United Nations A/CN.9/1170

General Assembly

Distr.: General
17 May 2024

Original: English

United Nations Commission on International Trade Law
Fifty-seventh session
New York, 24 June–12 July 2024

Report of Working Group VI (Negotiable Cargo Documents) on the work of its forty-fourth session (New York, 6–10 May 2024)

Contents

		Page
I.	Introduction	2
II.	Organization of the session	2
III.	Deliberations	3
IV.	Future instrument on negotiable cargo documents	3
	Preliminary draft provisions for an instrument on negotiable cargo documents	3
	1. Draft Article 8. Channel of communication	3
	2. Draft Article 9. Liability of holder	4
	3. Draft Article 10. Delivery of the goods	5
	4. Draft Article 11. Transfer of rights under a negotiable cargo document	6
	5. Draft Article 12. Legal recognition of a negotiable electronic cargo record	8
	6. Draft Article 13. Conditions for use of a negotiable electronic cargo record	8
	7. Draft Article 14. Reliability requirements of negotiable electronic cargo records	10
	8. Draft Article 15. Transfer of rights under a negotiable electronic cargo record	10
	9. Draft Article 16. Endorsement	10
	10. Draft Article 17. Replacement of a negotiable cargo document with a negotiable electronic cargo record and vice versa	11
	11. Draft Article 2. Definitions	12
	12. Draft Article 3. Issuance of a negotiable cargo document	14
	13. Draft Article 4. Content of the negotiable cargo document	16
	14. Draft Article 5. Deficiencies in the negotiable cargo document	17

V.24-08884 (E) 230524 240524

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] At its forty-first and forty-second sessions, the Working Group commenced its deliberations on the basis of a set of preliminary 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] At its forty-third session, the Working Group continued its deliberations on the basis of a revised set of preliminary draft provisions for an instrument on negotiable cargo documents prepared by the secretariat.

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-fourth session in New York from 6 to 10 May 2024.

4. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Brazil, Canada, China, Côte d'Ivoire, Dominican Republic, Finland, France, Germany, Ghana, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Kuwait, Malawi, Malaysia, Morocco, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, United States of America, Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Bolivia (Plurinational State of), Cambodia, Chad, El Salvador, Gabon, Myanmar, Oman, Pakistan, Paraguay, Philippines and Sri Lanka.

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

(a) *United Nations system*: International Civil Aviation Organization (ICAO) and United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP);

(b) *Intergovernmental organizations*: Intergovernmental Organisation for International Carriage by Rail (OTIF) and Organisation for Co-operation between Railways (OSJD);

(c) *International non-governmental organizations*: Center For International Legal Studies (CILS), China Council for the Promotion of International Trade (CCPIT), Comité Maritime International (CMI), Global Shippers Forum (GSF), Greater Caspian Association (GCA), International and Comparative Law Research Center (ICLRC), International Chamber of Commerce (ICC), International Federation of Freight Forwarders Associations (FIATA), International Union of Railways (UIC), New York City Bar Association (NYCBAR), New York State Bar Association (NYSBA), Shanghai International Arbitration Center (SHIAC, Shanghai International

[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.

Aviation Court of Arbitration) and the TT Club (Through Transport Mutual Services (UK) Ltd).

7. The Working Group elected the following officers:

Chair: Ms. Beate CZERWENKA (Germany)

Rapporteur: Ms. Nak Hee HYUN (Republic of Korea)

8. The Working Group had before it the following documents:

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.101);

(b) A note by the secretariat entitled "Fact sheet: UNCITRAL project on negotiable cargo documents" (A/CN.9/WG.VI/WP.102);

(c) A revised annotated set of preliminary draft provisions for an instrument on negotiable cargo documents (A/CN.9/WG.VI/WP.103); and

(d) A submission from the Government of Singapore containing a proposal on provisions relating to negotiable electronic cargo records (A/CN.9/WG.VI/WP.104).

9. 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

10. The Working Group continued its consideration of the topic on the basis of a Note by the Secretariat (A/CN.9/WG.VI/WP.103) containing a revised annotated set of preliminary draft provisions for an instrument 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

Preliminary draft provisions for an instrument on negotiable cargo documents (*continued*)

1. Draft Article 8. Channel of communication

11. The Working Group recalled its previous decision to avoid creating an obligation for the holder of a negotiable cargo document to provide information requested by the transport operator, on the basis that banks might not be in a position to provide such information (A/CN.9/1127, para. 88).

12. Support was expressed for revising the title of the provision to better reflect its contents, which did not focus on the channel of communication.

13. With a view to better reflecting the scope of the draft instrument, it was suggested that the first sentence should refer to information, instructions or documents that the transport operator needed to perform its obligations arising out of the negotiable cargo document, not the transport contract.

14. In respect of the second sentence, there was support for including a requirement for the transport operator to make reasonable efforts to seek information, instructions or documents from the holder of the negotiable cargo document. Reference was made to article 55 of the Rotterdam Rules. In response to a question regarding the necessity of that sentence, it was noted that it provided guidance on what the transport operator

could do in case the holder did not provide the requested information, by providing a safe harbour for carriers which, in the absence of specific information provided by the holder, relied on the delivery provisions set out in the transport contract. It was added that such a protection would be particularly helpful in the context of air transport when carriers often had limited time to perform its obligations. Another suggestion was made to replace the reference to "transport contract" with "the law applicable to the transport contract", noting the relevance of the existing transport conventions in this context. In response, it was explained that "transport contract" should be interpreted as including any special agreement between the parties and the law applicable to the transport contract.

15. Diverging views were expressed on the relationship between the draft instrument and existing conventions governing the carriage of goods, particularly in the context of draft article 7 concerning the rights of the holder of negotiable cargo documents. The importance of draft article 7 was emphasized since it explicitly provided that the holder would acquire all rights under the transport contract and any entitlement to such rights conferred upon the consignor or the consignee should extinguish. Concerns were, however, expressed that some existing transport conventions might not allow Contracting parties to derogate from the provisions of those conventions, including provisions relating to the rights of the consignor and the consignee. For example, it was noted that article 4, paragraph 1 of the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM Uniform Rules) provided very limited scope for derogation. In response, it was noted that limitations on the ability of Contracting parties to CIM-COTIF to modify the provisions of the CIM Uniform Rules by a subsequent agreement might not be the only angle to examine the assignment of rights under a railway consignment note. In that connection, a question was raised as to whether article 18 of the CIM Uniform Rules which provided that "[t]he consignor shall be entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders" might be interpreted as allowing some degree of party autonomy as to the assignment of rights. In the same vein, the question was asked as to whether the concept of "notify party" might work for rail transport.

16. Views were also expressed that the draft instrument intended to introduce a new type of document with its own autonomous regime, which did not interfere with the existing regime for transport documents under various transport conventions. In response, it was noted that the existing transport conventions governed not only the issuance and use of transport documents but also the transport contract. Nevertheless, the Working Group was reminded that draft article 1, paragraph 3, implicitly contemplated the possibility that the draft instrument might modify the rights and obligations of the transport operator, consignor and consignee and their liability under applicable international conventions or national law.

17. After discussion, the Working Group agreed to (i) revise the title of the provision to better reflect its contents, (ii) insert the phrase "under the Convention" after "transport contract" in the first sentence, and (iii) insert the phrase "after reasonable effort" in the second sentence.

2. Draft Article 9. Liability of holder

18. A query was raised regarding the phrase "solely by reason of being a holder of the negotiable cargo document". In response, it was explained that the phrase was intended to clarify that the holder did not exercise any right under draft article 7.

19. Turning to draft article 9, paragraph 2, views were expressed that the phrase "imposed on it under the transport contract" was unclear because the transport contract would not impose any liability on the holder of the negotiable cargo document. It was noted that reference should be made to the person entitled to exercise the right of disposal under the transport contract.

20. In response to the question of what rights might trigger liability in the context of draft article 9, paragraph 2, it was explained that exercising the right of disposal

referred to in draft article 7, paragraph 1, including the right to give instructions, would trigger liability. It was, however, noted that liability might be triggered in other circumstances such as when disclosure about dangerous goods was not made by the shipper.

21. A suggestion was made to delete the phrase "to the extent that such liabilities are incorporated in or ascertainable from the negotiable cargo document" in draft article 9, paragraph 2, on the grounds that if the holder gave instructions to the carrier it should know that such action would have consequences. It was noted that draft article 4, paragraph 1 did not contain any reference to liabilities. It was suggested that the transport operator should be obliged to provide a copy of the transport contract when requested by the holder. The Working Group was cautioned against deleting the phrase on the basis that it would be challenging for banks to know their potential liabilities and requiring banks to examine the transport contract and obtain legal opinion would significantly increase the transaction time and costs. The need to keep the negotiable cargo document short and simple was, however, emphasized, since banks would need to exercise due diligence in this context. It was added that the default rule under draft article 3, paragraph 2, was to upgrade the existing transport document into a negotiable cargo document. For instance, in case of a house bill of lading or of a negotiable multimodal transport document, all terms and conditions would typically be stated or incorporated by reference in that document.

22. After discussion, the Working Group agreed to delete the phrase "and this Convention" within square brackets in draft article 9, paragraph 1 because the draft new instrument did not impose any liability on the holder of a negotiable cargo document. The Working Group agreed to revise draft article 9, paragraph 2 along the lines of "A holder that is not the consignor and that exercises the right of disposal in accordance with article 7, paragraph 1 (b) under this Convention assumes any liability that may arise in connection with the exercise of that right under the transport contract".

3. Draft Article 10. Delivery of the goods

Paragraph 1

23. The need for the word "properly" was questioned given its ambiguity. In response, it was explained that such an expression, as in the case of article 47 of the Rotterdam Rules, referred to the identification in accordance with local rules at the place of delivery, which would typically require the presentation of certain official documents. If the word "properly" was deleted, the explanatory note should clarify that such deletion was not intended to change that substantive standard for identification of the holder.

24. Suggestions to specify who could demand delivery of the goods and to include a separate provision to explain the meaning of "duly endorsed" did not receive support. It was explained that draft article 7, paragraph 1 specified that the holder would have the right to demand delivery of the goods. Another suggestion to delete the explicit requirement for a holder to identify itself did not receive sufficient support.

25. Views were expressed that the phrase within the last set of square brackets might imply that the holder of a bearer document might not need to identify itself when demanding delivery of the goods. In response, it was emphasized that an explicit identification requirement for the holder of a negotiable cargo document made out to the order of a named person mirrored the maritime practice as reflected in article 47 of the Rotterdam Rules. In the case of a bearer document, it was noted that possession itself was the evidence of title in the goods and the carrier would not have sufficient information to verify the identity of the holder. Therefore, the draft instrument should not introduce a stricter rule.

26. The Working Group agreed to delete the word "properly" on the understanding that it was not intended to change the substantive standard to be applied for

identification of the holder as contained in article 47 of the Rotterdam Rules. The Working Group also agreed to retain the phrases in other sets of square brackets.

Paragraph 4

27. The Working Group agreed to delete the paragraph on the understanding that this issue was already addressed in draft articles 1, paragraphs 2 and 3.

4. Draft Article 11. Transfer of rights under a negotiable cargo document

Paragraph 1

28. The use of the verb "may" in the chapeau was questioned, as it seemed to suggest a mere permission for the holder, rather than the prescribed method for the transfer of rights.

29. Regarding subparagraph (a), the term "delivering" was questioned as some domestic laws also required the intention to transfer and the acceptance of transfer. It was pointed out that the definition of "transfer" in draft article 2 should be deleted as it was only linked to negotiable electronic cargo records.

30. Regarding subparagraph (b), a question was raised as to whether the term "the named person" was intended to refer to the named consignee. Another question was raised as to whether delivering the negotiable cargo document by the consignor to the consignee would be considered as the transfer of rights incorporated in the negotiable cargo document.

31. After discussion, the Working Group agreed to revise paragraph 1 along the following lines:

> "1. The holder transfers the rights incorporated in the negotiable cargo document by transferring it to another person:
>
> (a) Duly endorsed either to such person or in blank, if an order document; or
>
> (b) without endorsement, if: the negotiable cargo document is (i) made out to the order of a named person and the transfer is between the first holder and the named person; or (ii) a document made out to bearer or endorsed blank."

Paragraph 2

32. Several proposals have been put forward to revise paragraph 2. One suggestion was to replace the phrase "the person" with "the intended holder". Another suggestion was to revise the sentence to refer to a statement in the negotiable cargo document that more than one original had been issued. It was noted that the word "delivered" should be replaced with "transferred" because the latter implied physical delivery plus endorsement when necessary.

33. After discussion, the Working Group agreed to revise paragraph 2 along the lines of "[i]f the negotiable cargo document states that more than one original of a negotiable cargo document has been issued, all originals shall be transferred to the intended holder in order to effect a transfer of rights under a negotiable cargo document."

Paragraph 3

34. A suggestion was made to delete paragraph 3 on the basis that requiring the simultaneous transfer of the negotiable cargo document and the transport document might suggest an obligation to examine both documents, thus creating an additional burden for banks. It was explained that, in case of charter party bills of lading, banks were not required to examine the charter party contract. In response, it was noted that the provision promoted legal certainty for the holder of a negotiable cargo document, who might not always be a bank. The consignee, often as the last holder, would need to know the contents of the transport document in order to assess its rights, since

several key provisions for the consignee (such as jurisdiction clauses) were not required under draft article 4, paragraph 1 for inclusion in the negotiable cargo document.

35. A concern was raised that existing transport conventions required the original of the transport document to accompany the goods and therefore such original could not be transmitted with the negotiable cargo document. One possible solution was to require only a copy of the transport document to travel together with the negotiable cargo document.

36. A view was expressed in favour of including a cross reference to draft article 3, paragraph 3, considering that it imposed an obligation on the transport operator to acknowledge the issuance of a negotiable cargo document by inserting a conspicuous annotation in the non-negotiable transport document.

37. After discussion, the Working Group agreed to revise the paragraph to (i) require only a copy of the transport document to be delivered, and (ii) include a cross reference to draft article 3 (3).

38. Subsequently, the Working Group revisited the provision when discussing draft article 4, paragraph 3 (see paras. 113-114) and agreed that the simultaneous circulation should not be a condition for the effectiveness of the transfer, since this might entail a due diligence obligation on the part of banks to scrutinize both documents. The Working Group, therefore, agreed to replace draft article 11 (3) with a provision that would give the holder of the negotiable cargo document a right to demand a copy of the transport document.

Joint presentation

39. The Working Group heard presentations by OTIF, OSJD and ICAO on the issuance and use of non-negotiable transport documents under the CIM Uniform Rules, the Agreement on International Railway Freight Communications (SMGS) and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).

40. Under the CIM Uniform Rules, the consignor was responsible for completing the consignment note which would accompany the goods. The rail carrier must certify the taking over of the goods on the duplicate of the consignment note and return the duplicate to the consignor. It was also explained that the transport contract must be confirmed by a consignment note; however, the absence, irregularity or loss of the consignment note would not affect the existence or validity of the contract, but the exercise of certain rights would depend on the existence of the duplicate of the consignment note.

41. Under SMGS, the conclusion of the transport contract should be confirmed by a consignment note, which should be issued by the consignor and submitted to the contractual carrier. It was noted that the original of the consignment note would accompany the goods to the destination and was designated to the consignee. The duplicate of the consignment note would be handed over to the consignor upon conclusion of the transport contract. The Working Group was informed of the ongoing work at the OSJD ad hoc working group on the issues of negotiable document of title which aimed to prepare draft supplements and amendment to SMGS related to negotiable document of title.

42. Under the Montreal Convention, the ICAO representative noted that air waybills consisted of three parts: (i) the first part was for the carrier and signed by the consignor, (ii) the second part was for the consignee and signed by both the consignor and the carrier, and (iii) the third part was signed by the carrier to hand out to the consignor after cargo was accepted. It was explained that the presentation of air waybills would be required in order to exercise the right of disposal. Comparison was made between the issuance of air waybills and the issuance of negotiable cargo documents. Issues concerning the chain of responsibility were also analysed.

Chapter 3. Negotiable Electronic Cargo Records

43. The Working Group discussed a proposal for an alternative approach to the treatment of negotiable electronic cargo records, pursuant to which the provisions in chapter III would be replaced by a general provision requiring States parties to adopt under their national laws an appropriate legal framework enabling and governing the use of electronic equivalents of negotiable cargo documents with reference to the UNCITRAL Model Law on Electronic Transferable Records (MLETR) (see A/CN.9/WG.VI/WP.104). There was some support for that proposal, which would make it unnecessary to draft international standards on electronic aspects, a challenging task in light of the rapid technological development, while allowing national legislators to formulate appropriate standards to adapt to their domestic contexts.

44. The countervailing view expressed concerns that a reference to MLETR might not provide the level of legal certainty demanded by industry. Views were expressed that the Working Group should not miss the opportunity to develop uniform legal standards on negotiable electronic transferable records which could be beneficial for the industries, particularly in a multimodal context.

45. In that connection, the Working Group was invited to consider the medium-neutral approach adopted in the current draft of the model law on warehouse receipts developed by UNCITRAL Working Group I. It was noted that under the medium-neutral approach paper versions and electronic versions were treated in the same manner. The importance of such approach was also justified by the fact that a certain document might only exist in its electronic format in the near future which would make the functional equivalence rule inapplicable.

46. The need to ensure consistency between the draft instrument and the principles in MLETR was highlighted. The Working Group heard a suggestion to include provisions allowing States that had already enacted rules based on MLETR to maintain their application instead of the new instrument. The Working Group agreed to revert to that suggestion once it had completed its consideration of draft chapter 3 concerning negotiable electronic cargo records.

5. Draft Article 12. Legal recognition of a negotiable electronic cargo record

47. A suggestion was made to delete the first part of the sentence as being unnecessary and inconsistent with article 7 of MLETR. It was pointed out that the second part of the sentence contained a non-discrimination rule which would be sufficient for the purpose of this provision. Another suggestion was made to retain the provision and align the text closer to article 7, paragraph 1 of MLETR referring to “legal effect, validity or enforceability”. It was also observed that the provision bridged the gap between the paper version and the electronic version.

48. The Working Group was reminded that all previous UNCITRAL texts on electronic commerce contained a general provision stating the principle of non-discrimination. However, all those texts applied to various types of contracts, transactions, documents and communications. In contrast to the text under consideration, none of the earlier UNCITRAL texts introduced a particular type of commercial document or financial instrument, and their broad scope of application required such a generic rule. A different technique was, however, called for when the legislative text created a new type of document and established the conditions for its validity.

49. After discussion, the Working Group agreed to delete the provision.

6. Draft Article 13. Conditions for use of a negotiable electronic cargo record

Paragraph 1

50. The need for the paragraph was questioned given that draft article 3, paragraph 1 already addressed the same issue in the paper context. The Working Group agreed to

delete the paragraph and to request the secretariat to revise draft article 3, paragraph 1 and all other relevant provisions to include a reference to the negotiable electronic cargo record.

Paragraph 2

51. The Working Group heard the explanation that paragraphs 2 and 3 had been modelled after the signature requirement contained in the Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road concerning the Electronic Consignment Note (eCMR) since that was the only international instrument in force concerning international carriage of goods that dealt with electronic documents. It was, however, recognized that those provisions were only partly consistent with, and were generally more restrictive than, the approach taken in earlier UNCITRAL texts, in particular the Model Law on Electronic Signatures (MLES). Indeed, whereas the eCMR set forth one specific set of requirements, MLES distinguished between signature methods that enjoyed a presumption of reliability, and other methods that did not enjoy such ex ante presumption, but the reliability of which could be demonstrated ex post facto.

52. The Working Group noted the overlap between subparagraph 2 (d) and paragraph 5, which both dealt with integrity standards and agreed to delete the former.

53. The Working Group agreed to revise paragraph 2 along the lines of article 9 of MLETR, combining it with provisions based on paragraphs 3 and 4 of MLES.

Paragraph 3

54. The Working Group agreed to delete the paragraph as being unnecessary, noting that similar issue would be addressed in the revised paragraph 2.

Paragraph 4

55. Support was expressed for splitting the paragraph into two separate provisions following the structure of articles 10 and 11 of MLETR. Support was also expressed for splitting draft article 13 into two separate provisions: one provision focusing on electronic signature and another provision focusing on the rest of its contents.

56. The Working Group heard the following suggestions:

- To delete the functional equivalence rule in the chapeau so that the paragraph would simply state the conditions that would need to be met;
- To move subparagraph (a) to draft article 2 concerning definitions;
- To delete subparagraph (b) as being unnecessary;
- To align the texts in subparagraph (c) closer to articles 10–12 of MLETR;
- To include a new phrase “in a manner that ensures that the holder ceases to have control upon such transfer” at the end of subparagraph (c)(iii); and
- To clarify that the reference to draft article 10 in subparagraph (iv) was meant to refer to draft article 10, paragraph 1.

57. A question was raised about whether the draft instrument should address the possibility of issuing multiple originals of negotiable electronic cargo record. In response, it was recalled that in the paper version one of the reasons for issuing three originals of maritime bills of lading was to prevent the loss of documents, a risk that would not normally arise in connection with electronic records. Moreover, multiple electronic records would occur in the form of tokens but would be unlikely in registry-based systems. In the interest of technology neutrality, the new instrument should avoid specific rules on the matter.

7. Draft Article 14. Reliability requirements of negotiable electronic cargo records

58. A question was raised about whether the draft article intended to provide mechanisms for cross-border recognition of reliable methods. In response, it was clarified that the provision was based on similar provisions in MLETR and the Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services. A suggestion was made to adjust the title since it concerned the criteria to assess the reliability of the method used instead of the reliability requirements per se.

59. Questions were also raised regarding several subparagraphs of article 14, including the phrase "internationally recognized standards and procedures" in subparagraph (a) and the term "assets" in subparagraph (e). In response, it was noted that subparagraph (a) might capture internationally recognized standards developed for IT security. In addition, it was noted that subparagraph (e) was mainly relevant in the context of trust service providers. Therefore, the Working Group agreed to delete subparagraph (e).

60. Support was expressed for revising draft article 14 to align the text closer to article 12 of MLETR, including the chapeau of article 12, the chapeau of subparagraph (a) as well as the safe harbour provision in subparagraph (b).

8. Draft Article 15. Transfer of rights under a negotiable electronic cargo record

61. The purpose of the provision was questioned given that draft article 2 already defined the term "transfer". If retained, the provision should then specify a functional equivalence rule for the notion of "surrender" in the paper context. In response, it was noted that such rule had become unnecessary since the Working Group had agreed to revise draft article 13 to align the text closer to articles 10 and 11 of MLETR and article 11 of MLETR provided that the transfer of control would equal the transfer of possession.

62. In response to a suggestion, the Working Group noted the difficulty of defining the word "possession", a term that had different meanings under domestic laws. Suggestions were made to replace the word "possession" with "physical possession" or "taken in charge". In response, it was explained that the draft instrument used the term "taken in charge" only in relation to the goods to avoid a differentiation between physical and legal possession. For the same reason, the word "possession", which was preferably used in connection with the negotiable cargo document, was also unqualified. In this context, the Working Group was reminded that the concept of control in the UNCITRAL texts on electronic commerce had been developed as the functional equivalent of possession in a broad meaning.

63. Views were expressed that draft article 11 concerning transfer of rights should apply to both paper and electronic versions. It was added that draft article 15 should establish the functional equivalence of "possession", "transfer of possession" and "endorsement". Reference was also made to the definition of holder in the current draft of the model law on warehouse receipts which defined the holder of a paper version and the holder of an electronic version.

64. It was pointed out that the provision did not include any reference to a bearer document. In that connection, the Working Group was reminded that it had not yet made any decision on whether the issuance of a bearer negotiable electronic cargo record would be allowed under the draft instrument.

65. Recalling its earlier decision to essentially replace the current article 13 with provisions based on articles 10 to 12 of MLETR, the Working Group agreed to delete the provision bearing in mind that article 11 of MLETR addressed transfer of control.

9. Draft Article 16. Endorsement

66. In response to a question as to how electronic negotiable records were endorsed in practice, the Working Group was informed that various methods could be used, ranging from entries in registry systems to annotations on digital tokens and that some

technological solutions currently available even permitted displaying endorsements with essentially the same appearance as on paper-based documents. The Working Group agreed, however, that to ensure full functional equivalence, references to writing and signature requirements should be incorporated into draft article 16, along the lines of article 15 of MLETR.

67. In response to another question, the Working Group agreed that the word "included" in connection with the reference to "information required for the endorsement" did not mean that such information had to become part of the same record but could encompass information associated with or otherwise linked to the endorsement, in the light of the broad definition of electronic record in draft article 2, paragraph 5. The Working Group also agreed that the integrity requirements currently contained in draft article 13, paragraph 5 meant that the method used should also preserve the integrity of the chain of endorsements of an electronic negotiable cargo record.

10. Draft Article 17. Replacement of a negotiable cargo document with a negotiable electronic cargo record and vice versa

Paragraph 1

68. The Working Group did not take up a suggestion for subparagraph (a) to state that the holder must surrender all originals only when the negotiable cargo document stated that more than one original had been issued. It was noted that draft article 6, paragraph 3 already addressed that issue. It was also noted that the holder of three originals should not be allowed to surrender only one original when the negotiable cargo document failed to indicate that more than one original had been issued.

69. Regarding subparagraph (b), the Working Group agreed to retain the word "all" before "information" and to delete the phrase "consistent with article 4, paragraph 1". The need for the negotiable electronic cargo record to reproduce all information in the negotiable cargo document, including reservations made by the transport operator and a chain of endorsement, was emphasized. The Working Group noted that, under normal circumstances, the requirement of integrity referred to in draft article 13, paragraph 5 should suffice to avoid any loss of information, but requested the secretariat consider whether changes in paragraph 2 (a) of the provision might be needed to prevent that risk.

70. The Working Group agreed to delete the phrase "for the change of medium to take effect" in subparagraph (c) so as to align the text closer to articles 17 and 18 of MLETR. Another suggestion to delete the subparagraph did not receive sufficient support.

Paragraph 2

71. The Working Group considered whether a change of medium should be subject to the agreement of the parties or be crafted as a right of the holder. In favour of the second solution, it was argued that the holder might be required to produce a paper document, for instance with a view to complying with customs clearance or border controls. In response it was noted that such possibility would normally be contemplated in a transport operator's general conditions of contract and might be subject to different pricing, depending on the facilities available to a transport operator to switch from electronic to paper and vice-versa. Shippers would typically take into account the standards of service beforehand when choosing a transport operator so that in practice a change of medium assumed the consent of the transport operator would be required. The Working Group agreed to retain the sentence within the first set of square brackets and to delete the sentence within the second set of square brackets in the chapeau.

72. In respect of subparagraphs (a) and (b), a question was raised as to why the surrender of the negotiable electronic cargo record was not required. In response, it was explained that not every electronic cargo record would be capable of being

"surrendered" (in registry systems, for instance, no record would actually circulate) and that the reference to a "reliable method" for the change of medium in subparagraph (b) implied the cancellation of the record.

Paragraphs 3 and 4

73. In response to the concern that the phrase "made inoperative" was unclear, it was explained that an equivalent phrase in MLETR meant that the transferable document could not be further transferred after the change of medium. The phrase left sufficient flexibility as to the choice of the method to render the transferable document or instrument inoperative depending on the technology used.

Paragraph 5

74. A suggestion to include the words "by itself" before "affect" did not get sufficient support.

11. Draft Article 2. Definitions

Paragraph 2

75. The Working Group did not accept a suggestion to refer to transport document in addition to the transport contract. In response, it was clarified that the current text was consistent with the approach taken in the CIM Uniform Rules, which took into account the fact that a transport contract might exist even without the issuance of a transport document.

Paragraph 3

76. A question was raised as to whether under the Incoterm F terms when the buyer arranged transport, the documentary shipper holding a negotiable cargo document made to the order of the buyer would be considered as the holder. Support was expressed for the view that such documentary shipper would be identified as the consignor and thus would fall under the definition of "holder".

77. Another question was raised as to whether the draft instrument should address the issue of a holder in due course. It was noted that the notion of "holder in due course" was intimately linked to doctrines of good faith and negotiability that varied greatly among legal systems and that a common understanding was unlikely to be found.

78. A suggestion was made to replace the word "control" with "exclusive control" in the phrase within square brackets. It was also suggested to expand that phrase to mirror the approach used to describe a holder of the paper document. Yet another suggestion was to delete that phrase on the basis that the revised chapter 3 would contain similar wording based on article 11 of MLETR.

79. The Working Group agreed to retain the phrase within square brackets and to include a footnote to remind the Working Group to revisit this issue when considering the revised chapter 3.

Paragraph 4

80. The Working Group considered at length a suggestion to define a negotiable cargo document as an instrument that made express reference "to this Convention" or used a similar wording. In favour of such reference, it was stated that it offered clarity and legal certainty allowing a subsequent transferee to know that the document in question was a negotiable cargo document falling under the regime created by the draft instrument.

81. The countervailing view, however, was that the parties' agreement to issue a negotiable cargo document under draft article 3, paragraph 1 would be the deciding factor for a document to be treated as a negotiable cargo document. Whether the parties' agreement was evidenced by a reference to the Convention in the document

itself or elsewhere would be a matter for courts to determine, not the draft instrument. Requiring the inclusion of such phrase in the definition of "negotiable cargo document" would also risk invalidating a document which the parties intended to use as a negotiable cargo document under the draft instrument.

82. As a possible compromise, it was suggested to include a reference to the new instrument along the required content of the negotiable cargo document in draft article 4, paragraph 1, so that the inadvertent absence of the reference would not invalidate the negotiable cargo document. Yet, some other delegations pointed out that draft article 1 concerning the scope of application would be the most appropriate place to address this issue. A reference was made to article 1 of the United Nations Convention on International Bills of Exchange and International Promissory Notes.

83. Noting the widely diverging views on the matter, the Working Group requested the secretariat to reflect these three options in the next version of the working paper for further consideration by the Working Group.

Paragraph 7

84. Concerns were expressed about the definition of "right of disposal" on the grounds that (a) a long list of examples was unnecessary, (b) the fact that exercising the right of disposal would be subject to certain conditions was not reflected, and (c) the right of disposal was not defined in the same manner in the existing transport conventions governing different modes of transport.

85. Noting that draft article 7, paragraph 1 made it clear that the right of disposal was a contractual right under the transport contract which would be interpreted in accordance with the transport contract and the relevant international convention applicable to that contract, the Working Group agreed to delete the definition.

Paragraph 8

86. The need for the definition was questioned, since the Working Group had agreed to revise chapter 3 to align the text closer to article 11 of MLETR which addressed a similar issue. It was noted that if the definition was retained, a reference to endorsement where necessary should be included.

87. The Working Group agreed to place the definition within square brackets for further consideration at its next session.

Paragraph 9

88. The view was expressed that the phrase "for reward" was both outdated and imprecise and that it would be preferable to refer instead to carriage "against compensation" or "for value". The Working Group recalled, however, that the terms used in the draft definition also appeared in various international conventions in force, namely, CIM Uniform Rules (article 1), CMR (article 1) and the Montreal Convention (article 1, paragraph 1) and agreed for consistency purposes to retain those expressions.

89. The Working Group noted some degree of circularity when reading the draft definition in conjunction with the definition of "transport operator". The Working Group also noted that the phrase "international transport of goods" was not defined. The Working Group was nevertheless of the view that the definition was sufficiently clear and required no amendment for those reasons.

90. The Working Group did not agree to a suggestion to include reference to the consignor as the beneficiary of the transport operator's undertaking to transport the goods, since other parties such as the consignee or the holder could rely on that undertaking.

Paragraph 10

91. The Working Group held an extensive debate on the definition of "transport document" and considered various proposals for improving it.

92. There was some support for retaining Option 2 which was found to be more concise and to expressly state the transport operator's main obligation, namely: to deliver the goods in accordance with the terms of the transport contract. The countervailing view favoured Option 1 arguing that the final clause of Option 2 was redundant and potentially misleading, since a freight forwarder that entered into a transport contract with the consignor would not necessarily be the same entity that would deliver the goods under the transport document. Yet a third view advocated merging the two options with some amendments, for instance to clarify that a freight forwarder only "arranged" transport and did not undertake an obligation to deliver the goods but would merely "cause" the goods to be delivered, and to insert the verb "contain" before the words "an undertaking".

93. As the Working Group considered the various arguments, various difficulties were identified in both options. The obligation to deliver the goods, it was said, derived from the transport contract, but might not necessarily be repeated in the transport document. Also, the transport operator was not necessarily the issuer of the transport document, which in railway carriage, for instance, was completed by the consignor. Furthermore, the relationship between the draft definition and other provisions was said to be problematic. Article 11, paragraph 3, for instance required a copy of the transport document to be transmitted with the negotiable cargo document in order to transfer rights to a new holder. Since the draft instrument itself did not create a specific transport document, but relied on the existence of transport documents issued in accordance with other international conventions or domestic laws (which contained their own definitions and rules on issuance and number of originals), any discrepancy between the definition in the draft instrument and those other conventions or laws may give rise to questions as to whether the holder was indeed in possession of the correct documents to acquire rights under a negotiable cargo document. It was noted that the Working Group should avoid the risk that transport documents issued under other conventions might not qualify as a transport document under the draft instrument.

94. A consensus eventually emerged that the draft definition should be as simple as possible and make it explicit that the transport document emanated from the transport contract without entering into details as to who issued the document and what obligations it reflected. For that purpose, the Working Group agreed to revise the definition as follows:

"Transport document" means the document that:

"(a) Evidences or contains the transport contract"; and

"(b) Evidences the taking in charge of the goods for transportation under the transport contract."

12. Draft Article 3. Issuance of a negotiable cargo document

Paragraph 2

95. A concern was expressed that the provision did not clearly indicate the hierarchy of different ways of issuing a negotiable cargo document. The need for paragraph 2 to reflect that it described a default rule was emphasized.

96. The Working Group took up a suggestion to clarify that the annotations must be entered by the transport operator, noting that under some existing transport conventions the consignor was the person responsible for information in the consignment notes.

97. The Working Group heard a suggestion to require annotations to contain the words "to order" or "negotiable" or an equivalent expression as reflected in the

definition of the negotiable cargo document in draft article 2, paragraph 4. The secretariat was requested to revise draft paragraph 1 to reflect the information requirements of a negotiable cargo document.

Paragraph 3

98. The Working Group noted that under paragraph 3 a negotiable cargo document could only be issued as a separate document when the transport document was not negotiable. The purpose of such a provision was to avoid the existence of two negotiable documents in respect of the same goods.

99. The Working Group noted that the provision contemplated a transport document that was not negotiable by its very nature (i.e. because it had been issued under an international convention or domestic law that did not authorize its negotiability), and not because the parties had chosen to issue a non-negotiable document. However, the Working Group recalled its previous decision that the phrase "not negotiable" should not be replaced with "not able to be made negotiable", because such a wording would not promote legal certainty and might impose on holders and banks the burden to determine whether the law governing certain transport documents permitted or impeded their negotiability.

Paragraph 4

100. The Working Group agreed that in the situation contemplated by paragraph 3 the negotiable cargo document would necessarily be issued in addition to the transport document and that, consequently the first sentence of paragraph 4 was unnecessary.

101. A question was raised as to whether paragraph 4 was sufficient to prevent double issuance of negotiable documents in respect of the same cargo and what would be the consequences in case of infringement by the transport operator: would the subsequent negotiable document be invalid, or would the transport operator be liable for damages? It was noted that the paragraph imposed an obligation on the transport operator not to request the issuance of a negotiable transport document concerning a segment of carriage covered by a negotiable cargo document, and failure to do so would amount to a breach of contract. However, the negotiable transport document issued in violation of such an obligation would have its own governing law, and the draft instrument could not interfere with the validity of such a document. The Working Group was then invited to consider a further hypothesis, namely the risk of fraud and the presentation of two negotiable documents to two different banks. In response, it was noted that the possibility of double presentations of bills of lading to banks requested to issue letters of credit or of fraudulent duplicates of negotiable bills of lading, was not specific to the negotiable cargo document envisaged by the draft instrument and would in the future be dealt with under applicable domestic law in the same manner as double documentary presentations or fraudulent document duplicates had so far been dealt with. The risk of fraud, as such, concerned all types of negotiable documents and would fall outside the scope of the draft instrument.

102. A suggestion was made for draft article 3 to include another possibility to issue a negotiable cargo document in the absence of any transport document. It was noted, in that connection, that not all international conventions governing carriage of goods required the issuance of a transport document for their application or for the validity of the transport contract they governed. The secretariat was requested to reflect such possibility as a new option and place it within square brackets for further consideration by the Working Group.

Paragraph 5

103. The Working Group considered the practical difficulty to identify an "upgraded" transport document as a negotiable cargo document when the annotations did not contain the words "to order" or "negotiable" was highlighted. It was questioned whether in such cases the negotiable cargo document should be invalid for not meeting the requirements of negotiability pursuant to the definition in article 2,

paragraph 4, or whether there the draft instrument should provide a legal presumption of the modality of negotiability in such cases. In order to preserve the validity of the negotiable cargo document, a suggestion was made to include a presumption rule to state that the negotiable cargo document was deemed to be issued as "to order".

104. After discussion, the Working Group agreed to revise the paragraph along the following lines:

> A negotiable cargo document may be made out to order, to order of a named person or to bearer. If an annotation inserted in the transport document pursuant to paragraph 2 above fails to state whether the negotiable cargo document is made out to order, to order of a named person or to bearer, the negotiable cargo document shall be deemed to be made out [to order][[to the order of the [consignor][consignee]].

Paragraph 6

105. The Working Group did not take up the suggestions (a) to require the indication of the number of originals even when only one original was issued, and (b) to include a presumption rule that only one original was issued when the number of originals was not included in the negotiable cargo document. Another suggestion to delete the second sentence or to specify the consequences of failing to mark any copies as "non-negotiable" copy also did not receive support.

13. Draft Article 4. Content of the negotiable cargo document

Paragraph 1

106. A view was expressed that the draft instrument should impose an obligation to notify the transport operator of the transfer of a negotiable cargo document. It was explained that such obligation would not be burdensome because draft article 4, paragraph 1 (a) required the name and address of the transport operator to be included in the negotiable cargo document. The fact that such an obligation to notify the transport operator might undermine negotiability was questioned.

107. The Working Group heard suggestions to include additional items in the paragraph such as requiring the inclusion of a reference to this Convention as well as the name and identification of each underlining transport vehicle.

108. The need for the phrase "signed by the transport operator" in the chapeau was questioned as being unnecessary in light of the definition of the negotiable cargo document. It was also pointed out that such inclusion might suggest that signature requirement was not linked with the validity of a negotiable cargo document, which would be inconsistent with the definition of the negotiable cargo document in draft article 2, paragraph 4. The Working Group agreed to delete the reference to "signed by the transport operator" in the chapeau given that the signature requirement was already included in the definition of negotiable cargo document in draft article 2 (4).

109. In respect of subparagraph (b), the Working Group agreed to replace the phrase "identified by the consignor" with "if provided by the consignor".

110. In respect of subparagraph (e), the Working Group agreed to delete the phrase "or a statement to indicate that the transport operator has no reasonable means of inspecting the goods", since it should be the transport operator's obligation to verify the apparent order and condition of the goods.

Paragraph 2

111. The Working Group agreed to retain the current wording in subparagraph (a), in view of the importance of an express agreement between the parties.

112. The Working Group agreed to revise subparagraph (b) to allow for the inclusion of information enabling tracking of the goods, if known at the time of issuance of the negotiable cargo document.

Paragraph 3

113. The Working Group agreed to revise paragraph 3 to state that, when issued separately, the negotiable cargo document should reproduce all particulars as stated in the transport document. It was noted that the contents of revised paragraph 3 could be moved to draft article 3, paragraph 3.

114. Concerns were expressed that paragraph 3 imposed an obligation on the transport operator to ensure consistency between the separately issued negotiable cargo document and the transport document but did not explicitly state which document should be authoritative if they contained conflicting or inconsistent information. Clarity in that respect was necessary to protect the interests of third parties who became good faith holders of the negotiable cargo document. In response, it was explained that a holder who acquired a negotiable cargo document in good faith was already protected by draft article 6, paragraph 3, which entitled the holder acting in good faith to rely on the description of the goods as stated in the negotiable cargo document. It was noted that the draft instrument did not establish any hierarchy between the two documents before the transfer of a negotiable cargo document, since the consignor and the transport operator would normally have access to primary sources of factual information to rebut inaccurate statements in the negotiable cargo document. A question was raised as to whether the "good faith test" would require banks to examine and compare the contents of the negotiable cargo document and the transport document if they were both circulated together in accordance with draft article 11, paragraph 3. (See para. 38).

14. Draft Article 5. Deficiencies in the negotiable cargo document

Paragraph 3

115. The Working Group noted the practical usefulness of a presumption rule, for instance when the need to annotate a transport document pursuant to draft article 3, paragraph 2 arose after its issuance. For example, the consignor and the transport operator might agree to upgrade a maritime bill of lading into a negotiable cargo document if the mode of transport needed to be changed due to security concerns alongside the route or an unexpected disruption in the supply chain that prevented the use of maritime transportation. The Working Group agreed to retain the current wording.

Paragraph 5

116. The Working Group agreed to delete the phrase "unless the negotiable cargo document indicates that the transport operator has no reasonable means of inspecting the goods" in light of its decision on draft article 4, paragraph 1 (e).