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**United Nations Commission on
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Draft provisions for a new instrument on negotiable cargo documents

Submission from the International Chamber of Commerce Global Banking Commission

Note by the Secretariat

The present note contains a submission received on 29 November 2024 from the International Chamber of Commerce Global Banking Commission in preparation for the forty-fifth session of Working Group VI. The submission is reproduced as an annex to the present note in the form in which it was received by the Secretariat.

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Annex

Introduction

1. At the forty-fourth session (“session”) of UNCITRAL Working Group VI (the “Working Group”) on Negotiable Cargo Documents held in New York from 6 –10 May 2023, ICC (International Chamber of Commerce) representatives made interventions to propose the consideration of banking practice in relation to the provisions in the negotiable cargo documents in the draft instrument, and we appreciate the favourable considerations by the Working Group so far. This proposal is intended for the Working Group’s consideration at its forty-fifth session to be held in Vienna in 9-13 December 2024.

1. Definition of transport operator

2. It is suggested to clarify the definition of transport operator as to its capacity in issuing NCD, especially in the case of multimodal transport document. Articles 3 and 4 do not contain the rules regarding the method of signing, i.e., whether the transport operator signs as the carrier or agent for the carrier. In Article 2, the definition of “Negotiable cargo document” indicates that such document is signed and issued by the transport operator without indicating the capacity of transport operator as well.

3. In the ‘Fact sheet: UNCITRAL project on negotiable cargo documents’(for Forty-fifth session Vienna, 9–13 December 2024), it indicates that ‘The Working Group currently envisages that any transport operator acting as a contractual carrier could issue a negotiable cargo document or negotiable electronic cargo record, irrespective of whether or not that person performs the carriage itself....For the avoidance of doubt, freight forwarders acting merely as agents (not as contractual carriers) cannot issue negotiable cargo documents or negotiable electronic cargo records.’ However, the explanation as to “freight forwarders acting merely as agents (not as contractual carriers) cannot issue” could be misleading.

4. In letter of credit practice, ICC UCP 600 rules require the issuer to identify its capacity in various transport documents, and banks are not required to determine the identity of the issuer of the transport documents by examining the transport contract between the shipper and the transport operator, or the transport agent service agreement between the carrier and the freight forwarder/multimodal transport operator. However, freight forwarders¹ are allowed to issue transport documents as agent for a named carrier.

5. ICC UCP 600 sub-article 20 (a) (v) indicates “Contents of terms and conditions of carriage will not be examined”, and ICC’s numerous official opinions have reaffirmed that this will include an examination of those terms and conditions (to determine the name of the carrier).

6. UNCTAD/ICC Rules for Multimodal Transport Documents Rule Article 2.2. defines multimodal transport operator as “any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.”

7. In addition, the Working Group is requested to be aware of the current ICC UCP600 rules² which has deleted the multimodal transport operator as the issuer of

¹ UCP 600 Article 14 I. A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.

² UCP600 Article 19 (Transport Document Covering at Least Two Different Modes of Transport) : “a. A transport document covering at least two different modes of transport (multimodal or combined transport document), however named, must appear to **indicate the name of the carrier and be signed by:**

- the carrier or a named agent for or on behalf of the carrier, or
- the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent. Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.”

the multimodal transport document as stated in UCP500³. The reason for such deletion is a reflection of practice⁴. In other words, a multimodal transport document bearing “signed as multimodal transport operator” only is considered discrepant under UCP600.

2. Rights of the holder

8. We request the Working Group the consideration of deleting the condition of “the transport operator is in possession of the goods” in Article 7 paragraph 3, which states that “The issuance and transfer of the negotiable cargo document or negotiable electronic cargo record to the holder shall have the same effect, for the purpose of acquisition of rights to the goods, as a physical handing over of the goods, provided that the transport operator is in possession of the goods.”

9. The condition that “the transport operator is in possession of the goods” will impose additional burden on the holder to verify that the transport operator is in possession of the goods, which in practice is usually infeasible for the holder especially when the holder is a bank providing financing only.

3. Cargo pledge bond

10. We appreciate the approach of suggesting the addition of a new provision on cargo pledge bond (CPB) in addressing the concerns of some exiting conventions. However, we request the Working Group to consider the feasibility of such suggestion due to following reasons:

(1) Practice of taking collateral in trade finance

11. In practice, the transport operator signs the transport contract with the consignor (depending on the INCOTERMS, the exporter under C and D terms or importer under E and F terms), and the bank signs a financing agreement with the borrower.

12. When considering transferable transport documents as collateral in trade financing business, banks first need to consider whether the transport documents are negotiable or not by law. If the transport operator is unwilling to issue a NCD, the bank will not be able to sign any pledge agreement with the borrower due to the lack of negotiable transport documents. If the shipment of goods are arranged by the exporter, the importer has no right to interfere with the transport contract between the exporter and the transport operator, unless the exporter and importer agree in advance in their sales contract that the exporter authorizes the transport operator to issue a CPB creating a security right in the goods to facilitate the importer's financing demands. Otherwise, the transport operator will not have the right to do so, nor can it accept the request of third parties (including banks or importers) to create a security right in the exporter's goods and issue a CPB. Even if the importer arranges shipment of goods, the ownership of the goods belongs to the exporter before payment is made,

³ UCP500 Article 26 (Multimodal Transport Document): “a. If a Credit calls for a transport document covering at least two different modes of transport (multimodal transport), banks will, unless otherwise stipulated in the Credit, accept a document, however named, which appears on its face to indicate the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by:

- the carrier or multimodal transport operator or a named agent for or on behalf of the carrier or multimodal transport operator, or
- the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier, multimodal transport operator or master must be identified as carrier, multimodal transport operator or master, as the case may be. An agent signing or authenticating for the carrier, multimodal transport operator or master must also indicate the name and the capacity of the party, i.e. carrier, multimodal transport operator or master, **on whose behalf that agent is acting...**”

⁴ Commentary on UCP 600, ICC Publication NO.680 explains the deletion of “multimodal transport operator” as follows: “It should be noted under this sub-article that the document may no longer be signed in the capacity of multimodal transport operator. In discussions with the ICC Transport Commission it was determined that in most cases it is a carrier or agent that signs this type of document; a party signing as “Multimodal Transport Operator” was seldom seen.”

and the importer has no right to authorize the transport operator to create a security right in the exporter's goods in the transport contract. In addition, banks in trade financing business basically rely on negotiable documents as security of goods to mitigate the borrower's credit risks. In the absence of such negotiable transport documents, there is no basis for the bank to have security right over the goods relying solely on CPB, which is just a guarantee document, and the local law applicable may not support it as a security right.

13. In addition, the importer or exporter generally does not wish to disturb the counterparty to obtain its support for their financing applications, which may have negative impacts on their credit standing.

14. The willingness of the transport operator to issue such CPB is also doubtful since most corporates are very cautious in issuing guarantee documents and have to follow strict and long procedures, which will not satisfy the efficiency requirements in trade financing demands. If the transport operator is SME, banks will hardly accept the CPB issued by such SME transport operator.

(2) The liabilities of the transport operator in issuing a cargo pledge bond

15. The definition of "cargo pledge bond" only mentions that it evidences the creation of a security right in the goods covered by the transport contract to the benefit of the holder of the CPB, but it does not indicate the liabilities of the transport operation towards the holder of the CPB when releasing cargo without receiving the CPB.

(3) The nature of cargo pledge bond

16. It is unclear whether the CPB is an independent or dependent guarantee document.

17. We wish to draw the Working Group's attention of ICC URDG 758 (Uniform Rules for Demand Guarantee). In the case of an accessory bond (or suretyship bond), the rights of the pledgee may be adversely impacted.

18. In summary, we do not recommend the addition of CPB provisions in the draft convention so as to avoid it becoming practically useless due to its feasibility problems in practice.
