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Vienna, 28 June–16 July 2021**Work programme****Results of the preparatory work by the UNCITRAL
secretariat towards the development of a new international
instrument on negotiable multimodal transport documents****Note by the Secretariat****Contents**

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I. Introduction

1. At the fifty-second session of the Commission, the Government of the People's Republic of China presented a proposal on possible future work by UNCITRAL towards the development of a negotiable transport document to facilitate multimodal carriage of goods, particularly by railway in the Euro-Asian space ([A/CN.9/998](#)). The proposal indicated that, unlike the ocean bill of lading, the railway consignment note (hereinafter the "RCN") did not serve as a document of title and could not be used for the settlement and financing of letters of credit. The limited function of the RCNs also constrained the ability of banks and other institutions to provide financial services and increased the financial pressure on importers and the risks faced by exporters in collecting payments.¹

2. At that session, the Commission considered with interest the proposal, which was felt to have considerable practical significance for world trade, in particular for the economic growth of developing countries. However, given the wide range of issues involved and their complexity, the Commission agreed, as a first step, to request its secretariat to conduct research on legal issues related to the use of railway or other consignment notes, and to coordinate with other relevant organizations such as the Intergovernmental Organization for International Carriage by Rail (OTIF), the Organization for Cooperation between Railways (OSJD), the International Rail Transport Committee (CIT), the relevant United Nations regional commissions, in particular the Economic Commission for Europe (UNECE) (which was also working on legal standards for international railway transport), the Federation of Freight Forwarders Associations (FIATA) and the International Chamber of Commerce (ICC). In that connection, the Commission requested its secretariat to report back to the Commission, at its fifty-third session, in 2020, on the progress made in that research.²

3. At its fifty-third session, after considering the report by the secretariat on the results of its exploratory work on the topic ([A/CN.9/1034](#)), the Commission concurred with the secretariat's assessment that there was a demand for negotiable transport documents that could cover carriage by modes other than sea carriage, in particular by railways. It considered that its work could cover negotiable and non-negotiable transport documents (issuance and contents of transport documents, rights and obligations of the carriers or multimodal transport operators (MTOs) in respect of the contents and evidentiary function of documents as well as the delivery of goods). It also considered that the inclusion of electronic transport documents in that work would be particularly timely for supporting the new types of supply chain and logistics models expected to develop in response to the widespread business disruptions caused by the COVID-19.³ The Commission requested its secretariat to start preparatory work towards the development of a new international instrument on negotiable multimodal transport documents (hereinafter "NMTDs") that could be used for contracts not involving carriage by sea, and present the results of that work to the Commission for consideration at its next session. The secretariat was requested to carry out that work in close coordination and cooperation with relevant international organizations and convene as necessary expert group meetings and, resources permitting, an UNCITRAL colloquium.⁴

4. This note updates the Commission as regards relevant developments in other organizations and summarizes the preparatory work done by the secretariat in response to the Commission's request at its fifty-third session, conclusions it has drawn therefrom and its proposals on the way forward for consideration by the Commission. It builds on the note by the Secretariat that was before the Commission at its fifty-third session ([A/CN.9/1034](#)) and supplements the note by the Secretariat on coordination activities ([A/CN.9/1069](#)) that under the subheading "Preparatory

¹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 216.

² *Ibid.*, paras. 217 and 218.

³ *Ibid.*, *Seventy-fifth Session, Supplement No. 17 (A/75/17)*, part two, para. 81.

⁴ *Ibid.*, para. 82.

work on negotiable multimodal transport documents” reports about the secretariat’s participation at the UNECE’s and UNESCAP’s meetings referred to below (see paras. 5 and 8). In addition to those meetings, the secretariat participated at the April meeting of OTIF’s Working Group of Legal Experts (see para. 9 below).

II. Updates on relevant developments in other organizations

A. UNECE: unified railway law (URL)

5. As was mentioned in the note by the Secretariat (A/CN.9/1034, paras. 10–12), UNECE’s Group of Experts towards Unified Railway Law has worked for a number of years on a wide range of substantive issues of URL, including transport documents. At its most recent meeting in January 2021, the Group, after extensive discussion of whether URL should become an interface law that would co-exist with the COTIF/CIM⁵ and SMGS⁶ systems or it should replace those systems with a single legal regime, agreed to transmit to its parent body, the Working Party on Rail Transport, the knowledge material that the Group developed during its work on the project.

6. That knowledge material includes a draft convention on the contract for international carriage of goods by rail as a first convention of a system of URL conventions.⁷ The draft includes chapter 4a on a consignment bill, defined as a negotiable transport document “concerning the obligation of the carrier to deliver the goods to the bearer” of the consignment bill (as opposed to a consignment note defined as a document which confirms the conclusion and the content of the contract of carriage). The draft convention envisages that, if the parties to the contract of carriage agree to use a negotiable transport document, instead of a consignment note, the carrier is obliged “to issue a consignment bill concerning the obligation to deliver the goods to the bearer” (draft article 31a). The draft convention is not limited to the transportation by rail. Draft article 1 (2) states that: “[t]he contract of carriage may also stipulate that this legal regime applies to transport operations carried out by other modes of transport in addition to international rail transport (multimodal transport): 1. if such agreement does not contradict with any international treaty governing such additional transport, and 2. unless the Contracting State whose law applies to such multimodal transport contract has declared that it will not apply this legal regime to multimodal transport contracts.”

7. At its next session in November 2021, the Working Party on Rail Transport is expected to consider the knowledge material transmitted to it by the Group and offer its vision as regards next steps on URL.

B. UNESCAP: harmonization of legal frameworks for multimodal transport operations

8. UNESCAP’s ad hoc expert group working on harmonization of legal frameworks for multimodal transport operations, at its meetings in August 2020 and March 2021,⁸ considered options for further harmonization of a legal framework for

⁵ Stands for the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) – Appendix B to the Convention concerning International Carriage by Rail (COTIF) (found at https://otif.org/fileadmin/new/3-Reference-Text/3A-COTIF99/COTIF_1999_01_03_2019_corrected_31.07.2019_en.pdf). The Convention applies in Europe, the Maghreb and the Middle East.

⁶ Stands for the Agreement on International Goods Transport by Rail (found in Russian at <https://osjd.org/ru/8978/page/106077?id=2247>), applicable in the former Eastern bloc of countries.

⁷ ECE/TRANS/SC.2/GEURL/2021/3.

⁸ Meeting materials may be found at www.unescap.org/events/virtual-expert-group-meeting-legal-frameworks-multimodal-transport-operations-asia-and and

multimodal transport operations in the region, including with respect to a transport document that could serve as evidence of a contract and digitalization of a consignment note. The need to ensure synergies with the related work by other organizations, including UNCITRAL, was acknowledged.

C. OTIF: a document of title under CIM and digitalisation of freight transport documents

9. As was mentioned in the note by the Secretariat (A/CN.9/1034, para. 22), the topic of negotiable documents in railway transport had been included in the work plan of the Working Group of Legal Experts under the auspices of OTIF. At its fourth session, held on 15 April 2021, after consideration of the topic on the basis of an inception note on the bill of lading prepared by OTIF's secretariat, the Working Group of Legal Experts instructed OTIF's secretariat: (a) to initiate consultations with OTIF's members and relevant stakeholders on whether it was necessary to introduce the possibility of using transport documents with a document of title function under CIM; (b) to continue cooperation regarding this matter with relevant international organizations and associations, in particular UNCITRAL, ICC, OSJD and CIT, within the competence of OTIF; and (c) to prepare an inception paper on the digitalisation of freight transport documents for the first meeting in 2022. A close link between those projects and projects of the World Customs Organization and the European Union (EU) on dematerialization of customs procedures and electronic freight transport information was noted.⁹

D. OSJD: a negotiable transport document under SMGS

10. As was mentioned in the note by the Secretariat (A/CN.9/1034, para. 21), the Ad Hoc Working Group on Negotiable Transport Documents of the OSJD Commission on Transport Law considers the possibility of introducing a transport document with a document of title function under SMGS. The Ad Hoc Working Group decided to draft an annex to SMGS that would define the form of a negotiable transport document as well as circumstances and procedures for its use under SMGS. The work has also commenced on modifications and supplements to SMGS to address issues arising from the use of a negotiable transport document, including terminology related to negotiable transport documents.

E. CIT: electronic CIM/SMGS consignment note

11. As was mentioned in the note by the Secretariat (A/CN.9/1034, para. 9), CIT developed a standard CIM/SMGS consignment note in 2006 and the technical specifications for the electronic CIM/SMGS consignment note in 2019.¹⁰ Currently, solutions are explored for digitalization of documents that must accompany the CIM/SMGS consignment note (e.g., container and wagon notes), whose effectiveness is expected to be tested in pilot projects. The work has also commenced on an XML/EDIFACT converter. The aim of those projects is to comply with the EU electronic customs requirements (see para. 9 above) and also to ensure that an electronic CIM/SMGS consignment note is accepted by banks and recognized as evidence of the contract of carriage by courts, insurance agencies and other bodies

www.unescap.org/events/2021/second-virtual-expert-meeting-legal-frameworks-multimodal-transport-operations-asia-and.

⁹ See e.g., Regulation (EU) 2020/1056 of the European Parliament and of the Council of 15 July 2020 on electronic freight transport information at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1056>.

¹⁰ www.cit-rail.org/media/files/documentation/freight/cim/e-fb_cim-smgs_en_2019-07-01.pdf?cid=120604.

(the CIM/SMGS consignment note is accepted by customs as a transport document and by banks in documentary credit transactions).

III. Overview of the preparatory work by the secretariat

12. The preparatory work conducted by the secretariat since the fifty-third session of the Commission has consisted essentially of: (a) research on the subject matter, in particular provisions on negotiable and non-negotiable multimodal transport documents found in national, (sub) regional and international legislation (for the main findings of that research, see section A below); and (b) consultations with experts and interested organizations, primarily through an expert group meeting on a new international instrument on NMTDs that took place online on 2 and 3 February 2021,¹¹ and an open webinar on “International experiences with the dematerialization of negotiable transport documents” that took place on 13 and 14 April 2021¹² (see section B below for main takeaways from those consultations).

A. Provisions on multimodal transport documents found in national, (sub)regional and international legislation

1. General

13. A survey of provisions on multimodal transport documents found in national and (sub)regional legislation addressing multimodal transport indicates that most of them are similar to provisions of the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980) (the “MT Convention”).¹³

2. Definition of a “multimodal transport document”

14. A “multimodal transport document” is defined as a document which evidences a multimodal transport contract, the taking in charge of the goods by the MTO, and an undertaking by the MTO to deliver the goods in accordance with the terms of that contract.¹⁴

3. Issue of a multimodal transport document

15. The multimodal transport document is usually required to be issued and signed by the MTO (or by a person having authority from the MTO)¹⁵ and may, at the option

¹¹ Attended by more than 30 invited experts from academia, private practice and interested governments. Presentations were made by representatives of UNCTAD, UNECE, UNESCAP, OSJD, CIT, CMI and FIATA.

¹² The web page of the webinar may be found at <https://uncitral.un.org/en/webinar-dematerialization-negotiable-transport-documents>.

¹³ Not yet in force. A certified true copy may be found at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en.

¹⁴ See e.g., article 1 of the MT Convention; article 1 of Decision 331 of the Andean Community on Multimodal Transportation of 4 March 1993 as modified by Decision 393 of 9 July 1996 (found at SICE - Andean Community - Decision 331 (oas.org), applicable in Bolivia, Colombia, Ecuador and Peru (hereinafter the “Andean Community Decision”)); article 1 (c) of the MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport of Goods of 27 April 1995 (found at Decisión Nro. 15 Consejo Mercado Común - Acuerdo sobre Transporte Multimodal en ambito del MERCOSUR (loa.org.ar), applicable to Argentina, Brazil, Paraguay and Uruguay (hereinafter the “MERCOSUR Agreement”)); definition of “multimodal transport document” in the Multimodal Transport Bill of Singapore (found at <https://sso.agc.gov.sg/Bills-Supp/42-2020/Published/20201102?DocDate=20201102>) and section 4 of the Multimodal Transport Act of Thailand (found at http://web.krisdika.go.th/data/outsitedata/outside21/file/Multimodal_Transport_Act_B.E._2548.pdf).

¹⁵ See e.g., article 4.2 of Proclamation No. 548/2007 on Multimodal Transport of Goods of Ethiopia (found at https://lawethiopia.com/images/federal_proclamation/proclamations_by_number/548.ae..pdf); article 12 of the Multimodal Transport Law of Myanmar (found at Myanmar-Multimodal-Transport-

of the consignor, be in negotiable or non-negotiable form.¹⁶ Most surveyed legislation enable both handwritten and electronic signatures.¹⁷

16. A non-negotiable multimodal transport document must indicate a named consignee.¹⁸ Where a multimodal transport document is issued in negotiable form: (a) it must be made out to order or to bearer; (b) if made out to order, it must be transferable by endorsement;¹⁹ (c) if made out to bearer, it must be transferable without endorsement;²⁰ (d) if issued in a set of more than one original, it must indicate the number of originals in the set; and (e) if any copies are issued, each copy must be marked “non-negotiable copy”.²¹

17. The issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national law. The issue of such other documents does not affect the legal character of the multimodal transport document.²²

4. Contents of a multimodal transport document

18. The surveyed legislation require the multimodal transport document, regardless of whether it is negotiable or non-negotiable, to contain, as a rule, the following particulars: (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; (b) the apparent condition of the goods; (c) the name and principal place of business of the MTO; (d) the name of the consignor; (e) the consignee, if named by the consignor; (f) the place and date of taking in charge of the goods by the MTO; (g) the place of delivery of the goods; (h) the date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties; (i) a statement indicating whether the multimodal transport document is negotiable or non-negotiable; (j) the place and date of issue of the multimodal transport document; (k) the signature of the MTO or of a person having authority from the MTO; (l) the freight for each mode of transport, if expressly agreed between the parties, or the freight, including its currency, to the extent payable by the consignee or other indication that freight is payable by him; (m) the intended journey route, modes of

Law-2014.pdf (asean.org)); article 7 (1) and 8 (1) of the Multimodal Transportation of Goods Act of Nepal (found at Multimodal Transportation of Goods Act, 2063 - 2006 (lawcommission.gov.np)), article 9.1 and 3 of the Bill of Singapore; and article 10.2 of the Decree on Multimodal Transport of Viet Nam (found at Viet Nam Decree No. 87/2009/ND-CP of October 19, 2009, on multimodal transport (vanbanphapluat.co)).

¹⁶ See e.g., article 5 of the MT Convention; article 3 of the Andean Community Decision; article 3 of the MERCOSUR Agreement; article 4.1 of the ASEAN Framework Agreement on Multimodal Transport (found at <https://afamt.asean.org/wp-content/uploads/2019/07/2005-ASEAN-Framework-Agreement-on-Multimodal-Transport.pdf>), ratified by Cambodia, Indonesia, the Lao People's Democratic Republic, Myanmar, Philippines, Thailand and Vietnam (hereinafter the “ASEAN Agreement”); article 8 of Law No. 9611 on Multimodal Carriage of Goods of Brazil; article 4.1 of the Proclamation of Ethiopia; section 7 of the Act on Multimodal Transportation of Goods of India (found at The Multimodal Transportation of Goods Act, 1993 (indiankanon.org)); article 11 of the Law of Myanmar; article 7 (2) of the Act of Nepal; article 9.2 of the Bill of Singapore; section 10 of the Act of Thailand; and article 10.1 of the Decree of Viet Nam.

¹⁷ See e.g., article 5 (3) of the MT Convention; article 4 (3) of the ASEAN Agreement; article 3 of the Andean Community Decision; article 4.3 of the Proclamation of Ethiopia; article 8 (2) of the Act of Nepal; article 10 of the Act of Thailand; and articles 10.3 and 11.3 of the Decree of Viet Nam.

¹⁸ See e.g., article 12.2 of the Decree of Viet Nam.

¹⁹ Id.

²⁰ See e.g., article 13 of the Decree of Viet Nam.

²¹ Provisions similar to those in (a) to (e) are found e.g., in article 6 of the MT Convention; article 4 of Law No. 24.921 on Multimodal Transport of Goods of Argentina; and article 6 of the Proclamation of Ethiopia. Points listed in (a) to (d) but not (e) may also be found in article 10 of the Act of Nepal.

²² See e.g., article 13 of the MT Convention; and article 13 of the Proclamation of Ethiopia.

transport and places of transshipment, if known at the time of issuance of the multimodal transport document; (n) any mandatory legal regime applicable to the international multimodal transport; (o) any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.²³ The absence from the multimodal document of one or more of the particulars do not affect the legal character of the document as a multimodal transport document²⁴ provided that it nevertheless meets the requirements set out in the definition of the multimodal transport document (see para. 14 above).²⁵

5. Evidentiary effect of a multimodal transport document

19. The surveyed legislation usually state that a multimodal transport document is *prima facie* evidence of the taking in charge by the MTO of the goods as described in the document.²⁶ They establish the presumption of the apparent good condition of the goods received by the MTO unless the MTO notes otherwise in the multimodal transport document.²⁷ Proof to the contrary by the MTO is not admissible if the multimodal transport document has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein.²⁸ Some legislation limit the application of the latter provision only to the NMTDs.²⁹

6. Liability for misstatements or omissions

20. Most of the surveyed legislation envisages the MTO's liability for including false information or omitting any information required to be included in the multimodal transport document.³⁰ It also envisages the consignor's obligation to indemnify the MTO against loss resulting from inaccuracies in or inadequacies of the particulars furnished by the consignor for insertion in the multimodal transport document. That obligation remains with the consignor regardless of the transfer of the multimodal transport document to another person³¹ but does not limit the liability

²³ See e.g., article 8 of the MT Convention; article 4 of the Andean Community Decision; article 5.1 of the ASEAN Agreement; article 5.1 of the Law of Argentina; article 10 of the Law of Brazil; article 8 of the Proclamation of Ethiopia; section 408 (1) and 443 (1) of the Multimodal Transport Reform Law of Germany (available at www.fsk-gmbh.de/etc/docs/trg.pdf); section 9 of the Act of India; article 18 of the Regulation on International Multimodal Transport of Mexico (found at www.global-regulation.com/translation/mexico/560902/regulations-for-international-multimodal-transport.html); article 13 of the Law of Myanmar; article 9 of the Act of Nepal; section 11 of the Act of Thailand; and article 14 of the Decree of Viet Nam.

²⁴ See e.g., article 4 of the Andean Community Decision; article 5.2 of the ASEAN Agreement; section 9 of the Act of India; article 14 of the Law of Myanmar; article 12 (2) of the Act of Nepal; and article 14.2 of the Decree of Viet Nam.

²⁵ See e.g., article 8 of the MT Convention; article 8 (o) of the Proclamation of Ethiopia; article 10.2 of the Bill of Singapore; and section 11 of the Act of Thailand.

²⁶ See e.g., article 5 of the MERCOSUR Agreement; article 6.1 the ASEAN Agreement; article 10.1 of the Proclamation of Ethiopia, section 11 (a) of the Act of India; article 15 (a) of the Law of Myanmar; article 14 of the Act of Nepal; article 11.1 of the Bill of Singapore; and article 15.1 of the Decree of Viet Nam.

²⁷ See e.g., article 9 of the MT Convention; article 8 of the Law of Argentina; article 9 of the Proclamation of Ethiopia; sections 409 (2) and (3) and 444 (1) of the Law of Germany; section 10 of the Act of India; article 17 of the Regulation of Mexico; article 13 of the Act of Nepal; section 12 of the Act of Thailand; and article 16 of the Decree of Viet Nam.

²⁸ See e.g., article 10 of the MT Convention, article 6.2 of the ASEAN Agreement, article 10.2 of the Proclamation of Ethiopia, section 11 (b) of the Act of India, article 15 (b) of the Law of Myanmar; section 13 of the Act of Thailand; section 444 (2) of the Law of Germany; article 8:48 of Book 8 of the Civil Code of Netherlands; article 11 of the Bill of Singapore; and section 13 of the Act of Thailand.

²⁹ See e.g., article 15.2 of the Decree of Viet Nam.

³⁰ See e.g., article 11 of the MT Convention; article 11 of the Proclamation of Ethiopia; and article 16 of the Regulation of Mexico.

³¹ See e.g., article 21 of the ASEAN Agreement; article 24 of the Bill of Singapore; and articles 25 and 26 of the Decree of Viet Nam.

of the MTO under the multimodal transport contract to any person other than the consignor.³²

7. Delivery of goods

21. Where a NMTD has been issued, delivery of the goods may be demanded from the MTO or a person acting on the MTO's behalf only against surrender of the NMTD duly endorsed where necessary.³³ The MTO is discharged from its obligation to deliver the goods if, where a NMTD has been issued in a set of more than one original, the MTO or a person acting on its behalf has in good faith delivered the goods against surrender of one of the originals.³⁴ Liability is envisaged for delivery of the goods to a wrong person.³⁵ It may be limited, for example to what would be payable if the goods had been lost.³⁶ When there are more than one presenter of original prints of the same document, legislation may set out who among them has the best right.³⁷

22. In case of a non-negotiable document, the MTO is be discharged from its obligation to deliver the goods if the MTO makes delivery thereof to the named consignee or to such other person as the MTO may be duly instructed, as a rule, in writing.³⁸

23. Some surveyed legislation spells out the obligation of the MTO to deliver the goods as follows: (a) when the multimodal transportation document has been issued as a negotiable instrument "to the bearer", to the person that presents one of the original copies of that document; (b) when the multimodal transportation document has been issued as a negotiable instrument "to the order of", to the person presenting a duly endorsed copy of the original document; (c) when the multimodal transportation document has been issued as a negotiable instrument to the order of a given person, to that person, after having proven its identify and upon presentation of one of the original copies of the document. If the document has been endorsed "to the order of" or in blank, the provision of letter (b) applies; (d) when the multimodal transportation document has been issued as a non-negotiable instrument to the person designated in the document as the consignee, after that person has proven its identity; and (e) when no written document has been issued, to the person indicated in the instructions received from the consignor or such person as may have acquired the rights of the consignor or consignee to issue such instructions, pursuant to the multimodal transportation contract.³⁹

8. Multimodal transport document as document of title

24. Some legislation recognizes all multimodal transport documents as document of title.⁴⁰ Other laws allow only the holder of a NMTD to demand delivery of goods; in case of a non-negotiable multimodal transport document, delivery is permitted on proof of the identity of the named consignee, i.e., the holder of the document is not entitled to claim performance of the obligation. At least one law states that all

³² See e.g., article 12 of the MT Convention; article 20 of the Andean Community Decision; article 12 of the Proclamation of Ethiopia; and section 16 of the Act of Thailand.

³³ See e.g., section 444 (3) and 445 (1) and (2) of the Law of Germany.

³⁴ See e.g., article 6 (2 and 3) of the MT Convention; and article 14 of the Proclamation of Ethiopia. Expressed in article 8:45 of Book 8 of the Civil Code of the Netherlands as the "all for one and one for all" principle.

³⁵ See e.g., article 8:51 of Book 8 of the Dutch Civil Code; and section 445 (3) of the Law of Germany.

³⁶ See e.g., section 445 (3) of the Law of Germany.

³⁷ See e.g., article 8:52 of Book 8 of the Dutch Civil Code.

³⁸ See e.g., article 7 (2) of the MT Convention, article 5 (3) and (4) of the Proclamation of Ethiopia.

³⁹ See e.g., article 8 of the Andean Community Decision; article 9 of the ASEAN Agreement; article 14 of the Bill of Singapore; section 22 of the Act of Thailand; and article 19 of the Decree of Viet Nam.

⁴⁰ See e.g., article 7 of the Law of Argentina; article 7 of the Proclamation of Ethiopia; section 8 (1) of the Act of India; and article 9 (6) and (7) of the Bill of Singapore.

provisions in respect of a bill of lading in the law concerning carriage of goods by sea apply *mutatis mutandis* to the multimodal transport bill of lading.⁴¹

9. Electronic multimodal transport documents

25. Some surveyed legislation envisage electronic form for both negotiable and non-negotiable multimodal transport documents.⁴² Some other, like the MT Convention, envisage electronic multimodal transport document only for a non-negotiable multimodal transport document.⁴³ Some allow using electronic data interchange messages for transferring a multimodal transport document.⁴⁴

B. Preliminary conclusions from expert consultations

1. Expert group meeting on a new international instrument on NMTDs, held online on 2 and 3 February 2021

26. In addition to developments in various organizations (see chapter II above), experts discussed in detail issues related to: (a) the form that an international instrument providing for NMTD should take; (b) the scope of such an instrument; (c) interface between such an instrument and legal regimes applicable to unimodal transport; (d) contents of such an instrument; (e) extent to which such an instrument should address liability aspects; and (f) approaches to addressing electronic NMTDs (e-NMTDs).

(a) Form of an international instrument

27. Given the limited catalogue of property rights recognized in many jurisdictions (*numerus clausus*), it was considered that only a binding international instrument, i.e., an international convention, could recognize NMTDs and their legal effects, in particular vis-à-vis third parties, in modes of transport other than sea carriage. Whereas the function of the ocean bill of lading as document of title was widely accepted as a longstanding trade usage, contractual solutions would not enjoy such widespread international recognition without legislative recognition.

28. An international instrument could however reserve some flexibility for contracting parties to decide which type of transport document to use and whether to use more than one transport document and thus whether to apply or disapply a new instrument to their transactions (opt-in or opt-out clauses). Where derogation from, or variation of the effect of, any provisions would be envisaged, an instrument would have to identify provisions that could be derogated from or varied and those that cannot be derogated from or varied by the contracting parties.

(b) Scope

29. With the original focus on railway needs (see para. 1 above), the project evolved towards NMTDs (see para. 4 above). Some experts suggested a mode-neutral approach, which would allow contracting parties to use a negotiable transport document in multimodal or unimodal transport context (provided that the mandatorily applicable unimodal transport regime would allow them to do so). That approach has advantages in situations where mode(s) of transportation are unknown to contracting parties at the outset of their contractual relations and because MTOs or other freight forwarders often reserve the right to choose mode(s) of transportation. Multimodality was in any event considered irrelevant to discussion of negotiability of a transport document.

⁴¹ Section 15 of the Act of Thailand.

⁴² See e.g., sections 408 (3) and 443 (3) of the Law of Germany.

⁴³ See e.g., article 5 (4) of the MT Convention; and article 5 of the Proclamation of Ethiopia.

⁴⁴ See e.g., article 5 of the Andean Community Decision; article 6.2 of the ASEAN Agreement; and article 11 (2) of the Bill of Singapore.

30. Since a negotiable transport document would provide its holder with the constructive possession of the cargo, it was considered that an international instrument should cover the entire period during which the cargo would be in the care of the carrier⁴⁵ (from the handover of the cargo by the consignor to the carrier until the delivery of the cargo to the holder of the document). An instrument would thus be expected to cover short-term warehousing of cargo as part of a contract of carriage, which would be especially appropriate for containerized transportation.

31. It remains to be clarified whether non-negotiable transport documents, notably the straight bill of lading, would also be covered by a new instrument. Although not being transferable to new consignees, such documents fulfil the function of a document of title as regards the original consignee and play a role in securing trade finance under the UCP. Concerns were expressed that, if they were to be covered, confusion and overlap with existing conventions that already provided for them would arise. Preference was expressed for focusing on negotiable instruments and consider in due course whether there would be a need to expand the scope to non-negotiable documents.

(c) Interface with existing transport conventions

32. Under the dual track approach explained in the note by the Secretariat ([A/CN.9/1034](#)), a new international instrument would not interfere with other international instruments, be they on unimodal or multimodal transportation of goods. Nevertheless, amendments would be required to those other instruments in order to achieve recognition of a negotiable transport document and accommodate its use. States parties to relevant conventions might consider introducing appropriate amendments in due course.

33. In establishing an appropriate interface with existing transport conventions, a new instrument would need to accommodate two situations with the use of a negotiable transport document: (a) where it would be used by contracting parties for documentary credit and also as a transport document or record (e.g., for transportation and customs clearances); and (b) where it would co-exist with another document or record that would be used for purposes other than documentary credit (e.g., for transportation and customs clearances).

(d) Contents

34. Similar to the surveyed legislation on multimodal transport documents (see section A above), a new international instrument would be expected to answer questions such as: What is a negotiable transport document? How it should be issued and transferred? What is its minimum contents? How should the goods be delivered? What are the legal implications for the original holder and issuer of a negotiable transport document when the document is transferred? What are rules for amendment of the document and its replacement (e.g., with a data record and vice versa)?

35. The MT Convention and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”),⁴⁶ although not in force, were considered relevant as they contained provisions addressing those issues. For example, main features of a negotiable transport document are listed in article 1 (15) of the Rotterdam Rules and article 6 of the MT Convention while provisions on issuance of a transport document may be found in article 35 of the Rotterdam Rules and article 5 of the MT Convention. Those texts also address in detail the contents of transport documents (article 36 of the Rotterdam Rules and article 8 of the MT Convention), the evidentiary effect of the transport document (article 41 of the Rotterdam Rules and article 10 of the MT

⁴⁵ Understood as the person who enters into the contract of carriage with the shipper and encompassing also freight forwarders, MTOs, and non-vessel operating common carrier (NVOCC) and other actors performing similar roles in the multimodal and unimodal transport contexts.

⁴⁶ General Assembly resolution [63/122](#), annex.

Convention) and other aspects of a negotiable transport document, including the carrier's obligation to deliver the cargo to the holder of the negotiable transport document (article 45 of the Rotterdam Rules and article 6 (2) and (3) of the MT Convention).

36. Since the purpose of an international instrument is to ensure non-discrimination in the use of a negotiable transport document in different modes of transport and in unimodal and multimodal contexts, an instrument would have to be drafted to ensure that a negotiable transport document performs the same functions as an ocean bill of lading. In particular provisions would need to provide that: (a) the holder of the document has the right of control of the goods; and (b) a single transport document could be used in the chain of transactions, including as collateral by banks.

37. As regards the control of the goods, provisions of an instruments would need to provide the holder of the negotiable transport document or record with the right to control the goods in transit (i.e., the right to give or modify instructions with respect to the goods), to demand delivery of the goods upon presentation of the original document and to transfer title to the goods by transferring the document or record. An instrument would be expected to address obligations and liability of the issuer of the document for the failure to comply with the requirements applicable to such document and oblige the carrier to deliver the goods upon presentation of the original document. As regards the "guarantee of singularity" of the document in the chain of transfers, provisions ensuring that a negotiable document is "original" (its content has not been altered) and "unique" (the document is the only one that exists and could be distinguished from copies) would need to be included in an instrument together with the provisions related to the notions of constructive possession and transfer by endorsement or otherwise. The Rotterdam Rules and the UNCITRAL Model Law on Electronic Transferable Records, adopted by UNCITRAL in 2017 (MLETR),⁴⁷ were considered relevant for transposing those functions of a negotiable transport document to paperless environment and preventing multiple claims for performance of the same obligation.⁴⁸

38. At the same time, the instrument would not venture into issues that are subject to diverging solutions under domestic law such as property rights and the point in time when title to the goods would deem to be transferred. The future instrument should also not address issues concerning the rights and obligations of the parties under the underlying sales contract.

(e) Liability

39. A new instrument would be expected to address the responsibilities of parties in connection with the issuance, transfer and enforcement of a negotiable transport document, and the consequences of mistakes, incomplete information, inaccuracies and misrepresentations in the document. The instrument should also clearly affirm the carrier's obligation to deliver the goods to the controlling party and its legal implications. In addition, a proper solution would need to be found to establish an adequate interface between the transport document under the future instrument and the rules governing the liability of the carrier.

40. Without attempting to provide for a comprehensive liability regime, a future instrument could include mechanisms that would allow parties to clearly identify

⁴⁷ United Nations publication, Sales No. E.17.V.5.

⁴⁸ See e.g., MLETR's provisions on "singularity" and "control" in article 10, including the criterion for assessing integrity of the record in paragraph 2; on "exclusive control", identification of the "person in control" of the record and "transfer of control" of the record in article 11; the general reliability standard in article 12; and functional equivalence rules for all forms of endorsement and amendments in articles 15 and 16. Similar provisions are found in the Rotterdam Rules that contains provisions on electronic transport records throughout the text and specifically in chapter 3, including procedures for use of negotiable electronic transport records (article 9) and provisions on replacement of negotiable transport document or negotiable electronic transport record (article 10), and also in chapter 8 on transport documents and electronic transport records.

which liability regime would be applicable to which aspects of their relations. For example, the liability regime mandatorily applicable to the first leg of carriage could determine the liability of the carrier for cargo unless damage or loss can be localized. In that case, the liability regime applicable to the leg where damage or loss occurred would apply. Alternatively, as in FIATA bill of lading, default liability regimes for non-localized damage, loss or delay may be provided in an instrument itself whereas for localized damage, an instrument may refer to the applicable unimodal liability regime.

41. Addressing those issues in an instrument was considered important in particular in the multimodal transport context where the liability regime is fragmented and uncertain for non-localized damage, loss or delay. Market mechanisms alone (e.g., that merchants would not use services of those carriers whose level of liability was too low) were considered insufficient to protect weaker parties, such as small traders in developing countries, because contracts of carriage are often on the carrier's standard terms (contracts of adhesion). It was however acknowledged that the project should only deal with questions of liability to the extent strictly necessary.

(f) e-NMTDs

42. The secretariat's survey of provisions of existing transport conventions on electronic transport documents indicate that they range from a short enabling functional equivalence provision (e.g., in article 6 (9) of CIM or article 4 (2) of the 1999 Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)⁴⁹) to more detailed provisions, such as those found in the Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note.⁵⁰ As noted in section A above, the MT Convention, prepared in the 1970s, enables electronic signatures (article 5 (3)) and envisages a paperless form only for non-negotiable multimodal transport documents (article 5 (4)).

43. UNCITRAL texts in the areas of electronic commerce and transport law (see para. 37 above) as more recent and detailed may be used as the basis for work on electronic transferable or negotiable transport records. A new instrument would supplement them by providing for legal recognition of a transferable transport record, both paper and electronic, in modes of transport not limited to sea. Principles of functional equivalence, non-discrimination and technology neutrality would remain paramount in order to maintain the required balance between enabling new technological solutions and keeping market order and financial stability.

44. The secretariat's survey of existing systems for processing electronic transport documents indicates that, in non-maritime modes of transport, those systems replicate functions of non-negotiable transport documents reflecting the underlying legal regime for transport documents in the relevant mode of transport. Changes in those systems would be required to accommodate negotiable transport documents. Experience of the six systems accepted by P&I Club (essDOCS, Bolero, E-title, edoxOnline, WAVE and CargoX) that handle electronic negotiable ocean bill of lading would be relevant in that context.

45. The webinar on "International experiences with the dematerialization of negotiable transport documents", held on 13 and 14 April 2021, provided a further opportunity to discuss issues related to e-NMTDs (see below).

2. Webinar on "International experiences with the dematerialization of negotiable transport documents", held on 13 and 14 April 2021

46. The webinar discussed, on the first day, UNCITRAL standards and domestic experiences with electronic transferable records (ETR) and regulatory and industry

⁴⁹ Available at www.iata.org/contentassets/fb1137ff561a4819a2d38f3db7308758/mc99-full-text.pdf.

⁵⁰ United Nations, *Treaty Series*, vol. 2762, p. 23.

responses to the dematerialization of trade documents. On the second day, it addressed international standards for the dematerialization of transport documents and industry and regulatory responses to dematerialized negotiable transport documents, focusing first on non-maritime modes of transport and in the second panel, on sea carriage.

47. Examples of transposition of MLETR and the Rotterdam Rules provisions in the national legislation were given. Moreover, examples were given of system rules used by ETR service providers making reference to the law of a jurisdiction enacting MLETR as applicable law.

48. Despite the availability of foundational standards for the use of ETR and business case for their use in the light of obvious advantages (transparency, traceability, minimization of risks of human mistakes and forgery and opportunities arising from the Internet of Things (IoT)), a very low uptake of dematerialized trade documents in the banking sector and uneven uptake across various industries was noted.

49. The current situation was explained not so much by legal impediments but concerns over the absence of a uniform approach to ETR management systems and the lack of or inadequate quality controls over legal and other standards underpinning their operation. Concerns also exist over time and resources, including training, needed for shifting to new ways of doing business and connecting digital ecosystems, which may require a tailor-made solution in some cases. Those issues may arise in particular in the multimodal transport context because of diversity of legal regimes, uneven use of dematerialized transport records across various modes of transport and different systems in place for processing such records. The lack of interoperability and mutual legal recognition of authentication and identification techniques across borders, the subject currently addressed by UNCITRAL Working Group IV (Electronic Commerce), caused additional challenges in the use of ETR. Strong unified laws on ETRs as well as common technical standards and interoperable solutions were therefore considered essential for overcoming inertia of some sectors and industries to embrace ETRs. The need for reconciling interoperability with freedom of choice and innovation was however also recognized.

50. Examples of closed and open systems for issuance of electronic bills of lading and advantages and disadvantages of either were discussed, including on security and access.

51. The ultimate goal of those ETR solutions is to ensure that a single record created in one system will be recognized as such and be accessible by all relevant stakeholders within and outside that system. This may be achieved through the development of new processes that replace the existing structured documentation flow, electronic or otherwise, with data records (e.g., a record of the contract, its terms, implementation). Modern solutions already exist that take a data-centric as opposed to document-centric approach, focusing on essential controlling functions instead of replicating through structured messages paper documentation processes, workflow and requirements, some of which have already or may become obsolete (e.g., because transmission is instantaneous in paperless environment). Introduction of one record (i.e., the replacement of all paper or electronic documents pertaining to the same transaction with a single electronic record) allows shifting from a peer-to-peer messaging model to a virtual record-sharing model, which facilitates direct connectivity between all stakeholders and help to eliminate issues with duplicates, provide better visibility and transparency and achieve the best data quality. In addition, in that model the source owner assumes the full control over data in the end-to-end transportation chain, determining with whom data is to be shared and terms of access to data.

52. Among main challenges to ETRs' uptake are laws and practices requiring presentation of paper documents generally or certain types thereof, including supporting documents, for customs clearance, documentary credit transactions and other purposes. To address that challenge, ETR systems often are configured to allow

printouts and switching from one medium to the other, recording the resulting replacement and preventing the replaced document or record from further circulation.

53. Another challenge is that so far, few jurisdictions recognize ETRs. Where a transaction is made subject to the law of those jurisdictions, a simple cross-reference to that law might be sufficient for recognition of legal effects of electronic transfers of a negotiable document from one holder to another. Where transactions are not subject to the law of a jurisdiction that recognizes ETRs, contractual technics such as novation and assignment may need to be employed. The need for them may also arise in complex and long chains of trade transactions with many stakeholders involved since they raise questions of applicable law. It would take some time before uniform ETR laws based on MLETR become widespread replacing the need for contractual solutions. The latter have their limits: while a contractual basis may provide adequate legal certainty as regards the transfer of contractual rights (such as the right to demand delivery of goods), they are less appropriate for recognition of legal effects, especially across borders, of transfers of other rights (such as rights associated with the legal possession of the bill of lading), for which enabling legislation is required.

54. The need to ensure compliance of ETR solutions with mandatorily applicable regulatory frameworks (e.g., “know-your-customer” or “KYC”) was another challenge especially where the name of a client would be unknown (e.g., in anonymity or pseudo-anonymity situations like where a negotiable transport document is made out to bearer).

55. In the context of those challenges, it was recalled that article 8 of the Rotterdam Rules required the consent of the shipper and the carrier for the issuance and subsequent use of an electronic transport record. It was also recalled that articles 17 and 18 of the MLETR and article 10 of the Rotterdam Rules envisaged the possibility of replacing ETR with paper documents and vice versa. While enabling change of medium, they ensured that information required by substantive law was not lost and that the replaced transferable document or record will not further circulate so as to prevent the co-existence of two claims to performance of the same obligation.

IV. Conclusions

56. The preparatory work carried out by the secretariat indicates that provisions on multimodal transport documents, both negotiable and non-negotiable, found in national and (sub)regional legislation on multimodal transport drew significantly on the respective provisions of the MT Convention as regards definition, issue, form, type, content and evidentiary effect of a multimodal transport document and liability for misstatements or omissions. Different approaches are taken across jurisdictions in regulating negotiable as opposed to non-negotiable multimodal transport documents. A very few provisions are found addressing paperless aspects of multimodal transport documents.

57. While a new instrument may use the results of that survey as well as relevant provisions of the Rotterdam Rules and MLETR as the starting point, the primary purpose of a new international instrument could be to ensure legal recognition of a medium neutral negotiable transport document in different modes of transport. It may thus be desirable to commence work with the exclusive focus on negotiable transport documents and subsequently consider whether other types of transport documents accepted by banks for documentary credit should also be encompassed. It may also be desirable to take in a new instrument a mode neutral approach, rather than a multimodal or rail plus approach, as was originally envisaged, for reasons explained in paragraph 29 above. In addition, in the light of the constraints for an uptake of ETR highlighted during the webinar, it may be prudent neither to limit the scope of a new instrument to electronic negotiable transport records nor require or prefer the use of such records instead of paper negotiable transport documents. A preferred approach might be medium neutral by enabling the use of both negotiable transport documents and their functionally equivalent electronic transferable transport records.

58. A proper coordination and interface with regimes applicable to any existing and future negotiable transport documents, including the ocean bill of lading, and liability regimes, would need to be achieved in such work. That work should thus continue being closely coordinated with other organizations (e.g., UNECE, UNESCAP, OTIF and OSJD) currently working on or exploring solutions to enable the use of a negotiable transport document in the rail plus or other multimodal context.

59. The Commission may request the secretariat to continue expert consultations on open issues, working closely with all relevant international organizations with a view to ensuring that UNCITRAL work would be without prejudice to, and would not interfere with, any ongoing work of those international organizations. The Commission may wish to request the secretariat to report to the Commission, at its fifty-fifth session, in 2022, on the progress made, including on the preliminary draft of a new instrument on multimodal transport documents. The Commission may further wish to give this topic high priority for assignment to the first available working group, e.g., Working Group VI which is likely to complete the work on the draft convention on judicial sale of ships in the second half of 2022.
