONF.152/C.1/L.23.

[81]See statement of U.S. delegation, O.R. at 142, A/CONF.152/C.1/SR.3 at 2.

[82]Proposal by the Netherlands delegation, A/CONF.152/C.1/1.23.

[83]See supra note 16.

[84]O.R. A/CONF.152/13 at 6.

3. Period of Responsibility

The terminal operator's period of responsibility is from the time the operator takes charge of the goods until the time the goods have been handed over or placed at the disposal of the person entitled to delivery. Initially, it should be recalled that if a stevedore is in charge of goods pursuant to Article 3 and therefore is responsible for them, the liability will vary depending on whether there is an effective Himalaya clause or the stevedore's liability is governed by the OTT Convention.[85]

The concept that the terminal operator is responsible for the goods "from the time he has taken them in charge until the time he has handed them over or placed them at the disposal of the person entitled to take delivery" caused considerable discussion. A number of States sought extreme precision as to the exact moment when the goods would be in someone's "charge." Some even suggested that the goods must be put behind a fence or taken into a shed by the terminal operator. No perfect formula, other than "taken in charge," could be found to fit the various circumstances, including the situations under the sea, air, rail and road modes between the time when one carrier ceases to be responsible and another carrier takes over.

The concept of "charge" was familiar to civil law lawyers from its usage in Article 1384 of the French Civil Code's "*sous la garde de*."[86] U.S. lawyers also were familiar with the concept from the Harter Act's period of responsibility.[87] Article 4 of the Hamburg Rules makes the carrier responsible while in charge of the goods.[88] Article 4(2), however, details a range of limitations on the period of responsibility. Such limitations are not found in Article 3 of the OTT Convention. Several delegations to the conference sought to limit further the period of the terminal operator's responsibility. The prevailing view was that the context of the OTT Convention[89] provides sufficient delimitation of the terminal operator's period of responsibility. Many delegations continued to be dissatisfied but no better solution could be found.

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[85]See supra text accompanying notes 58–77.

[86]See also Law No. 66–420 of June 18, 1966, as amended by Law No. 79–1103 of Dec. 21, 1979 and Law No. 86–1292 of Dec. 23, 1986.

[87]See 46 U.S.C. app. § 190 (1988).

[88]The concept of "in charge" derives, in part, from the Harter Act case law. See, e.g., Baker Oil Tools, Inc. v. Delta Steamship Lines, Inc., 562 F.2d 938 (5th Cir. 1977).

[89]See, e.g., Articles 1, 2, 4 and 10.

The terminal operator thus has the flexibility to end the period of responsibility by either handing the goods over or placing them at the disposal of the person entitled to delivery. This provides a way for the operator to terminate the period of responsibility when the consignee cannot be located.

The conference rejected the U.K. delegation's proposal that the terminal operator be in "sole" charge of the goods in order to be responsible for them. In view of the nature of the operator's functions, such a requirement could only lead to disputes because of the many "transport-related" functions being performed during the gaps between modes or prior to destination; hence, goods may not be in the operator's sole charge. Some of the "transport-related services" listed in Article 1(d)—such as loading, unloading or lashing—may use other contractors even while the terminal operator is in "sole" charge of the goods.[90] The proposal seemed to be an invitation to divide up the present activities of operators into small specialties of individual, uninsured and asset-free corporations, just as fleets have been broken up into single ship-owning corporations.

4. Documents and Electronic Data Processing

a. Issuance of Document

Under Article 4, the terminal operator has the flexibility to use the customer's document, which may be in the form of a maritime bill of lading or other receipt used by the carrier. Alternatively, the terminal operator may issue an operator's bill or may issue no document at all. The customer usually gets to decide which form of document, if any, will be used.

If the terminal operator elects to use the document presented by the customer, the operator will rubberstamp the customer's document, record the date and sign it. The customer's document will identify the goods and will likely contain all of the information which is customarily recorded in a bill of lading (such as identity, weight, quantity, condition, consignor and consignee). At a minimum, the customer will present a simple receipt identifying the goods which the terminal operator will date and sign. This method relieves the operator (who often is a stevedore) of the burden of stopping the flow of goods to check and record information relating to the goods. This system suits the stevedores because they usually handle the goods for only a few

[90]O.R. at 147–49, A/CONF.152/C.1/SR. 4 at 2–4.

minutes. The system is particularly suitable for stevedore transfers from one carrier to another carrier. The U.S. delegation put a great deal of effort into obtaining this flexibility for stevedores and their customers.

At times, the customer may elect not to present a document. For example, a manufacturer, rather than a carrier, may deliver goods to the terminal and may not present a document for use by the operator. In this situation, the operator may issue a terminal operator's document under Article 4(1)(b), which requires a more formal document than the document that originates from the customer. The operator's document must acknowledge receipt of the goods, state the date of receipt and record the condition and quantity of the goods "as far as they can be ascertained by reasonable means of checking." Clearly, stevedores will tend to use customer-originated documentation because they will not want to stop the flow of transportation to check and record the condition and quantity of the goods. Such "dead time" does not earn the stevedore any money and may increase the costs of the customer.

A third alternative that exists in Article 4(2) is to have the terminal operator issue no document at all. In that event the operator "is presumed to have received the goods in apparent good condition."[91] The only exception to this presumption is during immediate transfers of goods between carriers, in which case no such presumption applies. While the terminal operator may still be held liable under Article 5 of the OTT Convention for undocumented transfers between carriers, the absence of the presumption of having received the goods in apparent good condition will affect the recovery of compensation for damages. Clearly, this alternative will also appeal to the stevedores.

A question of clarification was raised at the conference as to whether the absence of a presumption during immediate transfers of goods between carriers in Article 4(2) meant that a conclusive

[91]Compare the statement in Article 11(1) that the operator is *prima facie* held to have delivered the goods in good condition if the person entitled to delivery fails to give notice within three days after delivery.

No objections were made at the diplomatic conference to the U.S. declaration that "reasonable means of checking" does not include opening sealed containers. See Larsen, Sweeney & Falvey, supra note 14, at 30. Article 4(2) notes a presumption of apparent good condition but rejects that presumption for the immediate transfer of goods between modes. It is expected that operators will not be interested in issuing their own documents under Article 4(1)(b), so that the "document" will be a carrier's waybill or bill of lading. The terminal operator will not thereby be foreclosed from limiting its guaranty to "Shipper's Load and Count" in the carrier's document.

presumption might exist. The conference was of the view that no presumption would attach to the operator and Article 4(2) was adopted on the basis of that understanding.[92]

A concern was expressed by Japan that customers of the terminal operator might require the operator to issue a document even after having brought a lawsuit for a claim against the operator.[93] The conference agreed that the reference to issuance of a document "within a reasonable period of time" stated in Article 4(1) would preclude the problem described by the Japanese delegate.[94]

b. Electronic Data Processing

Terminal operator documentation under the OTT Convention is unusually well adapted to electronic data processing and constitutes a ready model for the future law on bills of lading.

Article 4(3) provides that the customer's document or receipt referred to in Article 4(1)(a), as well as the terminal operator's document described in Article 4(1)(b), may be issued in any form that generates a permanent record.[95] A computer record would satisfy the documentary requirements of Article 4. This provision parallels the provisions in Article 1(e)-(f) making any "notice" and any "request" acceptable if "made in a form which provides a record of the information contained therein." Thus, whenever notices or requests are required to be given under the OTT Convention, for whatever purpose, they may be made electronically, if an electronic record is available.

Article 4(3) states that electronic data interchange (EDI) messages will satisfy the requirements of Article 4(1).[96] This is the first treaty reference to EDI communications, which involve a computer-to-computer communication system based on pre-arranged and agreed terms of reference.

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[92]O.R. at 155–56, A/CONF.152/C.1/SR.6 at 2–6.

[93]A/CONF.152.C.1/L.26.

[94]O.R. at 151, A/CONF.152/C.1/SR.5 at 3–4.

[95]Compare Montreal Protocol No. 4 to the Warsaw Convention, ICAO Doc. 9148, Article 3, which will become new Article 5 of the Warsaw Convention (officially known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 300, T.S. No. 876, 137 L.N.T.S. 11).

[96]Article 4(3) provides:

> 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.

The conference noted that Article 4(2) provides not only that electronic documentation is permitted ("any form which preserves a record of the information"), but also that the document referred to in Article 4(1) "may be replaced by an equivalent electronic data interchange message."[97] These two sentences are not mutually exclusive but are instead supplementary.

Article 4(4) provides that the signature referred to in Article 4(1) "means a handwritten signature, its facsimile or an equivalent authentication effected by any other means." It should be noted that this is the same as Article 5(k) of the 1988 U.N. Convention on International Bills of Exchange and International Promissory Notes,[98] which is intended to facilitate international trade to the greatest possible extent. By adopting the language of Article 5(k), the OTT Convention accepts electronic signatures regardless of local law restrictions on the use of electronic signatures.[99]

5. Terminal Operators' Liability Regime

a. Fault Basis of Liability

Article 5(1) provides that fault of the terminal operator must be proved before the operator can be held liable; however, the burden of proof rests on the terminal operator to prove that "he, his servants or agents or other persons of whose services the operator makes use" took all reasonable measures to avoid the loss or damage to the goods. Thus, the fault of the terminal operator for the occurrence causing the loss, damage or delay is presumed unless the operator can prove the absence of fault by the operator, its servants or agents or other persons whose services are employed to perform transport-related services.

The U.S. delegation stated at the conference that all the usual factual (as opposed to policy-based) defenses to liability are implied in the statement that the terminal operator is held to be at fault unless proof to the contrary is shown.[100] Thus, if the operator proves that it was not at fault, or that all reasonable measures were taken to avoid the loss, damage or delay, the operator will not be held liable.

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[97]O.R. at 152, A/CONF/152/C.1/SR.5 at 7–8.

[98]UNGA Res. 43/165, XIX UNCITRAL Y.B. 173–86 (1988).

[99]Proposal of the U.S. delegation, A/CONF.154/C.1/L.10. Note the difference from Article 14(3) of the Hamburg Rules, supra note 18, which accepts signature by electronic means "if not inconsistent with the law of the country where the document is signed."

[100]O.R. at 160–62, A/CONF.152.C.1/SR.8 at 6. See also the reference to the existence of defenses from liability in Article 7(1).

The terminal operator is only presumed liable for activities during the period of time when the operator is responsible for the goods in accordance with Article 3. A proposal to extend the terminal operator's period of responsibility to a reasonable time period after the operator notifies the person entitled to take delivery that the goods are available was not adopted. There was some feeling at the conference that the proposal conflicted with Article 3, which clearly limits the period of the operator's responsibility.[101]

Proposals were made to the effect that the terminal operator should not be presumed liable when damage is caused while the customer had access to the goods within the terminal for the purpose of inspecting, treating or otherwise handling the goods. In the end, however, the conference concluded that in such circumstances the terminal operator would be able to prove that it had taken all reasonable measures and thus would not be held liable.[102] Consequently, the terminal operator remains under a presumption of liability for all occurrences.

The term "loss resulting from" refers to consequential damages. A proposal to limit damages to the value of the goods was made but was not adopted.[103]

b. Comparative Negligence

The terminal operator is only liable to the extent that such failure causes loss, damage or delay.[104] Thus, the customer (shipper or carrier) will be responsible to the extent that the customer's failure causes loss, damage or delay. Because the burden of proof is on the terminal operator to show the extent to which the operator's failure did not cause the loss, damage or delay, the determination of comparative negligence begins with a presumption of the operator's fault.

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[101]O.R. at 161–62, A/CONF. 152.C.1/SR.8 at 2–3.

[102]O.R. at 159, A/CONF.152/C.1/SR.7 at 4–6.

[103]O.R. at 161, A/CONF.152/C.1/SR.7 at 8.

[104]Article 5(2) of the OTT Convention provides:

> 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 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.

For the origin of this formula see Schnell v. The Vallescura, 293 U.S. 296 (1934), and Article 5(7) of the Hamburg Rules.

c. Delay in Handing Over the Goods

The operator is liable for delay when it fails to hand over the goods within the agreed time period, or, if no time period is stated in the agreement, within a reasonable time after being asked to hand them over.[105]

d. Presumption that the Goods are Lost

Failure to deliver the goods within 30 days of the agreed time or to place the goods at the disposal of the person entitled to accept delivery within 30 days after receiving a request for the goods entitles that person to treat the goods as being lost and to make a claim for loss of the goods.[106]

6. Limitation of Liability

a. Liability Limits for Loss and Damage

Liability limits are an unusually contentious issue in international negotiations. The actual amounts of the limits normally are not discussed in depth until the diplomatic conference because the limits are a function of, and depend upon agreement on, many related issues. Even at the diplomatic conference the figures may not be settled until near the end. Establishment of the actual limits on liability often reflects other negotiations regarding allocation of risks of carriage, such as who has the burden of proof, whether the limits are breakable, and what are the allowable defenses to liability.[107]

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[105]Article 5(3) of the OTT Convention provides:

> 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.

This is the presumed intention of the parties where there is no specific provision in the bill of lading. See Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1845) (contract damages must be within the contemplation of the parties). See also The Caledonia, 157 U.S. 124 (1895), and S.S. Willdomino v. Citro Chemical Co., 272 U.S. 718 (1927).

[106]Article 5(4) of the OTT Convention provides:

> 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.

[107]Compare the package deal of the Hamburg Rules conference, discussed in Congressional Oversight Hearing, supra note 11, at 150–52.

Limitation of liability is only one of several ways of allocating risks between the terminal operator and its customers.

Because the OTT Convention fills a gap between the existing transportation liability conventions,[108] the liability limits of the connecting transportation conventions must be considered to ensure that the OTT Convention fits harmoniously into the overall transportation network. On the other hand, the view was expressed by the U.S. delegation[109] that the limitation approach of any one of these connecting liability regimes was not necessarily appropriate for use in the OTT Convention since the subject matter of the OTT Convention differs from the other conventions. For example, there was no issue of the defense of negligent navigation or management in the OTT Convention, whereas preservation or suppression of the defense of negligent navigation was a significant bargaining chip in the Hamburg Rules negotiations.[110] Other relevant considerations in establishing liability limits in the OTT Convention were the value of goods handled by terminal operators, the costs of transport-related services, insurance costs, the average level of damages awarded against operators for loss of or damage to goods or for delay in handing over goods, and the utility expenses of terminal operators.[111]

Liability limits, once established, become very difficult to adjust for inflation erosion and other changes, such as improvements in the local standard of living.[112] To resolve the issue of revision of limits, the U.S. delegation supported not only a separate article on revision of liability limits but also sought to adjust the limits for inflation. The limits in the 1989 draft text were selected as illustrative examples, but proved to be impossible to change in 1991. They were the dual limits of the Multimodal Convention,[113] adopted in 1980, that is, 8.33 Special Drawing Rights (SDRs) per kilogram of weight except in cases of maritime carriage, where the limit is 2.75 SDRs per kilogram.

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[108]See supra notes 4, 8, 24 and 98.

[109]See Larsen, Sweeney & Falvey, supra note 14, at 36–37.

[110]O.R. at 39–40, A/CONF.152/7 at 14.

[111]As is discussed infra in connection with Article 24, the diplomatic conference adopted a list of items that are relevant for consideration in revising the limitation amounts.

[112]The liability limits of the 1929 Warsaw Convention, see supra note 95, roughly $8,300 for personal injury or death, have been very difficult to increase and have been a particularly vexing problem for continued adherence by the U.S. At one point the U.S. took the drastic step of denouncing the Warsaw Convention, only to withdraw its denunciation when a private agreement among international carriers known as the Montreal Agreement increased the amount to $75,000. See generally Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

[113]See supra note 24.

If adjusted for inflation since 1980, those limits would be 11.5 SDRs per kilogram for land transport and 3.15 SDRs per kilogram for maritime transport.[114]

The conference did not adopt the U.S. proposal for inflation adjustment of the Multimodal Convention limits.[115] Instead, liability limits for the OTT Convention were adopted at the identical levels of the Multimodal Convention. The result is that the liability limits of the OTT Convention are dated as of 1980 and reflect cargo values as of 1980. The reason for not adopting the U.S. proposal was the wish of the majority of the conference to keep costs low and to align the OTT Convention with the existing transport conventions (the road and maritime conventions) as much as possible.[116] While the terminal operators and their insurers probably favored these limits as being the lowest possible, the shippers would have preferred to have the limits adjusted for inflation in order to maintain the distribution of risk between the cargo and the carriers and other handlers of the cargo.

The conference did adopt, however, an article on adjustment of liability limits for inflation erosion.[117] Consequently, it will be possible to adjust for inflation erosion at the first meeting of the revision committee. However, the committee may adjust only back to 1991, when the OTT Convention was adopted. Adjustment back to 1980, the date of the Multimodal Convention, cannot be made under the fast-track procedure of Article 24. However, such backward adjustment could be made under Article 23, the general amendment procedure.

Japan proposed that "the total weight of the lost or damaged goods and of the goods whose value is affected" should be taken into consideration in establishing the limitation of liability. An example would be a piece of machinery shipped in two packages; the loss of one package would affect the value of the other. Therefore, the loss of both packages should be considered in establishing the total

[114]See The Economic and Commercial Implications of The Entry into Force of the Hamburg Rules and the Multimodal Convention, TD/B/C.4/315/Rev.1 at 15, Congressional Oversight Hearing, supra note 11, at 287. See also infra note 184 (discussion of "units of account").

[115]O.R. at 166–68, A/CONF.152/C.1/SR.8 and SR.9.

[116]See supra notes 8 and 24. The OTT Convention deals with gaps in coverage between modes of transport by sea, rail, road and air. Thus, the best way to have a single limitation with, at most, only one exception was to make a special provision for sea transport in Article 6(1)(b). As a result, while the normal limit is 8.33 SDRs per kilogram, the limit is reduced to 2.75 SDRs per kilogram when the terminal operator is in charge of the goods before or after sea transport. The OTT Convention does not establish new and significant incentives to litigate whether transportation is or is not by sea. The documentation will indicate whether sea transport is used.

[117]See infra text accompanying note 188 (discussing Article 24 of the OTT Convention).

limitation of liability. The Japanese proposal was adopted, although some delegates believed that the overall weight of the shipments should be excluded in favor of the weight of the damaged goods only.[118]

The 1989 UNCITRAL plenary had decided to adopt dual limits: one was the generally applicable limit of 8.33 SDRs per kilogram of weight; the other was the exception, when maritime carriage is involved, of 2.75 SDRs.[119] At the diplomatic conference, several delegations proposed a single limit on liability, regardless of the mode of transportation. Some of these delegations favored adoption of the low maritime limit as the single limit, while others favored adoption of the higher land carriage limits as the single limit. There was no consensus on this issue.[120]

Germany proposed the introduction of an alternative limitation based on the package doctrine of maritime law, following the example of Article 6(2) of the Hamburg Rules. The German delegation acknowledged that such a limitation might cause problems regarding definition of a container as a package and would complicate the documentation of the terminal operator. Nevertheless, the German delegate suggested that the system of the Hamburg Rules should be adopted for the OTT Convention in order to give the customer an additional option. The majority of delegates, however, were of the view that the package concept, especially as applied to containers, would cause difficulties for both operators and customers and was not absolutely necessary. The German proposal therefore was not adopted.[121]

Germany further proposed a global limit on the terminal operator's liability, a proposal also favored by the U.K.[122] Under this proposal, the

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[118]O.R. at 165, A/CONF.152.C.1/SR.8 at 6.

[119]See the discussion of "units of account" infra note 184. Article 6(1) of the OTT Convention provides:

(a) The liability of the operator for loss resulting from loss or damage to goods according to the provisions of Article 5 is limited to an amount not exceeding 8.33 units of account [SDR] 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 [SDR] 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.

[120]O.R. at 165–68, A/CONF.152/C.1/SR.8 and 9.

[121]O.R. at 171–73, A/CONF.152/C.1/SR.10. There are no package limits in air, rail and road transportation. The terminal governed by the OTT Convention is land-based and, as a result, the special arguments about perils of the sea used to justify special treatment of sea transport were not convincing.

[122]O.R. at 173–77, A/CONF. 152/C.1/SR.10.

operator's total liability would be limited to 10 million SDRs, regardless of circumstances. Such a global limit would impose an overall cap on liability. The U.S. delegate stated[123] that it was difficult to ascertain the capacity of the insurance market and questioned whether 10 million SDRs was realistic as a global limit when compared to the admitted ability of the insurance industry to deal with catastrophic losses in the range of $300-$500 million in other areas of transportation. After extensive discussion, the proposal was not adopted.

b. Liability for Delay

The conference did not change the text of the draft convention making the terminal operator liable for delay in an amount equivalent to 2½ times the charges of the operator for its services. However, the applicable liability cannot exceed the total of charges for the entire consignment of which the goods are a part.[124]

c. Aggregate Liability Limit

The conference agreed that the terminal operator shall in no case be held liable for an amount in excess of the total value of the goods lost or damaged.[125]

d. Terminal Operators' Agreement on Increased Limits

Under Article 6(4), the terminal operator may agree with the customer on liability limits higher than those provided under the preceding paragraphs of Article 6. The Yugoslav delegation proposed that such agreements on higher liability limits also should apply to the operator's servants, agents and other persons of whose services it makes use. The U.S. delegation expressed the view that servants, agents and independent contractors should not be affected by the terminal operator's contractual agreements to increase liability limits. In line with this, other delegations expressed the view that only those agreements that were compulsory should be governed by the OTT

[123]O.R. at 174–75, A/CONF. 152/C.2/SR.10.

[124]O.R. at 101, A/CONF.152/13 at 8. Liability for delay accords with current U.S. contract law holding that only the most unlikely consequences are outside the contemplation of the parties. See supra note 105. The delay damages provisions were among the non-controversial elements of the Hamburg Rules (Article 6(1)(b)).

[125]This provision, also found in Article 6(1)(c) of the Hamburg Rules, comes from Article III(3) of the Visby Amendments.

Convention, whereas discretionary agreements, such as those permitted under Article 6(4), should be outside the OTT Convention. As a result of this discussion, the conference decided not to adopt the proposal to extend the operator's agreements with the customer on higher limits to the operator's servants, agents and persons of whose services it makes use.[126]

7. Non-Contractual Claims

The defenses and liability limits provided under the OTT Convention apply to all actions against the terminal operator regardless of whether the actions are in tort, in contract or otherwise.[127]

If such actions are brought against a terminal operator's servant, agent or other person of whose services the operator makes use, the latter are entitled to the same defenses and limits to which the operator is entitled under the OTT Convention.[128] Initially, the "other person" phrase was controversial because it went beyond the formula contained in the Hamburg Rules. In the end, however, it was adopted due to the fact that the circumstances of terminal operators are sufficiently different to justify it.

When a claimant is able to recover both from the operator and from its servants, agents, or other persons of whose services the operator makes use, the aggregate or total recovery may not exceed the OTT Convention's liability limitation.[129] The U.S. delegation proposed that, insofar as servants, agents and other persons are concerned, the aggregate limit should not be increased by the operator's contractual agreements under Article 6(4) to increase the liability limits.[130] This proposal was withdrawn, however, in view of the satisfactory resolution of the issue during the discussion of Article 6(4).[131]

8. Breakability of the Liability Limits

Article 8(1) provides that the terminal operator's limitation on liability may be set aside (or broken) when the terminal operator or its servants or agents commit intentional acts causing loss, damage or delay, or commit such acts recklessly and with knowledge that loss,

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[126]O.R. at 168, A/CONF.152/C.1/SR.9.

[127]See Article 7(1) of the OTT Convention.

[128]Id. at Article 7(2).

[129]Id. at Article 7(3). Note, however, the exception for intentional torts under Article 8.

[130]Citing the Multimodal Convention, supra note 24.

[131]A/CONF.152/C.1/L.14, O.R. at 179, A/CONF.152/C.1/SR.11 at 4.

damage or delay probably will result. Article 8(2) provides for similar breakability of the liability limits of the operator's servants, agents and other persons of whose services the operator makes use for the performance of transport-related services.

The Netherlands delegate, although willing to accept the principle in Article 8 providing for breakability of liability limitation when a terminal operator commits an intentional tort,[132] proposed that the terminal operator should *not* be held responsible for the intentional torts of its servants and agents. The U.S. delegation, although agreeing that breaking liability limitation was justified only in extreme cases,[133] argued that since servants and agents doing sensitive work (such as handling jewelry or currency) normally are bonded, the Netherlands' proposal should not be accepted.[134] The U.S. delegate also reminded the conference that since most terminal operators are corporations that act only through servants and agents it was both prudent and necessary to attribute their acts to their employing corporations. On the other hand, the U.S. delegation supported the view that intentional torts by independent contractors hired by terminal operators should not expose terminal operators to the loss of limited liability. In the end, the Netherlands' proposal was not adopted.[135]

The German delegation proposed that the terminal operator's servants and agents should have the burden of proving that they acted within the scope of their employment.[136] The U.S. delegation expressed the view that this would be far out of line with the way other businesses are treated under the doctrine of *respondeat superior* in the law of many nations and that no justification existed for such a departure. If an act is done with the intent to cause loss, damage or delay, then the terminal operator, as the servant's or agent's employer, should remain responsible.[137] After a lengthy discussion, the German proposal was not adopted.[138]

9. Transport-Related Services to Dangerous Goods

Article 9 provides special liability rules for transport-related services to dangerous goods. This article is, in effect, an exception to

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[132]O.R. at 179, A/CONF.152/C.1/SR.11 at 4, A/CONF.152/C.1/L.25.

[133]O.R. at 180, A/CONF.152/C.1/SR.11 at 6.

[134]See supra text accompanying note 40.

[135]O.R. at 181, A/CONF.152/C.1/SR.11 at 5–6.

[136]A/CONF.152/C.1/L.3, O.R. at 180–81, A/CONF.152/C.1/SR.11 at 6–8.

[137]Id. See supra text accompanying note 40. The operator would have the advantage of the practice that a party must first prove that it is entitled to benefits before receiving such benefits.

[138]Id.

Article 5, the liability regime governing the terminal operator's transport-related services. Article 9 gives the operator not only the right to dispose of and even to destroy dangerous goods without liability (as the circumstances may require), but also the right to receive compensation for damages from the person (manufacturer, shipper or forwarder) who was legally obligated to label the goods and to inform the operator of the dangerous nature of the goods.

Belgium and some other delegations were of the view that Article 9 places an unduly heavy burden of proof on the operator to show that it did not know about the dangerous condition of the goods. The conference decided, however, that Article 9 merely tests whether the operator actually knew of the dangerous condition at the time of receipt.[139]

The Finnish delegation favored a more straightforward obligation on the customer to inform the operator of the dangerous nature of the goods and of the precautions to be taken in handling them.[140] Other delegations pointed out, however, that the customer (in particular the carrier) sometimes does not know the exact nature of the goods because the goods have been labeled (sometimes inaccurately) by the manufacturer, who is further back in the chain of transportation. Thus, it is difficult to enforce an obligation to inform the terminal operator of the dangerous nature of the goods. As a result of the discussion, the Finnish proposal was not adopted.[141]

The Swedish delegate asked whether the right to destroy goods would be justified not only by imminent danger to persons but also to property; that is, whether potential environmental damage would entitle the operator to destroy goods. The chair stated that, in his view, environmental protection is included in the Article 9(a) reference to "when the goods pose an imminent danger to any person or *property*."[142]

Several delegations supported a proposal[143] by the observer from the United Nations Environment Program to establish a firm obligation within Article 9 to label, package and document goods in conformity with international and domestic rules and regulations and to condition the operator's precautionary measures (disposal and destruction) on the failure to observe such rules and regulations. Most delegations, including the U.S. delegation, believed that the

[139]O.R. at 181–82, A/CONF.152/C.1/SR.11 at 7–9.
[140]O.R. at 182–83, A/CONF.152.C.1/SR.11 at 9–11.
[141]Id.
[142]Id. (emphasis added).
[143]O.R. at 184–85, A/CONF.152/C.1/SR.11 at 2–5.

application of the OTT Convention should be limited to those circumstances confronting the operator; otherwise, the OTT Convention would become the only legal instrument compelling the observance of rules and regulations on labeling, packaging and documenting the conformity of goods to those rules and regulations.[144]

10. Terminal Operator's Rights to Retain and Sell Goods

a. Right to Retain Goods for Costs and Claims

The operator may retain goods to satisfy charges relating to them both while they are in the operator's custody and afterwards.[145] For example, the operator may satisfy charges against goods that remain at the terminal after the period of responsibility has expired. The operator also may, in accordance with local law, enter into contractual arrangements with the customer to extend the operator's security in the goods to, for example, other goods in the terminal belonging to the same customer.

The German delegation proposed that the terminal operator also should have the right to retain the goods as security for transport-related services performed after its period of responsibility (as defined by Article 3) has expired. For example, charges might be incurred for storage of goods being held while waiting for the consignee to pick them up. The German delegate confirmed that the terminal operator would be governed by the duty of care required under local law during such additional period after the convention period of responsibility, as defined by Article 3, had ended. This proposal was adopted.[146]

Consequently, in voting for Article 10, the U.S. delegation stated its interpretation that the terminal operator may retain goods for satisfaction of unpaid charges that are due for keeping the goods, both during the period of its responsibility and thereafter. Thus, the

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[144]Id.

[145]Article 10(1) does not establish any new substantive legal right of retention. As suggested by the German delegate at the conference (his interpretation was not controverted), Article 10(1) is a conflicts of law provision recognizing that national law, whatever it may be, applies. O.R. at 186, A.CONF.152/C.1/SR.11 at 6–8. No delegation, including the U.S. delegation, advocated, encouraged or promoted a lien on cargo for charges due the terminal if those charges have been paid by the cargo (shipper) to the ocean carrier and not paid by the carrier to the terminal. No such lien could exist unless previously authorized by national law. Needless to say, as discussed supra note 75, the U.S. government should note this history in its ratification and implementing legislation.

[146]Id. The U.S. proposal to place a limit on the time goods may be left at the terminal was not adopted. O.R. at 40, A/CONF.152/7 at 15. But see infra note 157.

operator can claim damages for storage after the operator has placed the goods at the disposal of the person entitled to receive them.[147]

b. Guarantee for Charges Owed to the Terminal Operator

Article 10(2) provides that the customer may deposit a sufficient guarantee as security for charges owed. After such deposit, the terminal operator may no longer retain the goods as security.

c. Terminal Operator's Right to Sell the Goods

Under Article 10(3), the terminal operator is entitled to sell the goods to satisfy outstanding charges. Such a sale may take place only if permitted under the local law of the State where the goods are located. The right to sell does not apply to containers, pallets or similar articles of transport that are either leased from or belong to a party other than the terminal operator or the shipper. To qualify for this exception, the name of the owners of the leased equipment must be clearly marked on the equipment. Even if a right of sale does not exist under local law, the terminal operator nevertheless may recover any charges for repairs to such clearly marked equipment.[148] This provision is the only surviving aspect of the UNIDROIT safe-keeping terminal operator (its genesis having come from UNIDROIT's Hotelkeepers' Draft Convention). In the UNCITRAL Working Group and the Plenary Commission it always was very controversial.

The German delegation proposed total deletion of Article 10(3)[149] and suggested that the issue of sale of the goods and the operator's rights in leased equipment should be governed entirely by local law. The IICL observer stated that there are approximately 6.2 million 20-foot equivalent units of containers in the world that are permanently marked with the owner's code and registered with the International Container Bureau. Furthermore, each such container has an individual number.[150]

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[147]O.R. at 123, A/CONF.152/SR.7 at 4.

[148]Article 10(3) of the OTT Convention provides that the terminal operator may not sell leased containers to satisfy charges against goods being stored in leased containers "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."

[149]O.R. at 187–88, A/CONF.152/C.1/SR.12 at 8–12.

[150]Id. The majority of leased containers are U.S.-owned, which is the reason why the U.S. had a special interest in this issue at the conference.

The observer pointed out that containers are permanent means of transport rather than goods and are regulated by the Customs Convention on Containers, which allows containers to enter and leave a country without payment of duty. One half of the world's containers are leased, with the duration of leases varying from two months to five years. Aside from those containers owned by container leasing companies, the next greatest number of containers are held by state-owned railways. While under lease, the leasing company does not know the location of its containers since they are leased from one of approximately 1,000 container depots and returned to such depots. The IICL did not want these depots to be defined as transport terminals.[151]

The IICL observer noted that the major problem facing a container lessor occurs when a shipping line becomes bankrupt and leaves leased containers at a terminal. That is the problem that Article 10(3) is intended to resolve. It does so by providing that leased containers may not be sold to satisfy charges against the bankrupt shipping line.[152]

The IICL observer stated further that if the German proposal to delete Article 10(3) were to be accepted, the issue of whether leased containers could be sold to satisfy charges against the goods would be governed by local law. Under local law in the U.S. and the laws of other States, it is not clear whether leased containers can be sold to satisfy charges against the goods. Under German law, it is clear that the leased containers may not be sold to satisfy such charges. Another reason to support the paragraph in the text was that it codified the legal status of leased containers worldwide. Consequently, the IICL-favored Article 10(3) as drafted.[153]

The U.S. delegation supported the views of the IICL and reminded the conference that container lessors already have to deal with many different laws (at least 50 different laws in the U.S. alone). Consequently, the U.S. delegation supported maximum unification of the law governing the status of containers.

The Mexican delegation stated that deletion of the provision subjecting a sale to satisfy charges against the goods to "the law of the State where the goods are located" would create a constitutional problem of "due process" for Mexico. Consequently, after extensive discussion, the German proposal was rejected and the text remained as drafted.[154]

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[151]O.R. at 188, A/CONF.152/C.1/SR.12 at 8–12.

[152]Id.

[153]Id.

[154]O.R. at 189, A/CONF. 152/C.1/SR.12 at 11–12.

The delegation from Morocco proposed that empty containers should be clearly defined as being "goods" for the purposes of the OTT Convention. Under this proposal, the terminal operator would be able to treat them as goods and would be able to exercise a right of retention over them in the same way that it exercised retention over goods.[155] The IICL observer strongly objected to this proposal because, in the IICL's view, there should not be any right to sell containers, whether empty or full, belonging to a third party not involved in the terminal operator's claim. The IICL also believed that empty containers should not be defined as goods because, if they were so defined, the existing container depots might be defined as terminals. The delegation from China agreed that empty containers should not be treated as goods for the purpose of the OTT Convention, and the U.S. delegation agreed with China. Due to the absence of support, the Moroccan delegate withdrew the proposal.[156]

d. Notice of Sale to the Owner of Goods

Article 10(4) provides that the terminal operator shall give reasonable notice of an intended sale of goods to the owner, to the person from whom it received the goods, and to the person entitled to take delivery. Furthermore, the terminal operator must account for any excess proceeds from the sale. In all other respects, the rights of sale are governed by the local law of the State where the goods are located.[157]

The delegate from Morocco proposed that the terminal operator should only have to give notice to one of the three parties mentioned above. However, most delegates believed that the notice requirements as drafted were not excessive because the terminal operator is only required to "make reasonable efforts" to give notice. As such, the Moroccan proposal was not adopted.[158]

The U.S. delegation introduced a proposal to grant terminal operators the right of security in, and subsequent right of sale of, unclaimed or abandoned goods at the terminal in order to satisfy

[155]O.R. at 190, A/CONF. 152/C.1/SR.13 at 1–2.

[156]Id.

[157]O.R. at 191, A.CONF.152/C.1/SR.13 at 2–3. Compare the discussion supra note 79 and accompanying text of Article 1(b) of the OTT Convention. The conclusion of this discussion clearly supports the view expressed by the U.S. that container depots are not transport terminals. The related issue of whether empty containers abandoned by the lessor at a terminal can be retained or sold by the terminal operator for charges was not discussed and is an open question.

[158]O.R. at 191, A/CONF.152/C.1/SR.13 at 3.

unpaid charges.[159] The U.S. proposal would have established uniform law governing such goods. Although this proposal was supported by Mexico, Canada, Belgium and Sweden, it was rejected in a close vote with eleven votes in favor, twelve opposed, and nine abstentions.[160]

11. Notice to the Terminal Operator that the Goods Have Been Lost, Damaged or Delayed

a. Notice of Apparent Loss or Damage

Article 11(1) gives the customer three working days to notify the terminal operator of apparent loss or damage to the goods.[161] The three day limit begins to run when the goods are handed over to the person entitled to take delivery. If that person fails to give notice within three days, the document issued by the operator under Article 4(1)(b) will constitute *prima facie* evidence of delivery. If no such document is issued, the goods are presumed to have been delivered in good condition unless notice to the contrary is given within three working days.[162] The delegation from Morocco proposed that the person entitled to delivery should give three days notice beginning at the time when the goods are handed over "or placed at the disposal of" such person. This proposal was not adopted.[163]

b. Notice to the Terminal Operator of Concealed Loss or Damage to the Goods

Article 11(2) provides that in those circumstances when "the loss or damage is not apparent," the person entitled to delivery must give notice within 15 consecutive days after delivery of the goods. The same *prima facie* evidence rule described under Article 11(1) exists

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[159]O.R. at 191–92, A/CONF.152/C.2/SR.13 at 3–4.

[160]O.R. at 191–94, A.CONF.152/C.1/SR.13 at 7. It should be noted that the conference amendment to Article 10(1) permits the operator to retain the goods "during the period of his responsibility for them and thereafter." The effect of this amendment is, in part, what the U.S. delegation had sought: the right of security in goods abandoned at the terminal.

[161]Article 11(1) of the OTT Convention provides:

> 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.

[162]O.R. at 192–94, A/CONF.152/C.1/SR.13 at 7–10.

[163]Id.

for concealed damage under Article 11(2), if notice is not given within 15 days. In those cases where goods do not reach the final recipient until a considerable time after the goods have left the terminal, the 15 day time period may not begin to run until as late as 60 consecutive days after the goods are handed over by the terminal operator.

The Moroccan delegate proposed the same amendment to Article 11(2) as she had proposed for 11(1), that is, to add the point in time when the goods are placed at the disposal of the person entitled to receive delivery as a point from which to measure the 15 day notice period; once again, this proposal was not adopted.[164]

The Japanese delegation proposed that the "final recipient" should be described as one "who is in a position to inspect" the goods. Most delegations understood this proposed addition to be a limiting clause, that is, a person could only be a final recipient if he was in a position to inspect the goods. In view of this understanding, the proposal was withdrawn.[165]

c. Participation in Survey or Inspection of the Goods

An exception to the notice requirement exists when the goods are surveyed and inspected by the terminal operator at the time when they are delivered to the person entitled to take delivery.[166]

d. Reasonable Facility for Inspection of the Goods

Where the goods are thought to be lost or damaged, the operator, the carrier, and the person entitled to receive delivery must provide reasonable facilities for inspection and tally of the goods.

Originally, the carrier was to have been excluded from Article 11(4). The delegate from Morocco proposed that the carrier also should be obligated to provide reasonable facilities for inspection of the goods. Other delegations objected in principle to adding the carrier because the carrier may not be in a contractual relationship with the person entitled to take delivery of the goods and therefore may not have a contractual obligation to provide facilities for inspection and tally of the goods. For that reason, the U.S. delegation did not support the proposal. The conference, however, felt that the addition would not in any way modify Article 15, which provides that

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[164]Id.

[165]See Article 11(3) of the OTT Convention.

[166]See Article 11(4) of the OTT Convention.

the OTT Convention does not change the rights or duties arising under other international transportation conventions or laws giving effect to such conventions. As a result, the proposal was adopted.[167]

e. Notice of Delay in Delivery

Finally, Article 11(5) provides that a loss caused by a delay in delivery shall not be compensable unless the terminal operator receives notice within 21 consecutive days after the day the goods are delivered to the person entitled to delivery.

12. Time Limitations for Bringing Judicial or Arbitral Actions

Most recent transportation conventions provide for a two year period of limitations for bringing judicial or arbitral proceedings. Article 12(1) is aligned with those conventions.[168] Although proposals to shorten the period to one year were made, they were not adopted.[169]

Under Article 12(2), the limitations period begins to run on the day the terminal operator delivers the goods to the person entitled to delivery. In cases of total loss, however, the period commences on the day that the person entitled to delivery receives notice that the goods are lost. In accordance with Article 5(4), the earlier of these two alternative periods prevails. The "day on which the limitation period commences is not included in the period."[170]

Germany proposed that, in cases of total loss, the limitation period should begin on the day that the "person entitled to make a claim receives notice from the operator that the goods are lost." This proposal was adopted, although doubt remains as to what will happen if the operator refuses to accept such notice.[171]

The terminal operator may extend the period for bringing judicial or arbitral proceedings. Furthermore, recourse actions by carriers or other persons against the terminal operator may be instituted after the two year limitation period if "instituted within 90 days after the

[167]O.R. at 195, A/CONF.152/C.1/SR.13 at 7–10.

[168]See Article 20 of the Hamburg Rules and Article 25 of the Multimodal Convention. It should also be noted that in the 1977 British Hague Rules Agreement between cargo insurers and P & I Clubs the time bar was extended to two years. See W. Tetley, Marine Cargo Claims 1235, 1236–37 (3d ed. 1988).

[169]O.R. at 196–97, A/CONF.152/C.1/SR.14 at 3–4.

[170]See Article 12(3) of the OTT Convention.

[171]O.R. at 200, A/CONF.152.C.1/SR.13 at 4–10.

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 notice of such a claim was given to the operator within a reasonable time after the claim was filed against the carrier or other person resulting in a recourse action against the operator.[172]

The delegation from Morocco proposed that the 90 day period for recourse actions be shortened to 30 days after the carrier or other person has been sued to protect terminal operators from protracted litigation. The conference reviewed the history of such recourse actions, particularly those under the Visby Rules (Article 1(3)), the Multimodal Convention (Article 25(4)), and, finally, the Hamburg Rules (Article 20(5)), which permit recourse actions "if instituted within the time allowed by the laws of the State where proceedings are instituted." A proposal was made by the Italian delegation to align Article 12(5) with the Hamburg Rules. The Swedish delegation stated that national law might not provide for recourse actions at all. At the end of extensive discussion the conference approved Article 12(5) without making any changes.[173]

Finally, the U.S. delegation proposed that "written notices" be replaced by "notices," which are defined in Article 1(e) as including electronic communications. This proposal was adopted.[174]

13. Non-Derogation Provisions

Article 13 provides that the terminal operator may not enter into contractual stipulations derogating the provisions of the OTT Convention. The invalidity of such contractual stipulations does not invalidate the remainder of any contract with the operator. Nonetheless, the operator may enter into contractual stipulations increasing its responsibilities and obligations under the OTT Convention. The chairman stated that the phrasing at the beginning of Article 13, "Unless otherwise provided in this Convention," refers to the specific statement in Article 6(4) that the terminal operator may agree to limits of liability in excess of those established in Article 6.[175]

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[172]See Article 12(5) of the OTT Convention.

[173]O.R. at 197–99, A/CONF.152.C.1/SR.13 at 4–10. See also supra note 24 (discussing the Hamburg Rules and the Multimodal Convention).

[174]O.R. at 200, A/CONF.152/7 at 13, A/CONF.152/C.1/SR.14 at 10.

[175]O.R. at 200–01, A/CONF.152/C.1/SR.16 at 3.

14. Uniform Interpretation of the OTT Convention

Article 14 provides that the parties to the OTT Convention shall take into consideration the need to establish uniformity of application and the international character of the OTT Convention. This follows the simple formulation in the 1989 draft of the OTT Convention, taken from the Hamburg Rules, rather than the more complex formula contained in the CISG.[176]

15. Relationship of the OTT Convention to Other Transportation Conventions

As finally approved, Article 15 provides that the OTT Convention "does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods" to which a State Party to the OTT Convention is also bound; neither does the OTT Convention modify any rights or duties arising under any law of a Party State that gives "effect to a convention relating to the international carriage of goods."[177]

The conference reviewed at length the history of Article 15. The UNCITRAL working group, at the insistence of Germany, had felt that the draft convention should be subordinated not only to the relevant international treaties but also to national law implementing international transport conventions, whether or not ratified by the State, because of those Scandinavian states that have adopted the Visby Amendments only by domestic law.[178] Based on this principle, the working group had adopted language that the OTT Convention should be subordinated to any law of a Party State "giving effect to or derived from a convention relating to the international carriage of goods."[179] The words "derived from" referred to laws of States "derived from" international transportation conventions by States that had not become party thereto. The UNCITRAL working group had agreed that the words "derived from" did not subordinate the OTT Convention to laws which were not derived from international transportation conventions.[180] Nevertheless, there was concern in the U.S. Department of State that unilaterally-enacted domestic law

[176]See Article 7 of the CISG, supra note 19.

[177]See the discussion of Article 15 of the OTT Convention supra notes 58–77 and accompanying text.

[178]A/CN.9/298, paragraph 77.

[179]A/CONF.152/5 at 8.

[180]A/44/17, paragraph 162; A/CONF.C.1/SR.15 at 2–11.

could supersede the OTT Convention without formal denunciation, leading to chaotic uncertainty.

The U.S. delegation pointed out that Article 15 would not be necessary if a satisfactory subordination of the OTT Convention were achieved by definition of terminal operator in Article 1. The delegations of Denmark and Sweden stated that Article 15 was needed and disagreed with the U.S. view that Article 15 could be taken to suggest that any national law could take precedence over the OTT Convention. In their views, the understanding of the matter expressed by UNCITRAL at its twenty-second session fully answered the concerns expressed by the U.S. delegation.[181] Because the conference agreed with Denmark and Sweden, it voted by a large margin to delete the phrase "or derived from" in Article 15.[182]

The outcome of the discussion brought Article 15 of the OTT Convention into line with the Visby and the Hamburg Rules, both of which have narrowly-drawn provisions to allow named transportation conventions to be adopted as national legislation without the need to ratify the named conventions.[183] Consequently, the U.S. delegation supported the change in Article 15.

16. Units of Account

Article 16 provides that the liability limits are to be measured in units of account. For members of the International Monetary Fund (IMF), the units of account equal the IMF's SDRs. For non-IMF members, the units are stated in their national currencies in amounts equivalent in real value to SDRs.[184]

17. Depositary

The U.N. Secretary General is the sole depositary of the OTT Convention.

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[181]A/44/17, paragraph 162.

[182]O.R. at 202–07, A/CONF.C.1/SR.15 at 2–11.

[183]Id.

[184]This formulation of "units of account" differs from that contained in Article 26 of the Hamburg Rules and the 1979 SDR Protocol to the Hague Rules. See also supra note 95 (the SDR Protocol to the Warsaw Convention). The real value alternative formula in these conventions was drafted to accommodate the needs of the U.S.S.R. and its clientele states. The formulation in the OTT Convention is the closest to date of a direct use of the SDR to measure liability limits. See generally Larsen, New Work in UNCITRAL on Stable, Inflation-Proof Liability Limits, 48 J. Air L. & Com. 665, 677–78 (1983). This change has become possible because China and the U.S.S.R. have joined the IMF. See United Nations, UNCITRAL: The United Nations Commission on International Trade Law 40–41 (1986).

18. Signature, Ratification, Acceptance, Approval and Accession

The OTT Convention remained open for signature until April 30, 1992. Signatory states may ratify, accept or approve the OTT Convention. States that are not signatories may accede to the OTT Convention. Instruments of ratification, acceptance, approval and accession are to be deposited with the U.N. Secretary General.

France, Mexico, the Philippines and Spain signed the OTT Convention at the diplomatic conference. The U.S. signed the OTT Convention on April 30, 1992.[185] As of July 1, 1994, no State had ratified the OTT Convention.

19. Federal-State Clause

Article 19 provides that States having two or more territorial units with different laws may limit the application of the OTT Convention to less than all its territorial units. This provision met the needs of Canada, which will be able to apply the OTT Convention to fewer than all of its Provinces.

20. Declarations of Application to Territorial Units

Article 20 provides that the declarations made by States regarding application of the OTT Convention to territorial units under Article 19 may be made at the time of signature and may be confirmed at the time of ratification. Such declarations may be withdrawn at any time. Withdrawal takes effect six months after receipt of the withdrawal notification by the depositary.

21. Reservations to the OTT Convention

The OTT Convention does not permit any reservations.[186]

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[185]Although the U.S. has signed the OTT Convention, it has not yet submitted it to the Senate for advice and consent.

[186]O.R. at 214–16, A.CONF.152/C.2/SR.1 at 1–2 and SR.2 at 1–2. As explained supra notes 7–13, at the last minute the U.S. delegation proposed a narrow reservation to preserve the Himalaya clause for U.S. stevedores. Although this proposal was rejected, as explained supra notes 58–77 and accompanying text, the Himalaya clause was preserved through a different avenue. Neither the Hague Rules nor the Visby Amendments discuss reservations. No reservations are permitted in the Hamburg Rules, the Multimodal Convention, the CISG, or the 1982 U.N. Convention on the Law of the Sea (UNCLOS).

22. Entry Into Force of the OTT Convention

Most delegations, including that of the U.S., were of the view that requiring a large number of ratifications for entry into force had tended to frustrate entry into force of several other transportation conventions. These delegations believed that if UNCITRAL's work was important enough to complete, then the product of this work, the OTT Convention, should not be frustrated by the requirement of an excessively large number of States for entry into force. Because this point of view prevailed, the OTT Convention will enter into force one year from the first day of the month after the deposit of the fifth ratification, acceptance, approval or accession.[187]

23. Amendment of the OTT Convention

The depositary is required to convene a conference of Contracting States to amend the OTT Convention if so requested by at least one-third of the States Parties. After such amendment, any subsequent ratifications are deemed to be of the OTT Convention as amended.

24. Revision of the OTT Convention's Liability Limits

Article 24 provides for a fast-track amendment of the OTT Convention's liability limits. This is in recognition of the fact that inflation tends to erode the level of compensation for loss, damage or delay and that the liability limits will likely need adjustment sooner than other aspects of the OTT Convention. As a consequence, the depositary must convene a meeting of a revision committee consisting of Contracting States at the request of one-fourth of the States Parties.

The OTT Convention establishes criteria for the committee's determination as to whether the liability limits should be amended. In particular, the following items are to be considered: (1) the amounts by which other transportation conventions have been amended, (2) the value of the goods, (3) the cost of transport-related services, (4)

[187]A.CONF.152/7 at 16, O.R. at 214–15, A.CONF.152/C.2/SR.1 at 2–3. The Hague Rules came into force in 1931 with four ratifications. The Hamburg Rules required 20 before entering into force in 1992. The Multimodal Convention requires 30. UNCLOS, which will come into force in November 1994, required 60 ratifications, but it is a public law convention that makes changes in existing treaty and customary international law.

changes in insurance rates, (5) changes in the average level of damages, and (6) the cost of electricity, fuel and other utilities.

Amendments to the liability limits require adoption by a two-thirds majority. Amendments may be adopted by tacit acceptance; that is, the amendments will be deemed to have been accepted after an 18 month period unless, within that time, not less than one-third of the States communicate to the depositary that they do not accept the amendment. Such an amendment goes into effect for all Party States unless a State denounces the OTT Convention. A State that becomes a party after amendment becomes a party to the amended OTT Convention.[188] The applicable liability limits are those in effect at the time when the loss, damage or delay occurred.

25. Denunciation of the OTT Convention

Article 25 provides that a State Party may denounce the OTT Convention at any time. A denunciation takes effect one year after the depositary has been notified. The only exception is that denunciation by a State Party in connection with an increase in the liability limit under Article 24(8) takes effect when the amended liability limit enters into force.

VI.
PRO AND CONTRA OF THE OTT CONVENTION

It is difficult to visualize all of the circumstances in which users of the OTT Convention's regime would or would not benefit from adoption of it by the U.S. The following is a survey of how the OTT Convention might affect its users in the most obvious cases.

A. U.S. Stevedores and Other Terminal Operators

Pro:

1. The Administration would submit to Congress the U.S. statement made at the diplomatic conference that stevedores and terminal operators, by virtue of Article 15, retain the option to seek the

[188]See Larsen, supra note 184, at 683–87. Article 20 of the 1969 Vienna Convention on Treaties has a tacit acceptance provision for reservations. The International Maritime Organization Treaty also has a tacit acceptance provision for amendments. See Article VII, IMO Treaty, as amended, TIAS No. 4044 (1948), TIAS No. 10374 (1975).

benefits of the maritime carrier under COGSA.[189] Thus, the statement would become legislative history and also would be submitted with the U.S. ratification to the depositary as the U.S. understanding of the OTT Convention. Only U.S. courts would be affected by the implementing legislation; they would have access to and would act consistently with the legislative history and the U.S. understanding.

2. The OTT Convention would fill the gaps between the existing legal regimes.

3. In situations where the carrier refuses to extend its COGSA rights to the stevedore or the terminal operator, or when the Himalaya clause in the maritime bill of lading is too broad to satisfy the test of *Herd*,[190] the stevedore would avoid being subject to U.S. *state* law if the OTT Convention was in place.

4. The stevedores' use of documentation is easy under the OTT Convention because stevedores may use the carriers' documentation without having to stop the flow of the goods to ascertain the condition and quantity of the goods. The stevedore also may issue a separate document.[191]

5. The legal regime of the OTT Convention is close to the existing related transportation regimes.[192]

6. The OTT Convention establishes uniformity and predictability of law.

7. Under the OTT Convention, the risk is defined and, thus, easier and possibly cheaper to insure.

8. Under the OTT Convention, stevedores will not have to insure for the uncertainty that the goods may be subject to liability under the laws of the fifty states, because the goods will not be subject to state law. Thus, stevedores may save money.

9. The OTT Convention is adaptable to EDI.[193]

10. The OTT Convention would facilitate international trade because it would establish a uniform and predictable international liability regime.

11. There would be less temptation to litigate under the OTT Convention because the liability regime would be more uniform and predictable.

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[189]See supra note 11 and accompanying text.

[190]See supra note 58.

[191]See Article 4 of the OTT Convention, discussed supra notes 91–94 and accompanying text.

[192]See supra notes 8 and 24. The liability limitation is close to the maritime limit if carriage is maritime and close to the European truck and rail conventions' limits if carriage is by truck and rail.

[193]See Article 4(3) of the OTT Convention.

Contra:

1. Stevedores and terminal operators have adjusted to the existing legal situation by buying insurance for the uncertainties.
2. Insurance cost is related to claims experience. It is uncertain whether the insurance costs of stevedores and terminal operators will increase under the OTT Convention given its presumption of fault and the breakability of liability limits in cases of intentional torts under Article 8.

B. Shippers

Pro:

1. The OTT Convention fills the gaps between the existing legal regimes.
2. Under the OTT Convention, shippers may have an easier time recovering because the burden is on the terminal operator to prove that the terminal operator was not negligent.
3. Under the OTT Convention, U.S. shippers will be assured that foreign stevedores cannot exculpate themselves from liability.[194]
4. Shippers will not have to over-insure for uncertain risks under the OTT convention.
5. There would be less temptation to litigate under the OTT Convention because the liability regime is more uniform and predictable.
6. Shippers will experience easy and cheap EDI under the OTT Convention.
7. The OTT Convention establishes uniformity and predictability of law.
8. The OTT Convention will induce and facilitate international trade.

Contra:

1. The existing legal arrangement works. Shippers are able to buy insurance to compensate for gaps and uncertainties in the system.
2. Shippers would lose the possibility of recovery under state law because the OTT Convention would supersede state law.[195]

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[194]See supra notes 53, 55 and 56. This is a problem in some countries, notably Australia, Germany and Japan.

[195]See supra note 9 (discussing *Colgate*).

C. Carriers

Pro:

1. The OTT Convention's liability regime approximates the regime of maritime carriage for maritime carriers and approximates the air, road and rail regimes for non-maritime carriers.
2. Under the OTT Convention, carriers will have the assurance that stevedores cannot exculpate themselves from liability. Consequently, in some foreign ports, stevedores will have to pay compensation for loss, damage and delay that they have caused where previously they would have been totally exculpated.[196]
3. Carriers will have less reason for concern as to the liability of independent contractors.
4. There would be less litigation under the OTT Convention because it establishes uniformity and predictability in the law.
5. The OTT Convention primarily envisions use of carrier documentation by stevedores in the stevedores' dealings with non-affiliated terminal operators.
6. The OTT Convention establishes uniformity and predictability of law.
7. The OTT Convention will induce and facilitate international trade.

Contra:

Carriers have adjusted to the existing legal regime by buying insurance for uncertainties.

D. Cargo and Liability Insurers

Pro:

1. Under the OTT Convention, the risk of carriage would become defined and, thus, easier to insure.
2. Significant amounts of liability and cargo insurance would continue to be sold.
3. Insurers would avoid the uncertainties inherent in the application of state law and, in particular, would avoid the result in *Colgate*.[197]
4. There would be less temptation to litigate under the OTT Convention because it would establish a uniform and predictable liability regime.

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[196]Id. See also supra note 57.

[197]See supra note 9.

5. Insurers would not have to be concerned about foreign stevedores exculpating themselves.

Contra:

The existing legal regime works and insurers are able to provide insurance to cover uncertainties.

E. Port Authorities

Pro:

1. Certainty and predictability of the law would be advantageous to port authorities as operators of terminals.
2. Uniformity of law and less litigation make port business more attractive because customers of the port are more certain of clear compensation for loss, damage and delay of goods.
3. The OTT Convention will induce and facilitate international trade from which all ports would benefit.
4. Warehousing and the movement of goods would be more controlled and efficient because the OTT Convention authorizes the use of EDI.

Contra:

Some terminal operators believe that the existing regime and insurance arrangements work.

F. Container Lessors

Pro:

1. Container lessors will benefit because the OTT Convention provides that terminal operators may not sell containers owned by leasing companies,[198] except to satisfy claims by the terminals for the cost of repairs to such containers.[199] Sale of leased containers to satisfy charges against goods stored in leased containers currently causes loss of leased containers. National laws on the rights of

[198]See supra notes 150–54 and accompanying text.
[199]See supra note 148.

terminal owners to sell leased containers vary. The OTT Convention would resolve this problem in the container lessors' favor.

2. The OTT Convention does not apply to container depots, relationships with which are governed by commercial contract.

3. Container lessors will save money because they will not have to replace containers lost to the foreign creditors of owners of goods.

4. Container lessors would experience less litigation under the OTT Convention because terminal operators would not have the right to sell leased containers to satisfy storage charges against the goods stored in leased containers.

5. Certainty and predictability of the law on terminal operations would facilitate the international container leasing business.

Contra:

The existing regime works and container lessors are able to insure against uncertainties.

VII.
CONCLUSION

The U.S. delegation voted for the OTT Convention at the final vote because it was convinced that, in the end, the difficult negotiations had been successful and the goals set forth in its instructions had been met. In particular, the U.S. delegation felt that the problem of U.S. stevedores and the maritime bill of lading defenses had been satisfactorily resolved.

The U.S. now should take the next step and ratify the OTT Convention because of the benefits that will be reaped. Of course, such ratification must occur with the understanding expressed by the U.S. delegation at the end of the conference, namely, that Article 15 of the OTT Convention preserves the rights of U.S. stevedores and terminal operators to the benefits available under COGSA.[200]

[200]See supra text accompanying note 11.