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## Negotiable Cargo Documents

### Note by the Secretariat

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## I. Introduction

1. The background information about the project on negotiable multimodal transport documents referred to the Working Group by the Commission at its fifty-fifth session<sup>1</sup> may be found in the provisional agenda of the forty-second session of the Working Group (A/CN.9/WG.VI/WP.97, paras. 5–7). As requested by the Working Group, this note sets out some key issues that the Working Group is invited to consider in connection with the development of a new instrument on negotiable cargo documents, as well as a revised annotated set of preliminary draft provisions for such a new instrument, which have been prepared by the secretariat to reflect the deliberations of the Working Group at its forty-first session.

## II. Issues for consideration by the Working Group

2. During its forty-first session, the Working Group had extensive discussion on draft article 3 (*Issuance of a negotiable cargo document*). It became apparent that there were doubts as to whether a negotiable cargo document contemplated by the new instrument could be issued by the transport operator acting as a contractual carrier, by an actual carrier, or by both. The following paragraphs are intended to assist the deliberations of the Working Group on this matter.

### A. Issuance of a negotiable cargo document

3. The question of who issues a negotiable cargo document determines the connection between the negotiable cargo document contemplated by the new instrument and the transport document issued pursuant to the transport contract. Such connection is particularly important for analysing the interplay between the new instrument and the application of any international convention or domestic law governing the transport contract concluded between the original holder of the negotiable cargo document and the transport operator. The Working Group is invited to consider the below example with illustration of different types of legal relationship involved in a transaction to which the new instrument may apply.

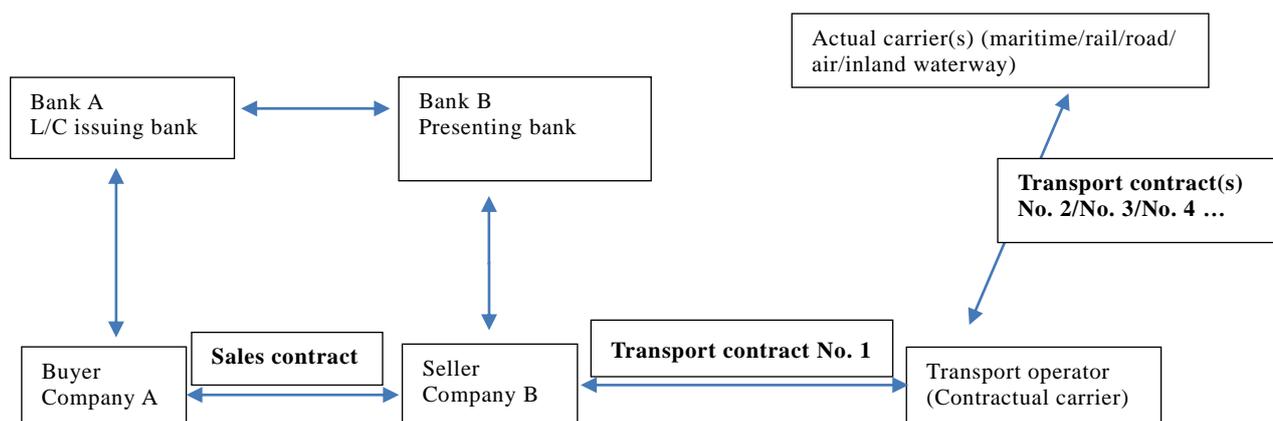
4. Company A enters into a sales contract with Company B, which provides that the seller Company B will arrange transportation of the goods to a destination named by the buyer Company A. In order to finance its purchase, Company A requests Bank A to issue a letter of credit for the benefit of Company B. The letter of credit transaction being carried out through Bank B requires Company A to submit a document which evidences the transport operator's receipt of goods and could also serve as a document of title. Upon Company A's request, Company B approaches the transport operator for the issuance of a negotiable cargo document.

5. The transport operator may perform the carriage of goods itself or may choose to subcontract the carriage to actual carriers. In practice, freight forwarders may assume the function of a contractual carrier arranging the carriage in their own name, in addition to their traditional role as agents who arrange for the shipment of goods on behalf of the consignor.

6. As illustrated below, when the transport operator acts as a contractual carrier, it concludes transport contract No. 1 with Company B and may issue transport document No. 1 in accordance with the international convention or domestic law applicable to transport contract No. 1. Subsequently, the transport operator may conclude transport contract No. 2 with an actual carrier for unimodal transport of goods. That actual carrier (not the transport operator) may issue transport document No. 2 in accordance with the international convention or domestic law applicable to transport contract No. 2.

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<sup>1</sup> *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)*, para. 202.



7. Assuming that the new instrument would apply in the above scenario, upon Company B's request, the transport operator could issue a negotiable cargo document as a separate document or insert an appropriate reference to the new instrument on the face of transport document No. 1 which would then also serve as a negotiable cargo document. According to article 3, paragraph 4, of the draft new instrument, if issued as a separate document, a corresponding annotation should be made in all copies of transport document No. 1 issued by the transport operator. However, no annotation would be required for transport document No. 2 as it is a document issued by the actual carrier under transport contract No. 2 to which Company B is not a party. The holder of the negotiable cargo document (e.g. Bank A, Bank B or Company A) could demand delivery of the goods from the transport operator (not the actual carrier) upon presentation of a duly endorsed negotiable cargo document. In principle, the transport operator could demand delivery of the goods from the actual carrier in accordance with transport contract No. 2.

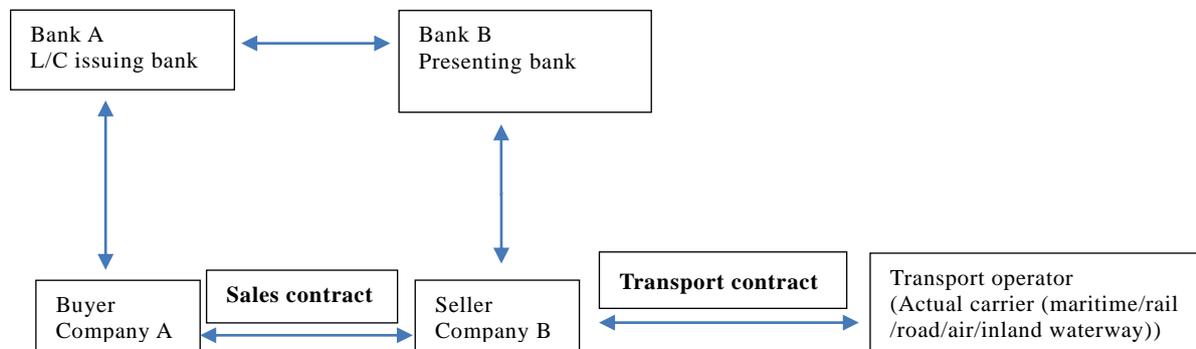
8. Similar analysis would apply in a multimodal transport context when the transport operator concludes several individual transport contracts with multiple actual carriers. Those actual carriers could issue separate transport documents in accordance with the international convention or domestic law applicable to each transport contract. If the negotiable cargo document is issued as a separate document, a corresponding annotation should still be made in all copies of transport document No. 1 issued by the transport operator, but not other transport documents issued by actual carriers.

9. When the negotiable cargo document is issued by the transport operator as a contractual carrier, it is unlikely that the new instrument would substantially affect the application of any existing international conventions governing transport of goods currently in force, particularly those provisions concerning liability of the carrier for loss of or damage to the goods or for delay in their delivery.<sup>2</sup> The reason for this understanding is that, under the terms of the new instrument, the holder of the negotiable cargo document could only demand delivery of the goods from the transport operator, as issuer of the negotiable cargo document, rather than from the actual carrier(s). The actual carrier(s) would perform its obligations towards the transport operator, regardless of the issuance of any negotiable cargo document by the transport operator, given that the transport operator would be named as the consignee and consignor under transport document No. 2.

10. In another scenario (as illustrated below), the transport operator performs the carriage itself and thus acts as an actual carrier. It would conclude the transport contract with Company B and would issue a transport document in accordance with the international convention or domestic law applicable to the transport contract.

<sup>2</sup> However, the Working Group is invited to consider carefully the relationship between the evidentiary value of the negotiable cargo document in case of conflicts with the contents of the transport document and the implications for the liability of the carrier (see draft articles 7 and 8 of the preliminary draft provisions for a new instrument on negotiable cargo documents).

No other transport contract or transport document would exist in such a legal relationship. Upon Company B's request, the transport operator could also issue a negotiable cargo document as a separate document or insert an appropriate reference to the new instrument on the face of the transport document, which would then also serve as a negotiable cargo document, if such a function was not incompatible with any applicable international convention or domestic law. If issued as a separate document, a corresponding annotation should be made in all copies of the only transport document (either multimodal or unimodal) issued in this scenario. The holder of the negotiable cargo document (e.g. Bank A, Bank B or Company A) could demand delivery of the goods from the transport operator (acting as the actual carrier) upon presentation of a duly endorsed negotiable cargo document.



11. When the negotiable cargo document is issued by the transport operator acting as the actual carrier, the negotiability contemplated by the new instrument would require the transport operator to deliver the goods to the holder of the negotiable cargo document, which might differ from the named consignee under the transport document. If the goods were to be delivered to someone other than the named consignee, the transport operator might be held liable for wrongful delivery under any existing international conventions governing transport of goods currently in force.

12. The current version of the preliminary draft provisions for a new instrument on negotiable cargo documents (see annex) defines "transport operator" broadly to encompass both contractual carriers and actual carriers. In the light of the above analysis, the Working Group may wish to consider whether the scope of application of the new instrument should be limited to situations where the negotiable cargo document is issued by the transport operator acting as a contractual carrier, but not where the transport operator also performs under the transport contract as actual carrier. As a result, the definition of "transport operator" should be revised to refer to contractual carriers only. The Working Group may also wish to assess the eventual interest of market participants and industry support for negotiable cargo documents issued by actual carriers. In addition, the Working Group may wish to consider whether the scope of application of the new instrument should be further limited to situations when no consignment note has been issued.

13. With respect to the possible format of a negotiable cargo document, the Working Group may wish to consider whether the nature of the transport document (i.e. negotiable or non-negotiable) would determine the suitable format of a negotiable cargo document. When the transport document itself is issued as a negotiable document (such as the multimodal transport bill of lading developed by the International Federation of Freight Forwarders Associations (FIATA)), the issuance of a separate negotiable cargo document may not be necessary and the transport document may serve as the negotiable cargo document for the purposes of the new instrument by inserting an appropriate reference to it on the face of that transport document. When the transport document itself is issued as a non-negotiable document, permitting that transport document to serve as a negotiable cargo document may inevitably create a conflict with any existing international conventions that governs the transport contract concluded between the original holder of the

negotiable cargo document and the transport operator which do not envisage the negotiability of a transport document.

## **B. Electronic cargo documents**

14. The Working Group may wish to recall the discussion on electronic cargo documents contained in a Note by the Secretariat prepared for the forty-first session of the Working Group ([A/CN.9/WG.VI/WP.96](#), paras. 22–24).

## **III. Conclusions and organization of future work**

15. The Working Group may wish to use the revised preliminary draft provisions for a new instrument in the annex to this note as a basis for its deliberations at its forty-second session. After conclusion of its deliberations, the Working Group may wish to request the secretariat to prepare a further revised version of the preliminary draft provisions for consideration by the Working Group at its forty-third session, tentatively scheduled to be held in Vienna from 18 to 22 December 2023.

## Annex

### Preliminary draft provisions for a new instrument

#### *Article 1. Scope of application*

1. This Convention applies to the issuance, transfer and legal effects of a negotiable cargo document in connection with the international transport of goods if:

(a) The place of receipt of the goods by the transport operator as provided for in the transport contract is located in a Contracting State; or

(b) The place of delivery of the goods by the transport operator as provided for in the transport contract is located in a Contracting State.<sup>3</sup>

2. This Convention does not affect the application of any international convention or national law relating to the regulation and control of transport operations.<sup>4</sup>

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.

#### *Article 2. Definitions*

For the purposes of this Convention:

1. “Actual carrier” means any person to whom the performance of the carriage of goods, or of part of the carriage, has been entrusted by the transport operator, and includes any other person to whom such performance has been entrusted.<sup>5</sup>

2. “Consignor” means any person by whom or in whose name or on whose behalf the transport contract has been concluded with the transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the transport operator in relation to the transport contract.<sup>6</sup>

3. “Consignee” means the person entitled to take delivery of the goods.<sup>7</sup>

4. “Holder” means a person that is in possession of a negotiable cargo document and is identified in it as the consignor or the consignee or is the person to which the document is duly endorsed; [or if the document is a blank endorsed order document or bearer document, is the bearer thereof].<sup>8</sup>

5. “International transport of goods” means the carriage of goods by one or more modes of transport on the basis of a transport contract from a place in one country at

<sup>3</sup> Convention on International Multimodal Transport 1980 (the “MT Convention”), article 2. In the consultations held by the secretariat, it was considered that a new instrument should apply to the issuance, transfer and legal effects of negotiable cargo documents only in connection with the international transport of goods where the place of receipt and the place of delivery of the goods by the transport operator as provided for in the transport contract were located in two different Contracting States. In addition, for a new instrument to apply, some experts were of the view that the parties to the transport contract should opt into its application, failing which the otherwise applicable law would apply. The Working Group may wish to consider these suggestions.

<sup>4</sup> MT Convention, article 4 (1).

<sup>5</sup> United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”), article 1 (2).

<sup>6</sup> MT Convention, article 1 (5).

<sup>7</sup> MT Convention, article 1 (6).

<sup>8</sup> Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (the “Rotterdam Rules”), article 1 (10)(a).

which the goods are received by the transport operator to a place designated for delivery situated in a different country.<sup>9</sup>

6. “Negotiable cargo document” means a document signed by the transport operator that indicates by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document that the goods have been received by the transport operator and consigned to the order of the holder and is not explicitly stated as being “non-negotiable” or “not negotiable”.<sup>10</sup> Unless otherwise stated, references to a “negotiable cargo document” in this Convention include a “negotiable electronic cargo record”.

7. “Electronic record” means information generated, communicated, received or stored by electronic means including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.<sup>11</sup>

8. “Negotiable electronic cargo record” means a negotiable cargo document issued in the form of electronic record.

9. The “transfer” of a negotiable electronic cargo record means the transfer of exclusive control over the record.<sup>12</sup>

10. “Transport contract” means a contract whereby a transport operator undertakes, against payment of freight, to perform or to procure the performance of international transport of goods.<sup>13</sup>

11. “Transport document” means a document issued under a transport contract by the transport operator that:

(a) Evidences the transport operator’s receipt of goods under a transport contract; and

(b) Evidences or contains a transport contract.<sup>14</sup>

12. “Transport operator” means any person who concludes a transport contract with the consignor and who assumes responsibility for the performance of the contract, irrespective of whether or not that person performs the carriage itself.<sup>15</sup>

### *Article 3. Issuance of a negotiable cargo document<sup>16</sup>*

1. The consignor and the transport operator<sup>17</sup> may agree that when the goods are received by the transport operator,<sup>18</sup> [or at a later date determined by the parties,] the

<sup>9</sup> MT Convention, article 1 (1).

<sup>10</sup> Rotterdam Rules, article 1 (15). The secretariat has revised the definition in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 57).

<sup>11</sup> UNCITRAL Model Law on Electronic Transferable Records (MLETR), article 2.

<sup>12</sup> Rotterdam Rules, article 1 (22).

<sup>13</sup> Rotterdam Rules, article 1 (1); MT Convention, article 1 (3).

<sup>14</sup> Rotterdam Rules, article 1 (14); see also MT Convention, article 1 (4).

<sup>15</sup> MT Convention, article 1 (2). The secretariat has revised the definition to clarify that it was intended to cover actual carriers unless the Working Group decides otherwise. The Working Group may wish to note that in the new instrument a transport operator assumes responsibility for both: (a) the performance of the transport contract (i.e. delivery of the cargo from the place of its receipt to its destination); and (b) issuance of a negotiable cargo document and delivery of the cargo to the lawful holder of the negotiable cargo document against the surrender of the negotiable cargo document. In addition, the new instrument is not intended to deal with sub-contracts that might be concluded by the transport operator to perform the transport contract, whether in unimodal or multimodal context.

<sup>16</sup> The Working Group may wish to recall the extensive deliberations on the draft provision during its forty-first session (A/CN.9/1127, paras. 13–26). The Working Group may wish to note that FIATA’s freight forwarding members use the FIATA Multimodal Transport Bill of Lading as a negotiable document of title, both for shipments by multiple modes and by a single mode, depending on the consignor’s needs.

<sup>17</sup> The secretariat has replaced the term “the parties to an international transport contract” by “the consignor and the transport operator” for clarity.

transport operator shall issue a negotiable cargo document in accordance with the provisions of this Convention.

*Option 1*<sup>19</sup>

2. Unless the consignor and the transport operator agree otherwise, the negotiable cargo document shall be issued as a separate document in addition to the transport document [whenever the contract provides for international transport by more than one mode of transport].

*Option 2*

2. The consignor and the transport operator may agree:

(a) That the negotiable cargo document be issued as a separate document in addition to the transport document; or

(b) That the transport document issued under the contract to cover one or more modes of transport shall also serve as a negotiable cargo document for the purposes of this Convention by inserting an appropriate reference to this Convention on the face of the transport document.

*Option 3*

2. The consignor and the transport operator may agree:

(a) That the negotiable cargo document be issued as a separate document in addition to the transport document; or

(b) That the transport document issued as a negotiable document to cover one or more modes of transport shall serve as a negotiable cargo document for the purposes of this Convention by inserting an appropriate reference to this Convention on the face of the transport document.

3. The negotiable cargo document does not substitute any transport document which the transport operator [or any actual carrier]<sup>20</sup> may be required to issue pursuant to the law applicable to the transport contract or to the terms of the contract. The issuance of the negotiable cargo document does not preclude the issuance, if necessary, of any other documents relating to transport or other services involved in international transport of goods, in accordance with applicable international conventions or national law.<sup>21</sup>

4. A negotiable cargo document that is issued as a separate document in addition to an airway bill, a road consignment note or a railway consignment note, as provided in subparagraph 2(a), shall only be valid if its issuance has been acknowledged by a corresponding annotation in all copies of the transport document.

5. A negotiable cargo document shall be made out to order [or to order of a named person]<sup>22</sup> [or to bearer].<sup>23</sup> A negotiable cargo document that is made out to

<sup>18</sup> MT Convention, article 5 (1).

<sup>19</sup> The secretariat has drafted three different options for consideration by the Working Group. Option 1 is similar in substance to draft article 3, paragraph 2 as contained in the annex to A/CN.9/WG.VI/WP.96. Option 2 has been prepared to offer parties the flexibility to choose under which circumstances a negotiable cargo document should be issued to best accommodate their business practices, in line with the deliberations of the Working Group at its forty-first session (A/CN.9/1127, para. 18). Option 3 has been prepared following suggestions by experts consulted by the secretariat to link the format of a negotiable cargo document with the nature of the transport document (i.e. negotiable or non-negotiable).

<sup>20</sup> The Working Group may wish to consider whether the reference to “actual carrier” could be deleted in the light of the revised definition of “transport operator”.

<sup>21</sup> MT Convention, article 13.

<sup>22</sup> In the expert consultations held by the secretariat, it was suggested that the phrase “or to the order of a named person” was needed to ensure consistency with draft article 10, paragraphs 1 and 3. In addition, it was explained that in letter of credit transactions a negotiable transport

order shall contain the name of the person to whose order the goods are to be delivered. If the name is not indicated, the negotiable cargo document shall be deemed to be made out to the order of the consignor.

*Option 1*<sup>24</sup>

6. A negotiable cargo document that is issued in a set of more than one original shall indicate the number of originals in the set. If any copies are issued, each copy shall be marked as “non-negotiable” copy.

*Option 2*<sup>25</sup>

6. A negotiable cargo document may be issued in a set of more than one original. If any copies are issued, each copy shall be marked as “non-negotiable” copy.

*Article 4. Content of the negotiable cargo document*

1. The negotiable cargo document shall be signed by the transport operator or a person acting on its behalf<sup>26</sup> and indicate:<sup>27</sup>

- (a) The name and address<sup>28</sup> of the transport operator;
- (b) The name and address of the consignee, if required by the law applicable to the transport contract or named by the consignor<sup>29,30</sup>; and
- (c) The date of receipt of the goods by the transport operator.<sup>31</sup>

2. The negotiable cargo document shall reproduce the following information as they appear in the transport contract:

- (a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;<sup>32</sup>

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document might be required to be made out to order or to order of a named person. In case the letter of credit required the negotiable transport document to be made out to order, the document would be considered discrepant if it was made out to order of a named person, and vice versa.

<sup>23</sup> MT Convention, article 6 (1)(a). In view of the increased risks of delivery of the goods to the wrongful holder under a bearer negotiable cargo document, the Working Group may wish to consider the desirability of introducing the notion of “lawful holder” of the negotiable cargo document if bearer negotiable cargo documents were to be retained in the draft instrument.

<sup>24</sup> Option 1 is the same as draft article 3, paragraph 6, as contained in the annex to [A/CN.9/WG.VI/WP.96](#).

<sup>25</sup> The secretariat has drafted option 2 for consideration by the Working Group in line with the deliberations of the Working Group at its forty-first session ([A/CN.9/1127](#), para. 25).

<sup>26</sup> The secretariat has replaced the phrase “authorized by the transport operator” with “acting on its behalf” in line with the decision of the Working Group at its forty-first session ([A/CN.9/1127](#), para. 46).

<sup>27</sup> The secretariat has (i) revised the chapeau so as not to limit the application of article 4 to situations when the negotiable cargo document was issued as a separate document, and (ii) regrouped items listed in article 4 and placed them in two mandatory lists and one indicative list, in line with the decisions of the Working Group at its forty-first session ([A/CN.9/1127](#), paras. 27 and 30–50).

<sup>28</sup> The secretariat has replaced the phrase “principal place of business” with the term “address” in line with the decision of the Working Group at its forty-first session ([A/CN.9/1127](#), para. 32).

<sup>29</sup> The secretariat has replaced the phrase “applicable law” with “the law applicable to the transport contract” for clarity.

<sup>30</sup> Rotterdam Rules, article 36 (3). The Working Group may wish to consider the differences across different modes of transport as regards this item.

<sup>31</sup> Rotterdam Rules, articles 36 (2)(c) and 36 (3)(c).

<sup>32</sup> Rotterdam Rules, article 36 (1); Convention for the Unification of Certain Rules for International Carriage by Air (the “Montreal Convention”), article 5 (c); the COTIF/CIM Uniform Rules concerning the Contract of International Carriage of Goods by Rail (the “CIM-COTIF 1999”), article 7 §1; Agreement on International Railway Freight Communications 2020 (SMGS),

- (b) The apparent condition of the goods;
- (c) The name and address of the consignor;<sup>33</sup>
- (d) The place of receipt of the goods by the transport operator;<sup>34</sup>
- (e) The place and date of issue<sup>35</sup> of the transport document and of the negotiable cargo document, if issued separately;
- (f) When known to the transport operator,<sup>36</sup> the place of delivery of the goods;<sup>37</sup>
- (g) The number of originals of the negotiable cargo document, when more than one original is issued;<sup>38</sup> and
- (h) A statement as to whether the freight has been prepaid or an indication as to whether the freight is payable by the consignee.<sup>39</sup>

3. The negotiable cargo document may further indicate:

- (a) The date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;
- (b) The intended journey route, mode of transport and places of trans-shipment, if known at the time of issuance of the negotiable cargo document;
- (c) The law applicable to the transport contract, in particular any international convention to which the transport contract is subject;
- (d) The method by which confirmation could be given to indicate that delivery of the goods to the holder has been effected, or that, pursuant to article 6, paragraph 4, or article 12, the negotiable electronic cargo record, if any, has ceased to have any effect or validity; and
- (e) Any other particulars which the parties may agree to insert in the negotiable cargo document, if not inconsistent with the law of the country where it is issued, or which may be required to be inserted in that document under the law of the country where the negotiable cargo document is issued.<sup>40</sup>

2. [The signature on the negotiable cargo document must be in handwriting.]<sup>41</sup>

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article 15 §1. As regards dangerous goods, see e.g. CIM-COTIF 1999, article 7 §1 (h), and SMGS, article 9 and annex 2.

<sup>33</sup> CIM-COTIF 1999, article 7 §1 (b) and SMGS, article 15 §1 (1).

<sup>34</sup> Rotterdam Rules, articles 36 (2)(c) and 36 (3)(c). The secretariat has deleted the reference to “loading” in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 36).

<sup>35</sup> The Working Group may wish to consider whether including a date on the negotiable electronic cargo record might cause confusion as the date of issue of electronic records would typically be automatically generated by the system. (A/CN.9/1127, para. 38)

<sup>36</sup> Rotterdam Rules, article 36 (3)(c).

<sup>37</sup> CIM-COTIF 1999, article 7 §1 (f) and SMGS, article 15 §1 (5). The Working Group may wish to consider differences across different modes of transport as regards this item.

<sup>38</sup> Rotterdam Rules, article 36 (2)(d). The Working Group may wish to consider whether multiple originals of negotiable electronic cargo records could be generated in the light of the principle of technological neutrality, given that not all electronic systems would allow the issuance of multiple originals. (A/CN.9/1127, para. 44).

<sup>39</sup> The secretariat has revised this item in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 47).

<sup>40</sup> E.g. the Rotterdam Rules require naming the ship in the transport document, including a negotiable transport document and specifying there also the port of loading and the port of discharge, if specified in the transport contract (see article 36 (3)(d)).

<sup>41</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 51–52). The Working Group may wish to consider whether the requirement for handwritten signature, which derives from existing international conventions, is still realistic in practice. The Working Group may also wish to consider the appropriate method(s) of signature for electronic negotiable cargo documents.

*Article 5. Conditions for use and effect of negotiable electronic cargo records*

1. A negotiable electronic cargo record can be issued if the issuance and subsequent use of a negotiable electronic cargo record is with the consent of the transport operator and the consignor.<sup>42</sup> A negotiable electronic cargo record shall have the same legal effect of a negotiable cargo document and shall not be denied legal effect on the sole ground that it is in electronic form<sup>43</sup> if a reliable method is used:

(a) To identify that electronic record as the negotiable electronic cargo record;<sup>44</sup>

(b) To record all information required by article 4 in a manner that is accessible so as to be usable for subsequent reference;<sup>45</sup>

(c) To render that negotiable electronic cargo record capable of being subject to exclusive control from its creation until it ceases to have any effect or validity;<sup>46</sup>

(d) To permit the identification of the holder and the transfer of exclusive control over the negotiable electronic cargo record to another holder<sup>47</sup> [including by endorsement or to the bearer];

(e) To provide confirmation that delivery of the goods to the holder has been effected, or that, pursuant to article 6, paragraph 4, or article 13, the negotiable electronic cargo record has ceased to have any effect or validity;<sup>48</sup> and

(f) To retain the integrity of that negotiable electronic cargo record.<sup>49</sup>

2. A negotiable electronic cargo record shall be signed by the transport operator or a person acting on its behalf by means of a reliable electronic signature that ensures its link with the negotiable electronic cargo record.

3. The reliability of an electronic signature method is presumed, unless otherwise proved, if the electronic signature is:

(a) Uniquely linked to the signatory;

(b) Capable of identifying the signatory;

(c) Created using means that the signatory can maintain under its exclusive control; and

(d) Linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.<sup>50</sup>

4. A negotiable electronic cargo record may also be signed by any other electronic authentication method permitted by the law of the country in which the negotiable electronic cargo record has been made out.<sup>51</sup>

5. The criterion for assessing integrity shall be whether information recorded in the negotiable electronic cargo record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete

<sup>42</sup> Rotterdam Rules, article 8 (a).

<sup>43</sup> MLETR, article 7 (1).

<sup>44</sup> MLETR, article 10 (1)(b)(i).

<sup>45</sup> MLETR, articles 8 and 10 (1)(a); Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road concerning the Electronic Consignment Note (e-CMR), article 4 (1); Rotterdam Rules, article 8 (a).

<sup>46</sup> MLETR, articles 10 (1)(b)(ii) and 11 (1)(a); Rotterdam Rules, articles 1 (21) and 1 (22).

<sup>47</sup> MLETR, article 11 (1)(a); see e-CMR, article 5 (1)(c) (“The manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement.”).

<sup>48</sup> Rotterdam Rules, article 9 (1)(d); e-CMR, article 5 (1)(d). In the consultations held by the secretariat, it was noted that the negotiable electronic cargo record might still have some evidentiary value after the transfer although it would cease serving the primary purpose.

<sup>49</sup> MLETR, article 10 (1)(b)(iii); e-CMR, article 5 (1)(b); Rotterdam Rules, article 9 (1)(b).

<sup>50</sup> e-CMR, article 3 (1).

<sup>51</sup> e-CMR, article 3 (2).

and unaltered apart from any change which arises in the normal course of communication, storage and display.<sup>52</sup>

6. The requirements in paragraph 1 of this article shall be readily ascertainable.<sup>53</sup>

*Article 6. Replacement of a negotiable cargo document with a negotiable electronic cargo record and vice versa*<sup>54,55</sup>

1. If a negotiable cargo document has been issued and the transport operator and the holder agree to replace that document by a negotiable electronic cargo record:

(a) The holder shall surrender the negotiable cargo document, or all of them if more than one has been issued, to the transport operator;<sup>56</sup>

(b) The transport operator shall issue to the holder a negotiable electronic cargo record that reproduce [all] information as recorded in the negotiable cargo document, consistent with article 4, paragraph 1<sup>57</sup> and includes a statement that it replaces the negotiable cargo document; and

(c) For the change of medium to take effect, a reliable method for such change shall be used.<sup>58</sup>

2. If a negotiable electronic cargo record has been issued and the transport operator and the holder agree to replace that negotiable electronic cargo record by a negotiable cargo document:

(a) The transport operator shall issue to the holder, in place of the negotiable electronic cargo record, a negotiable cargo document that reproduces information as recorded in the negotiable electronic cargo record, consistent with article 4, paragraph 1 and includes a statement that it replaces the negotiable electronic cargo record; and

(b) For the change of medium to take effect, a reliable method for such change shall be used.<sup>59</sup>

<sup>52</sup> MLETR, article 10 (2); e-CMR, article 4 (2).

<sup>53</sup> Rotterdam Rules, article 9 (2).

<sup>54</sup> Rotterdam Rules, article 10; MLETR, articles 17 and 18. The Working Group may wish to note the existing practice with the use of transport documents comprising several copies, each of which performed a particular function and consider whether the same could be achieved in the use of a negotiable electronic cargo record. The Working Group may also wish to note that current commercial practice would require the use of a paper document in some circumstances, and consider whether it would be preferable to ensure that the holder of a negotiable electronic cargo record has the right to require the change of medium instead of seeking an agreement with the transport operator.

<sup>55</sup> In the consultations held by the secretariat, a suggestion was made to introduce provisions dealing with the transfer of a negotiable electronic cargo record from one system to another system with a different technology, considering that different technologies might be employed by different systems.

<sup>56</sup> The Working Group may wish to note that the reference to “a negotiable cargo document” would normally include all of its originals if more than one original has been issued, both in paper and electronic form. Accordingly, the Working Group may wish to consider the need: (a) to retain “or all of them if more than one has been issued” in this subparagraph; and (b) to introduce in paragraph 2 of this article similar wordings requiring the surrender of negotiable electronic cargo record.

<sup>57</sup> In the consultations held by the secretariat, some experts noted the need to add a provision that explicitly required all the information contained in a negotiable cargo document (see article 4) to be accurately reflected in a negotiable electronic cargo record and vice versa when carrying out a change of medium. Support was expressed as such a requirement would be appealing to the banking industry, especially considering the difficulty for banks to check and ensure the completeness and accuracy of the information. However, in the view of some other experts, “mirroring” the content of the previous document or record in the converted one was not considered necessary but preserving the minimum required contents as stipulated in article 4 was considered essential. The Working Group may wish to consider which approach is more appropriate.

<sup>58</sup> Rotterdam Rules, article 10 (1); MLETR, articles 17 (1) and 17 (2).

3. Upon issuance of the negotiable electronic cargo record in accordance with paragraph 1, the negotiable cargo document shall be made inoperative and ceases to have any effect or validity.<sup>60</sup>
4. Upon issuance of the negotiable cargo document in accordance with paragraph 2, the negotiable electronic cargo record shall be made inoperative and ceases to have any effect or validity.<sup>61</sup>
5. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.<sup>62</sup>

*Article 7. Deficiencies in the negotiable cargo document*<sup>63</sup>

1. The absence of one or more of the particulars referred to in article 4 does not of itself affect the legal character of the document as a negotiable cargo document provided that it nevertheless meets the requirements set out in article 2, paragraph 6.<sup>64</sup>
2. If the negotiable cargo document includes a date but fails to indicate its significance, the date is deemed to be the date of issue of the negotiable cargo document. Unless otherwise indicated, the negotiable cargo document is deemed to have been issued simultaneously with the transport document.<sup>65</sup>
3. If the negotiable cargo document does not include the date of receipt of the goods by the transport operator, the goods are deemed to have been received by the transport operator on the date of issue of the negotiable cargo document.<sup>66</sup>
4. If the negotiable cargo document fails to state the apparent order and condition of the goods at the time the transport operator receives them, the negotiable cargo document is deemed to have stated that the goods were in apparent good order and condition at the time the transport operator received them.<sup>67</sup>

*Article 8. Evidentiary effect of the negotiable cargo document*

*Option I*<sup>68</sup>

1. The transport operator may qualify any of the information referred to in article 4, paragraph 2 (a) as furnished by the consignor and contained in the negotiable cargo document in a manner that indicates that:
  - (a) The transport operator does not assume responsibility for the accuracy of such information because it has either actual knowledge or reasonable grounds to believe that any such information is false or misleading; and

<sup>59</sup> Rotterdam Rules, article 10 (2); MLETR, articles 18 (1) and 18 (2).

<sup>60</sup> MLETR, article 17 (3).

<sup>61</sup> MLETR, article 18 (3).

<sup>62</sup> MLETR, articles 17 (4) and 18 (4).

<sup>63</sup> The secretariat has deleted the paragraph concerning the liability of the transport operator with the intent to defraud in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 65).

<sup>64</sup> Hamburg Rules, article 15, paragraph 3. The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 57).

<sup>65</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 61).

<sup>66</sup> The secretariat has added the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 61).

<sup>67</sup> Rotterdam Rules, article 39 (3). The Working Group may wish to consider whether the question of the holder's legitimate reliance should be treated separately from claims for cargo loss or damage under the transport contract as a warranty to a subsequent holder that the goods had been received in good order (A/CN.9/1127, para. 63).

<sup>68</sup> Rotterdam Rules, articles 40 and 41; MT Convention, article 10 (a); see also CIM-COTIF 1999, article 12. The secretariat has drafted two options for consideration by the Working Group in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 67–68).

(b) The transport operator has no reasonable means of checking such information.

2. Except to the extent that the information furnished by the consignor has been qualified, the negotiable cargo document shall be prima facie evidence of the transport operator's receipt of the goods as stated in the negotiable cargo document.

*Option 2*

1. Except to the extent that the information referred to in article 4, paragraph 2 (a) as furnished by the consignor and contained in the negotiable cargo document has been qualified in accordance with the law applicable to the transport contract, the negotiable cargo document shall be prima facie evidence of the transport operator's receipt of the goods as stated in the negotiable cargo document.

2. Proof to the contrary by the transport operator in respect of any information in the negotiable cargo document shall not be admissible if the negotiable cargo document has been transferred to a third party [, including a consignee,] acting in good faith in reliance on the description of the goods therein.<sup>69</sup>

*Article 9. Extent of rights of the holder under a negotiable cargo document*

1. The holder has the right of control of the goods represented by the negotiable cargo document, including:

(a) The right to give or modify instructions in respect of the goods consistent with the transport contract;

(b) The right to demand delivery of the goods while in transit;

(c) The right to replace the consignee; and

(d) The right to assert, in its own name, any rights against the transport operator under the transport contract for loss or damage to the goods as well as for delay in delivery.<sup>70</sup>

2. The issue and transfer of the negotiable cargo document to the holder shall have the same effect, for the purpose of acquisition and disposition of rights to the goods, including for the creation of any security right in the goods, as a physical handing over of the goods, provided that the transport operator is in possession of the goods.<sup>71</sup>

3. The rights listed in paragraphs 1 and 2 above exist after the issuance of the negotiable cargo document and cease, except for that listed in subparagraph 1 (d), when the negotiable cargo document is surrendered.<sup>72</sup>

4. In order to exercise the rights listed in paragraph 1 above, the holder shall produce the negotiable cargo document to the transport operator and shall properly identify itself.<sup>73</sup> If more than one original of the negotiable cargo document was

<sup>69</sup> Rotterdam Rules, article 41 (c); MT Convention, article 10 (b); and Multimodal Transport Act of Singapore, article 11 (2). The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 70).

<sup>70</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 73–75).

<sup>71</sup> The secretariat has added the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 75).

<sup>72</sup> Rotterdam Rules, article 50 (2). The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 76). The Working Group may wish to note that a concern was raised during its forty-first session that linking the rights of the negotiable cargo document holder with the surrender of the negotiable cargo document might be problematic when the negotiable cargo document, like for instance the maritime bill of lading, might not yet have been transmitted to the destination when the goods arrived (A/CN.9/1127, para. 77).

<sup>73</sup> The Working Group may wish to consider whether the paragraph needs to be adapted to the electronic context (A/CN.9/1127, para. 78). The Working Group may also wish to consider

issued, all originals shall be produced, failing which the right of control cannot be exercised.<sup>74</sup>

5. [Any demand, declaration, instruction, request, reservation or other communication relating to the transfer of a negotiable cargo document or the delivery of the goods mentioned in the negotiable cargo document, may be made out by electronic communication].<sup>75</sup>

*Article 10. Transfer of rights under a negotiable cargo document or negotiable electronic cargo record*<sup>76</sup>

1. The holder may transfer the rights incorporated in the negotiable cargo document to another person by:

(a) Delivering the negotiable cargo document duly endorsed [either] to such person [or in blank][, if an order document];<sup>77</sup> or

(b) Delivering the negotiable cargo document without endorsement, if: (i) the negotiable cargo document is made out to the order of a named person and the negotiable cargo document is delivered by the consignor identified in the negotiable cargo document to the named consignee;<sup>78</sup> [or (ii) a document made out to bearer or endorsed blank.]<sup>79,80</sup>

2. If more than one original of a negotiable cargo document was issued, all originals shall be delivered to the person in order to effect a transfer of rights under a negotiable cargo document.<sup>81</sup>

3. When a negotiable electronic cargo record is issued, its holder may transfer the rights incorporated in it, [whether it be made out to order or to the order of a named person,] by transferring the exclusive control of the electronic cargo record in accordance with the requirements referred to in article 5, paragraph 6.<sup>82</sup>

*Article 11. Channel of communication*

If the transport operator needs information, instructions or documents relating to the goods in order to perform its obligations under the transport contract, the transport operator shall seek those information, instructions or documents from the holder of the negotiable cargo document. If the transport operator is unable to obtain

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whether different requirement(s) should apply to the holder when exercising the right listed in article 9, paragraph 1 (d).

<sup>74</sup> Rotterdam Rules, article 51.

<sup>75</sup> e-CMR, article 2 (1). The Working Group may wish to recall that some support was expressed during its forty-first session for deleting the paragraph on the ground that the manner of communication would be subject to party autonomy and applicable domestic law. It was noted that the purpose of the paragraph was unclear and it might be misinterpreted as not allowing electronic communication to be made out for situations not explicitly referred to in the paragraph. There was also some concern that the draft paragraph might be misconstrued to suggest that electronic communications might suffice in all instances where the holder exercised the right of control irrespective of specific mechanisms for exercising the right of disposal under existing international conventions concerning carriage of goods (e.g. inserting instructions on the transport document itself) (A/CN.9/1127, para. 79).

<sup>76</sup> The Working Group may wish to consider which documents the customs and other authorities of the countries concerned would be expected to examine (i.e. whether the transport document or the negotiable cargo document or both) and the extent to which they would be expected to acknowledge transfers of rights to the goods under a negotiable cargo document (A/CN.9/1127, para. 85).

<sup>77</sup> Rotterdam Rules, article 57 (1); Standard Conditions (1992) governing the FIATA Multimodal Transport Bill of Lading, 3.1.

<sup>78</sup> Rotterdam Rules, article 57 (1).

<sup>79</sup> Ibid.

<sup>80</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 84).

<sup>81</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 86).

<sup>82</sup> Rotterdam Rules, article 57 (2).

those instructions within a reasonable time, the transport operator shall proceed in accordance with the transport contract.<sup>83</sup>

*Article 12. Liability of holder*

A holder of the negotiable cargo document that is not the consignor and that does not exercise any right under the transport contract does not assume any liability under the transport contract [and this Convention] solely by reason of being a holder of the negotiable cargo document.<sup>84</sup>

*Article 13. Delivery of the goods*<sup>85</sup>

1. Delivery of the goods may be demanded from the transport operator only against surrender of the negotiable cargo document duly endorsed where necessary [and upon the holder properly identifying itself].<sup>86</sup>
2. [Where a negotiable cargo document has been issued in a set of more than one original, the transport operator shall be discharged from its obligation to deliver the goods if it has in good faith delivered the goods against surrender of one of such originals<sup>87</sup>.][If more than one original of the negotiable cargo document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity.<sup>88</sup>]<sup>89</sup>
3. On request of the transport operator, the holder shall acknowledge receipt of the goods from the transport operator in the manner that is customary at the place of delivery. The transport operator may refuse delivery if the holder refuses to acknowledge such receipt.<sup>90</sup>
4. The law applicable to the transport contract shall govern other aspects of delivery of the goods to the holder.

*Article 14. Reliability requirements of negotiable electronic cargo records*

In determining the reliability of the method used for the purposes of this Convention, all relevant circumstances shall be taken into account, which may include:<sup>91</sup>

- (a) Compliance of the operational rules, policies and practices used in the method with any applicable internationally recognized standards and procedures;
- (b) Any relevant level of reliability of the method used;
- (c) Any applicable industry standard;

<sup>83</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 89).

<sup>84</sup> Rotterdam Rules, article 58 (1). The secretariat has added the provision in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 90).

<sup>85</sup> The Working Group may wish to consider whether this provision should address (a) the liability of the transport operator to the lawful holder of the negotiable cargo document for delivery of goods to the wrong person, and (b) the liability of the lawful holder of the negotiable cargo document for not complying with the obligation to pay the transport operator for freight when it is required to do and to accept the goods.

<sup>86</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 91 and 93).

<sup>87</sup> MT Convention, article 6 (3).

<sup>88</sup> Rotterdam Rules, article 47 (1)(c).

<sup>89</sup> The Working Group may wish to note that the requirement to surrender one original is inconsistent with the requirements to surrender all originals under article 9 (4) regarding the exercise of the right of control (including the right to demand delivery of goods) and article 10 (2) regarding the transfer of rights. The Working Group may wish to consider whether surrendering all originals of the negotiable cargo document would be required for delivery of the goods.

<sup>90</sup> Rotterdam Rules, article 44.

<sup>91</sup> The Working Group may wish to consider whether the chapeau of this article needs to be further revised to explicitly refer to specific situations where reliable methods need to be employed, including the identification of the holder and exclusive control.

- (d) The security of hardware and software;
  - (e) Financial and human resources, including existence of assets;
  - (f) The regularity and extent of audit by an independent body; and
  - (g) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method.<sup>92</sup>
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<sup>92</sup> MLETR, article 12; UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, article 10.