

to the carrier and the consignee later alleges that he did not receive the correct quantity of goods or that goods which he received were damaged, and the loss or damage might have been sustained while the goods were in the custody of the OTT. It may be noted, however, that under the preliminary draft Convention (article 10 (1)) the right of the consignee to recover for loss of or damage to the goods might not be defeated by a failure of the carrier to give such notice. In such a case, the handing over of goods to the carrier would be *prima facie* evidence of delivery of the goods as described in the document issued by the OTT or in good condition. If the OTT was acting for the carrier, the consignee could still claim against the carrier for the loss or damage. Even if the OTT was not acting for the carrier, the consignee could claim against the carrier, and this claim would be aided by the *prima facie* evidentiary effect of the handing over of the goods by the OTT that the goods were delivered as described in the document issued by the OTT or in good condition, plus the evidentiary effect of any bill of lading or other transport document issued by the carrier showing that the goods were received by him in the correct quantity or in good condition. Issuance by the carrier of a transport document showing that he received goods from the OTT in an insufficient quantity or in a damaged condition, or proof by the carrier in the claim against him that he

received the goods from the OTT in an insufficient quantity or in a damaged condition, could be used to overcome the *prima facie* evidentiary effect of the handing over of the goods by the OTT in a claim by the consignee against the OTT. Moreover, the Working Group may wish to consider whether the Uniform Rules are the proper place for imposing on the carrier an obligation to protect the right of the consignee to claim for loss of or damage to the goods.

Issue 29

Should the Uniform Rules deal with obligations of the customer towards the OTT, such as (a) an obligation to pay for the services performed by the OTT; (b) an obligation to inform the OTT as to any dangerous character of the goods and a corresponding right of the OTT not to accept the goods, or to deal with them in a way appropriate to their character; (c) an obligation to hold the OTT harmless from any consequences caused other than by dangerous goods, such as a liability to authorities for deficiencies in documentation?

Annotation

A/CN.9/252, para. 45.

Explanatory Report, para. 20.

2. Explanatory report to the preliminary draft Convention on the Liability of Operators of Transport Terminals, prepared by the secretariat of UNIDROIT; note by the secretariat (A/CN.9/WG.II/WP.52/Add.1)

(For reference only)

[The Explanatory report is reproduced in Yearbook XV, 1984, part two, IV, C, in connection with the text of the preliminary draft Convention, since it was made available in the form of a UNIDROIT document at the seventeenth session of the Commission (New York, 25 June-10 July 1984). The report is noted here for

reference since it was reproduced during the period covered by this Yearbook as UNCITRAL document A/CN.9/WG.II/WP.52/Add.1 for the eighth session of the Working Group on International Contract Practices (3-14 December 1984).]

3. Liability of operators of transport terminals: additional issues for discussion by the Working Group; note by the secretariat (A/CN.9/WG.II/WP.53)

Additional issue 1

Should the Uniform Rules provide that the defences and limits of liability provided for therein apply whether the action is founded in contract, tort or otherwise?

Hamburg Rules, article 7 (1).

Multimodal Convention, article 20 (1).

Additional issue 2

Should the Uniform Rules specify those categories of entities who are entitled to claim against the OTT?

Remarks

A provision such as that contained in article 8 (1) of the preliminary draft Convention, whereby the Rules would apply to actions founded in tort or otherwise, would hold open the possibility of actions being brought against the OTT by persons other than those in a contractual relationship with the OTT. However, the issue of who may claim against the OTT is not directly addressed by the preliminary draft Convention. In some legal systems, a claim against an OTT performing services in connection with maritime transport may be

Annotation

Preliminary draft Convention, article 8 (1).

Explanatory Report, para. 61.

brought only by an entity in a contractual relationship with the OTT. In other legal systems, a claim may be brought by persons who are not in such a relationship with the OTT but who have an interest in the goods. The Working Group may wish to consider whether it would be preferable to specify categories of entities who may bring claims against the OTT or to leave this issue to be settled by rules of national law other than the Uniform Rules.

Additional issue 3

Should the Uniform Rules entitle a servant or agent of the OTT acting within the scope of his employment to avail himself of the defences and limits of liability which the OTT is entitled to invoke under the Rules?

Annotation

Preliminary draft Convention, article 8 (2).

Explanatory Report, para. 61.

Hamburg Rules, article 7 (2).

Multimodal Convention, article 20 (2).

Remarks

An OTT acting as an agent of a carrier may be able to benefit from defences and limits of liability which are applicable to the carrier under the relevant transport convention, if the transport convention contains a provision similar to article 7 (2) of the Hamburg Rules, or if the transport document issued by the carrier contains a "Himalaya clause". Those defences and limits of liability may be more favourable to the OTT than the ones provided for in the Uniform Rules. Such a situation may present no difficulty in the context of a recourse action by the carrier against the OTT, since the defences and limits of liability which the OTT would be entitled to invoke in the recourse action would be the same as those which the carrier could invoke in the action against him. On the other hand, in an action by a cargo interest directly against the OTT, such a situation might entitle the OTT to invoke more favourable defences and limits of liability than would otherwise be available to him under the Uniform Rules. The Working Group may wish to consider whether it is desirable or possible to permit an OTT acting as an agent for a carrier to invoke the defences and limits of liability available to the carrier only in recourse actions by the carrier against the OTT.

It may be noted that under article 8 (2) of the preliminary draft Convention, a servant or agent of the OTT would be able to invoke only the defences and limits of liability available to the OTT under the Convention, and not those which may be available to the OTT as described in the preceding paragraph.

Additional issue 5

Should the Uniform Rules require notice of loss of or damage to the goods to be given to the OTT? If so, within what period of time should such notice be given, and what should be the effect of a failure to give such notice?

Annotation

Preliminary draft Convention, article 10.

Explanatory Report, paras. 66-68.

Hamburg Rules, article 19.

Multimodal Convention, article 24.

Remarks

The discussion in the remarks to issue 28 in document A/CN.9/WG.II/WP.52 may be relevant in this regard.

The Working Group may wish to consider whether the 15 days notice period for non-apparent damage is sufficient. A situation could occur, for example, in which containerized goods suffer damage while in the custody of an OTT immediately prior to carriage by sea, but the damage is not discovered until the container is opened after the end of the voyage, which could be longer than 15 days after the OTT hands the container over to the carrier.

It may be noted that some general conditions provide for a longer period of notice (e.g. 60 days) than the periods specified in the preliminary draft Convention, but also provide that a claim for loss or damage against the OTT would be barred if notice were not given as required.

Additional issue 6

Should the Uniform Rules provide to whom notice may be given?

Remarks

The preliminary draft Convention does not deal with this question. One approach might be to leave the issue to be resolved by rules of national law other than the Uniform Rules.

The Working Group may wish to consider whether it would be desirable for the Uniform Rules to provide that notice given to a carrier on behalf of whom the OTT was acting also constitutes notice to the OTT. Such a provision might be appropriate in order to deal with the situation in which the goods were deposited by a carrier with an OTT acting as his agent and were handed over by the OTT to the consignee, who discovered that they were damaged. One possibility may be to provide that notice to the carrier also constitutes notice to the OTT. In this connection, it may also be desirable for the Uniform Rules to specify against whom the *prima facie* effect of a failure to give notice operates (e.g. only against the person who received the goods).

Additional issue 7

Should the Uniform Rules provide that an OTT may not by agreement derogate from the provisions of the Rules? Should the Uniform Rules enable the OTT to increase his responsibilities and obligations under the Rules?

Annotation

Preliminary draft Convention, article 12.
Explanatory Report, paras. 73 and 74.
Hamburg Rules, article 23.
Multimodal Convention, article 28.

Remarks

A provision such as article 12 (2) of the preliminary draft Convention could help to protect a carrier's right of recourse against an OTT, if the carrier's responsibilities and obligation toward the cargo interest were higher than those of the OTT toward the carrier.

Additional issue 8

Should the Uniform Rules provide that they are subordinate to rights and duties arising under an international convention relating to the international carriage of goods?

Annotation

Preliminary draft Convention, article 14.
Explanatory Report, para. 76.

Remarks

A provision such as article 14 of the preliminary draft Convention could have various consequences, including the following:

(a) It could exclude a carrier from the coverage of the Rules while he is subject to an international transport convention.

(b) It could hold rights under a transport document paramount to rights under a document issued by an OTT.

(c) It could hold the rights of a person entitled to receive the goods under a transport document paramount to rights of security of the OTT in the goods.

The Working Group may wish to consider whether the Uniform Rules should be subordinate to rights and obligation arising even under an international transport convention to which the State where the OTT performs his operations is not a party.

Additional issue 8

Should the Uniform Rules contain a provision comparable to article 15 of the preliminary draft convention?