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Report of Working Group VI (Negotiable Cargo Documents) on the work of its forty-sixth session (New York, 17–21 March 2025)

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-fourth session in 2024, the Commission noted that the Working Group 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 requested the secretariat to align 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 the MLETR.[9]

4. At its forty-sixth session, the Working Group continued its article-by-article review of the revised draft provisions in the form of a convention 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-sixth session in New York from 17 to 21 March 2025.

6. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Brazil, Canada, Chile, China, Côte d'Ivoire, Czechia, Dominican Republic, Finland, France, Germany, Ghana, Hungary, India, Iran (Islamic Republic of), Japan, Kuwait, Malaysia, Mexico, Nigeria, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

[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] *UNCITRAL Model Law on Electronic Transferable Records* (United Nations publication, Sales No. E.17.V.5).
[8] Ibid., para. 258.
[9] Ibid., para. 261.

7. The session was attended by observers from the following States: Denmark, El Salvador, Guatemala, Kazakhstan, Myanmar, Paraguay, Philippines, Sweden, Togo and Zambia.

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

(a) *United Nations system*: International Civil Aviation Organization (ICAO);

(b) *Intergovernmental organizations*: World Customs Organization (WCO);

(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), Grain and Feed Trade Association, International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Center for Transport Diplomacy (ICTD), 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), Instituto Iberoamericano de Derecho Maritimo (IIDM), 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.112);

(b) An updated version of the note by the Secretariat entitled “Fact sheet: UNCITRAL project on negotiable cargo documents” (A/CN.9/WG.VI/WP.113);

(c) A note by the Secretariat setting out a revised annotated set of provisions for a convention on negotiable cargo documents (A/CN.9/WG.VI/WP.114);

(d) A note by the Secretariat entitled “Interaction between draft convention on negotiable cargo documents and existing international transport law conventions” (A/CN.9/WG.VI/WP.115); and

(e) A compilation of comments from organizations (A/CN.9/WG.VI/WP.116/Rev.1).

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.114) containing revised draft provisions for a convention 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

A. Article 1. Scope of application

1. Application to the maritime leg or negotiable transport documents recognized under applicable law

13. The Working Group heard suggestions to limit the scope of application of the convention and counter arguments as elaborated in the submissions from organizations contained in A/CN.9/WG.VI/WP.116/Rev.1:

- One suggestion was to exclude the maritime leg from the scope of application of the convention, given the longstanding practice of issuing negotiable bills of lading in respect of goods carried by sea, which were widely recognized as documents of title. It was emphasized that the well-established legal ecosystem for maritime bills of lading should not be disrupted by the convention. A concern was expressed that maritime carriers would receive less protection in case of the issuance of a negotiable cargo document (hereinafter "NCD"), rather than a maritime bill of lading.
- Another suggestion was to limit the scope of application of the convention to documents that are not otherwise recognized by applicable law as negotiable transport documents. A concern was raised that annotating a maritime bill of lading to issue an NCD could cause confusion and ultimately jeopardize the legal status of the bill of lading as a document of title in a non-contracting State or invalidate the bill of lading.
- A counter argument was that the purpose of the convention was to create a consistent and uniform legal regime for documents of title. In practice, freight forwarders were often given a discretion to choose the most suitable mode of transport. Applying the convention to all modes of transport would provide freight forwarders, shippers and banks with the ability to opt for the solution to organize multimodal end-to-end or unimodal transportation as the circumstances required. The "opt in" nature of the convention was emphasized. Furthermore, the difficulty in determining a "maritime" leg when negotiating the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)[10] (hereinafter "Rotterdam Rules") was recalled. For banks, the convention provided a simple and straightforward regime to determine whether a document was a document of title. It was added that the negotiability of maritime bills of lading might be uncertain if issued in a jurisdiction which a bank was unfamiliar with.

14. Strong support was expressed against limiting the scope of application of the convention, given that NCDs could only be issued if so agreed by the parties. It was emphasized that the convention would not affect the application of existing transport law conventions which did not contain specific provisions on the legal effect of bills of lading. Noting the significance of maritime transport in international trade, it was said that the convention would thus apply to a small portion of multimodal transport if the maritime leg was excluded. Given that the purpose of the convention was to facilitate international trade, limiting the scope of application would likely defeat such a purpose.

15. A concern was, however, expressed that a conflict might arise between the convention and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924) (hereinafter "Hague Rules") when issuing an NCD in the context of unimodal maritime transport. It was explained that after the issuance of an NCD, the transport operator might still be obliged to issue a maritime bill of lading at the request of the consignor under article 3 (3) of the Hague Rules. In response, it was noted that such a scenario would be unlikely because the same

[10] General Assembly resolution 63/122, annex.

parties to the transport contract would have agreed on the issuance of an NCD. Article 3(5) served as an example of an attempt to avoid a maritime bill of lading issued once an NCD had been issued.

16. Questions were raised as to how a maritime bill of lading could be converted into an NCD through annotation and whether the document would contain the exact wording of both “bill of lading” and “negotiable cargo document”.

17. After discussion, the Working Group agreed not to exclude maritime transport or negotiable transport documents recognized under applicable law from the scope of application of the convention.

2. Paragraph 1

18. The Working Group agreed to remove both sets of square brackets from the chapeau of paragraph 1 and thus to retain the bracketed text.

19. For the first set of square brackets, there was broad support for the requirement to annotate NCDs with a conspicuous annotation with reference to the convention, although a variety of views were heard as to how to operationalize that requirement. The Working Group considered the three options presented in footnote 1 of A/CN.9/WG.VI/WP.114. While it was acknowledged that the convention was based on party autonomy and thus afforded the parties to opt in to the convention regime, a concern was expressed that defining the scope of application by reference to the will of the parties might produce some uncertainty. For that reason, support was expressed for option 3, by which the annotation would be inserted as a minimum content requirement for NCDs in article 4(1). In response, it was observed that option 3 was not satisfactory as non-observance of the content requirements did not affect the legal effect or validity of an NCD by virtue of article 5. Some support was expressed for option 2, by which the requirement was incorporated into the definition of NCD in article 2, while another option was to include the requirement in article 3 so as to avoid including substantive requirements in the definitions. After discussion, a preference emerged within the Working Group for option 1, and thus to retain the requirement as limiting the scope of application of the convention.

20. For the second set of square brackets, there was broad support for retaining an explicit acknowledgment that the convention applied in both a unimodal and multimodal context.

21. The Working Group heard a suggestion to delete subparagraph (b) and thus to apply the convention only where the place of taking in charge of the goods was located in a State Party. It was noted that such a fact was readily determinable and thus afforded greater legal certainty as to the applicability of the convention. The prevailing view, however, was to retain subparagraph (b) and thus to apply the convention also where the place of delivery of the goods was located in a State Party. It was emphasized that the place of delivery of the goods might be the place of the buyer’s bank. The desirability of not unduly limiting the geographic scope of the convention was also mentioned.

22. The Working Group heard further reflections on article 1(1) without making any further amendments:

(a) It was suggested that, as the purpose of the convention was not to govern the transport contract but to create a new document of title, its application should depend not on the place of taking in charge of the goods and the place of delivery but on the place of issuance of the NCD. It was added that the convention could also be applied where the rules of private international law led to the application of the law of a State Party. It was also noted that additional rules might be needed to identify the place of issuance of an NCD in electronic form (“eNCD”). Reference was made to

article 6 of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005);[11] and

(b) It was suggested that, as the convention was based on party autonomy and the idea that the parties could opt into the convention regime, it was sufficient for the NCD to refer to the convention. Reference was made to article 2(1)(e) of the United Nations Convention on the Carriage of Goods by Sea (1978) (hereinafter "Hamburg Rules").[12]

3. Paragraph 2

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

4. Paragraph 3

24. A view was expressed that anti-derogation provisions in certain transport law conventions were not intended to prohibit the assignment of contractual rights by agreement of the same parties to the transport contract. It was emphasized that such assignment would not modify the substance of rights and obligations but merely transfer contractual rights from one party to another. The passing of certain rights to insurers through subrogation was cited as an example of transferring contractual rights. A change in the company structure of the consignee was cited as another example.

25. It was suggested that paragraph 3 could be revised to clarify when it applied. It was noted that whether a matter was "explicitly provided for" in the convention was open to interpretation, and that formulations used in other conventions could be considered.

26. It was also questioned whether paragraph 3 was intended to apply as a primacy clause. In response, it was explained that paragraph 3 reflected the general understanding that the convention did not deal with rights, obligations or liability of the transport operator, consignor and consignee with respect to the transport of goods and therefore was not expected to give rise to incompatibility with other international conventions or national law; however, in the event that such incompatibility arose, the convention would prevail. Broad support was expressed for that view, and the Working Group invited the secretariat to revise the wording of paragraph 3 to better reflect that understanding.

B. Article 2. Definitions

1. Paragraphs 1 and 2

27. The Working Group agreed to retain paragraphs 1 and 2 without amendment.

2. Paragraph 3 ("Holder")

28. The Working Group agreed to the following:

- Delete the phrase within square brackets as being unnecessary, noting that article 15 provided for a functional equivalence rule for possession; and
- Delete the reference to the consignee on the grounds that (a) information concerning the consignee was no longer required in article 4 (1) and (b) the consignee would be the person named in the transport contract as the person entitled to take delivery of the goods and would not have any such right under the NCD.

29. The Working Group further agreed to expand the definition of holder to cover the person to whose order it is issued.

[11] General Assembly resolution 60/21, annex.
[12] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

3. Paragraph 4 (“Negotiable cargo document”)

30. Recalling its deliberations on article 1 (1) (see para. 19 above), the Working Group agreed to delete letter (c), which had become redundant.

31. It was observed that the requirement in letter (b) was important as it assured the link between the NCD and a transport contract. It was observed that such a link was already established where a transport document existed, as that document was required to evidence or contain the transport contract by virtue of the definition of “transport document” in article 2 (9). However, it was questioned whether such a link would be assured where no transport document was issued, as contemplated in article 3 (4).

32. It was nevertheless observed that the requirement in letter (b) was unclear. On the one hand, to the extent that it was concerned with the evidentiary effect of an NCD, it was suggested that the requirement could be addressed in article 6. It was observed that the definition of NCD should not address the legal consequences of an NCD, which should instead be addressed in the operative provisions of the convention.

33. On the other hand, to the extent that it was concerned with mandatory content requirements for an NCD, it was suggested that the requirement could be addressed in article 4 (1) or by revising the proviso in article 5 (1) to require the NCD to reflect the essential elements of the transport contract. The importance for the holder to be able to rely exclusively on the information in the NCD was emphasized. In response, it was recalled that the exercise by the holder of its rights in article 7 (1) depended on the conditions and limitations set forth in the transport contract, and that these conditions and limitations might not be characterized as essential elements of the contract. Accordingly, it was suggested that it was more appropriate for the convention to establish a right of the holder to request information from the transport operator about the terms of the transport contract. A concern was expressed to avoid imposing an unreasonable burden on the transport operator.

4. Paragraphs 5 to 7

34. The Working Group agreed to delete paragraphs 5 to 7 altogether on the basis that (i) definitions regarding the issuance and use of NCDs in electronic form would be consolidated in chapter 4, and (ii) the definition of “transfer” in paragraph 7 was redundant in view of the functional equivalence rule for possession in article 15.

5. Paragraphs 8 and 9

35. The Working Group agreed to retain paragraphs 8 and 9 without amendment.

6. Paragraph 10 (“Transport operator”)

36. The Working Group heard several suggestions to amend or delete the definition, none of which were taken up.

37. It was suggested that the definition could be deleted as unnecessary because the meaning of the term “transport operator” could readily be derived from the definition of “transport contract”. It also heard a suggestion to insert the words “as carrier” after the words “transport contract” to specify the capacity in which the transport operator was acting under the convention (see A/CN.9/WG.VI/WP.110). In response, it was noted that the definition should be retained as drafted as it clarified that the convention applied to NCDs issued by contractual carriers only (not agents or actual carriers), although it was acknowledged that the two definitions could be aligned.

38. It was also suggested to specify that the transport operator performed the “delivery” of the goods.

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

1. General

39. It was envisaged that, given the deliberations on paragraphs 5 to 7 of article 2 (see para. 34 above), the term "negotiable electronic cargo record" could be deleted from article 3 and the remainder of chapter 2 and chapter 3 of the text.

2. Paragraph 1

40. It was observed that paragraph 1 was concerned with the conditions for issuance of an NCD and the point in time at which an NCD was issued. It was stressed that the agreement of the parties was always a condition for issuance, but that the second sentence of paragraph 1 left some room for doubt. The Working Group agreed to reformulate paragraph 1 to clarify that (i) an NCD could only be issued where the parties had agreed to do so and (ii) the NCD could only be issued either at a point in time when the goods were taken in charge by the transport operator, or at a subsequent point in time in certain circumstances.

41. The Working Group agreed to amend article 3, paragraph 1 to make it clear that an NCD that was issued at a subsequent point in time might be issued by annotating an existing document as provided for in paragraph 2, or by issuing a new document that substituted a cancelled transport document. The Working Group heard that, in practice, maritime bills of lading were typically not issued at the moment when the goods were taken in charge but at a later date once the goods were examined. It also heard the practice of switching, whereby an initial maritime bill of lading was surrendered, cancelled and substituted by a new bill of lading. It was suggested that the convention could accommodate and apply these practices to the issuance of an NCD by amending paragraph 1 or paragraph 4. Several drafting proposals were put forward.

3. Paragraphs 2 to 4

42. The view was widely shared that the intention and interaction of paragraphs 2 to 4 could be clarified and the Working Group focused attention on how this could be achieved.

43. It was explained that the words "unless otherwise agreed" in paragraph 2 were intended to clarify that paragraph 2 established the default mode of issuance as compared to the modes of issuance established by paragraphs 3 and 4. It was noted that the words could alternatively be interpreted as allowing the parties to modify the requirements in paragraph 2 by agreement, and it was therefore suggested to find alternative wording. It was added that this could be done by amending paragraphs 3 and 4 to emphasize that those paragraphs applied on an exceptional basis.

44. It was observed that, by virtue of paragraph 2 (b), the annotation on a transport document comprised a signed statement by the transport operator and a reference to the convention, whereas paragraph 1 suggested that the annotation also comprised the inclusion of the wording required by paragraph 2 (a). It was added that, if an NCD was issued under paragraph 2 to "upgrade" a transport document that was not negotiable, these words would need to be inserted in the underlying transport document. The secretariat was asked to review paragraphs 1 and 2 for consistency.

45. With reference to the chapeau of paragraph 3, it was noted that whether a transport document was "not negotiable" was a question of fact not of law, and therefore that references to a transport document being "not capable of being negotiable" should be avoided. It was observed that the wording of paragraph 3 left some doubt as to whether paragraph 3 established the exclusive mode of issuance for NCDs where a transport document existed but was not negotiable, or whether it established an alternative mode of issuance.

46. After discussion, the Working Group heard a suggestion to replace paragraphs 2 to 4 with a simpler provision that acknowledged that an NCD could be issued by annotating an existing transport document. It was observed that the suggestion obviated the need to make express provision for the issuance of an NCD as a separate document – whether in parallel with a transport document that was not negotiable (as contemplated in paragraph 3) or in the absence of a transport document (as contemplated in paragraph 4) – as that would go without saying. It was also observed that, for the issuance of an NCD as a separate document in parallel with a transport document that was not negotiable, it was not necessary to retain the requirement in paragraph 3 (b) to annotate that transport document with a reference to the NCD as that would be a matter of practice to be determined by the market. It was pointed out that no international conventions or national laws governing maritime bills of lading contained prescriptive rules on the modes of issuance. Broad support was expressed for the suggestion, which, it was noted, neither prohibited nor promoted the issuance of an NCD and other transport document in parallel. Broad support was also expressed for ensuring that the replacement provision reproduced the substance of paragraph 4. The Working Group asked the secretariat to draft a replacement provision along the lines discussed.

4. Paragraph 5

47. The Working Group agreed to delete the phrase “by any transport operator performing any part of the carriage”, on the ground that the term “transport operator” did not capture any actual carrier performing any part of the carriage as the definition of “transport operator” required that person to conclude a transport contract with the consignor. It was noted that such phrase seemed unnecessary and deleting it would avoid introducing new terms to refer to actual carriers.

48. The Working Group did not take up the suggestions to expand the scope of the provision to prohibit the consignor or the holder to request the issuance of negotiable transport documents after the issuance of an NCD. It was explained that once an NCD was issued the goods would have been handed over to the transport operator. It was noted that neither the consignor nor the holder could request the issuance of another transport document as they would not be in possession of the goods.

49. A question was raised as to whether the provision should also address the situation when a negotiable transport document had been issued by an actual carrier before the issuance of an NCD by the transport operator. This concern was not taken up by the Working Group.

5. Paragraph 6

50. It was observed that the first sentence of paragraph 6 recognized that the NCD did not need to name the person to whose order it was made out, while the second sentence filled in the gap where no person was named. A concern was raised regarding the reference to the “holder” in the second sentence, as it could be interpreted as permitting the issuance of bearer documents. It was therefore suggested that the sentence should state that, if an NCD failed to name the person to whose order it was made out, it should be deemed to be made out to the order of the consignor. It was explained that, as such, the second sentence would be consistent with the existing practice with maritime bills of lading. It was added that the definition of NCD would also permit the issuance of a document which contained the wording “negotiable”.

51. Broad support was expressed for the suggestion, and the Working Group agreed to revise the second sentence accordingly.

D. Article 4. Contents of the negotiable cargo document or negotiable electronic cargo record

1. Paragraph 1

52. The Working Group agreed to retain subparagraphs (f) and (g) on the understanding that the revisions to article 3 (see para. 46 above) would not prohibit the issuance of an NCD as a separate document.

53. The Working Group agreed to delete subparagraph (k) in view of its deliberations on article 1 (1) (see para. 19 above). It was noted that the inclusion of a conspicuous annotation with reference to the convention was already signalled in article 3 and that this provided sufficient guidance to the transport operator who might otherwise not look to the scope of application of the convention when looking for the requirements for issuing an NCD.

2. Paragraph 2

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

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

1. Paragraph 1

55. The suggestion was recalled to revise the proviso to require the NCD to reflect the essential elements of the transport contract. Alternatively, it was suggested that the proviso could be deleted as the definition of an NCD, as revised, contained very few information requirements. In response, it was observed that the proviso as drafted provided legal clarity and should be retained. It was added that, by virtue of the definition of NCD, the NCD would at least identify the goods and the transport operator who had taken them into charge, as well as indicate that the goods were consigned.

2. Paragraph 2

56. The Working Group agreed to replace the phrase “other law” with “applicable law” for consistency.

3. Paragraphs 3 to 6

57. The Working Group agreed to retain paragraphs 3 to 6 without amendment.

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

1. Paragraph 1

58. The Working Group requested the secretariat to revise the chapeau of paragraph 1 for improved clarity.

2. Paragraphs 2 to 3

59. The Working Group agreed to retain paragraphs 2 to 3 without amendment.

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

1. Paragraph 1

60. The Working Group heard an explanation of the suggestion to establish a right for the holder to request information from the transport operator about the terms of the transport contract (see para. 33 above). It was explained that exercising a right to bring a claim against the transport operator required the holder to have access to the transport contract. It was added that this was particularly relevant in a multimodal context, where standard industry terms did not exist. Accordingly, it was suggested to insert a new paragraph in article 7 along the following lines:

> Without prejudice to article 6, paragraph 3, upon request of the holder of the NCD other than the consignor, the transport operator shall provide the terms of the transport contract to the extent that they are not reflected in the NCD.

61. It was observed that article 9 (1) of the UNCITRAL/UNIDROIT Model Law on Warehouse Receipts ("MLWR") contained a similar provision. Ultimately, the Working Group did not take up the suggestion. The view was echoed that the new paragraph would be burdensome for the transport operator. It was also cautioned that it could produce adverse legal consequences for a holder who did not request the contract. It was emphasized that the relationship between the holder and the transport operator should only be regulated in the NCD, not the transport contract.

62. The Working Group heard several drafting suggestions to clarify the operation of paragraph 1. It was noted that the word "evidenced" was ambiguous, although it was acknowledged that the wording represented a compromise reached by the Working Group at its previous session (A/CN.9/1199, paras. 22–23). The Working Group agreed to amend the chapeau of paragraph 1 to refer to the holder acquiring "the rights under the transport contract to the extent that these rights are incorporated in the NCD". It was added that this requirement could be satisfied where the relevant terms of the contract were expressed in the NCD itself or where they were incorporated by reference. It was also acknowledged that consequential amendments would need to be made to other provisions of the text that referred to the rights acquired by the holder.

63. It was observed that the words "as if it had been a party to that contract" were problematic as they implied that the holder acquired all rights under the transport contract regardless of whether those rights were incorporated in the NCD. Conversely, it was observed that the rights under the transport contract might be subject to provisions of mandatory law, and that the words allowed those provisions to accompany the transfer of the NCD. In response, it was noted that those provisions would presumably be picked up by virtue of the choice of law rules of the forum. It was therefore suggested that the words could be deleted, and that the applicability of mandatory law could be elaborated in the explanatory note. The Working Group agreed to that suggestion.

64. It was observed that maintaining the list of rights in paragraph 1 was similarly problematic as a listed right might not be incorporated in the NCD. It was therefore suggested to delete the list. In response, the utility of listing those rights in the convention was reiterated, and it was suggested to address the issue by replacing "including" with "which may include". It was explained that the amendment clarified that the list was indicative only. The Working Group agreed to that suggestion.

65. It was observed that issues could arise if the rights incorporated in the NCD differed from the rights under the transport contract. To address a potential conflict, it was suggested that a rule based on article 9 (2) MLWR could be inserted, whereby the transport operator was barred from invoking against the holder any term of the transport contract that was inconsistent with the terms of the NCD. The Working Group agreed to that suggestion.

2. Paragraph 2

66. It was suggested to delete the paragraph. On one view, the paragraph was unnecessary as it was a logical consequence of article 7 (1). It was noted that the acquisition of rights under article 7 (1) could be understood as a transfer of those rights to the holder. On another view, the effect of transfer differed among legal systems; for some, the transfer of a maritime bill of lading transferred all rights under the transport contract, while for others, it created a new third party beneficiary without necessarily transferring all rights. In response, it was emphasized that the paragraph established a new harmonized rule for a new type of negotiable document, which served a useful purpose, although its drafting could be simplified.

67. After discussion, the Working Group agreed to retain the paragraph and to amend it to state that, upon issuance of an NCD, any entitlement to the rights incorporated therein could only be exercised by the holder.

3. Paragraph 3

68. The Working Group agreed to retain the paragraph with a minor amendment to clarify that it also applied to the subsequent transfer of NCDs after issuance. It agreed to a suggestion to acknowledge in the explanatory note that the paragraph accommodated differences among legal systems as to the nature of rights that the holder acquired in respect of the goods, as reflected in the two options presented in article 18 MLWR.

4. Paragraph 4

69. The Working Group agreed to delete the paragraph, noting that it was unnecessary and might be interpreted as interfering with the rules on the exercise of contractual rights.

5. Paragraph 5

70. It was questioned why exercising the right of disposal required all originals while demanding delivery of the goods under article 10(2) required only one original. The Working Group recalled its previous deliberations (A/CN.9/1127, para. 78).

71. Divergent views were expressed as to the number of originals to be produced to exercise the right to bring a claim. On one view, courts in some jurisdictions required all originals. On another view, requiring all originals would be unreasonable where the claim related to damage to the goods. It was explained that, in such a case, one original would have already been surrendered before the goods were handed over to the holder. Support was expressed not to address the issue in the convention as it touched on matters of procedure that should be left to the law of the forum.

72. After discussion, the Working Group agreed to retain the paragraph and that the explanatory note should explain why the convention was silent on the number of originals required to exercise the right to bring a claim.

H. Article 8. Missing information, instructions or documents

73. The Working Group agreed to retain article 8 without amendment.

I. Article 9. Liability of holder

1. Paragraph 1

74. The Working Group agreed to replace the phrase “any right under the transport contract” with “any right acquired under article 7 (1)”, such right being one that was incorporated in the NCD. The importance of the paragraph was emphasized in providing legal clarity where the transport contract contained a merchant clause.

2. Paragraph 2

75. Concerns were raised that the paragraph introduced an unbalanced regime whereby the holder only assumed liability when exercising the right of disposal. The Working Group was cautioned against introducing a rule that limited the defences that a transport operator could assert against the holder, for instance when the vessel was arrested. It was suggested that the holder should also assume liability when exercising the right to demand delivery of the goods. Reference was made to unpaid freight, demurrage fees and damages caused by providing incorrect information regarding dangerous goods. In response, it was observed that the holder should only assume those liabilities if they were incorporated in, or ascertainable from, the NCD, although the meaning of "ascertainable" might need to be elaborated. It was emphasized that the holder should be able to rely on the NCD alone and not be expected to examine the transport contract.

76. A suggestion to delete the paragraph in deference to applicable law was not taken up.

77. The Working Group agreed to revise the paragraph along the following lines:

> A holder that is not the consignor and that exercises a right in accordance with article 7 assumes any liability that arises in connection with the exercise of that right under the transport contract to the extent that such liabilities are ascertainable from the NCD.

J. Article 10. Delivery of the goods

78. The Working Group agreed to revise paragraph 1 to reflect its deliberations on the definition of "holder" and article 3 (6) and thus to reformulate the paragraph to state that delivery "may be demanded from the transport operator only against surrender of the NCD by the holder".

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

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

80. It was observed that article 11 acknowledged blank endorsement. It was added that, as such, the convention would accommodate the existing practice of endorsing a negotiable document without naming the endorsee. It was also recalled that a document endorsed in blank was not the same as a bearer document, and that the Working Group had agreed not to accommodate the issuance of bearer documents (see A/CN.9/1199, paras. 53–54).

81. It was suggested that the heading of article 11 did not align with the content of the article, which in turn would need to be revised to reflect the deliberations of the Working Group on the definition of "holder" and article 7 (1). It was added that referring to rights "incorporated in" an NCD as opposed to "under" an NCD emphasized the status of the NCD as a stand-alone instrument that represented rights. It was also suggested that article 11 should clarify that a reference to the holder transferring "it" (i.e. the NCD) to another person was a reference to the holder transferring possession of the NCD, which would in turn facilitate the application of the functional equivalence rule in article 15 (2) for NCDs in electronic form. The Working Group agreed to amend article 11 as follows:

(a) To replace "under" in the heading with "incorporated in";

(b) To replace "transferring it" with "transferring possession of the NCD"; and

(c) To delete subparagraph (b)(i).

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

1. General remarks

82. It was noted that the convention used the term “electronic record” to refer to an NCD in electronic form. A question was raised as to why the term “electronic record” was used, noting that a distinction between “document” and “record” was not recognized in all languages. The Working Group heard that, although earlier work at UNCITRAL on negotiable transport documents in electronic form had shied away from referring to an “electronic document” due to the association of the term “document” with the paper form, the term “electronic document” was widely accepted in practice. At the same time, the need to ensure consistency between the convention and other UNCITRAL texts, in particular the MLETR which used the term “electronic record”, was reiterated. The Working Group agreed that the “NCD” should be understood to encompass both the paper and electronic form, and that the rules in chapter 4 should be amended to remove references to “negotiable electronic cargo records”.

83. The Working Group heard that the current version of the text was silent on applying other substantive law to eNCDs. An example was given of law governing the creation and effectiveness of security rights in negotiable document, which might require the secured creditor to take possession of the document. It was observed that the rule in article 15 would offer no assistance to applying that law to eNCDs. It was suggested that, to facilitate the use of eNCDs, the rules in chapter 4 should be amended to apply “where any rule of law (including this Convention) requires or permits”.

84. In response, the Working Group was reminded that the current version of the text reflected deliberations at its previous sessions, where it was noted that the functional equivalence rules needed to be adapted to apply to the requirements in the draft convention rather that unspecified requirements under other unspecified substantive law (see A/CN.9/1199, para. 59). The Working Group reaffirmed that approach.

85. Nevertheless, to ensure that no requirement of the convention was inadvertently left out, the Working Group agreed to reformulate those rules to apply “for the purposes of this Convention”.

2. Article 12. Requirements for a negotiable electronic cargo record

86. Taking up a suggestion in footnote 91 of A/CN.9/WG.VI/WP.114, the Working Group agreed to delete the words “issued and used” in paragraph 1. It also agreed to replace “creation” with “issuance” in paragraphs 1(b) and 2. It was observed that issuance of an eNCD was a legal act whereas creation of an electronic record was a technical act.

87. Recalling its earlier deliberations (see para. 34 above), the Working Group agreed to incorporate the definition of ‘electronic record’ in article 12.

3. Article 13. Content requirements

88. Recalling its earlier deliberations (see para. 82 above), the Working Group agreed to reformulate article 13 along the following lines: “For the purposes of this Convention, a requirement for information to be contained in a negotiable cargo document is met with respect to an electronic record if the information contained therein is accessible so as to be usable for subsequent reference.”

4. Article 14. Signature requirements

89. The Working Group agreed to reformulate article 14 along the following lines:

> For the purposes of this Convention, the requirement for a negotiable cargo document to be signed is met with respect to an electronic record if a reliable method is used to identify the signatory and to indicate that person's intention in respect of the information contained in the electronic record.

5. Article 15. Possession requirements

90. Recalling its deliberations on article 11 (see para. 81), the Working Group agreed to amend paragraph 2 to refer to a requirement to transfer "possession" of an NCD.

91. It was observed that paragraph 1(i) referred to "exclusive control" whereas paragraph 2 referred to "control". It was also observed that article 12(1)(b) also referred to "control". A concern was expressed that the different references could cause confusion, and it was suggested that the convention should refer to "exclusive control" throughout. In response, the view was broadly shared that the use of the word "control" in paragraph 2 did not imply that a subsequent holder of an eNCD was subject to a lower standard of control, and that paragraph 2 effectively required the transfer of exclusive control. Reference was made to the remark in paragraph 119 of the explanatory note to the MLETR that "transfer of control implies transfer of exclusive control since the notion of 'control', similarly to that of 'possession', implies exclusivity in its exercise". Similarly, it was noted that article 12(1)(b) was concerned with ensuring that an electronic record was capable of being subject to control and did not detract from the requirement for a holder to exercise exclusive control of an eNCD. The need to ensure consistency between the convention and the substantive provisions of the MLETR was stressed. It was suggested that the heading of article 13 should be amended to refer to "control". The Working Group did not take up these suggestions.

92. It was observed that the meaning of "exclusive control" was unclear and that a definition of the term should be inserted in the text. The following definition was suggested as a starting point:

> The holder of an NCD exerts exclusive control when it can be verified that it is the only one to be able to modify it to the extent needed to transfer or surrender it.

93. It was cautioned that developing an agreeable definition would be challenging, as was experienced in developing the MLETR. Nevertheless, there was some support for the issue to be considered further by the Commission.

6. Article 16. Endorsement requirements

94. The Working Group agreed to reformulate article 16 along the following lines:

> For the purposes of this Convention, the requirement for a negotiable cargo document to be endorsed is met if the information required for the endorsement is included in the electronic record and that information is compliant with the requirements set forth in article 13 and 14.

7. Article 17. Change of medium

95. Recalling its earlier deliberations on the issuance of eNCDs in multiplicate, the Working Group agreed to retain subparagraph 5(a). It was pointed out that there was no assurance that the holder wishing the change of medium would surrender all originals. In response, it was noted that the transport operator was responsible for the issuance of the NCD and for the change of medium and would be in a position to ascertain whether all originals were surrendered. A concern was, however, expressed that subparagraph 5(a) introduced a rule different from article 10 (2) where the surrender of one original to demand delivery of the goods would make other originals cease to have any effect or validity only when the NCD stated that more than one original had been issued.

96. A concern was raised that, by virtue of the chapeau of paragraphs 2 and 5, even a minor error in copying the information from one medium to the other could undermine the continued legal effectiveness of the NCD following the change in medium. It was added that it might not be technically possible to reproduce all contents of an eNCD in paper. The Working Group agreed to delete from both paragraphs the requirement to reproduce all information contained in the NCD. It was observed that the requirement was implied as the words "change of medium" indicated that only the medium was being changed. It was also observed that the requirement was not necessary as the mere change of medium did not involve the issuance of a new NCD and that, in any event, the "replacement" of an NCD implied that the information contained therein would be reproduced in the new medium.

97. The Working Group took up a suggestion to revise paragraph 6 to reflect that all originals of an eNCD should be made inoperative after the issuance of the NCD in paper in order to ensure consistency with subparagraph 5(a).

98. Besides amendments necessary to accommodate the use of NCD as a medium neutral term, the Working Group agreed to retain article 17 without further amendment.

8. Article 18. General reliability standard

99. It was suggested that, consistent with the corresponding provision of the MLETR, the chapeau should specify the provisions to which it applied (i.e. articles 12, 14, 15 and 17). In response, it was observed that this departed from the approach that the Working Group had agreed to take in formulating the functional equivalence rules in chapter 4 (see para. 84 above) and the suggestion was not taken up. It was nevertheless acknowledged that the chapeau was unusually drafted and the secretariat was invited to consider revising the text to delete "for the purposes of this chapter" and to reference to the method referred to "in this chapter".

M. Chapter 5. Final clauses

1. General remarks

100. The Working Group agreed to retain the final clauses in articles 19, 20, 23, 25 and 26 without amendment. The Working Group heard a suggestion to allow States Parties to make a reservation with respect to the provisions of chapter 4, citing a concern that States which had enacted the MLETR might otherwise be unwilling to join the convention. In response, it was noted that such an option risked undermining harmonization efforts given the importance of chapter 4 to the convention regime. In any event, it was added, the option was unnecessary as chapter 4 had been carefully developed to ensure consistency with the MLETR. Nevertheless, it was observed that the suggestion was a reminder that chapter 4 did not serve as a complete law for the use of eNCDs (see para. 83 above).

101. There was a suggestion to incorporate the equivalence of article 16 of the MLETR to provide for amendment of electronic records. This suggestion was not taken up.

2. Article 21. Participation by regional economic integration organizations

102. A suggestion was made to replace the term "sovereign States" with "States" in paragraph 1. Another suggestion was to delete paragraph 3 and to use a neutral term such as participants. In response, it was explained that article 21 represented a standard REIO clause in international treaties. The secretariat was requested to consult with the Treaty Section of the Office of Legal Affairs of the United Nations on the suggestion.

3. Article 22. Non-unified legal systems

103. The Working Group took up a suggestion to delete paragraph 5 on the basis that the text did not refer to “the law of the State”.

4. Article 24. Entry into force

104. The Working Group agreed to remove the square brackets in paragraphs 1 and 2 and thus to retain the requirement for three States to ratify the convention to bring it into force. It was noted that a relatively low threshold for entry into force was consistent with recent UNCITRAL practice. Reference was made to the United Nations Convention on the International Effects of Judicial Sales of Ships (2022)[13] and the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018).[14] It was explained that a higher threshold applied for the Rotterdam Rules because it governed transport contracts for which international treaty regimes already existed. It was added that entry into force of the Rotterdam Rules had the effect of withdrawing a State Party from those other regimes such as the Hague Rules and the Hamburg Rules. The purpose of the NCD convention was recalled, noting that there was no specific reason to restrict interested States from applying it.

105. Support was expressed for deleting paragraph 3. It was explained that, logically, NCDs would only exist after entry into force of the convention because they were new type of documents to be created under the convention.

106. Nevertheless, the Working Group considered whether, by the same logic, it was not possible for an NCD to be issued in a non-State Party, as this had implications for the scope of application of the convention. It was recalled that, by virtue of article 1(1)(b), the convention would apply to an NCD issued in a non-State Party provided that the place of delivery of the goods was located in a State Party.

V. Next steps

107. The Working Group requested the secretariat to revise the draft convention to reflect its deliberations and decisions and to transmit the revised draft to the Commission for consideration and possible approval at its fifty-eighth session. The Working Group also requested the secretariat to circulate the revised draft to all Governments and relevant international organizations for comment, and to compile the comments received for the consideration of the Commission. The Working Group also requested the secretariat to prepare an explanatory note on the draft convention for consideration at its next session.

[13] General Assembly resolution 77/100, annex.

[14] United Nations, *Treaty Series*, vol. 3360, No. 56376.