Submission by The Baltic and International Maritime Council (BIMCO), the International Group of Protection & Indemnity Clubs (IGP&I) and the International Chamber of Shipping (ICS), the 'Submitting Parties' to the 46th Session of Working Group VI (Negotiable Cargo Documents)

A. INTRODUCTION

1. The Submitting Parties understand that, as there was insufficient time at the last Session to discuss the scope of application of the new instrument, delegates were invited to consult with domestic maritime industry. Taking this opportunity, the Submitting Parties, who represent a broad cross-section of interests in maritime carriage of goods[1], seek to address concerns relating to the current scope of application and highlight provisions of the draft instrument on Negotiable Cargo Documents (NCDs) that are incompatible or create confusion with the existing legal framework associated with maritime bills of lading.
2. The Submitting Parties acknowledge the significant value of developing an instrument which allows for negotiable documents in land carriage. Unlike the maritime sector, which has used negotiable bills of lading with near universal recognition and acceptance for centuries, there is no equivalent for land carriage. It is equally important to clarify the position with respect to through transport documents which cover both sea and land legs to ensure that the land legs can be the subject of negotiation/financing.
3. Given that it is estimated that over 80% of the volume of international trade in goods is carried by sea[2], it is however imperative that this is done without disturbing the well settled and well understood legal framework associated with maritime bills of lading.

B. ARTICLE 1

1. Article 1 of the draft instrument [set out below], ensures that the new instrument does not impact the application of other international conventions or national laws that may apply to the carriage.

   "*Article 1…*
   2. This Convention does not affect the application of any international convention or national law relating to the regulation and control of transport operations.
   3. Other than as explicitly provided for in this Convention, this Convention does not modify the rights and obligations of the transport operator, consignor and consignee and their liability under applicable international conventions or national law."

2. While there are of course international conventions concerning the carriage of goods, there is no international convention which provides for the negotiability of maritime bills of lading, and which ensures uniformity across maritime jurisdictions. However, national laws are such that jurisdictions broadly treat negotiable maritime bills of lading in the same manner.

3. As a result, while Article 1 preserves the applicability of conventions and national laws, it does not protect against the risks in case of *conflict* between the new instrument and international conventions/national laws that may apply to negotiable maritime bills of lading. In addition, Article 1.3 does not deal with how the liability of the Transport Operator will be dealt with for any new rights and obligations which are created under the Convention.

4. In terms of a potential conflict with international conventions, looking at Article 3 of the Hague Visby Rules (HVR) and Article 6 of the new instrument, it would appear that the formulation of the carrier's rights with respect to information contained in the transport document has been reversed:

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[1] See About the Submitters section at the end of this Submission.

[2] It is estimated (UNCTAD Review of Maritime Transport 2021)

(a) Under Article 3 of HVR, the carrier is not required to include in the bill of lading any information which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has no means of checking.
(b) Under Article 6 of the new instrument, a transport operator can qualify information "*as furnished by the consignor and contained in the negotiable cargo document…*" to indicate that he does not assume responsibility for it.
(c) This type of inconsistency has the potential for disputes in what is otherwise settled practice in the maritime sector.

C. **ARTICLE 3.1**

1. The new instrument envisages in Article 3.1 that the transport operator and the consignor may agree to issue an NCD at a later stage and not when the goods are taken in charge by the transport operator. The issuance of an NCD at a later stage would be possible through an annotation entered and signed by the transport operator into an existing type of transport document, including a maritime bill of lading.

2. The Submitting Parties understand that during the discussions at the 45th session of Working Group VI, it was explained by the Secretariat that this provision is intended to deal with situations where the consignor and the transport operator agree to switch between different modes of transport in case of need. However, a number of practical and legal difficulties arise from this proposal as highlighted in the below example:
   (a) A consignor and a transport operator conclude a transport contract, and the mode of transport is carriage by sea.
   (b) The transport operator enters into a contract of carriage with a maritime carrier. After the loading is completed, the maritime carrier issues a negotiable maritime BL, evidencing the contract of carriage and the ship embarks on her voyage.
   (c) While on course of the voyage, the transport operator and the consignor agree to switch the mode of transport due to potential security threats alongside the route.
   (d) Is it the intention that, under Article 3.2, the **maritime BL** (rather than the transport contract identified in sub-paragraph (a) above) will be annotated so as to serve as an NCD? If so, it raises certain concerns as follows:
      a. When does this annotation take place and is the consent of the shipowner required?
      b. Any transshipment prior to the named port of delivery is likely to require a deviation. This may raise issues for the shipowner under other contracts (e.g. a charterparty contract that may not permit such deviation or cover the costs incurred therefrom) and also in respect of its P&I insurance cover. Delivery of a cargo at a port other than that named in the negotiable maritime BL leaves the shipowner carrier exposed to a potential mis-delivery claim.
      c. If the negotiable maritime BL is annotated so it then serves as an NCD a number of potential problems arise:
         (i) the maritime BL ordinarily contains a contract of carriage for transporting goods by sea, it will not address issues raised by road or rail carriage.
         (ii) the original contract of carriage is between the maritime carrier (e.g the shipowner) and the shipper (e.g. the transport operator in this scenario). It is therefore unclear how a maritime BL could be transformed into an NCD by virtue of an agreement between the transport operator and the consignor (e.g. a non-party to the maritime BL). Would a novation of the contract be required with the new road or rail carrier assuming the rights and obligations of the shipowner?
         (iii) If the existing contract of carriage is novated how would the terms of a maritime BL and the underlying liability regime apply to the road or rail carriage context?

D. **ARTICLE 9 & CONFLICT OF LAWS**

1. From an English law point of view, there is a potential conflict between Article 9 of the draft instrument and Section 3 of the Carriage of Goods by Sea Act 1992. While English law is only one of a number of relevant jurisdictions, it is a critical one due to the prominence of English law and bills of lading subject thereto in international carriage and trade law. For example, the majority of bulker bills of lading are subject to English law and, of the top 10 container lines, 4 use English law to govern their bills of lading (excluding transit to and from the US). The issue can be summarised as follows:
2. Under Article 9 of the new instrument, a holder that is not a consignor and that exercises the "*right of disposal*" assumes any liability that may arise "*in connection with the exercise of that right under the transport contract*".
3. Under Section 3(1) of COGSA 1992, a person who "*takes or demands delivery from the carrier of any of the goods to which the document relates*" or "*makes a claim under the contract of carriage against the carrier in respect of any of those goods*" becomes "*subject to the same liabilities under that contract as if he had been a party to that contract*."
4. COGSA 1992 is therefore broader than the new instrument in 2 ways: (i) the trigger for becoming subject to liabilities (demanding/taking delivery and making a claim); and (ii) the scope of the liabilities to which the holder is exposed (as if the holder was an original party vs the new instrument which limits liabilities to just the costs of disposal).
5. Also, legislation on bills of lading (at least until the Rotterdam Rules come into effect), does not recognise the concept of a right of disposal - which is a much broader right than rights granted to bill of lading holders under settled law.
6. If there was a dispute involving loss on a sea leg of an NCD, would an English court seized with a dispute under the NCD consider this title document as a bill of lading? If so, would the holder, for example, be subject to liability for freight because he has brought a claim under the bill (COGSA rules) or not (under the new instrument the liability would not arise by virtue of simply bringing a claim).
7. Critically, under the new instrument, the liabilities that pass to the holder are limited to those in connection with the right of disposal. This means that liabilities for dangerous cargo would not, for example, pass to a holder of an NCD who brings a claim against a carrier. This would be a major departure from settled law on maritime bills of lading.
8. A worked example of a potential conflict is set out below:
   (a) A multimodal bill of lading (BL) is issued which specifies that it is subject to the NCD Convention and is governed by English law. The carriage includes a sea leg.
   (b) The cargo causes an explosion, and the resulting litigation is heard in the courts of a state which has ratified the NCD Convention.
   (c) The holder of the BL/NCD brings a claim against the carrier for loss.
      (i) Pursuant to the NCD Convention, the holder has not exercised a right of disposal and is therefore not subject to liabilities under the NCD.
      (ii) Pursuant to COGSA 1992, under English law, the holder of a BL who brings a claim against the carrier also becomes subject to the liabilities under the BL.
      (iii) This conflict creates uncertainty which in what is otherwise well settled law.

E. **PROPOSAL**

1. The Working Group may find drafting solutions to issues and examples explored above. The concern, however, is much broader: identifying each and every occasion where the rights and obligations of parties under national law applicable to a negotiable maritime bill of lading may differ to those set out in the new instrument would take time. In addition, stakeholders handling negotiable documents associated with sea transport are well versed in the rights and obligations of the parties and the allocation of risks between them. Insurers have the benefit of centuries of experience to manage risk.

2. Uniformity is essential for global trade, and, in particular, the shipping industry, as it ensures predictability, efficiency and legal certainty across jurisdictions. And this sort of certainty allows insurers to insure risks across borders. However, if the proposed new instrument on NCDs extends to maritime transport, it risks having the opposite effect by introducing inconsistencies and increasing uncertainties for the parties involved. If the maritime community and in particular insurers, cannot be made comfortable with the risks associated with an NCD, it may limit their willingness to insure liabilities arising from the use of NCDs for maritime transport. This will have an impact in turn on shipowners' agreements to issue such bills, thereby disrupting centuries-old trade practices in this sector.
3. To avoid this, the Submitters propose that the maritime leg is carved out from the NCD such that the new instrument applies to the non-sea legs of any transport and existing, well understood maritime law applies to the sea leg. i.e. one document which has distinct phases. Multimodal bills of lading are commonly issued for carriage partly by sea and partly by other means and the need is for the non-sea legs of these bills of lading to be negotiable. This proposal ensures that:
   (a) The sea leg continues to be subject to existing rights and obligations which are well understood and universally accepted (conversely, if NCDs are used instead of bills of lading for maritime transport, there is a risk that they will not be recognised by non-contracting states; this potential risk may limit the willingness of trade participants, and their insurers, to allow the use of NCDs for any transport which includes a maritime leg).
   (b) The new instrument ensures the negotiability of land transport, where there is no risk of conflict with existing legislation/practice.
   (c) A bank can finance the combined document, NCD for the land leg and bill of lading for the sea leg, thereby taking security for the entire period of the carriage.

About the Submitters:

The Baltic and International Maritime Council (BIMCO)

As background information, BIMCO members cover 62% of the world's tonnage and consist of local, global, small, and large companies. We are an organisation and global shipping community of over 2,000 members in 130 countries. From our offices in Athens, Brussels, Copenhagen, Houston, London, Shanghai and Singapore we aim to help build a resilient industry in a sustainable future whilst protecting world trade. We do this by finding practical solutions for our members to help them manage risk in a changing world.

The International Group of Protection & Indemnity Clubs (IGP&I)

As background information, the International Group of P&I Clubs comprises 12 mutual P&I Clubs that provide third party liability (P&I) cover relating to the use and operation of ships, including for cargo loss and damage. Collectively, the IG Clubs provide P&I cover to approximately 90% of the world's ocean-going tonnage.

International Chamber of Shipping (ICS)

As background information, the International Chamber of Shipping is the global trade association representing national shipowners' associations from Asia, Africa, the Americas and Europe and more than 80% of the world merchant fleet.