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Compilation of comments from organizations

Note by the Secretariat

Contents

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I. Introduction

1. This document reproduces comments received from organizations on the draft provisions for a convention on negotiable cargo documents as contained in document A/CN.9/WG.VI/WP.114. The comments are reproduced in the order in which they were received.

II. Comments received from organizations

A. Comité Maritime International

[Original: English]
[5 March 2025]

CMI proposal for UNCITRAL WG VI

I. Proposal re article 1

1. Following further discussions and taking into account concerns expressed informally by other delegations and observers at the WG VI meeting in Vienna in December 2024, the Comité Maritime International (CMI) has formulated a final revision to the proposal it previously made to the working group. The proposal would involve the addition of a new paragraph in article 1 of the Draft Instrument on Negotiable Cargo Documents.

Article 1(4)

"This Convention shall apply only to documents not otherwise recognized by applicable law as negotiable transport documents."

Why the proposed provision is needed

2. This provision is needed to ensure that it is clear to which documents the Convention applies. The intention has from the start been to recognize a new document of title to goods in transit where one is not already recognized, and not to substitute or disapply existing law.

3. In particular, there is an established body of law on negotiable maritime bills of lading as documents of title which is by and large uniform across States because it derives from transnational mercantile law (the *lex mercatoria*). In many jurisdictions this body of law already applies to multimodal bills of lading that include a maritime leg as well as "pure" maritime bills of lading, and creates a strong protection framework for holders of such documents, wherever they may be in the world, recognizing their general or special property rights in the goods, and not just contractual rights against the issuer.

4. This protection framework does not yet exist for NCDs and may take a while to become established. It will depend on how many States become parties to the new instrument and how quickly. Of course, if the document in question is not recognized as a negotiable bill of lading by existing law, the NCD Convention (where it applies) could provide similar protection, and its application should be permitted, even if the transport involves a maritime leg. However, where the relevant protection is already provided by existing law, the parties' decision to call the document an NCD and include a reference to the Convention should not preclude the application of the existing and established framework applicable to bills of lading. If this action were to have the effect of disapplying existing law, it would cause significant uncertainty for third-party holders, which may lead to reduced acceptability of the eventual NCD Convention to States and of NCDs to stakeholders. The new article 1(4) proposed above would remove this uncertainty.

5. The issue arises because the agreement between the carrier and the shipper and reference to the Convention can lead to the issue of an NCD, but they cannot make

that NCD a document of title. Only applicable law can do that. Situations where applicable law is uncertain may be less rare than the Working Group may be envisaging. The dispute arising in connection with the document may have nothing to do with the contract of carriage, for example because it concerns ownership of the goods, in which case the law indicated in the document as governing the contract of carriage may not be the applicable law. The jurisdictions whose laws come into play may also become uncertain if, for example due to supply chain disruption, changes need to be made to the place where the goods are taken in charge by the TO, the route or destination, the mode of transport or the place of issue of the document. As the document of title function brings into play property law, the lex situs of the goods may govern proprietary issues and that law may not recognize an NCD as a document of title.

6. The scenario below, while not exhaustive, is intended to illustrate the type of problem we wish to resolve with this new provision.

> A negotiable multimodal bill of lading that includes a sea leg is issued with a stamped reference to the NCD Convention on its face. A dispute arises between the holder of the document and a third party regarding the cargo, which is stored in a transit shed in a non-contracting State. Under the law of this State multimodal bills that include a sea leg fall within the definition of "bill of lading" and are treated as documents of title. Is this document a negotiable bill of lading or an NCD (as the stamp on its face would indicate)? If it is the former, the holder has acquired the usual rights of a bill of lading holder, as the parties intended. If it is the latter, it may not be considered a document of title at all under the law of the forum, in which case the holder's rights over the goods may not be recognized and the intent of the parties will have been frustrated.

II. Proposal re article 3(2) and (3)

7. As currently drafted paragraphs (2) and (3) of article 3 envisage that an NCD can be issued on or alongside a sea waybill, as the latter type of document would fall within the definition of a "non-negotiable transport document". The CMI considers that the Convention should not envisage this, as the purpose of issuing a sea waybill rather than a maritime bill of lading is precisely to preclude negotiability, so we recommend that the Working Group explicitly exclude sea waybills from this provision.

III. Proposal re article 3(5)

8. The CMI has concerns about this provision as it precludes the possibility of a multimodal transport operator as contractual carrier requesting a negotiable bill of lading from the actual maritime carrier of the goods. While we understand that in practice it is quite usual to request a straight bill of lading, we believe it may be preferable to allow some flexibility to the multimodal transport operators in terms of which document to request. The CMI therefore recommends that the working group consider the addition of one of the following phrases at the start of this paragraph:

> Option A: "If the parties so agree …".
>
> Option B: "Unless the parties agree otherwise …".
>
> Option C: "The consignor may request when agreeing to the issue of a NCD that …".

B. The Baltic and International Maritime Council, the International Group of Protection & Indemnity Clubs and the International Chamber of Shipping

[Original: English]
[7 March 2025]

I. Introduction

1. The Submitting Parties understand that, as there was insufficient time at the last Session to discuss the scope of application of the new instrument, delegates were invited to consult with domestic maritime industry. Taking this opportunity, the Submitting Parties, who represent a broad cross-section of interests in maritime carriage of goods, [1] seek to address concerns relating to the current scope of application and highlight provisions of the draft instrument on Negotiable Cargo Documents (NCDs) that are incompatible or create confusion with the existing legal framework associated with maritime bills of lading.

2. The Submitting Parties acknowledge the significant value of developing an instrument which allows for negotiable documents in land carriage. Unlike the maritime sector, which has used negotiable bills of lading with near universal recognition and acceptance for centuries, there is no equivalent for land carriage. It is equally important to clarify the position with respect to through transport documents which cover both sea and land legs to ensure that the land legs can be the subject of negotiation/financing.

3. Given that it is estimated that over 80% of the volume of international trade in goods is carried by sea[2], it is however imperative that this is done without disturbing the well settled and well understood legal framework associated with maritime bills of lading.

II. Article 1

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

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

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

3. As a result, while Article 1 preserves the applicability of conventions and national laws, it does not protect against the risks in case of conflict between the new instrument and international conventions/national laws that may apply to negotiable maritime bills of lading. In addition, Article 1.3 does not deal with how the liability

[1] See About the Submitters section at the end of this Submission.
[2] It is estimated (UNCTAD Review of Maritime Transport 2021).

of the Transport Operator will be dealt with for any new rights and obligations which are created under the Convention.

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

(a) Under Article 3 of HVR, the carrier is not required to include in the bill of lading any information which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has no means of checking.

(b) Under Article 6 of the new instrument, a transport operator can qualify information "as furnished by the consignor and contained in the negotiable cargo document…" to indicate that he does not assume responsibility for it.

(c) This type of inconsistency has the potential for disputes in what is otherwise settled practice in the maritime sector.

III. Article 3.1

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

2. The Submitting Parties understand that during the discussions at the 45th session of Working Group VI, it was explained by the Secretariat that this provision is intended to deal with situations where the consignor and the transport operator agree to switch between different modes of transport in case of need. However, a number of practical and legal difficulties arise from this proposal as highlighted in the below example:

(a) A consignor and a transport operator conclude a transport contract, and the mode of transport is carriage by sea.

(b) The transport operator enters into a contract of carriage with a maritime carrier. After the loading is completed, the maritime carrier issues a negotiable maritime BL, evidencing the contract of carriage and the ship embarks on her voyage.

(c) While on course of the voyage, the transport operator and the consignor agree to switch the mode of transport due to potential security threats alongside the route.

(d) Is it the intention that, under Article 3.2, the **maritime BL** (rather than the transport contract identified in sub-paragraph (a) above) will be annotated so as to serve as an NCD? If so, it raises certain concerns as follows:

a. When does this annotation take place and is the consent of the shipowner required?

b. Any transshipment prior to the named port of delivery is likely to require a deviation. This may raise issues for the shipowner under other contracts (e.g. a charterparty contract that may not permit such deviation or cover the costs incurred therefrom) and also in respect of its P&I insurance cover. Delivery of a cargo at a port other than that named in the negotiable maritime BL leaves the shipowner carrier exposed to a potential mis-delivery claim.

c. If the negotiable maritime BL is annotated so it then serves as an NCD a number of potential problems arise:

(i) The maritime BL ordinarily contains a contract of carriage for transporting goods by sea, it will not address issues raised by road or rail carriage.

(ii) The original contract of carriage is between the maritime carrier (e.g. the shipowner) and the shipper (e.g. the transport operator in this scenario). It is therefore unclear how a maritime BL could be transformed into an NCD by virtue of an agreement between the transport operator and the consignor (e.g. a non-party to the maritime BL). Would a novation of the contract be required with the new road or rail carrier assuming the rights and obligations of the shipowner?

(iii) If the existing contract of carriage is novated how would the terms of a maritime BL and the underlying liability regime apply to the road or rail carriage context?

IV. Article 9 and Conflict of Laws

1. From an English law point of view, there is a potential conflict between Article 9 of the draft instrument and Section 3 of the Carriage of Goods by Sea Act 1992. While English law is only one of a number of relevant jurisdictions, it is a critical one due to the prominence of English law and bills of lading subject thereto in international carriage and trade law. For example, the majority of bulker bills of lading are subject to English law and, of the top 10 container lines, 4 use English law to govern their bills of lading (excluding transit to and from the US). The issue can be summarised as follows:

2. Under Article 9 of the new instrument, a holder that is not a consignor and that exercises the "*right of disposal*" assumes any liability that may arise "*in connection with the exercise of that right under the transport contract*".

3. Under Section 3(1) of COGSA 1992, a person who "*takes or demands delivery from the carrier of any of the goods to which the document relates*" or "*makes a claim under the contract of carriage against the carrier in respect of any of those goods*" becomes "*subject to the same liabilities under that contract as if he had been a party to that contract*."

4. COGSA 1992 is therefore broader than the new instrument in 2 ways: (i) the trigger for becoming subject to liabilities (demanding/taking delivery and making a claim); and (ii) the scope of the liabilities to which the holder is exposed (as if the holder was an original party vs the new instrument which limits liabilities to just the costs of disposal).

5. Also, legislation on bills of lading (at least until the Rotterdam Rules come into effect), does not recognise the concept of a right of disposal - which is a much broader right than rights granted to bill of lading holders under settled law.

6. If there was a dispute involving loss on a sea leg of an NCD, would an English court seized with a dispute under the NCD consider this title document as a bill of lading? If so, would the holder, for example, be subject to liability for freight because he has brought a claim under the bill (COGSA rules) or not (under the new instrument the liability would not arise by virtue of simply bringing a claim).

7. Critically, under the new instrument, the liabilities that pass to the holder are limited to those in connection with the right of disposal. This means that liabilities for dangerous cargo would not, for example, pass to a holder of an NCD who brings a claim against a carrier. This would be a major departure from settled law on maritime bills of lading.

8. A worked example of a potential conflict is set out below:

(a) A multimodal bill of lading (BL) is issued which specifies that it is subject to the NCD Convention and is governed by English law. The carriage includes a sea leg.

(b) The cargo causes an explosion, and the resulting litigation is heard in the courts of a state which has ratified the NCD Convention.

(c) The holder of the BL/NCD brings a claim against the carrier for loss.

(i) Pursuant to the NCD Convention, the holder has not exercised a right of disposal and is therefore not subject to liabilities under the NCD.

(ii) Pursuant to COGSA 1992, under English law, the holder of a BL who brings a claim against the carrier also becomes subject to the liabilities under the BL.

(iii) This conflict creates uncertainty which in what is otherwise well settled law.

V. Proposal

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

2. Uniformity is essential for global trade, and, in particular, the shipping industry, as it ensures predictability, efficiency and legal certainty across jurisdictions. And this sort of certainty allows insurers to insure risks across borders. However, if the proposed new instrument on NCDs extends to maritime transport, it risks having the opposite effect by introducing inconsistencies and increasing uncertainties for the parties involved. If the maritime community and in particular insurers, cannot be made comfortable with the risks associated with an NCD, it may limit their willingness to insure liabilities arising from the use of NCDs for maritime transport. This will have an impact in turn on shipowners' agreements to issue such bills, thereby disrupting centuries-old trade practices in this sector.

3. To avoid this, the Submitters propose that the maritime leg is carved out from the NCD such that the new instrument applies to the non-sea legs of any transport and existing, well understood maritime law applies to the sea leg. i.e. one document which has distinct phases. Multimodal bills of lading are commonly issued for carriage partly by sea and partly by other means and the need is for the non-sea legs of these bills of lading to be negotiable. This proposal ensures that:

(a) The sea leg continues to be subject to existing rights and obligations which are well understood and universally accepted (conversely, if NCDs are used instead of bills of lading for maritime transport, there is a risk that they will not be recognised by non-contracting states; this potential risk may limit the willingness of trade participants, and their insurers, to allow the use of NCDs for any transport which includes a maritime leg).

(b) The new instrument ensures the negotiability of land transport, where there is no risk of conflict with existing legislation/practice.

(c) A bank can finance the combined document, NCD for the land leg and bill of lading for the sea leg, thereby taking security for the entire period of the carriage.

About the Submitters

The Baltic and International Maritime Council (BIMCO)

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

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

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

International Chamber of Shipping (ICS)

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

C. International Federation of Freight Forwarders Associations and Global Shippers Forum

[Original: English]
[11 March 2025]

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

I. Introduction

1. FIATA (International Federation of Freight Forwarders Associations) and GSF (Global Shippers Forum) make the following submission for consideration by the UNCITRAL Working Group VI (Negotiable Cargo Documents) at its forty-sixth session to be held on 17-21 March 2025 in New York. FIATA and GSF represent key global constituencies in respect of the draft NCD Convention, bringing the perspectives of shippers, freight forwarders and logistics providers worldwide. This submission is made following consultation with the international banking community, in the context of recent uncertainty noted amongst certain actors as to the necessary scope and applicability of the Convention, and builds on the previous submissions made by FIATA and GSF (A/CN.9/WG.VI/WP.109 and A/CN.9/WG.VI/WP.111) to the Working Group at its forty-fifth session.

2. FIATA and GSF remind the Working Group that the original purpose and role of the NCD Convention is to facilitate and strengthen international trade by providing a legal framework that, upon their agreement, establishes in law the rights and obligations of the parties to a sale of goods made using either unimodal or multimodal negotiable transport documents. As such, the draft Convention is constructed as a facilitating instrument intended to provide confidence, certainty and enforceability in transactions where the parties willingly decide to make use of its provisions. It does not seek to supplant, contradict or conflate existing laws, nor does it impose any new standing obligations on any parties in the transaction or shipment.

3. In a global trading environment undergoing extraordinary changes and subject to increasingly severe and enduring disruption, freight forwarders, shippers and traders require flexibility and agility to facilitate trade and provide legal certainty. The international sale of goods and related logistics span every geographic region on the globe, requiring complex planning and the flexibility to modify those plans en route. The NCD Convention will support the essential role of freight forwarders, shippers and trade financing institutions in meeting global needs in today's ever-changing supply chains. It will provide freight forwarders, shippers and banks with the ability to opt for the NCD solution to organise multimodal end-to-end or unimodal transportation as the circumstances require. It is therefore critical that the new draft Convention has the possibility to cover all modes of transport.

4. In addition, the draft Convention's focus on providing clear recognition for negotiable documents in both paper and electronic form in the multimodal context

will offer significant legal certainty and clarity for banks to provide financing for trade transactions worldwide, filling a clear existing legal gap. This will greatly facilitate trade by providing access to trade finance for companies engaged in international trade around the world and will be a key driver for innovation and digital trade.

II. Scope of the Convention in the multimodal context

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

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

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

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

III. "Opt-in" nature of the Convention and respect for party autonomy

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

9. Such 'opt-in' approach is confirmed by the following existing provisions of the draft Convention:

(a) The opt-in nature of the Convention in Art. 3(1);

(b) The need for the transport operator to sign and issue the document as an NCD upon agreement with the consignor (Art. 2(4). Arts. 3(1)-(5)).

10. The draft NCD Convention does not require a shipping line or any other transport operator to issue documents subject to the Convention. Transport operators issuing negotiable documents may decline to sign and issue them as an NCD under

Article 3 and may even make this a condition of issuance in their standard terms and conditions if they so choose.

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

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

12. FIATA and GSF consider that the draft NCD Convention would fill an important existing legal gap. The current legal landscape regarding negotiable transport documents remains fragmented, with heavy reliance on national legal frameworks that often do not have specific detailed provisions on negotiability and documents of title. This can bring challenges when seeking trade finance, as there may be less certainty for banks. Any exclusion as regards a specific mode of transport in the NCD Convention will simply cause more confusion regarding the applicable law and will pose challenges for trade finance and the ability for the commercial parties to control their rights over the goods.

13. In addition, the electronic provisions of the NCD Convention will be an important driver for digital trade, by providing legal certainty for the use of electronic title records for all modes of transport. Such provisions are based on the UN Model Law on Electronic Transferrable Records (MLETR) and therefore are expected to greatly accelerate the move to a more harmonised legal framework for the recognition of electronic transport documents. Such harmonised legal framework in the digital landscape does not currently exist today either in the unimodal or in the multimodal context, and it is important that all modes of transport are included to prevent further confusion which can hinder digital trade. The NCD Convention by its nature therefore provides opportunities for innovation in the logistics and banking sectors and promotes greater facilitation through a clear framework that support paper and electronic documents of title.

14. Any permanent carve-out of any mode of transport – including maritime – would stifle such innovation and prevent the NCD Convention from fulfilling its intended purpose. Initial precautionary approaches taken by insurers in relation to the pricing of risks related to NCDs issued under the Convention will be reflected in the premiums that are charged for policies against loss, damage or mis-delivery. Indeed, with the greater legal certainty as to enforceability provided by the convention, it can be expected that some trade insurance providers may well conclude that their insured risks on negotiable transport documents have been reduced. Not every insurer will be a maritime P&I Club and the efforts of established interests to exclude innovation from their market and protect established practices should not be enshrined permanently in an international convention. Confidence of insurers can reasonably be expected to improve with claims experience, and hesitation by incumbent providers is likely to diminish over time, especially if new providers enter the market, perhaps in regions where the risks are more easily priced or legal regimes clearer. The emergence of innovative and competitive products should not be prevented by incumbent providers inserting a permanent exclusion in the Convention to protect established practices.

V. Conclusion

15. FIATA and GSF therefore oppose the proposals made to the Working Group as regards the exclusion of maritime transport, or the exclusion of negotiable cargo documents subject to existing applicable law. They also oppose the suggestion that the draft Convention should apply only to the non-maritime portions of intermodal movements with a sea leg. Art. 1(2) and (3) already provide clarity that the NCD Convention will not impact any other applicable law, and these clauses should be strengthened if not considered sufficient. Should further exclusions be introduced as proposed, this would remove from the scope of the Convention many documents that

require the legal certainty of the NCD Convention. It may also cause confusion as to the scope of such an exclusion, which would become a threshold issue for a court to decide in any claim where the convention would otherwise apply. This is particularly the case today in multimodal transport situations where there is a partial sea leg. In such situations, there remains a lack of clarity as to the legal treatment of purportedly negotiable documents under maritime and potentially other applicable international and regional conventions, with such decisions often being left to the courts to sort out.

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