

# Application of the NCD Convention to maximise benefits to users and value in international trade

Submission by FIATA and GSF to UNCITRAL WG VI for consideration at its 46<sup>th</sup> session to be held on 17-21 March 2025, New York

## 1. Introduction

- 1.1. FIATA (International Federation of Freight Forwarders Associations) and GSF (Global Shippers Forum) make the following submission for consideration by the UNCITRAL Working Group VI (Negotiable Cargo Documents) at its forty-sixth session to be held on 17-21 March 2025 in New York. FIATA and GSF represent key global constituencies in respect of the draft NCD Convention, bringing the perspectives of shippers, freight forwarders and logistics providers worldwide. This submission is made following consultation with the international banking community, in the context of recent uncertainty noted amongst certain actors as to the necessary scope and applicability of the Convention, and builds on the previous submissions made by FIATA and GSF ([A/CN.9/WG.VI/WP.109](#) and [A/CN.9/WG.VI/WP.111](#)) to the Working Group at its forty-fifth session.
- 1.2. FIATA and GSF remind the Working Group that the original purpose and role of the NCD Convention is to facilitate and strengthen international trade by providing a legal framework that, upon their agreement, establishes in law the rights and obligations of the parties to a sale of goods made using either unimodal or multimodal negotiable transport documents. As such, the draft Convention is constructed as a facilitating instrument intended to provide confidence, certainty and enforceability in transactions where the parties willingly decide to make use of its provisions. It does not seek to supplant, contradict or conflate existing laws, nor does it impose any new standing obligations on any parties in the transaction or shipment.
- 1.3. In a global trading environment undergoing extraordinary changes and subject to increasingly severe and enduring disruption, freight forwarders, shippers and traders require flexibility and agility to facilitate trade and provide legal certainty. The international sale of goods and related logistics span every geographic region on the globe, requiring complex planning and the flexibility to modify those plans en route. The NCD Convention will support the essential role of freight forwarders, shippers and trade financing institutions in meeting global needs in today's ever-changing supply chains. It will provide freight forwarders, shippers and banks with the ability to opt for the NCD solution to organise multimodal end-to-end or unimodal transportation as the circumstances require. It is therefore critical that the new draft Convention has the possibility to cover all modes of transport.
- 1.4. In addition, the draft Convention's focus on providing clear recognition for negotiable documents in both paper and electronic form in the multimodal context will offer significant legal certainty and clarity for banks to provide financing for trade transactions worldwide, filling a clear existing legal gap. This will greatly facilitate trade by providing access to trade finance for companies engaged in international trade around the world and will be a key driver for innovation and digital trade.

## 2. Scope of the Convention in the multimodal context

2.1. Since the beginning of its work on the draft Convention, the Working Group has continued to focus on ensuring that the Convention does not impact existing transport liability regimes, with the focus being solely on negotiability. This is reflected in the draft Article 1(2) and (3), which state:

*Article 1. Scope of application*

[...]

*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.*

2.2. These provisions therefore deal with possible conflicts between conventions, stating that the Convention does not affect the application of other Conventions and national legal regimes, nor does it impact the rights and obligations afforded under such conventions. As such, the draft Convention is constructed as a facilitating instrument intended to provide confidence and certainty in transactions where the parties willingly decide to make use of its provisions.

2.3. Such approach is consistent with the “dual track” approach currently used in relation to multimodal transport documents such as the FIATA Multimodal Transport Bill of Lading (FBL). Under such approach, the multimodal transport document is issued by a freight forwarder in respect of its shipper client to cover the whole transportation journey. Meanwhile, the forwarder is mandated by its shipper client to take responsibility for the organisation of the transportation from origin to destination. The forwarder then acts as the “shipper” vis-à-vis the actual carriers, providing full-load or consolidated shipments and ensuring compliance with any necessary transportation documentation requirements under the relevant laws and regulations for the various modes of transport. This significantly facilitates trade in today’s increasingly complex supply chains, and allows micro-, small- and medium-sized enterprises (MSME) to access global supply chains at more competitive rates.

## 3. “Opt-in” nature of the Convention and respect for party autonomy

3.1. The application of the draft Convention is predicated on an ‘opt-in’ approach which makes application of its provisions entirely voluntary between the parties, in line with the principles of party autonomy. The Convention would apply only where the parties (the transport operator and the consignee) so expressly declare by agreeing to endorsement of applicable documents as being subject to the NCD Convention.

3.2. Such ‘opt-in’ approach is confirmed by the following existing provisions of the draft Convention:

- a. the opt-in nature of the Convention in Art. 3(1);
- b. the need for the transport operator to sign and issue the document as an NCD upon agreement with the consignor (Art. 2(4). Arts. 3(1)-(5)).

3.3. The draft NCD Convention does not require a shipping line or any other transport operator to issue documents subject to the Convention. Transport operators issuing negotiable documents may decline to sign and issue them as an NCD under Article 3 and may even make this a condition of issuance in their standard terms and conditions if they so choose.

3.4. If these clauses are considered to be ambiguous or in conflict with existing law, then the remedy should be to strengthen the wording of the draft Convention to make the expressed intent of the users decisive in determining when the Convention is meant to apply.

#### 4. Legal certainty for paper and electronic documents of title in international trade

5. FIATA and GSF consider that the draft NCD Convention would fill an important existing legal gap. The current legal landscape regarding negotiable transport documents remains fragmented, with heavy reliance on national legal frameworks that often do not have specific detailed provisions on negotiability and documents of title. This can bring challenges when seeking trade finance, as there may be less certainty for banks. Any exclusion as regards a specific mode of transport in the NCD Convention will simply cause more confusion regarding the applicable law and will pose challenges for trade finance and the ability for the commercial parties to control their rights over the goods.
6. In addition, the electronic provisions of the NCD Convention will be an important driver for digital trade, by providing legal certainty for the use of electronic title records for all modes of transport. Such provisions are based on the UN Model Law on Electronic Transferrable Records (MLETR) and therefore are expected to greatly accelerate the move to a more harmonised legal framework for the recognition of electronic transport documents. Such harmonised legal framework in the digital landscape does not currently exist today either in the unimodal or in the multimodal context, and it is important that all modes of transport are included to prevent further confusion which can hinder digital trade. The NCD Convention by its nature therefore provides opportunities for innovation in the logistics and banking sectors and promotes greater facilitation through a clear framework that support paper and electronic documents of title.
7. Any permanent carve-out of any mode of transport – including maritime – would stifle such innovation and prevent the NCD Convention from fulfilling its intended purpose. Initial precautionary approaches taken by insurers in relation to the pricing of risks related to NCDs issued under the Convention will be reflected in the premiums that are charged for policies against loss, damage or mis-delivery. Indeed, with the greater legal certainty as to enforceability provided by the convention, it can be expected that some trade insurance providers may well conclude that their insured risks on negotiable transport documents have been reduced. Not every insurer will be a maritime P&I Club and the efforts of established interests to exclude innovation from their market and protect established practices should not be enshrined permanently in an international convention. Confidence of insurers can reasonably be expected to improve with claims experience, and hesitation by incumbent providers is likely to diminish over time, especially if new providers enter the market, perhaps in regions where the risks are more easily priced or legal regimes clearer. The emergence of innovative and competitive products should not be prevented by incumbent providers inserting a permanent exclusion in the Convention to protect established practices.

#### Conclusion

8. FIATA and GSF therefore oppose the proposals made to the Working Group as regards the exclusion of maritime transport, or the exclusion of negotiable cargo documents subject to existing applicable law. They also oppose the suggestion that the draft Convention should apply only to the non-maritime portions of intermodal movements with a sea leg. Art. 1(2) and (3) already provide clarity that the NCD Convention will not impact any other applicable law, and these clauses should be strengthened if not considered sufficient. Should further exclusions be introduced as proposed, this would remove from the scope of the Convention many documents that require the legal certainty of the NCD Convention. It may also cause confusion as to the scope of such an exclusion, which would become a threshold issue for a court to decide in any claim where the convention would otherwise apply. This is particularly the case today in multimodal

transport situations where there is a partial sea leg. In such situations, there remains a lack of clarity as to the legal treatment of purportedly negotiable documents under maritime and potentially other applicable international and regional conventions, with such decisions often being left to the courts to sort out.

9. FIATA and GSF consider that the NCD Convention can play a critical role in facilitating trade, transport and trade financing, particularly noting the importance of multimodality in today's disrupted times. In its current form, it provides a framework that ensures greater legal clarity regarding negotiable transport documents in both paper and electronic form and will be an incentive for further innovation in the industry. Any substantiated risks of ambiguity can be remedied by further strengthening the language in the draft Convention, rather than limiting its applicability, so that it can be presented to UNCITRAL for approval at its upcoming session in July of this year.