United Nations A/CN.9/1127

General Assembly

Distr.: General
9 December 2022

Original: English

**United Nations Commission on International Trade Law**
**Fifty-sixth session**
Vienna, 3–21 July 2023

# Report of Working Group VI (Negotiable Multimodal Transport Documents) on the work of its forty-first session (Vienna, 28 November–2 December 2022)

## Contents



V.22-27527 (E) 151222 161222

# I. Introduction

1. At its forty-first session, the Working Group took up new work towards the development of a new instrument on negotiable multimodal transport documents referred to it by the Commission.[1]

# II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its forty-first session in Vienna from 28 November to 2 December 2022 at the Vienna International Centre.

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Brazil, Canada, Chile, China, Colombia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Japan, Kuwait, Malaysia, Mali, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Bolivia (Plurinational State of), Egypt, El Salvador, Gabon, Jordan, Libya, Malta, Myanmar, the Sultanate of Oman, Pakistan, Philippines, Qatar, Romania, Senegal and Sri Lanka.

5. The session was attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD) and United Nations Economic Commission for Europe (UNECE);

(b) *Intergovernmental organizations*: Gulf Cooperation Council (GCC), Intergovernmental Organization for International Carriage by Rail (OTIF) and Organization for Cooperation between Railways (OSJD);

(c) *International non-governmental organizations*: Association of American Railroads (AAR), China Council for the Promotion of International Trade (CCPIT), International and Comparative Law Research Center (ICLRC), International Center for Transport Diplomacy (ICTD), International Chamber of Commerce (ICC), International Federation of Freight Forwarders Associations (FIATA), Kozolchyk National Law Center (NATLAW), New York City Bar Association (NYCBAR) and Shanghai Arbitration Commission (SHAC).

6. The Working Group elected the following officers:

*Chairperson*: Ms. Beate CZERWENKA (Germany)

*Rapporteur*: Ms. Nak Hee HYUN (Republic of Korea)

7. The Working Group had before it the following documents:

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.95); and

(b) An annotated set of preliminary draft provisions for an instrument on negotiable cargo documents (A/CN.9/WG.VI/WP.96).

8. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.

2. Election of officers.

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 22 (h) and 202.

3. Adoption of the agenda.

4. Future instrument on negotiable multimodal transport documents.

5. Adoption of the report.

# III. Deliberations

9. The Working Group commenced its initial consideration of the new topic on the basis of a Note by the Secretariat (A/CN.9/WG.VI/WP.96) containing an annotated set of preliminary draft provisions for an instrument on negotiable cargo documents. The summary of deliberations of the Working Group may be found in chapter IV below. The Working Group agreed to consider draft articles 3, 4, 7–12 and reserved deliberations on the other draft articles for a future session.

# IV. Future instrument on negotiable multimodal transport documents

## A. General remarks

10. The Working Group began its deliberations with a general exchange of views on the objectives, scope and form of the proposed new instrument, for which general support was expressed. It was noted that the new instrument had the potential of satisfying the expanding needs of financing in international trade by offering banks in non-maritime contexts a negotiable document with a similar function as the maritime bill of lading. To achieve that goal such a document should (a) allow a third party in good faith to rely on all information contained therein, (b) grant the right of control over goods in transit to the holder of such document, and (c) function as the key document for delivery at destination.

11. It was suggested that the new instrument should adopt a modality-neutral approach to develop a negotiable document for land transportation which would cover both multimodal and unimodal carriage of goods. It was explained that while the title of the topic referred to negotiable multimodal transport documents, the working title of the preliminary draft provisions as contained in the annex to the document A/CN.9/WG.VI/WP.96 did not make such reference.

12. As to the form of the instrument, the Working Group noted a prevailing preference in favour of an international convention so as to ensure a high degree of uniformity. It was, however, emphasized that a new instrument would need to be carefully drafted in order to avoid conflicts with existing international conventions governing carriage of goods. Views were also expressed that the ratification process for international conventions may take some time. Other views expressed preference for a modal law in order to facilitate adapting the provisions to supplement domestic legislation on multimodal transport documents. The Working Group did not make a final decision on that issue.

## B. Preliminary draft provisions for an instrument on negotiable cargo documents

### 1. Draft article 3. Issuance of a negotiable cargo document

13. It was explained that the preliminary draft provisions reflected a “dual-track” approach under which the negotiable cargo document (NCD) to be provided under the new instrument would not replace any transport document that an actual carrier may be required to issue under domestic law or an applicable international convention. It was added that the new instrument would co-exist and would not substantially affect the application of any existing conventions.

*Paragraph (1)*

14. With respect to the issuance of NCDs, different views were expressed as to whether such issuance should require the agreement of the parties to an international transport contract. Questions were raised regarding the undefined term “parties to an international transport contract” (i.e. whether it referred to the shipper and the transport operator or to any other party receiving the goods).

15. Support was expressed for deleting the text in square brackets, on the basis that the intended evidentiary value of such negotiable document would require the document to be issued at the time of shipment. It was also noted that the negotiable document should be issued as soon as possible in order for it to be submitted to banks for letter of credit purposes. In response it was noted that the issuance of an NCD should reflect the commercial needs of the parties and that they should be free to agree on the appropriate time.

*Paragraph (2)*

16. With respect to the form of NCD, a question was raised as to why the form of NCD issued in a multimodal context would differ from that issued in a unimodal context. It was pointed out that, in rail transport, the CIM transport document could extend to multimodal transport and the CIM Uniform Rules could also apply to rail plus maritime transport. In the view of some delegates, issuing an NCD under subparagraph (a) instead of a maritime bill of lading might cause conflicts with existing applicable law governing the transport contract. It was, however, noted that issuing a separate document as contemplated in subparagraph (a) would not be a novelty in international trade, as evidenced by the long-standing practice of so-called “charter party bills of lading” issued to confer negotiability on the transport documents covering individual shipments under a charter party.

17. In the view of some other delegates, inserting a reference in the existing transport document under subparagraph (b) would in principle interfere with existing international conventions governing carriage of goods. It was added that inserting a reference in the existing transport document would lead to too much unnecessary information in the NCD. In response, it was explained that the paradigm contemplated in subparagraph (b) was that of a multimodal transport where the document issued by the contractual carrier (e.g. the transport operator) would be the umbrella covering the issuance of specific transport documents by the actual carriers transporting the goods in partial segments of the overall journey. Moreover, even in the absence of such document all conventions governing unimodal transport would allow the relevant document to include any other information that the parties considered useful, which might conceivably include a reference to the new instrument. It was, however, noted that such a reference could in some cases be problematic. While most relevant international conventions were silent on the nature of consignment note, the CIM Uniform Rules (art. 6.5) did not allow the consignment notes governed by such rules to have the effect as a bill of lading. It was further noted that the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (the “Budapest Convention”) envisaged a possibility for negotiable document.

18. A suggestion was made for subparagraph (b) to function as the default rule and for subparagraph (a) to function as the alternative option where the relevant international conventions would not permit the negotiability of NCDs. Another suggestion was made for the new instrument to give flexibility to the parties to choose under which circumstances an NCD should be issued to avoid too much interference with business practice. The Working Group acknowledged that a final decision as to the suitability of the options in subparagraphs (a) and (b) depended on a broader discussion on the purpose and function of the NCD but agreed that both options should be rendered more flexible and the choice between them made less prescriptive in a future version of the draft provisions.

*Paragraph (3)*

19. The need for this paragraph was questioned noting that its purpose was merely for the avoidance of doubt. The Working Group agreed to revisit this paragraph at a later stage in conjunction with other relevant articles.

*Paragraph (4)*

20. Concerns were expressed regarding the need for and feasibility of inserting annotation in all copies of the transport documents as a condition for the validity of the NCDs. The practical difficulty for the holder of an NCD to verify the annotations in underlying transport documents was highlighted, especially in the context of multimodal transport. It was also noted that this requirement would inhibit the negotiability and financing function of NCDs. It was further pointed out that allowing the issuance of NCDs at an agreed later date when the need arose would pose obstacles to inserting those annotations since transport documents may have already been circulated. A suggestion was made that the rights of parties to the transport document should not be affected in case of missing annotation, but the NCD should remain valid.

21. On the other hand, the importance of such annotation in the transport document was emphasized in order to put the actual carrier on notice that delivery should be made to the holder of NCD, not the consignee. It was clarified that unimodal transport conventions normally stipulated the minimum contents of the transport documents without prohibiting the insertion of annotations therein. With references to house bills of lading and master bills of lading, it was explained that this paragraph referred to the house bill of lading scenario.

22. A suggestion was made to delete the term “only” in the third line and adjust the wording of this paragraph based on subsequent discussion on electronic cargo documents and the final form of the instrument.

*Paragraph (5)*

23. While general support was expressed for the draft instrument to include both order and bearer NCDs, a concern was raised regarding the legal complexity of introducing bearer NCDs as well as its implications especially in an electronic context. It was explained that introducing bearer NCDs may require the introduction of the notion of “lawful bearer” which may fall beyond the scope of the project. It was suggested that the introduction of bearer documents could be further considered when business needs for such documents had been identified.

24. A suggestion was made to insert the phrase “physically or electronically” at the end of the first sentence to accommodate the electronic version of NCDs. The need for the first sentence as a whole was questioned as already being contemplated in the definition of NCDs in article 2.

*Paragraph (6)*

25. Questions were raised regarding the purpose and need for the paragraph. It was clarified that paragraph 6 was not intended to prescribe the number of originals to be issued but simply to permit the issuance of multiple originals if needed, as was the usual practice in ocean carriage, but also contemplated in CMR article 5. On that basis, it was added that the paragraph could apply to different forms of NCDs as envisaged in paragraphs (2)(a) and (2)(b). While acknowledging the possible evidentiary value of copies, it was noted that the reasons for issuing copies would need to be clarified in line with relevant industry practice. It was further noted that the distinction between originals and copies would make sense in both paper-based and electronic environments, given the fact that a unique and exclusive original could be enabled by electronic means, such as in the context of non-fungible tokens.

26. After discussion, the Working Group decided not to revise draft article 3, paragraphs 1–6, at this stage.

### 2. Draft article 4. Content of the negotiable cargo document

27. A suggestion was made for not limiting the application of draft article 4 to situations when the NCD was issued as a separate document in accordance with draft article 3, subparagraph 2(a). It was explained that the same information should be included in the NCD for the benefit of third parties, regardless of the format of the NCD (i.e. either a separate document or a reference in the existing transport document). Support was expressed for the NCD to reproduce the transport contract particulars, noting that in most jurisdictions the consignee would also benefit from the transport document, at least when it exercised rights arising out of that contract. After discussion, the Working Group requested the secretariat to revise the chapeau of draft article 4, paragraph 1, so that draft article 3, subparagraph 2(b) would not be excluded from its application.

28. In respect of the items listed in paragraph 1, it was noted that the list included not only information required by negotiability but also additional information that might be required by the law of some countries (e.g. concerning dangerous goods) and other information distilled from the transport contract. In particular, it was suggested that several items went beyond transport contract particulars which would often not be included in the transport document, such as subparagraphs (f), (k), (o), (p) and (m).

29. Considering, however, that most items listed in paragraph 1 provided useful information, the Working Group agreed to consider grouping those items into a mandatory list containing minimum required information and another indicative list with additional relevant information. On that basis, the Working Group agreed to consider each individual element listed in paragraph 1.

30. The Working Group reconsidered the grouping of items in draft article 4, paragraph 1, and tentatively agreed to break them down on:

- A first mandatory list of essential elements of an NCD;
- A second mandatory list of particulars of the transport document that needed to be reproduced in the NCD; and
- A third indicative and non-exhaustive list to include any other particulars that the parties might agree to insert in the NCD, if not inconsistent with the law of the country where it was issued.

*Subparagraphs (a), (b), (c) and (d)*

31. The Working Group agreed to keep subparagraphs (a), (b), (c) and (d) at an appropriate place as items to be mandatorily included. The importance of the identity of the carrier in the maritime context was highlighted, noting that in practice there had been disputes on such issue as carriers might use agents for concluding the transport contract.

32. The Working Group also agreed to replace the phrase “principal place of business” in subparagraph (c) with the term “address” to ensure consistency.

*Subparagraph (e)*

33. The Working Group agreed to retain the text in square brackets and to keep subparagraph (e) in the mandatory lists. It was noted that the consignee might be unknown under bearer documents as well as some order documents in which only “To order” was indicated. It was explained that the square-bracketed text was intended to clarify that the name of the consignee should be included only when named by the consignor, and that the reference to application law was made to the law governing the transport contract.

*Subparagraph (f)*

34. The Working Group agreed to remove subparagraph (f) from the mandatory lists. It was emphasized that the validity of a transfer should not be subordinated to the notification of the transport operator and that introducing a notification obligation of the transfer of the NCD would undermine its negotiability. It was explained that the purpose of subparagraph (f) was not to subject the validity of a transfer to prior notification, but to promote clarity as to the manner in which notification could be given, and to provide comfort to carriers used to deal only with non-negotiable transport documents.

35. The need for the new instrument to clarify the channel of communication between the carrier and the person with the right to dispose of goods was highlighted. Reference was made to article 55, paragraph 2, of the Rotterdam Rules, which provided a default rule when the carrier needed instructions but was unable to locate the controlling party. The Working Group was also reminded of the circumstances preventing the carriage of goods as stipulated in article 20 of the CIM Uniform Rules, which required the carrier to seek instruction from the person with the right to dispose of the goods. In that connection, a concern was raised as to whether the carrier would be required to check the chain of transfer which would present difficulties in a paper environment. The Working Group agreed to revisit the question of whom the carrier should contact in case it needed instructions at a later stage (see paras. 87–89 below).

*Subparagraph (g)*

36. The Working Group agreed to keep subparagraph (g) in the mandatory lists and to delete the phrase within square brackets referring to the loading of goods. It was noted that the term “receipt of the goods” introduced a legal concept similar to the term “taking over the goods” found in the CIM Uniform Rules. It was further noted that the distinction between loading and receipt came from the ICC Incoterms which might not be necessary in this context. The linkage between subparagraphs (g) and (h) was emphasized, which should also be read together with draft article 7, paragraph 2, providing a default rule when the NCD included a date without specifying its significance.

37. The Working Group did not take up a suggestion for the new instrument to define the term “receipt of the goods”, since the actual act of “receipt” would differ depending on the actual mode of transport and would be governed by relevant applicable rules.

*Subparagraph (h)*

38. The Working Group agreed to keep subparagraph (h) in the mandatory lists. It was explained that the place of issue of the transport document would be relevant for determining the law that would govern the liability of the carrier for loss of or damages to the goods, and the date of issue would be relevant for calculating the limitation period within which claims could be brought against the carrier. It was also pointed out that under UCP 600, article 24, the date of issue of transport documents would be deemed to be the date of shipment in the absence of the date of receipt. It was added that the date of shipment would be critical in letter of credit transactions so as to allow the issuing bank to ascertain whether the shipment had been made within the stipulated shipment period. A concern was raised regarding the date of issue of electronic records which would typically be automatically generated by the system; as a result, it was said that including a date on the electronic record might cause confusion.

*Subparagraph (i)*

39. A query was raised regarding the practical need for the phrase “when known to the transport operator”. In response, it was explained that in maritime non-liner transport (or “tramp trade”) where goods were shipped in vessels under a charter-party, as was common in the commodity trade, the place of delivery would

often be unknown to the carrier at the time of concluding the transport contract, as it might change following sales of goods in transit, thus possibly remaining unknown for some time during the voyage.

40. A suggestion was made for subparagraph (i) to accommodate the actual needs of international trade, particularly the likelihood of a change of place of delivery during transit. The requirement in UCP 600 for banks to examine the place of destination upon issuing letters of credit was noted.

41. The Working Group agreed to keep subparagraph (i) in the mandatory lists and to retain the square-bracketed text.

*Subparagraph (j)*

42. The Working Group agreed to remove subparagraph (j) from the mandatory lists on the ground that the date or the period of delivery of goods was more relevant for carrier liability issues which would fall outside the scope of this instrument. It was noted that the period of delivery of goods would vary significantly depending on the actual mode of transport.

*Subparagraph (k)*

43. Divergent views were expressed regarding the need for subparagraph (k) to require the NCD to specify the number of originals in the light of a similar provision in draft article 3 (6). While some delegations suggested deleting subparagraph (k) so as to avoid overlap with draft article 3 (6), some other delegations were in favour of deleting draft article 3 (6) instead and retaining subparagraph (k) to ensure the completeness of the checklist provided in draft article 4. There was also some support for retaining both provisions given the different intended purposes. As an alternative, a suggestion was made for subparagraph (k) to require the numbering of each original of NCD. In response, it was emphasized that the negotiability of the NCD would require the new instrument not to attribute different functions to different originals of the NCD and to treat all originals equally; as a result, there would be no need for each original to be numbered. It was also pointed out that under the Budapest Convention the carrier would be obliged to deliver goods to the first person presenting the original consignment note, regardless of the specific number of that original. Another suggestion was made to revise draft article 3 (6) to permit the issuance of multiple originals of the NCD without requiring that the number of originals be indicated.

44. The purpose of indicating the number of originals of maritime bills of lading was recalled as being important for banks to mitigate the risk for losing control over the cargo by taking only one original where several had been issued. It was also noted that relevant provisions in the UPC 600 would require the presentation of a full set of originals of bill of lading for the issuance of letters of credit. A query was raised as to whether multiple originals of NCDs could be produced in an electronic context and whether the new instrument should contemplate that possibility. In response, it was noted that this issue would indeed merit careful consideration in the light of the principle of technological neutrality, given that not all electronic systems would allow the issuance of multiple originals.

45. After discussion, the Working Group agreed to keep subparagraph (k) in its current form in the mandatory lists.

*Subparagraph (l)*

46. The Working Group agreed to keep subparagraph (l) in the mandatory lists and to replace the phrase “authorized by the transport operator” with “acting on its behalf” for improved clarity.

*Subparagraph (m)*

47. The Working Group agreed to revise subparagraph (m) along the lines of "a statement as to whether the freight has been prepaid or an indication as to whether the freight is payable by the consignee". It was explained that the revised text could accommodate different scenarios in international trade where the freight could be prepaid by the consignor or the consignee, depending, for example, on the particular Incoterm they chose (i.e. a "C" or "F" term), or be payable at the time of delivery ("freight collect").

*Subparagraph (n)*

48. The Working Group agreed to remove subparagraph (n) from mandatory lists on the ground that the transport operator should have the discretion to decide on the journey route and suitable mode of transport. It was noted that subparagraph (n) enhanced transparency for a prospective holder, as different limits on carrier liability might apply depending on the chosen route and mode of transport. It was also noted that in maritime trade shippers might give specific instructions to the carrier to follow a particular route for customs or other purposes, but such instructions could be reflected under subparagraph (q).

*Subparagraph (o)*

49. The Working Group agreed to delete subparagraph (o) from the mandatory lists and reflect it under subparagraph (q), considering the limited value of information on the applicable law to the transport contract. The practical difficulty of finding out relevant applicable laws in the context of multimodal transport was also highlighted.

*Subparagraph (p)*

50. The Working Group took note that subparagraph (p) was meant to refer to the method by which confirmation of delivery of goods could be given. A suggestion to remove subparagraph (p) from the mandatory list was taken up by the Working Group, on the basis that the same issue had already been addressed in draft article 12, paragraph 3, requiring the holder of the NCD to acknowledge receipt of the goods upon the request of the transport operator.

*Paragraph 2*

51. Support was expressed for removing the reference to applicable national laws (i.e. the law of the country in which the NCD was issued) on the ground that such reference would create a burden on banks to check relevant national laws. It was explained that such reference came from corresponding provisions applicable to non-negotiable transport documents in certain existing international conventions. It was added that the need for such reference in the context of NCDs would merit careful consideration given the importance and different evidentiary value of negotiable documents. In this respect, it was also noted that transport documents and NCDs might be subject to different national laws.

52. Support was also expressed for limiting the method of signature for paper version of NCDs to handwriting only so as to reduce the risk of issuance of fraudulent documents. In the light of the document of title function of NCDs, the need to treat non-negotiable transport documents and NCDs differently in the context of permitting other means of signature (e.g. perforated, stamped etc.) was emphasized. It was also noted that permitting any other means of signature would require the new instrument to define and explain the requirements for the reliability of such other means, which would fall outside the scope of the instrument. Referring to the electronic environment, it was explained that draft article 5 specified the reliability criteria for all types of electronic signature (including digital signature).

### 3. Draft article 7. Deficiencies in the negotiable cargo document

*Paragraph 1*

53. The Working Group considered the issues relating to the absence of particulars in draft article 4 and the inaccuracy of such particulars separately. Different views were expressed as to whether the absence of any particulars contemplated in draft article 4 would affect the validity of the NCD. In the view of some delegations, the NCD should be valid as long as it met the requirements in its definition under draft article 2, such as indicating that it related to goods received by a transport operator for international transport and contained words indicating its negotiability such as "to order" or "negotiable". Otherwise, the absence of any other particulars under draft article 4 should not affect the validity of the NCD. It was noted that the new instrument should not impose stricter rules than those designed for the maritime bill of lading (e.g. article 39, paragraph 1, of the Rotterdam Rules).

54. Another view was that the validity of the NCD should not be affected by the absence of any particulars since such deficiencies could be rectified by the parties involved either before or after the circulation of the NCD. In that connection, the principle of party autonomy, under which the parties could supplement a negotiable document without undermining its validity, was highlighted.

55. There was, however, broad support for the notion that the NCD must contain certain essential elements in order for it to be recognized as a negotiable document that would trigger the application of the new instrument. At the same time, the validity of the NCD would be of significance to banks and the envisaged minimum elements should not entail a burdensome verification of its validity, since that would undermine the NCD's negotiability and financing function. The Working Group was reminded of article 15, paragraph 3, of the Hamburg Rules which affirmed the validity of the bill of lading, despite the absence of any particulars, if it met the definition in article 1, paragraph 7, of that convention. It was suggested that the new instrument could follow a similar approach.

56. Regarding the inaccuracy of particulars, it was questioned how the holder of the NCD could have the knowledge of the existence of any inaccuracy and what would be the benchmark for determining inaccuracy (i.e. the transport contract or the goods itself). As the term "inaccuracy" encompassed different scenarios, it was clarified that inconsistency between the NCD and the transport document should be addressed in draft article 8 instead. Considering that the holder should not be required to examine the goods, it was noted that any inaccuracy of particulars should not be linked to the validity of the NCD. As an alternative to avoid any inconsistency, it was suggested that the content of the NCD could be kept to a minimum, by requiring it to be appended to the transport document and cross-refer to the particulars contained in the transport document. In response, however, it was noted that an NCD could refer to carriage for which no transport document was issued, as was often the case in rail and road carriage.

57. After discussion, the Working Group agreed to (a) delete the text in square brackets, (b) revise paragraph 1 to include a proviso referring to the definition of NCD, and (c) expand the definition of NCD to specify that the goods had been received by the transport operator and to require that the NCD be signed by the transport operator.

*Paragraph 2*

58. The reference to "transport contract particulars" was questioned on the basis that such particulars would typically describe the rights and obligations of the parties to the transport contract but would not contain information about contract performance such as loading of the goods. In response, it was explained that such term was intended to refer to the contract particulars as reflected in the transport document, and as such incorporated in the NCD pursuant to draft article 4.

59. The need for this provision was questioned in the light of the decision of the Working Group not to make information concerning the loading of the goods as a mandatory essential element of the NCD (see para. 36 above). It was noted that draft paragraph 2, which was inspired by article 39, paragraph 2, of the Rotterdam Rules, seemed to provide default rules for missing information that were more relevant for supplementing the transport document than the NCD itself. There was support for the suggestion that all that was needed was to provide a default rule for situations when the NCD failed to state its own date.

60. The countervailing view was that this provision contained a default rule of great practical significance, as the party acquiring an NCD would be interested to know when the goods had been received by the carrier and on which date it could rely if not the date as stated in the NCD. The Working Group was mindful of the critical importance of the notion of "receipt" of the goods for international trade and considered various suggestions on how to reflect that in the draft instrument. There was agreement that it was important to distinguish between (a) the omission of the date of the NCD itself, (b) the omission to incorporate in the NCD the date of receipt of the goods as stated in the transport document, and (c) the omission of the date of receipt of the goods in the transport document itself. The appropriate default rule for supplementing that omission might vary in each situation. In that connection, the Working Group was reminded of the need to avoid a possible conflict between a deemed date of receipt pursuant to the NCD and a different date of receipt stated in the transport document but which the parties had failed to reflect in the NCD. It was also pointed out that the purpose of this provision was not to supplement the deficiencies in the transport document which should be addressed in the applicable rules governing the transport document.

61. After discussion, the Working Group agreed to revise paragraph 2 to reflect that: (a) if the NCD included a date but failed to indicate its significance, the date would be deemed to be the date of issue of the NCD; (b) if the NCD did not include its date of issue, it would be deemed to have been issued simultaneously with the transport document; and (c) if the NCD did not include the date of receipt of the good, the goods would be deemed to have been received by the carrier on the date of issue of the NCD.

*Paragraph 3*

62. The need for this provision was questioned in the light of draft article 8, paragraph 1, concerning prima facie evidentiary value of the NCD. It was noted that the provision referred to a deemed statement that the goods were in apparent good condition to which the transport operator could not object. The Working Group was reminded that not all modes of transportation had recognized such a general default rule. The CIM Uniform Rules, for example, linked the presumptions on the condition of the goods to the party effectively responsible for loading the goods (i.e. carrier or consignor). In response, it was explained that the provision reflected maritime transport practice and was very important for letter of credit transactions because most bills of lading did not contain any explicit statement about the apparent order and condition of the goods, as banks typically required "clean" bills of lading. At the same time, the draft provision was sufficiently flexible to accommodate the parties' agreement as to who effectively carried out the loading and stowing of goods in the forms of various clauses used in transport practice (e.g. "shipper's load and count").

63. There was agreement within the Working Group that it was important to reassure the third-party holder of the NCD that, if it needed to claim compensation for loss of or damage to the goods, it should be allowed to rely on the information on the goods quantity and condition as stated in the NCD it had acquired. The practical problem would be the extent to which the performing carrier could invoke other defences based on the contract and mandatory rules applying to a specific leg of the transportation with the result that the holder could receive a lesser compensation than it had expected by relying on the information on the face of the NCD. A suggestion was that any such differential claims in practice would be settled between the transport operator and the

performing carrier. Another possible alternative was for the new instrument to treat the question of the holder's legitimate reliance separately from claims under the transport contract as a warranty to a subsequent holder that the goods had been received in good order.

*Paragraph 4*

64. While there was some support for retaining paragraph 4, the need for the new instrument to regulate the issue of fraud was questioned, noting the difficulty to prove the "intent to defraud". It was noted that including such a provision stipulating liability of the transport operator towards any third party who acted in reliance on the description of the goods in the NCD without specifying the limitation period for bringing claims would also be problematic. It was further pointed out that in practice it was often the shipper (not the transport operator) who might have the intention to defraud. The Working Group was reminded of the silence of the CIM Uniform Rules on this issue.

65. The Working Group agreed to delete this provision on the basis that the liability of the transport operation should be addressed under relevant applicable law and the new instrument did not otherwise touch upon liability.

### 4. Draft article 8. Evidentiary effect of the negotiable cargo document

66. A question was raised as to how inconsistencies between the NCD and transport document, such as serious errors concerning the quantity of the goods, would be addressed in the new instrument. It was explained that the holder of the NCD acting in good faith in reliance on the wrong quantity of the goods should be protected under draft article 8 and be entitled to demand delivery of goods of that quantity.

*Paragraph 1*

67. Different views were expressed regarding how qualifications could be made in the NCD. Some delegations believed that the new instrument should contain an autonomous regime with explicit rules on making qualifications. It was noted that the phrase "does not assume responsibility for the accuracy of the information furnished by the consignor" could be misunderstood without reference to relevant circumstances indicated in article 40, paragraph 1, of the Rotterdam Rules. A suggestion was made to split the provision into two separate provisions distinguishing the issue of qualification from that of prima facie evidentiary value. In response, it was explained that the provision did not mirror articles 40 and 41 of the Rotterdam Rules because the latter were drafted in a different context and imposed an obligation on the carrier to make qualification. It was suggested that the daft instrument should set out in greater detail the admissible reservations. An alternative solution, which received some support, was for the draft provision to refer to the reservations and qualifications that the transport operator would be allowed to make under the relevant applicable law. Considering the importance of this provision for negotiability and liability issues, it was noted that a reference to relevant application law would make it clear that the new instrument did not interfere with existing liability regimes for transport of goods. In response, it was noted that attempting to determine the relevant applicable law would be difficult and potentially misleading, since the validity of any clause or qualification capable of limiting the carrier's liability for loss or damage to the goods would be determined by the competent court according to the law it considered applicable to that particular issue pursuant to the conflict-of-laws rules of the forum.

68. After discussion, the secretariat was requested to revise this provision to include both options for further consideration by the Working Group.

*Paragraph 2*

69. A suggestion was made to delete the reference to the consignee in this provision on the ground that a consignee, unlike other third parties, would have information

about the goods and therefore would not need to act in reliance on the description of goods in the NCD. In response, it was noted that the consignee (as buyer) would typically be a party to the sales contract with the consignor (as seller) but not a party to the transport contract concluded between the consignor and the carrier; as a result, the consignee might not know whether the description of the goods in the transport contract matched that in the sales contract. The Working Group agreed to revisit this issue at a later stage.

70. A query was raised as to whether the texts in the second and last sets of square brackets would work as alternatives. Support was expressed in favour of retaining the standard of good faith reliance as stated in the first set of square brackets rather than the alternative "gross negligence" standard. It was clarified that beneficiaries of this provision should demonstrate good faith when acting in reliance on the description of the goods in the NCD, such as making payment or opening a documentary credit.

### 5. Draft article 9. Extent of rights of the holder under a negotiable cargo document

*Paragraph 1*

71. The Working Group exchanged views on the scope of the rights of a NCD holder, as compared with the rights of the original consignor under the transport contract. Pursuant to one view, the holder of the NCD should have the same rights as the original consignor, and it would suffice for the draft article to refer to them. For purposes of clarity, the draft paragraph might explicitly state that the rights of the original consignor should cease once the NCD has been issued. Support was expressed for the countervailing view that granting the holder of the NCD only those rights of the original consignor would not ensure the negotiability of the NCD. To achieve the objective of the new instrument to create a negotiable document for financing purposes, it would be crucial to include a list of rights which the NCD holder could exercise, along the lines of chapter 10 of the Rotterdam Rules. In doing so, however, the new instrument should avoid addressing issues concerning the effect of an NCD on the ownership of the goods, in view of the great diversity of solutions found under domestic law for that issue, which international conventions on both sales and carriage contracts had so far consistently avoided.

72. The Working Group was reminded of the rules developed under particular modes of transportation to deal with the right of control (or "disposal") of the goods under the transport contract. The need to avoid potential conflicts with the right of disposal under existing international conventions governing the carriage of goods (e.g. article 18 of the CIM Uniform Rules) was emphasized. It was also stressed that granting rights for the NCD holder to give delivery instructions to the carrier that differed from the originally agreed terms of transportation might potentially increase the carrier's liability risk. The Working Group took note of those concerns and agreed that it should proceed with determining first what set of rights of control would be needed to guarantee the negotiability of NCDs and then consider how those rights could be made compatible with carriage regimes in modes where negotiability was not practised.

73. There was concern that subparagraph (a) did not limit the holder's right to give instructions to the carrier in respect of the goods, for example, requiring reimbursement of additional costs entailed by carrying them out and allowing the carrier to refuse to carry out the instructions on legitimate grounds. It was noted that relevant existing international conventions required the instructions to be lawful, reasonable and capable of being carried out by the carrier without unreasonable cost or disruption of its operations. In this respect, it was emphasized that the new instrument should not jeopardize the carrier's current right to refuse to follow instructions under certain circumstances (e.g. certain customs stations might not be able to handle dangerous goods). It was agreed that the new instrument should acknowledge those concerns, and that the text in square brackets should require the holder's instructions to be "consistent with the transport contract", which would impliedly incorporate any provisions of the law applicable to that contract, including

any relevant international convention. The Working Group took up a suggestion for the new instrument to address separately the question of who bore the costs incurred by the carrier to follow instructions by the NCD holder.

74. Turning to subparagraph (b), it was asked how it related to the right to demand delivery of the goods under draft article 12. In response, it was clarified that the subparagraph referred to the right to demand delivery of goods in transit, which differed from the right to demand delivery of the goods at destination, but that could be clarified by adding a phrase such as “while in transit”.

75. There was broad support for the rights of the holder to include the right to transfer or pledge the goods to a third party as described in subparagraph (d) but to address it in a separate provision since it differed from other contractual rights stated therein. The right to transfer or pledge the goods should be explicitly stated in order for the NCD to function as a document of title in all jurisdictions. It was, however, noted that such right did not appear in existing conventions concerning the carriage of goods, not even in the maritime sector, where such right had long been recognized by the law merchant and legislation. The Working Group heard several drafting suggestions to use alternative legal concepts such as “constructive possession” of the goods or to introduce equivalence to the effect of the “physical handover of goods”. The linkage between the right to transfer the goods and the right to transfer the rights incorporated in the NCD under draft article 10 should be clarified.

*Paragraph 2*

76. Support was expressed for retaining paragraph 2 given the importance to explicitly state the period in which the NCD holder could exercise its rights, including the right to assert any rights against the transport operator for loss of or damage to the goods. It was suggested that the rights of the NCD holder should not be linked to the receipt and delivery of the goods but to the issuance and surrender of the NCD, i.e. when demanding delivery of the goods at destination under draft article 12, paragraph 1. The Working Group took up this suggestion.

77. A concern was raised that linking the rights of the NCD holder with the surrender of the NCD might be problematic when the NCD, like for instance the maritime bill of lading, might not yet have been transmitted to the destination when the goods arrived. The Working Group was reminded that, in the maritime practice, and in order to avoid delay in the vessel’s continuing voyage, carriers accepted to deliver the goods without the production of all originals of the bill of lading if they were contractually protected against liability for wrongful delivery by a letter of indemnity provided by the party demanding delivery.

*Paragraph 3*

78. It was pointed out that the requirement for the NCD holder to surrender a full set of originals in order to exercise its right to demand delivery of the goods as stated in draft article 9, paragraph 1, subparagraph (b) was inconsistent with the requirements to surrender only one original under draft article 12 dealing with delivery of the goods. In response, it was explained that the draft paragraph only dealt with the exercise of the right of control during the voyage, and not with the difficulty created by late arrival of the bill of lading at the destination, for which draft article 12 offered a solution based on commercial practice. The Working Group noted a suggestion for the paragraph to be adapted to the electronic context.

*Paragraph 4*

79. Some support was expressed for deleting the paragraph on the ground that the manner of communication would be subject to party autonomy and applicable domestic law. It was noted that the purpose of the paragraph was unclear and it might be misinterpreted as not allowing electronic communication to be made out for situations not explicitly referred to in the paragraph. There was some concern that the draft paragraph might be misconstrued to suggest that electronic communications

might suffice in all instances where the holder exercised the right of control irrespective of specific mechanisms for exercising the right of disposal under existing international conventions concerning carriage of goods (e.g. inserting instructions on the transport document itself). Taking into account the view of some delegations in favour of retaining the paragraph, the Working Group agreed to place the paragraph in square brackets with a footnote indicating the above deliberations and revisit it at the next session.

### 6. Draft article 10. Transfer of rights under a negotiable cargo document or negotiable electronic cargo record

*Paragraph 1*

80. The Working Group noted that draft article 10 did not require the notification of the transport operator about the transfer of the NCD so as not to undermine the nature of an NCD as a document of title (see also above, para. 34).

81. The Working Group was reminded that it had not yet made a final decision as to whether a bearer NCD should be allowed (see above, para. 23) and agreed to retain references to blank endorsement within square brackets for the time being.

82. The Working Group considered whether both scenarios envisaged in subparagraph (b)(i) and (ii) should be retained, and which person would be the "first holder" under subparagraph (b)(i). In response, it was observed that, in practice, it was important to protect a seller/consignor particularly in cases where the carriage was arranged by a buyer named in the transport documents as consignee. The consignor had a legitimate right to retain control over the goods until payment of the sales price but was not a party to the transport contract arranged by the buyer (for example under Incoterms "F-Terms"). In order to protect itself against default by the buyer, the seller/consignor would typically retain the transport documents pending payment. Thereafter, the transport documents would be delivered to the buyer/consignee without endorsement, which made that situation different from the one envisaged in subparagraph 1(a).

83. The Working Group acknowledged the need to recognize that particular form of transfer of rights under the NCD but agreed that the draft article did not distinguish clearly between transfer by physical delivery and endorsement of the NCD and transfer of rights by mere delivery.

84. After discussion, the Working Group tentatively agreed to redraft paragraph 1 along the following lines:

> "1. The holder may transfer the rights incorporated in the negotiable cargo document to another person by:
>
> "(a) Delivering the negotiable cargo document duly endorsed [either] to such person [or in blank][, if an order document]; or
>
> "(b) Delivering the negotiable cargo document without endorsement, if [: (i)] the negotiable cargo document is made out to the order of a named person and the negotiable cargo document is delivered by the consignor identified in the negotiable cargo document to the named consignee; [or (ii) a document made out to bearer or endorsed blank.]"

85. The Working Group was reminded of the need to consider the interplay between the commercial use of the NCD and the legal and regulatory requirements for customs clearance and import/export formalities connected with the international carriage of goods. In particular, the Working Group should consider which documents the customs and other authorities of the countries concerned would be expected to examine (i.e. whether the transport document or the NCD or both) and the extent to which they would be expected to acknowledge transfers of rights to the goods under an NCD. The Working Group agreed on the importance of that question but deferred its consideration until it had concluded a review of the substantive provisions of the draft instrument.

*Paragraph 2*

86. The Working Group agreed to adjust the paragraph in line with its decision to link the transfer of rights of the holder with the physical delivery of the NCD under draft article 10, paragraph 1.

### 7. Draft article 11. Providing additional information, instructions or documents to the transport operator

87. The Working Group agreed on the importance of the draft article, as the carrier might need instructions to carry out the contract or deliver the goods and should, for that purpose, seek instructions from the party in control of the goods, that is the holder of the NCD.

88. The question was asked whether the provisions should be supplemented with a rule providing consequences if the holder failed to provide the requested information or instructions to the carrier. The Working Group was reminded of provisions in international conventions that authorized the carrier, in the absence of instructions from the controlling party, to take such steps as, in the carrier's judgment, would be in the best interests of that person. In order to avoid possible conflicts with existing regimes, it was suggested that the draft article should refer to the transport contract and its governing law on that matter. The current text, however, seemed to create a strict obligation for the holder to provide such information or instructions, which some holders other than the shipper, such as the issuing bank of a letter of credit, might not be in a position to provide.

89. After discussion, the Working Group agreed to redraft the provision along the following lines:

> If the transport operator needs information, instructions or documents relating to the goods in order to perform its obligations under the transport contract, the transport operator shall seek those information, instructions or documents from the holder of the negotiable cargo document. If the transport operator is unable to obtain those instructions within a reasonable time, the transport operator shall proceed in accordance with the transport contract.

90. The Working Group further agreed to supplement that provision with another paragraph based on article 58, paragraph 1, of the Rotterdam Rules to the effect that a holder that was not a shipper and did not exercise any right under the transport contract did not assume any liability arising out of draft article 11.

### 8. Draft article 12. Delivery of the goods

*Paragraph 1*

91. The Working Group agreed to delete the reference to the surrender of "the transport document, if required" in the paragraph. It was pointed out that any requirement for the surrender of the transport document as a condition for taking delivery of the goods would be governed by the law applicable to the transport contract, which was already addressed under draft article 12, paragraph 4. It was emphasized that the NCD should be the only document required for taking delivery of the goods so as to ensure its negotiability.

92. The Working Group was reminded that the CIM Uniform Rules did not require the surrender of the railway consignment note against delivery. On the contrary, the consignment note would accompany the goods and be handed over by the carrier to the consignee at the time of delivery. The Working Group also took note of the practice of issuing house and master bills of lading in the maritime sector. It was explained that, while a house bill of lading would be issued by the freight forwarder, master bills of lading would be issued by the actual carrier to the freight forwarder as consignor. The surrender of the relevant master bill of lading would be required for the actual carrier to deliver the goods to the freight forwarder. In turn, when the holder

demanded delivery of the goods from the freight forwarder only the surrender of the house bill of lading would be needed.

93. The Working Group also considered whether the phrase “duly endorsed, where necessary” and the phrase in square brackets which obliged the holder to identify itself were needed. It was noted that “duly endorsed” might be redundant in the light of the definition of the holder under draft article 2. The need for the text in square brackets was also questioned considering a similar provision in draft article 9, paragraph 3, requiring the holder to identify itself when exercising the right of control. The Working Group agreed to keep those phrases in their current form.