

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (United Nations 1994)

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United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (United Nations 1994)

Preamble

The Contracting States:

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

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

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

HAVE AGREED AS FOLLOWS:

Article 1 - Definitions

In this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage;

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

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

(d) "Transport-related services" includes such services as storage, warehousing, loading,

unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein; 14

(f) "Request" means a request made in a form which provides a record of the information contained therein. 15

Article 2 - Scope of application 16

(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage: 17

(a) When the transport-related services are performed by an operator whose place of business is located in a State Party, or 18

(b) When the transport-related services are performed in a State Party, or 19

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party. 20

(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. 21

(3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence. 22

Article 3 - Period of responsibility 23

The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them. 24

Article 4 - Issuance of document 25

(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either: 26

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or 27

(b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking. 28

(2) If the operator does not act in accordance with either subparagraph (a) or (b) of para- 29

graph (1), he is presumed to have received the goods in apparent good condition, unless he proves otherwise. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

(3) A document referred to in paragraph (1) may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message. 30

(4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means. 31

Article 5 - Basis of liability 32

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as from delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences. 33

(2) Where a failure on the part of the operator, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto. 34

(3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person. 35

(4) If the operator fails to hand over the goods to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, a person entitled to make a claim for the loss of the goods may treat them as lost. 36

Article 6 - Limits of liability 37

(1) 38

(a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged. 39

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port. 40

(c) When the loss of or damage to a part of the goods affects the value of another part of the goods, the total weight of the lost or damaged goods and of the goods whose value is affected shall be taken into consideration in determining the limit of liability. 41

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part. 42

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred. 43

(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3). 44

Article 7 - Application to non-contractual claims 45

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise. 46

(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention. 47

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention. 48

Article 8 - Loss of right to limit liability

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

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

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Article 9 - Special rules on dangerous goods

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

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(a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

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

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Article 10 - Rights of security in goods

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

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(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum

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claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in the State where the operator has his place of business.

(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled, to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. This right to sell does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging. 59

(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in all other respects be exercised in accordance with the law of the State where the goods are located. 60

Article 11 - Notice of loss, damage or delay

(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over by the operator to the person entitled to take delivery of them, the handing over is prima facie evidence of the handing over by the operator of the goods as described in the document issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was issued, in good condition. 61 62

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60`consecutive days after the day when the goods were handed over to the person entitled to take delivery of them. 63

(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection. 64

(4) In the case of any actual or apprehended loss of or damage to the goods, the operator, the carrier and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods. 65

(5) No compensation is payable for loss resulting from delay in handing over the goods 66

unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

Article 12 - Limitation of actions

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

(2) The limitation period commences:

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

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

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

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

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

Article 13 - Contractual stipulations

(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

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

Article 14 - Interpretation of the Convention

In the interpretation of this Convention, regard is to be had to its international character

and to the need to promote uniformity in its application.

Article 15 - International transport conventions

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

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Article 16 - Unit of account

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

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

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Final Clauses

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Article 17 - Depositary

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

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Article 18 - Signature, ratification, acceptance, approval, accession

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(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade and will remain open for signature by all States at the Headquarters of the United Nations, New York, until 30 April 1992.

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(2) This Convention is subject to ratification, acceptance or approval by the signatory States. 90

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature. 91

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations. 92

Article 19 - Application to territorial units 93

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may at any time substitute another declaration for its earlier declaration. 94

(2) These declarations are to state expressly the territorial units to which the Convention extends. 95

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, this Convention shall be applicable only if 96

(a) The transport-related services are performed by an operator whose place of business is located in a territorial unit to which the Convention extends, or 97

(b) The transport-related services are performed in a territorial unit to which the Convention extends, or 98

(c) According to the rules of private international law, the transport-related services are governed by the law in force in a territorial unit to which the Convention extends. 99

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State. 100

Article 20 - Effect of declaration 101

(1) Declarations made under article 19 at the time of signature are subject to confirmation upon ratification, acceptance or approval. 102

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary. 103

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives 104

formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under article 19 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 21 - Reservations

No reservations may be made to this Convention.

Article 22 - Entry into force

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

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

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

Article 23 - Revision and amendment

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

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

Article 24 - Revision of limitation amounts

(1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.

- (2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force. 117
- (3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law. 118
- (4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration: 119
- (a) The amount by which the limits of liability in any transport-related convention have been amended; 120
 - (b) The value of goods handled by operators; 121
 - (c) The cost of transport-related services; 122
 - (d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen; 123
 - (e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and 124
 - (f) The costs of electricity, fuel and other utilities. 125
- (5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting. 126
- (6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature. 127
- (7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph enters into force for all States Parties 18 months after its acceptance. 128
- (8) A State Party which has not accepted an amendment is nevertheless bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation takes effect when the amendment enters into force. 129
- (9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period is bound by the amendment if it enters into force. A 130

State which becomes a State Party after that period is bound by any amendment which has been accepted in accordance with paragraph (7).

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

Article 25 - Denunciation

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

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

[Post Provisions]

[Post Clauses (If any: Signed; Witnessed; Done; Authentic Texts; & Deposited Clauses)]

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

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

Note by the Secretariat:

[Note]

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

1 . The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade was adopted on 17 April 1991 and was opened for signature on 19 April 1991 by a universal diplomatic conference at Vienna, Austria. The Convention is based upon a draft prepared by the United Nations Commission on International Trade Law

(UNCITRAL) and an earlier preliminary draft Convention elaborated by the International Institute for the Unification of Private Law (UNIDROIT).

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

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A. Policies underlying the Convention

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Need for mandatory liability rules

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

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

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

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6 . Those concerns may become even more serious when transport-related services for a particular transport route are provided by only one or a limited number of operators. 146

Gaps in liability regimes left by international conventions 147

7 . When the consignor hands over goods for carriage to a terminal operator, the carrier's liability may not yet begin; at the place of destination, the carrier's liability may end when the carrier hands the goods over to a terminal operator, which is usually before the goods are handed over to the consignee or to the next carrier. While the carrier's liability is through various transport conventions to a large degree subject to harmonized and mandatory rules, there may exist periods during which the goods in transit are not subject to a mandatory regime. The negative consequences of those gaps in the liability regime are serious because, according to statistics, most cases of lost or damaged goods occur not during the actual carriage but during transport-related operations before or after the carriage. 148

Need for harmonization and modernization 149

8 . The rules in national legal systems governing the liability of terminal operators differ widely, as to both their source and content. The rules may be contained in civil or commercial codes or in other bodies of law governing the deposit or bailment of goods. As to the standard of liability, in some legal systems the terminal operator is strictly liable for the goods, and he can be exonerated only if certain narrow exonerating circumstances are established. In other systems the operator is liable for negligence, i.e. if he did not take reasonable care of the goods. Further differences concern the burden of proving the circumstances establishing the operator's liability. Under many systems a limited quantum of evidence put forward by the claimant is sufficient to establish a presumption of the operator's liability, and it is then up to the operator to prove exonerating circumstances. There are, however, also legal systems in which it is up to the claimant to prove circumstances establishing the operator's liability. Disparities exist also in respect of financial limits of liability. In some legal systems the operator's liability is unlimited, while in others limits are established. Further differences concern limitation periods. In some legal systems these periods may be very long. The disparities may be complicated by the fact that in some legal systems operators are subject to different liability rules depending upon the nature of services rendered. For example, storing goods in the operator's warehouse and loading of goods into the vessel's hold may be subject to different sets of rules. 150

9 . Such disparity of laws causes problems in particular to carriers and other users of transport-related services who are in contact with terminal operators in different countries. 151

10 . Furthermore, many national laws are not suited for modern practices in transport 152

terminals. For example, national laws may not accommodate the use of containers or computerized communication techniques or may not deal adequately with the question of dangerous goods.

Consequences and benefits of the Convention

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

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

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

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

B. Preparatory work

[Preparatory work]

15 . The Convention has its origins in work by the International Institute for the Unification of Private Law (UNIDROIT) on the topic of bailment and warehousing contracts, which led to the adoption in 1983 by the UNIDROIT Governing Council of the preliminary draft Convention on the Liability of Operators of Transport Terminals.^{1/}

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

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17 . The United Nations Conference on the Liability of Operators of Transport Terminals in International Trade was held at Vienna, Austria, from 2 to 19 April 1991. Forty-eight States were represented at the Conference as well as intergovernmental organizations and international non-governmental organizations interested in the topic. The Conference thoroughly reviewed all issues, including views that were considered and rejected during the preparatory work within UNCITRAL. The Convention was adopted on 17 April 1991.4/ Until 30 April 1992, the deadline for signing the Convention, the following States signed it: France, Mexico, Philippines, Spain and the United States of America.

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

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2 / A/CN.9/260 (UNCITRAL Yearbook, vol. XVI - 1985); A/CN.9/275 (UNCITRAL Yearbook, vol. XVII - 1986); A/CN.9/287 (UNCITRAL Yearbook, vol. XVIII - 1987); and A/CN.9/298 (UNCITRAL Yearbook, vol. XIX - 1988).

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3 / The discussion in the Commission is reflected in document A/44/17 (UNCITRAL Yearbook, vol. XX - 1989), paras. 11 to 225.

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4 / The documents of the diplomatic conference have been compiled in the United Nations publication A/CONF.152/14.

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C. Salient features of the Convention

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Definitions

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18 . For the Convention to apply, the transport-related services must be performed by a person who falls within the scope of the definition of the “operator of a transport terminal”. The operator of a transport terminal is defined in article 1(a) as “a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access

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or use. However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage”.

19 . “In the course of his business”. The Convention applies only if the transport-related services constitute a commercial activity. This does not mean that a particular transport-related service must be subject to the payment of a fee. For example, in some terminals short-term storage at the place of destination may be “free of charge” and the charges would start to accrue after the second or third day. 169

20 . “Goods involved in international carriage”. If transport-related services are performed with respect to goods involved in domestic carriage, the Convention does not apply. In order to provide certainty as to the applicable regime, article 1(c) provides that the places of departure and destination must be “identified” as being located in different States already at the time when the goods are taken in charge by the operator. 170

21 . “Transport-related services”. The Convention provides in article 1(d) a non-exhaustive list of services that fall within the category of transport-related services governed by the Convention. The examples given (storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing) indicate that those services include only physical handling of goods and not, for instance, industrial processing such as repacking or cleaning of goods, or financial or commercial services. 171

22 . “Area under his control or in respect of which he has a right of access or use”. At an early stage of the preparatory work within the UNCITRAL Working Group it was considered that the draft Convention should apply only if the safekeeping of goods was part of the operator's services. That approach would exclude, for example, those stevedoring companies that limited their services to loading and unloading of goods without themselves storing the goods. In order to express more clearly that approach, the Working Group included in the definition the criterion that the operator should perform his services “in an area under his control or in respect of which he has a right of access or use”. The scope of application of the draft Convention was subsequently broadened to include the performance of various transport-related services even if no safekeeping of goods is involved. In light of the broadened scope of application, the criterion relating to the area in which the services are performed also has a broader meaning. It means, for example, that stowing or trimming of goods in the hold of a vessel would be considered a service performed in an area to which the operator has a right of access; a wharf on which the operator moves goods and which is used by various enterprises would be an area of which the operator has a right of use; the operator's warehouse would be an area under his control. 172

23 . “A person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage”. The Convention excludes from its scope of application the cases when a person performs transport-related services while he is responsible for the goods under the rules of law governing carriage. For example, if a particular carriage of goods by sea is subject to the Hamburg Rules, and the carrier takes the goods in charge 173

at the port of loading and stores them until the commencement of the voyage, or keeps the goods in his charge for some time at the port of discharge, the Hamburg Rules, and not the Convention on terminal operators, will govern the carrier's liability for the goods held by him in the port.

Period of responsibility

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

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

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26 . The purpose of the concept of placing goods "at the disposal of the person entitled to take delivery of them" is to allow the operator to terminate his responsibility under the Convention when he has fulfilled all of his obligations even if the person entitled to take delivery of the goods fails to take them over. For the responsibility under the Convention to be terminated, the placing of goods at the disposal of the entitled person must be done in accordance with the contract and the usages applicable to the situation.

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Issuance of document

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27 . The Convention in principle leaves it up to the operator whether to issue a docu-

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

28 . The Convention provides that a document may be issued “in any form which preserves a record of the information contained therein”. It is further provided that a signature can be a “handwritten signature, its facsimile or an equivalent authentication effected by any other means”. This provision is not qualified by a requirement that a particular means of authentication must be permitted by the applicable law. The expression “equivalent authentication” should be understood as a requirement that the method used must be sufficiently reliable in the light of the usages relevant to the situation. 180

29 . The Convention refers in several places to notices and requests (articles 4(1); 5(3)(4); 10(4); 11(1),(2),(5); 12(2),(4),(5)). Article 1(e) and (f) specifies that a notice or a request may be given “in a form which preserves a record of the information contained therein”. The purpose of the provision, which parallels the provision on the form of a document issued by the operator and is modelled on equivalent formulations in several international legal texts, is to make it clear, on the one hand, that a notice or request under the Convention cannot validly be made orally, and, on the other hand, that a notice or request may be given in the form of a written paper or may be transmitted by the use of electronic data interchange (EDI). Since the use of EDI requires that both parties use suitable and compatible equipment, the use of electronic transmission techniques presupposes previous agreement by the parties. 181

Basis of liability

30 . The Convention deals with the operator's liability for loss resulting from physical loss of or damage to goods as well as from delay in handing over the goods (article 5). The question whether the concept of “loss” includes lost profits is left to the applicable law. 182

31 . The liability of the operator under the Convention is based on the principle of presumed fault or neglect. This means that, after a claimant has established that the loss or damage occurred during the operator's period of responsibility, it is presumed that the loss or damage was caused by the operator's negligence. The operator can be relieved of his liability if he proves that he, his servants or agents, or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the loss or damage. 183

32 . Reservations were expressed about the principle of presumed liability on the ground that in some terminals people who deposited goods in the terminal may come in the terminal in order to inspect the goods, take samples or show the goods to prospective buyers, 184

and that, as a result, the terminal operators could not exercise full control over goods. Those reservations were not accepted since it was considered that placing the burden of proof of negligence on the owner of goods would in practice often mean that the owner would not be able to establish liability for losses arising from pilferage, theft and poor organization of work. Moreover, it is reasonable to expect that operators should organize proper supervision over goods and that the principle of presumed liability was a suitable stimulus therefor.

Limits of liability

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

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

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

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Application to non-contractual claims

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

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

37 . The Convention does not expressly address the question whether an agreement between the operator and a customer to increase liability limits or to waive defences binds the operator's servants, agents or independent contractors. 192

Loss of right to limit liability 193

38 . The operator loses the benefit of the financial limits of liability if it is proved that he himself or his servants or agents acted in a reckless manner defined in article 8. The operator does not lose the benefit of liability limits if an operator's independent contractor acted in such manner. 194

39 . During the preparation of the Convention, it was proposed that the operator should lose the benefit of the liability limit only if he himself acted with qualified fault and that he should not lose that benefit if his servants or agents so acted. The prevailing view, however, was that the operator has a duty to supervise his servants and agents and that he should bear the risk for their reckless actions. 195

Rights of security in goods 196

40 . Article 10, which gives the operator a right of retention over goods for claims due to him, does not itself establish a right of sale of retained goods. The right of sale is dealt with in the Convention only to the extent such a right exists under the law of the State where the retained goods are located. 197

Limitation of actions 198

41 . In providing a two-year limitation period for actions against the operator (article 12), the drafters of the Convention wanted to avoid a situation in which it would be difficult or impossible for a carrier to institute a recourse action against the operator. This would be the case when the carrier is sued or held liable close to or after the expiration of the two-year limitation period. Article 12(5) allows a claim against the operator even after the expiration of the limitation period if the action is instituted within 90 days after the carrier has been held liable in an action against himself or has settled the claim upon which such action was based. 199

Final clauses 200

42 . Despite proposals for permitting reservations to the Convention, it was decided not to 201

allow reservations (article 21).

43 . The desire for the Convention to enter into force soon is reflected in article 22, according to which the Convention enters into force when five States have adhered to it. 202

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