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*Session 4. Transforming Supply Chains: The Impact of Negotiable Cargo Documents on Multimodal Transport*

## Implications of the draft Convention on Negotiable Cargo Documents for future Multimodal Transport

- Potential practical and legal challenges

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## Recap: Aim and Scope of the Draft Convention on Negotiable Cargo Documents (NCDs)

- 2019: Proposal on UNCITRAL work towards '*development of a negotiable transport document to facilitate multimodal carriage of goods*', particularly by railway in Euro-Asian space
- Since 2022: [UNCITRAL WG VI](#) work towards a **new legal instrument on '*Negotiable Multimodal Transport Documents*'** (later renamed '***Negotiable Cargo Documents***')
- Aims to address expanding **needs of financing** in international trade by establishing legal recognition of negotiable [MT] transport documents (and electronic records) as **transferable documents of title**, similar to **negotiable marine/ocean bills of lading (b/l)** enabling performance of sale of goods in transit and providing independent documentary security
  - But in contrast to the b/l, the NCD is not a transport document. It is an entirely new type of document, conceptually distinct from the (unimodal/multimodal) transport document which 'evidences or contains the transport contract' (Art. 2 (5) and (7))
- **Novel approach, differs from existing international transport conventions which all establish mandatory cargo liability regimes:** draft Convention regulates the NCD as a 'document of title' (& assignment of rights to holder) and as a 'receipt', but does not regulate the underlying **transport contract** (unimodal/multimodal), or the **liability of the carrier** (Art. 1(1))



## Why addressing implications for liability could be critical to making the use of NCDs commercially viable

- Important to also consider and address **potential implications for liability issues:**
  - **no international mandatory liability regime is in force for MT** to protect the rights of cargo claimants (see also [UNCTAD, 2003a](#))
- If, as intended, the new legal instrument (once in force), would ensure full legal recognition of [multimodal transport] NCDs (and electronic equivalents) as negotiable documents of title
  - these documents **could be traded/used for sale of goods in transit** (string sales, CIF), similar to negotiable b/l's, **with the buyer bearing the risk of loss of or damage to the goods in transit** and left to seek redress, if any, from the carrier/MTO in a cargo claim
  - **important to ensure that a final consignee in any cargo claim against the multimodal transport operator would be protected by mandatory minimum standards of carrier liability**, as is the case for claims under a negotiable b/l (Hague, Visby and Hamburg Rules)

This is critical for **SMEs**, especially in developing countries, but also for other potential cargo claimants, e.g. **subrogated cargo insurers, banks** who may need to realize their security, or any **seller/intermediate trader who remains unpaid**.



## Why addressing implications for liability could be critical to making the use of NCDs commercially viable

- **UNCTAD/ICC Rules for MT Documents** may continue to be used (see e.g. [FIATA FBL](#)), but are contractual in nature (do not override conflicting terms)
- In the absence of mandatory minimum standards of liability a MTO/carrier would be free to **exclude or limit its liability unilaterally** as part of its standard contract terms, except in cases where:
  - (a) the loss in question can be attributed to a particular stage of the transport (localized) **and** a mandatory unimodal cargo liability regime is applicable; or
  - (b) a national mandatory multimodal liability regime is applicable
- In cases where loss cannot be localized and no national mandatory liability regime is applicable **a cargo claimant could be effectively left empty handed.**
- This would **undermine a key objective of the NCD convention**: to enable the sale of goods in transit and raising of finance against the security inherent in a document of title and facilitate trade MT.
- Why would anyone accept (and pay against) a document under a sale contract, or as a security/collateral if they may end up without either the goods or a residual right of effective redress against a carrier?
- To ensure the NCD accords with **commercial needs** and provides the holder with **actual documentary security**, some provision needs to be made to ensure **minimum standards of cargo liability**



## Potential approach to address the concerns

A possible **stop-gap solution** that could address the abovementioned concerns may be to include a new provision in the draft convention, potentially at the end of or after Art. 1(3), to **provide for the statutory application of the UNCTAD/ICC Rules on Multimodal Transport Documents, as a fall-back, in cases where no international or national liability regime applies.**

This could be along the following lines:

*In cases where no relevant [mandatory] international convention or national law is applicable to govern the rights and obligations of the transport operator, consignor and consignee and their liability, the obligations and liability of the transport operator under the transport contract shall in no event be less than as provided for in the UNCTAD/ICC Rules on Multimodal Transport Documents, irrespective of whether the UNCTAD/ICC Rules on Multimodal Transport Document have been effectively incorporated into the transport contract. Any terms of the transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the transport operator shall be null and void and of no effect.*

**Art. 4(1) of the draft convention could be amended to include a clause e.g. sub-section (k) to ensure that the NCD includes: an express reference to [the above-mentioned provision]**

# Thank you

