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Report of Working Group VI (Negotiable Cargo Documents) on the work of its forty-fifth session (Vienna, 9–13 December 2024)

Contents

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I. Introduction

1. At its fifty-fifth session in 2022, the Commission assigned the topic of negotiable multimodal transport documents to Working Group VI. [1] From its forty-first to forty-fourth sessions, the Working Group commenced and continued its deliberations on the basis of draft provisions for an instrument on negotiable cargo documents prepared by the secretariat. Given that the instrument on negotiable cargo documents may apply to both multimodal and unimodal transport contexts, the title of the Working Group was revised to "negotiable cargo documents" to avoid confusion.[2]

2. At its fifty-sixth session in 2023, the Commission took note of the decision of the Working Group to postpone its consideration of draft provisions on electronic aspects and revisit them after finalizing the substantive provisions concerning negotiability.[3] The Commission expressed its satisfaction with the progress made by Working Group VI and the support provided by the secretariat.[4]

3. At its fifty-seventh session in 2024, the Commission noted that the Working Group had heard presentations on the issuance and use of non-negotiable transport documents under existing transport conventions, with a view to identifying possible conflicts between the draft instrument and existing transport law conventions.[5] The need to adequately address any potential conflicts with existing transport law conventions was emphasized.[6] The Commission was also informed that the Working Group had completed its review of draft chapter 3 on negotiable electronic cargo records and had requested the secretariat to align the draft provisions more closely with the Model Law on Electronic Transferable Records (MLETR).[7] The Working Group had also agreed to follow the approach to electronic aspects adopted in the draft joint UNCITRAL-UNIDROIT model law on warehouse receipts. [8] The Commission emphasized the need to avoid duplication of work and to ensure consistency with existing UNCITRAL texts on electronic commerce, in particular MLETR.[9]

4. At its forty-fifth session, the Working Group continued its consideration of revised draft provisions for an instrument on negotiable cargo documents.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its forty-fifth session in Vienna from 9 to 13 December 2024.

6. The session was attended by representatives of the following States members of the Working Group: Afghanistan, Algeria, Argentina, Armenia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Japan, Kuwait, Malaysia, Mexico, Nigeria, Panama, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Ukraine, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

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[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 22 (h) and 202.
[2] Ibid., *Seventy-eighth Session, Supplement No. 17* (A/78/17), para. 174 (f).
[3] Ibid., para. 168.
[4] Ibid., para. 171.
[5] Ibid., *Seventy-ninth Session, Supplement No. 17* (A/79/17), para. 259.
[6] Ibid., para. 261.
[7] Ibid., para. 258.
[8] Ibid.
[9] Ibid., para. 261.

7. The session was attended by observers from the following States: Azerbaijan, Cambodia, Egypt, El Salvador, Guatemala, Kazakhstan, Libya, Madagascar, Malta, Myanmar, Paraguay, Philippines, Portugal, Romania and Slovakia.

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

(a) *United Nations system*: International Civil Aviation Organization (ICAO), International Maritime Organization (IMO) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Gulf Cooperation Council (GCC) and Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) *International non-governmental organizations*: Baltic and International Maritime Council (BIMCO), China Council for the Promotion of International Trade (CCPIT), Comité Maritime International (CMI), Digital Container Shipping Association (DCSA), Greater Caspian Association (GCA), Instituto Liberoamericano de Derecho Maritimo (IIDM), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity Clubs (IGP&I Clubs), International Union of Railways (UIC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar Association (NYCBAR), Shanghai Arbitration Commission (SHAC), Shanghai International Aviation Court of Arbitration (SIACA) and the TT Club (Through Transport Mutual Insurance Association).

9. The Working Group elected the following officers:

Chair: Ms. Beate CZERWENKA (Germany)

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

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

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.105);

(b) A note by the secretariat entitled “Fact sheet: UNCITRAL project on negotiable cargo documents” (A/CN.9/WG.VI/WP.106);

(c) A revised annotated set of preliminary draft provisions for an instrument on negotiable cargo documents (A/CN.9/WG.VI/WP.107); and

(d) Submissions from the CMI (A/CN.9/WG.VI/WP.108), FIATA (A/CN.9/WG.VI/WP.109) and the ICC (A/CN.9/WG.VI/WP.110).

11. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Future instrument on negotiable cargo documents.
5. Adoption of the report.

III. Deliberations

12. The Working Group continued its consideration of the topic on the basis of a note by the secretariat (A/CN.9/WG.VI/WP.107) containing issues for consideration by the Working Group and draft provisions for a new instrument on negotiable cargo documents. The summary of deliberations of the Working Group may be found in chapter IV below.

IV. Future instrument on negotiable cargo documents

13. The Working Group agreed to commence its read-through of the draft provisions from article 6, effectively picking up where it left off at its forty-fourth session. It also agreed to defer consideration of the need to refer to "negotiable electronic cargo records" alongside "negotiable cargo documents" in the various substantive provisions when considering the definition of those terms in article 2.

A. Article 6. Evidentiary effect of the negotiable cargo document or negotiable electronic cargo record

1. Paragraph 1

14. The Working Group heard a concern that, in its present form, paragraph 1(a) could be interpreted as allowing the transport operator to disclaim liability in cases where it had actual knowledge that the information was false or misleading. Reference was made to article 12(2) of the UNCITRAL-UNIDROIT Model Law on Warehouse Receipts[10] (hereinafter "MLWR"). In response, it was noted that paragraph 1(a) was formulated in a manner consistent with other transport conventions (for example, article 40 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)[11] (hereinafter "Rotterdam Rules")), and that the Working Group should avoid departing from such standard formulations. Nevertheless, it was pointed out that paragraph 1 could be amended to clarify that qualifying the information contained in the negotiable cargo document (hereinafter "NCD") had the effect of relieving the transport operator of responsibility in the circumstances referred to in both subparagraphs (a) and (b), and therefore it was suggested that the reference to the transport operator disclaiming responsibility should be moved from subparagraph (a) to the chapeau of paragraph 1. The Working Group agreed to that suggestion.

15. The Working Group heard a query as to how the existence of "reasonable grounds" was to be ascertained for the purposes of subparagraph (a), but agreed that it was not necessary to amend paragraph 1 any further.

2. Paragraph 2

16. A suggestion was made not to except information that had been qualified, as both the information and the qualification would form part of the NCD and would thus be read together. It was explained that, although a similar exception was found in article 41 of the Rotterdam Rules, that exception applied to information contained in the transport contract, and could therefore be distinguished. In response, it was noted that the qualification itself should enjoy the same treatment as other information in the NCD.

17. The Working Group agreed to a suggestion to clarify that the exception in paragraph 2 applied only to qualifications that were made under paragraph 1. It heard that this could be done either by referring to (i) qualifications "by the transport operator" or (ii) information being qualified "in the manner" set out in paragraph 1 (article 41 of the Rotterdam Rules). The Working Group agreed to the latter approach, and to apply it to paragraph 3 as well.

3. Paragraph 3

18. It was observed that paragraph 3 referred to reliance on the "description of the goods" in the NCD but resulted in the inadmissibility of evidence in respect of "any information" in the NCD. It was suggested that, in both instances, paragraph 3 should refer to any information in the NCD, which would promote the negotiability of the

[10] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17* (A/79/17), annex I.

[11] The text of the convention is contained in the annex to A/RES/62/122.

NCD as it would allow the holder to rely exclusively on the information contained therein. The Working Group agreed to that suggestion.

B. Article 7. Rights of the holder under a negotiable cargo document or negotiable electronic cargo record

1. Paragraph 1

(a) Source of rights

19. It was emphasized that paragraph 1 represented a core provision of the instrument that was concerned with the rights of the NCD holder as opposed to the obligations of the transport operator. It was recalled that those rights derived from the transport contract, and therefore that the exercise of those rights would be subject to the conditions and limitations set forth in that contract. The importance for the holder to be able to rely exclusively on the information in the NCD was emphasized.

20. The Working Group heard a suggestion to revise paragraph 1 to state that the holder acquired the benefit of the obligation of the transport operator to transport and deliver the goods in accordance with the terms of the NCD. It was explained that similar wording was used in article 16(1) of the MLWR. It was pointed out that the instrument did not require the terms of the transport contract to be reproduced in the NCD and that a reference to the transport contract might imply a requirement to review the transport contract, which could impose an unreasonable burden on the holder.

21. In response, it was explained that a clear reference to the transport contract would not be problematic because, under the default rule in article 3(2), an NCD would be issued by annotating an existing transport document which already met the minimum information requirements and would ordinarily contain all terms of the transport contract. Furthermore, it was noted that the instrument envisaged a right of the holder to request a copy of the transport document from the transport operator in article 3(3) and the holder would be expected to review the terms of the transport contract. The charterparty bill of lading was provided as an example where a reference was made to the charterparty contract.

22. Support was expressed for a suggestion to reinforce the link between the rights of the holder and the transport contract by expressly acknowledging that the transport contract was "evidenced by the NCD". It was noted that the term "evidenced" should be given the same meaning as in the definition of "transport document" (article 2(9)). A concern was raised that such an acknowledgment might allow the transport operator to limit in the NCD the rights acquired by the holder under the transport contract. In response, it was noted that such an eventuality was unlikely in practice and, in any case, was addressed by the existing reference in paragraph 1 to the holder acquiring the rights "as if it had been a party to that contract".

23. After discussion, the Working Group agreed to amend paragraph 1 by inserting the words "as evidenced by the negotiable cargo document" after "transport contract". The secretariat was asked to clarify in the explanatory note that the rights of the holder as evidenced by the NCD should be the same as provided in the transport contract.

(b) List of rights

24. A suggestion was made to delete the list of rights in paragraph 1 on the basis that the holder acquired all rights under the transport contract. Listing three of those rights was considered potentially confusing. A concern was also expressed that the term "right of disposal" was unclear and undefined. In order to avoid any conflict with existing transport law conventions concerning the right of disposal, it was suggested that the right of disposal should be left to party autonomy and the NCD holder would acquire the right of disposal as the transport operator might be able to offer under applicable transport law conventions. The right of disposal was not

considered as an essential right for the instrument to address and harmonize in order for the NCD to be recognized as a document of title.

25. In response, the importance of those rights listed in paragraph 1 was emphasized, noting that these rights were considered essential for the negotiability of the NCD. Moreover, listing such rights would be particularly helpful in situations where NCDs were issued as a separate document in addition to a non-negotiable transport document. The Working Group recalled its previous decision to delete a definition of "right of disposal" (A/CN.9/1170, paras. 84 and 85). It was clarified that such a right did not presuppose ownership of the goods.

26. After discussion, the Working Group agreed to retain the list of rights in paragraph 1 without amendment.

2. Paragraph 2

27. It was noted that it was not accurate to refer to an instrument "extinguishing" rights conferred from another source, namely the transport contract. Instead, it was suggested that paragraph 2 should refer to the exercise of those rights being suspended or denied, which was more consistent with paragraph 1. It was pointed out that article 8 also contemplated the possibility for the consignor or the consignee to give instructions. For these reasons, the Working Group agreed to amend paragraph 2 by replacing "shall extinguish" with "cannot be exercised by the consignor or the consignee that is not the holder", or words to similar effect. It was noted that excepting a "holder" of the NCD meant that it was sufficient for paragraph 2 to apply upon issuance of the NCD, and that it was thus unnecessary to refer to the subsequent transfer of the NCD.

3. Paragraph 3

28. It was observed that the legal effect of transferring a document of title differed among legal systems, and that this difference was acknowledged by the two options presented in article 18 of the MLWR. It was added that, as it would not be possible for a convention to present options, the instrument should refer to applicable law instead of reflecting only one of the options. A concern was expressed that paragraph 3 introduced an international standard inconsistent with the existing standard in some jurisdictions under which the legal effect of transferring a document of title would entail the transfer of ownership of the goods represented by that document. Alternatively, it was suggested that paragraph 3 could be deleted.

29. In response, it was noted that paragraph 3 was a fundamental provision insofar as it recognized that the NCD would function as a document of title. It was observed that it was sufficient for paragraph 3 to state that transferring the NCD had the same effect as physically handing over the goods. It was added that the legal consequences that might flow from the goods changing hands would be a matter for applicable law, including not only the law of property but also the law of insolvency. It was suggested that the explanatory note could clarify the intended operation of paragraph 3.

30. It was observed that, as an NCD would only be issued once the goods were taken in charge by the transport operator (art. 3(1)), the proviso in paragraph 3 (that it applied only if the latter was "in possession of the goods") was redundant. A concern was also raised that such proviso would impose an additional burden on the holder to verify that the transport operator was in possession of the goods.

31. After discussion, the Working Group agreed to retain paragraph 3 and to delete the proviso.

4. Paragraph 4

32. A concern was expressed that paragraph 4 could be misinterpreted as implying that the right to demand delivery would be lost upon surrender. It was suggested that the rights of the holder should exist until the goods were delivered. In response, it was noted that paragraph 4 needed to be read with article 10, which referred to

delivery of the goods against surrender of the NCD. The Working Group was cautioned against linking the rights of the holder with delivery of the goods because the goods could be delivered against a letter of indemnity without the surrender of a maritime bill of lading. It was also added that, in practice, maritime carriers might issue a new bill of lading upon surrender of the old bill of lading. After discussion, the Working Group agreed to retain the current wording in paragraph 4.

5. Paragraph 5

(a) First sentence

33. It was observed that paragraph 5 established general rules regarding the holder's exercise of rights and that article 10 made special provision regarding the exercise of the right to demand delivery. It was clarified that the "surrender" of the NCD in article 10 effectively captured the notion of "production".

34. It was noted that the requirement for the holder to identify itself was distinct from the requirement to identify the "holder" in article 2(3), and that the former could be met by the holder presenting identity credentials to establish that it was the person named in the NCD. It was observed that, in its present form, the paragraph only applied where the NCD was made out to order of a named person, and a question was raised as to whether it should also apply when the NCD was made out to order and was to be produced by the consignor.

35. The Working Group agreed to retain the first sentence without amendment.

(b) Second sentence

36. The Working Group noted that the instrument pursued a general policy by which the holder of an NCD issued in multiplicate was required to produce all originals to exercise its rights as a holder, with the exception of the right to demand delivery of the goods. It was observed that paragraph 5 presented two options to give effect to that requirement: (i) the first option reflecting a "factual approach", and (ii) the second option reflecting a "formalistic approach". It was explained that a failure to comply with the requirements in articles 3(7) and 4(1)(i) might produce different legal consequences. It was added that, by operation of article 5(1), the absence of the number of originals would not affect the legal character of the document as an NCD as long as it met the definition of NCD in article 2(4).

37. Support was expressed for the formalistic approach, and thus for paragraph 5 to apply only where the NCD stated that more than one original had been issued. It was explained that the transport operator should bear the risk for failing to state the number of originals in the NCD. The need to protect the interests of third-party holders acting in good faith, who would not know the number of originals, was highlighted. A concern was, however, raised that a formalistic approach might produce a situation whereby the holder of one original could exercise the right of disposal and that would not deprive the holder of another original of its entitlement to exercise the right to demand delivery of the goods. It was noted that concerns regarding the fraudulent use of NCDs would ordinarily be addressed under applicable law but could be mitigated by other provisions of the instrument.

38. The Working Group did not take up a suggestion to require all originals to be produced in order to exercise any rights other than the right of disposal. It was explained that a holder could bring a claim against the transport operator without needing to produce all originals.

39. A view was expressed that the instrument did not need to contain detailed rules concerning multiple originals, which might imply that issuing multiple originals was a common practice or otherwise encouraged under the instrument. It was also noted that, in practice, a distinction was drawn between issuing a single set of multiple originals, as referred to in article 3(7), and issuing multiple originals.

40. Separately, the Working Group was invited to consider whether the instrument should contemplate the issuance of electronic cargo records in multiplicate, given that the systems supporting such records obviated the need for issuing multiple "originals", which itself was a custom developed to address risks historically associated with the transmission of physical bills of lading. The Working Group heard views from industry that the instrument should accommodate the issuance of multiple "originals" if there was a business case to do so. The need for the instrument to reflect the principle of technology neutrality was highlighted.

41. The Working Group heard that the Rotterdam Rules did not provide for the issuance of multiple "originals" as there was no business case at the time of drafting. It also heard that, although a provision on the issuance of multiple originals was ultimately not included in the UNCITRAL Model Law on Electronic Transfer Records (2017) (MLETR), the model law did not affect the practice of issuing multiple originals in respect of electronic transferable records when that practice was permitted under applicable law.

42. The Working Group agreed to retain a reference to negotiable electronic cargo records in the second sentence of paragraph 5.

6. Paragraph 6

43. The Working Group agreed to delete paragraph 6 on the understanding that the manner of communication was a matter of party autonomy and applicable law.

C. Article 8. Missing information, instructions or documents

44. The Working Group agreed (i) to delete "[under the Convention]", as the transport operator would ordinarily seek information etc. to perform its obligations under the transport contract and (ii) to align the usage of "information, instructions or documents" in both sentences.

45. The Working Group did not take up a suggestion to impose an obligation on new holders to notify the transport operator of becoming a holder. The Working Group recalled concerns expressed in earlier deliberations regarding the potentially negative impact of a notification obligation on the negotiability of NCDs (A/CN.9/1127, para. 34). It was noted that some traders and banks might not be interested in the transportation and preferred not to identify themselves due to confidentiality concerns. It was added that, in practice, holders were not required to notify the transport operator unless they were interested in taking delivery of the goods. A concern was raised that a transport operator would not know from whom it could request information if it could not identify the holder. In response, it was explained that the second sentence envisaged that the transport operator should proceed in accordance with the transport contract if (i) the transport operator was not able to contact the holder after reasonable effort, or (ii) the holder did not respond to the transport operator's request for instruction. It was added that the second sentence implied that the holder would bear the risk of not notifying the transport operator.

D. Article 9. Liability of holder

1. Paragraph 1

46. The Working Group agreed to retain paragraph 1 without amendment. It was recognized that a transport operator could suffer loss as a result of omissions of the holder, notably a failure to instruct or to take delivery. However, it was observed that any liability assumed by the holder for such loss would arise under applicable law (including the law of negligence or transport law), and not from the mere fact of being the NCD holder. It was recalled that article 7 was concerned with the holder acquiring rights – not obligations – under the transport contract, and the need to avoid

interfering with existing liability regimes, including for breach of obligations under the transport contract, was stressed.

2. Paragraph 2

47. A concern was raised that article 9 was incomplete, as paragraph 2 only addressed liability for the exercise of the right of disposal. In response, it was recalled that paragraph 2 previously applied to a broader range of rights but was amended following the deliberations of the Working Group at its forty-fourth session (A/CN.9/1170, para. 22). It was observed that, in practice, a transport operator would only hold the holder liable for losses in limited circumstances, and unpaid freight was cited as an example. The Working Group was cautioned against expanding the scope of paragraph 2 given that the issuance of an NCD did not transfer obligations of the consignor to the holder, and that liability for the exercise of other rights would be addressed in the transport contract. After discussion, the Working Group agreed to retain the current wording of paragraph 2.

E. Article 10. Delivery of the goods

1. Paragraph 1

48. The Working Group agreed to retain the current wording of paragraph 1.

2. Paragraph 2

49. The Working Group was invited to choose between a factual approach and a formalistic approach (see para. 36 above) to give effect to a requirement that the holder of an NCD issued in multiplicate would surrender only one original when demanding delivery of the goods. Some support was expressed for a factual approach on the basis that the surrender of one original would suffice regardless of whether the number of originals was stated on the NCD itself. In support of a formalistic approach, it was said that the paragraph should protect the holder in case the NCD did not state the number of originals. Deleting both sets of bracketed text was also considered, provided that the paragraph clearly stated that only one original would be required to demand delivery of the goods. A question was raised as to which original would cease to have any effect or validity when an incorrect number of originals was stated on the NCD. Another question was raised as to how to address situations in which an original was lost in the hands of the holder.

50. A proposal was made to split the paragraph into two separate sentences: the first sentence stating that, for NCD issued in multiplicate, the surrender of one original would suffice; the second sentence stating that the surrender of one original would only affect the validity of the other originals if the NCD stated that more than one original had been issued. A potential conflict between these two sentences was highlighted, considering that a transport operator would have already discharged its obligation to deliver the goods against surrender of one original under the first sentence, yet remain responsible to the holders of other originals under the second sentence. A suggestion was to rephrase the first sentence to avoid such conflict.

51. The Working Group requested the secretariat to redraft the provision in line with the proposal in paragraph 50 above for further consideration by the Working Group.

3. Paragraph 3

52. The Working Group agreed to delete the paragraph on the understanding that this issue (i.e. acknowledgment of receipt of the goods) should be left to the transport contract and applicable law as already reflected in paragraphs 2 and 3 of article 1. The secretariat was requested to reflect such understanding in the explanatory note and to consider the desirability of merging article 10 and article 7(5).

F. Article 11. Transfer of rights under a negotiable cargo document or negotiable electronic cargo record

1. Paragraph 1

53. The Working Group agreed not to accommodate the issuance of bearer documents in light of possible abuse and the risk of money-laundering. It was noted that the issuance of bearer documents would be considered particularly problematic given that the instrument did not include any requirement for the holder of a bearer document to identify itself when producing the NCD. It was further noted by industry representatives that bearer documents were extremely rare in practice.

54. A question was raised as to whether the instrument should accommodate the issuance of blank endorsed documents. In response, it was explained that blank endorsed documents were fairly common in practice, particularly for banks and traders when they did not want to disclose information about their suppliers. Another question was raised as to whether a bearer document could be issued in an electronic context.

2. Paragraph 2

55. A concern was raised about a possible conflict between paragraph 2 and article 10(2) given that a holder could produce one original to demand delivery of the goods but still be expected to prove that all originals had been transferred under paragraph 2. In response, it was recalled that the purpose of article 11 was to establish modalities for transferring rights under the NCD. There was general agreement that issues concerning the exercise of those rights were adequately addressed in articles 7(5) and 10(2). The purpose served by paragraph 2 was thus questioned, noting that it did not address the consequences for failing to transfer all originals. It was added that the transport operator would not know whether the transfer had been done properly.

56. A view was expressed that paragraph 2 could serve to safeguard different originals from being transferred to different holders. In response, it was noted that the payment terms in the sales contract would ordinarily address how many originals needed to be transferred to the buyer.

57. The Working Group agreed to delete paragraph 2.

G. Chapter 4. Special conditions for issuance and use of a negotiable electronic cargo record

1. General remarks

58. Broad support was expressed for applying a functional equivalence approach to address negotiable electronic cargo records (hereinafter “NECRs”). It was noted that chapter 4 did not fully apply such an approach. In particular, it was indicated that “deeming” an electronic record to have satisfied a paper-based requirement (e.g. to be signed) could pose difficulties by implying a presumption of validity regardless of vitiating factors that might otherwise deny validity under applicable law (e.g. mistake or duress). The Working Group was cautioned against suggesting that electronic signatures had a different legal effect to “wet” signatures, or that a particular type of electronic signature was required.

59. It was noted that, unlike existing UNCITRAL texts on electronic commerce, which contained functional equivalence rules to meet requirements under other substantive law, the present instrument itself established the substantive law requirements. It was added that the standard formulation of functional equivalence rules would therefore need to be adapted, including by specifying the requirements in the instrument to which they applied. The need to ensure consistency between the instrument and the substantive provisions of the MLETR was stressed.

60. The Working Group agreed to revise chapter 4 in line with these principles.

61. The Working Group did not take up a suggestion to include a functional equivalence rule for amending an NCD (see art. 16 MLETR) as the instrument did not establish substantive requirements on amendments. The Working Group was invited to consider whether additional functional equivalent rules might be desirable for other requirements, such as the requirement for the holder to "produce" an NECR and to "identify itself".

2. Article 12. Electronic signature

62. The Working Group heard a suggestion to align article 12 more closely to article 9 MLETR by replacing the words before "if" with "where the Convention requires or permits a signature of a person, that requirement is met by a negotiable electronic cargo document". It was further suggested that the wording should be adapted to refer to provisions that required a signature (see para. 59 above). The Working Group requested the secretariat to revise article 12 along those lines.

63. It was queried whether the provision should refer to the person's "approval" of what was being signed, rather than their "intention", and whether it was necessary to refer to provisions of the instrument that "permitted" a signature. It was also observed that, in its application to endorsement, article 12 should refer to the person's intention with respect to the contents of the endorsement and not to the contents of the underlying NCD.

3. Article 13. Identification, control, assessment of integrity

64. The Working Group agreed to revise the heading of article 13 to better reflect its contents. It was pointed out that the provision was concerned with establishing (not assessing) the conditions for an NECR, which included integrity.

65. The Working Group agreed to reformulate the chapeau of article 13(1) to align with article 10(1) MLETR, with adaptations to refer to provisions on the issuance and use of an NECR. It was highlighted that such provisions not only "required" but also "permitted" the use of NECRs, and that this should be reflected in the text.

66. The Working Group heard a suggestion to insert a functional equivalence rule for writing along the lines of article 8 MLETR. It was observed that such a provision already existed in article 15 for endorsements, but not for the NECR as issued. In response, it was noted that the instrument did not expressly require an NCD to be "in writing", although several provisions established information requirements that would ordinarily be met in writing. The Working Group agreed to apply the requirement in article 8 MLETR to NECRs. The Working Group requested the secretariat to identify the location for such a requirement, whether as an element of the definition of NECR or as an additional condition in article 13(1). A preference was expressed to avoid including substantive requirements in the definitions.

67. The Working Group agreed to replace "recorded" with "contained" in article 13(2) and otherwise to retain the paragraph as drafted. A concern was expressed that the allowance for "any change which arises in the normal course of communication, storage and display" should not comprise changes affecting the contents of an NECR that could arise from a data breach. In response, it was explained that the allowance captured information generated for technical purposes, as explained in paragraph 104 of the explanatory note to the MLETR.[12]

4. Article 14. Possession of a negotiable electronic cargo record

68. The Working Group agreed to reformulate article 14 to align it with article 11 MLETR, with adaptations to refer to provisions of the instrument that required or permitted possession of an NCD, including the definition of "holder". It was noted

[12] *UNCITRAL Model Law on Electronic Transferable Records* (United Nations publication, Sales No. E.17.V.5).

that this would avoid treating electronic records as capable of possession, which could pose difficulties in some legal systems.

5. Article 15. Endorsement

69. The Working Group agreed to reformulate article 15 to align it with article 15 MLETR. It was observed that the signature requirement applied to the information required for the endorsement. It was also observed that the requirement for that information to be "included in" the NECR was not subject to a reliability assessment pursuant to article 17, but rather to an assessment of whether it was logically associated or otherwise linked to the information contained in the NECR.

6. Article 16. Replacement of a negotiable cargo document with a negotiable electronic cargo record and vice versa

(a) Paragraph 1

70. The Working Group agreed to streamline paragraph 1 and align it more closely to article 17 MLETR, by replacing the chapeau and subparagraph (c) with the following: "If the transport operator and the holder agree, a negotiable cargo document may be replaced by an NECR if a reliable method for the change of medium is used". The Working Group also agreed to replace "recorded" with "contained" in subparagraph (b). It was observed that, with these changes, subparagraphs (b) and (c) would become standalone paragraphs, and the text would pick up a requirement similar to that in article 17(2) MLETR.

71. The Working Group heard a suggestion for article 16 to be restructured to reflect the chronology of effecting a change of medium (i.e. surrender, change, make inoperative). A query was raised as to whether it was necessary to require the NCD to be surrendered under subparagraph (a) given that (i) it would cease having any effect or validity under paragraph 3, and (ii) the reference in that paragraph to the NCD being "made" inoperative implied some action by the transport operator that presupposed that it had assumed possession of the NCD. It was observed that such action could include obliterating or annotating the NCD, and it was suggested to include a requirement to annotate the NCD accordingly. In response, attention was drawn to paragraph 171 of the explanatory note to the MLETR,[13] which indicated that the corresponding provision in article 17(3) MLETR left flexibility as to the methods for making a negotiable document inoperative, and it was advocated that the same approach should be applied in the present instrument.

72. The Working Group agreed to retain the requirement to surrender the NCD. It also agreed to retain the requirement for all originals to be surrendered, which reflected practice, and to simplify the drafting of subparagraph (a) in that regard.

(b) Paragraph 2

73. The Working Group agreed to revise paragraph 2 to mirror the revisions made to paragraph 1.

74. It was observed that paragraph 2 did not contain a requirement to surrender the NECR, although provisions of the instrument, such as article 7(4), contemplated surrender. Different views were expressed as to whether to include the requirement and what it meant to "surrender" an NECR. It was recalled that, at its forty-fourth session, the Working Group had heard that not every NECR would be capable of being "surrendered" (A/CN.9/1170, para. 72). It was added that "surrendering" an NCD served a different purpose in article 16 that was unrelated to the exercise of rights under the NCD. Conversely, it was said that, in the context of the MLETR, surrendering the record was understood to involve the holder relinquishing control of the record. On that basis, it was possible to include a requirement to surrender the NECR and sufficient to reflect that understanding in the explanatory note. While a

[13] Ibid.

preference emerged not to include the requirement, the Working Group requested the secretariat to present options in the next version of the instrument for including it.

(c) Paragraphs 3 to 5

75. The Working Group agreed to retain these paragraphs without amendment.

7. Article 17. General reliability standard

76. The Working Group agreed to retain article 17 without amendment.

H. Article 3. Issuance of a negotiable cargo document or negotiable electronic cargo record

1. Paragraph 1

77. The Working Group did not take up a proposal to specifically oblige the transport operator to issue the NCD "to" the consignor since, under certain circumstances, it would be issued to the documentary shipper. A question was raised as to whether the first sentence might be interpreted as permitting the transport operator effectively to issue an NCD unilaterally, and whether the requirement for an agreement also applied to the second sentence.

78. The Working Group agreed to retain the second sentence without square brackets and requested the secretariat to refine the drafting.

2. Paragraph 2

79. A question was raised as to whether it was necessary to require the transport operator to "enter" annotations; it was explained that some transport documents might eventually feature pre-printed annotations, which it would be sufficient for the transport operator to sign. In response, it was noted that the transport operator was the issuer of an NCD and therefore it was appropriate to refer to it "entering" annotations.

80. A concern was raised that upgrading a maritime bill of lading to an NCD might be problematic in light of differences in liability regimes, particularly liability of the holder.

81. The Working Group agreed to retain paragraph 2 without amendment.

3. Paragraph 3

82. The desirability of avoiding discrepancy between the contents of the NCD and that of the non-negotiable transport document was emphasized. However, the desirability of including a priority clause to resolve discrepancies, or of allocating risk in that event, was questioned. It was felt that the requirement in subparagraph (a) to reproduce "all particulars as stated in the transport document" was unclear and potentially too onerous. The Working Group agreed to a suggestion to substitute a requirement to contain a clear reference to that transport document. It was noted that the reference should sufficiently identify the transport document so as to enable the NCD holder to request a copy thereof under subparagraph (c).

83. Uncertainty was observed as to the legal consequences of failing to comply with the requirement. A concern was expressed that it could deny the existence of a valid NCD, while a view was shared that the conditions for a valid NCD were contained in article 2(4) not article 3. It was suggested that moving the requirement to article 4 not only made logical sense, but also addressed the uncertainty as the rule in article 5(1) would apply to preserve validity. The Working Group agreed to move the requirement accordingly. It also requested the secretariat to review whether the words "notwithstanding paragraph 2" were sufficient to identify paragraph 3 (and para. 4) as fallback rules.

4. Paragraph 4

84. The Working Group agreed to retain the paragraph without square brackets and requested the secretariat to replace the words “has been issued” with “is issued”.

5. Paragraph 5

85. The Working Group heard that the purpose of paragraph 5 was to safeguard against the risk of multiple negotiable documents in respect of the same goods, which was a concern to the banking industry and could discourage the use of NCDs. It was emphasized that paragraph 5 was careful only to prohibit the transport operator from making a request, thereby avoiding conflict with other treaty regimes.

86. It was noted that, in practice, the use of master bills of lading did not create serious concerns as the transport operator issuing the house bill of lading was ultimately responsible for delivering the goods and therefore had an interest in avoiding potential conflicting claims. In any event, any difficulties could be resolved under existing law (e.g. fraud). In response, it was noted that non-negotiable options (e.g. seaway bills and consignment notes) could also ensure that the transport operator would have the right of disposal over the goods.

87. To accommodate these concerns, it was suggested that paragraph 5 could be applied “unless otherwise agreed”, thus giving primacy to party autonomy, or modified to state that the transport operator bore the risk of requesting a subsequent negotiable transport document. The prevailing view within the Working Group was to retain paragraph 5 as drafted.

6. Paragraph 6

88. It was clarified that the second sentence of paragraph 6 was not intended to resolve formal defects in an NCD that might affect its validity, but rather to facilitate the interpretation of an NCD that did not specify whether it was made out to order or to order of a named person. On that understanding, broad support was expressed for retaining a presumption that such an NCD was made out to order of the holder, and for that presumption to apply not only to NCDs issued under paragraph 2. The Working Group requested the secretariat to revise the second sentence to reflect that position. It was suggested to avoid the term “annotation” in that context.

7. Paragraph 7

89. Divergent views were expressed about the function of the first sentence in paragraph 7 given that very similar wording appeared in article 4(1)(i). It was explained that article 4(1) set out minimum yet mandatory content requirements for an NCD, the non-fulfilment of which would not affect the validity of an NCD by virtue of article 5(1) and would not trigger liability for the transport operator, while article 3 set out requirements for the issuance of an NCD and imposed obligations on the transport operator. While the instrument did not presently contain provisions on the liability of the transport operator, it was generally understood that a breach of obligations would trigger liability under the transport contract and applicable law.

90. One view was that the first sentence was not necessary because article 7(5) and 10(2) already incentivized the transport operator to indicate the number of originals in each NCD issued in multiplicate. It was added that the first sentence was also not helpful given that it did not clarify the legal consequences for failing to do so, which in turn could be argued to invalidate the NCD (e.g. by applying a contrary interpretation of art. 5(1)). Another view was that a prominent requirement to mark all originals could help promote the negotiability of NCDs.

91. A concern was expressed that the requirement in the second sentence to marked copies as “non-negotiable” was too prescriptive and it was suggested to leave flexibility as to how copies were marked. A question was raised as to whether a rule on marking copies was even warranted.

92. Ultimately, the Working Group agreed to delete paragraph 7 in its entirety.

I. Cargo pledge bonds

93. The Working Group heard a proposal to make provision for a separate document that would evidence the creation of a security interest in the goods, which could be issued in lieu of an NCD. It was explained that this could address concerns that the rights of the holder under an NCD might conflict with mandatory provisions under other transport conventions (e.g. CIM Uniform Rules). It was clarified that security rights over goods could not be created by the transport operator and cargo pledge bonds could only be issued after a separate security agreement had been concluded between the bank and the owner of the goods.

94. While appreciation was expressed for the proposal, the view was broadly shared within the Working Group that the proposed cargo pledge bond would create difficulties with principles and priorities under existing law relating to secured transactions and insolvency law. It was emphasized that the rationale for giving priority to a secured creditor who created a security right over a negotiable instrument was that the negotiable instrument represented the goods. Concerns were expressed by the banking industry highlighting the practical difficulty for banks to identify the owner of the goods in transit who could grant a security right over the goods.

95. Accordingly, the Working Group agreed not to take up the proposal. The secretariat was requested to elaborate in the explanatory note how a security right could be created over an NCD and how that security right would extend to the goods represented by the NCD under the UNCITRAL Model Law on Secured Transactions.

J. Coverage of goods in storage

96. The Working Group agreed not to include a new provision explicitly stating that NCDs would cover the storage of goods if such service was included in the transport contract. There was general agreement that the short-term storage of goods after being taken in charge by the transport operator was ordinarily part of the transport contract and was therefore already covered by the NCD. It was noted that such a provision would add little value and might cause unnecessary complications in light of other legal regimes applicable to warehousing.

K. Article 4. Content of the negotiable cargo document or negotiable electronic cargo record

1. Paragraph 1

(a) General remarks

97. The Working Group recalled its earlier agreement to insert a requirement for the NCD to contain a clear reference to the transport document (see para. 82 above). The Working Group heard a suggestion to insert a requirement for the NCD to refer to the transport contract, which would be particularly important where the NCD was issued under article 3(4). The Working Group agreed to consider the issue further when considering the definition of NCD.

(b) Subparagraph (b)

98. The need for subparagraph (b) was questioned as it was the holder (not the consignee) who would be entitled to demand delivery of the goods. A concern was expressed that including the name and address of the consignee as a mandatory content requirement would likely affect the negotiability of the NCD, even if the requirement to include that information only applied “if required… or provided”. It

was noted that paragraph 2(d) would still allow such information to be included if the parties so wished.

99. The Working Group agreed to delete subparagraph (b).

(c) Subparagraph (c)

100. The Working Group did not take up a suggestion to insert additional wording to reflect the notion of a documentary shipper.

(d) Subparagraph (i)

101. The Working Group agreed to delete the phrase “when more than one original is issued” on the understanding that it was equally important for the transport operator to indicate the number of originals when only a single NCD was issued.

(e) Subparagraph (j)

102. The Working Group did not take up the suggestion to replace the word “freight” with “reward” as appearing in the definition of the transport contract. It was noted that, as used in subparagraph (j), freight was a term that was commonly used and generally understood in practice.

(f) Subparagraph (k)

103. The Working Group agreed to consider subparagraph (k) when deliberating the scope of application of the instrument under article 1.

2. Paragraph 2

104. It was suggested that subparagraph (d) was sufficient to cover the other particulars listed in paragraph 2. In response, it was noted that it was useful to indicate those other particulars, which might not always be included by agreement between the parties. The Working Group agreed to retain paragraph 2 as drafted.

L. Article 5. Deficiencies in the negotiable cargo document or negotiable electronic cargo record

105. The importance of paragraph 1 was emphasized, although it was acknowledged that its operation could be clarified. In particular, it was suggested that the concept of “legal character” could be replaced with reference to legal effect or validity and that an additional provision could be inserted to clarify that paragraph 1 did not affect other legal consequences of non-compliance with the content requirements in article 4. The Working Group agreed to retain paragraph 1 and asked the secretariat to revise it to reflect those suggestions. Recalling earlier deliberations with respect to article 3(7), the Working Group heard that non-compliance could trigger liability of the transport operator which would be addressed under applicable law.

M. Form of the instrument

106. Broad support was expressed for the Working Group to continue deliberations on the basis that the instrument would take the form of a convention, and requested the secretariat to prepare the next version of the instrument on that basis, including the insertion of final clauses.

107. The Working Group expressed the expectation for the instrument to be submitted to the Commission for consideration at its next session, in 2025.