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Report of Working Group VI (Negotiable Cargo Documents) on the work of its forty-third session (Vienna, 27 November–1 December 2023)

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I. Introduction

1. At its fifty-fifth session in 2022, the Commission assigned the topic of negotiable multimodal transport documents to Working Group VI.[1] At its forty-first and forty-second sessions, the Working Group commenced its deliberations on the basis of a set of preliminary draft provisions for an instrument on negotiable cargo documents prepared by the secretariat. Given that the instrument on negotiable cargo documents may apply to both multimodal and unimodal transport contexts, the title of the Working Group was subsequently revised to "negotiable cargo documents".[2]

2. At its fifty-sixth session in 2023, the Commission took note of the decision of the Working Group to postpone its consideration of draft provisions on electronic aspects and to revisit them after finalizing the substantive provisions concerning negotiability.[3] The Commission expressed its satisfaction with the progress made by Working Group VI and the support provided by the secretariat.[4]

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-third session in Vienna from 27 November to 1 December 2023.

4. The session was attended by representatives of the following States members of the Working Group: Afghanistan, Argentina, Australia, Austria, Brazil, Canada, Chile, China, Côte d'Ivoire, Czechia, Dominican Republic, Finland, France, Germany, Ghana, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Japan, Kuwait, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Egypt, El Salvador, Guatemala, Libya, Malta, Mauritania, Myanmar, Oman, Paraguay, Philippines, Seychelles, Slovakia, Sri Lanka and United Republic of Tanzania.

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

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD) and United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP);

(b) *Intergovernmental organizations*: Gulf Cooperation Council (GCC), Hague Conference on Private International Law (HCCH) and Organization for Cooperation between Railways (OSJD);

(c) *International non-governmental organizations*: Center For International Legal Studies (CILS), Comité Maritime International (CMI), Global Shippers Forum (GSF), International and Comparative Law Research Center (ICLRC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA) and Shanghai Arbitration Commission (SHAC).

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 22 (h) and 202.
[2] Ibid., *Seventy-eighth Session, Supplement No. 17* (A/78/17), para. 174 (f).
[3] Ibid., para. 168.
[4] Ibid., para. 171.

7. The Working Group elected the following officers:

Chairperson: Ms. Beate CZERWENKA (Germany)

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

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

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.99); and

(b) A revised annotated set of preliminary draft provisions for an instrument on negotiable cargo documents (A/CN.9/WG.VI/WP.100).

9. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Future instrument on negotiable cargo documents.
5. Adoption of the report.

III. Deliberations

10. The Working Group continued its consideration of the topic on the basis of a Note by the Secretariat (A/CN.9/WG.VI/WP.100) containing a revised annotated set of preliminary draft provisions for an instrument on negotiable cargo documents. The summary of deliberations of the Working Group may be found in chapter IV below.

IV. Future instrument on negotiable cargo documents

Preliminary draft provisions for an instrument on negotiable cargo documents

General remarks

11. The Working Group heard a joint presentation by representatives from the International Federation of Freight Forwarders Associations (FIATA), the Global Shippers Forum, and the International Chamber of Commerce (ICC). The presentation discussed the need for an international legal framework to support the use of negotiable unimodal and multimodal transport documents, the role of the buyer and seller of the goods, the role of the freight forwarder, evolution of the negotiable multimodal bill of lading, letter of credit transaction flows, sale of goods in transit as well as electronic bills of lading.

12. In particular, reference was made to the ICC Incoterm® which identified the point at which responsibility for the goods transferred from the seller to the buyer and which party would be responsible for (a) arranging and paying for the international transport of the goods, (b) insuring the goods, and (c) completing customs formalities and paying custom duties. It was suggested that the allocation of responsibility should be kept in mind when discussing the features of a negotiable cargo document.

13. As regards negotiable multimodal bills of lading, it was noted that FIATA commenced in 1968 preparation of a standard bill of lading to enable forwarders to meet shipper demand for a document acceptable for letters of credit, which could be used for unimodal or multimodal transport modes. The various functions of bills of lading were recalled, including evidence of contract of carriage, receipt of goods, evidence of title to goods and freight (prepaid or freight collect). It was mentioned that a negotiable cargo document to be issued under the draft instrument would only need to perform the function of evidence of title to goods, not all functions of bills of lading.

14. In letters of credit transactions, it was noted that banks would typically require collateral from the applicant (i.e. importer) for issuing letters of credit, which might be in the form of cash collateral or credit facility. It was added that credit facility might be granted either based on the importer's credit, mortgage or pledged properties (such as negotiable instruments). It was explained that, when examining bills of lading, banks would mainly examine information concerning shipper, consignee, ocean vessel voyage number, port of loading, port of discharge, description of goods, number of originals, date, the person who loaded goods on broad, prepaid, place and date of issue, the name and identity of the carrier or the person who signed the bills of lading. It was clarified that banks usually would not deal with goods directly but would nominate a qualified warehouse to handle goods under the pledged bills of lading.

Draft Article 1. Scope of application

Paragraph 1

15. The Working Group began its deliberations by considering whether the meaning of "international transport of goods", in the chapeau of paragraph 1, was sufficiently clear given its decision, at its forty-second session, to delete the draft definition of that term (A/CN.9/1134, para. 38). In response, it was noted that such term was generally well understood and also defined in various unimodal transport conventions. It was added that the "internationality" element required the goods to pass through different States.

16. With respect to subparagraphs (a) and (b), one view favoured a more restrictive scope of application requiring both the place of taking in charge of the goods and the place of delivery to be located in different Contracting States, so as to avoid potential conflicts of law issues and reduce the risk of litigation. It was noted that a broader scope was adopted in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) because it had been envisaged to comprehensively address all issues contemplated, which was not the purpose of the draft instrument. Another view advocated a broader scope under which the draft instrument would apply when either the place of taking in charge of the goods or the place of delivery would be located in a Contracting State. It was explained that, in practice, goods might be sold while in transit and, as a result, the place of delivery might change multiple times during the course of transport. The requirement that the place of delivery must be located in a Contracting State would create great uncertainty on the applicability of the draft instrument when goods were sold in transit.

17. An intermediate view proposed a combination of a broader scope of application and a mechanism for the parties to opt into the application of the draft instrument. Different views were expressed as to whether draft article 3, paragraph 1 already presented such a mechanism. It was noted that draft article 3 reflected the principle of party autonomy in the context of the issuance of a negotiable cargo document.

18. A suggestion was made for the place of issuance of a negotiable cargo document to trigger the application of the draft instrument, considering that the law of the place of issuance would typically be applied to determine whether a document could be recognized as a document of title. The practical difficulty for identifying the place of issuance was highlighted, particularly in an electronic context.

19. The Working Group recalled that the term "receive" was replaced by "taking in charge" to address the concern that in practice goods were typically not physically received by freight forwarders themselves (A/CN.9/1134, para. 41). The Working Group was also reminded that the current working assumption was that the draft instrument would take the form of a convention.

20. A suggestion to insert a new subparagraph (c) to read that "the transport of delivery of the goods is from another country contracted by a contracting State" did not receive support.

21. After discussion, the Working Group agreed to keep the connector "or" in paragraph 1 at this stage and requested the secretariat to elaborate on the mechanism that would allow the parties to opt into the application of the draft instrument in a footnote.

Paragraph 2

22. The Working Group revisited the question of whether international transport with a sea leg should be excluded from the scope of application of the draft instrument (A/CN.9/1134, para. 55). There was some support for such exclusion since rules concerning bills of lading were long established and should not be affected by the draft instrument. Moreover, once a bill of lading – itself a document of title – had been issued, there would be no need for a negotiable cargo document. The possible gap left by existing maritime conventions, which did not recognize electronic bills of lading, was gradually being filled by implementation of the UNCITRAL Model Law on Electronic Transferable Records and the Rotterdam Rules, which already provided adequate solutions. The countervailing view cautioned against the exclusion of international transport with a sea leg, on the basis that multimodal transport might often include a sea leg even though not as the main leg. It was pointed out that non-negotiable transport documents (such as seaway bills) were also used in maritime transport.

23. The concern was voiced that paragraph 2 did not specify that the draft instrument would not apply to certain goods whose transfer might be subject to restrictions in some jurisdictions, such as hazardous materials. Another concern regarded the absence of any specific rules on the delivery of certain goods, which might require special arrangements for delivery (e.g. technical equipment or facilities). In response, it was explained that an instrument on negotiable cargo documents would not be the appropriate instrument to address the tradability of certain goods, which was a matter of public policy and national law.

24. A suggestion was made to include the phrase "as well as the competent authorities of each State" after "national law". Another suggestion was to insert the word "custody" in reference to the scope of application of the draft instrument.

25. After discussion, the Working Group agreed to retain the current wording, noting that the desirability of excluding international transport with a sea leg could be discussed at a later stage when discussing possible conflicts with other conventions.

Paragraph 3

26. A query was raised regarding the relationship between the draft instrument and existing international conventions, particularly those provisions concerning the right to dispose of goods. The Working Group was reminded that paragraph 3 was intended to reflect the dual-track approach adopted by the draft instrument.

Draft Article 3. Issuance of negotiable cargo documents

Paragraph 1

27. It was clarified that paragraph 1 allowed the parties to issue a negotiable cargo document and that document would be governed by the draft instrument from its issuance.

Paragraph 2

28. Noting that paragraph 2 contained a cross reference to draft article 4, paragraph 1, suggestions were made to include in draft article 4, paragraph 1 the requirement for a negotiable cargo document to contain the wording "to order" or "negotiable", instead of leaving it as an element of the definition of a negotiable cargo document in draft article 2, paragraph 4. The Working Group was reminded of its earlier decision to follow, in this respect, the approach in the United Nations

Convention on the Carriage of Goods by Sea (Hamburg Rules), which affirmed in article 15, paragraph 3, the validity of the bill of lading, despite the absence of any particulars, if it met the definition in article 1, paragraph 7, of that convention (A/CN.9/1127, para. 55). It was further clarified that under draft article 5, paragraph 1 the validity of a negotiable cargo document was not linked with draft article 4, paragraph 1.

29. Another suggestion was to delete the phrase "on its face" given the ambiguity of such a term and the challenge to apply this concept in an electronic context. In response, it was emphasized that an annotation to state that a transport document should serve as a negotiable cargo document and an appropriate reference to draft instrument should be conspicuous and not hidden among the general conditions applicable to the transport document.

30. In the event that no transport document had been issued under a particular transport contract, a question was raised as to whether such transport contract could serve as a negotiable cargo document by operation of paragraph 2. In response, it was explained that paragraph 2 always assumed the issuance of a transport document and was not intended to convert a transport contract into a negotiable cargo document.

31. When discussing draft article 5, paragraph 3, a concern was raised that paragraph 2 did not specify that the required annotation must state the date from which the transport document should serve as a negotiable cargo document.

32. After discussion, the Working Group agreed to delete the phrase "on its face" and to clarify that annotations and references to the draft instrument should be conspicuous.

Paragraph 3

33. Concerns were raised regarding the complexity of the first sentence, in particular the three phrases at the beginning of that sentence. Suggestions were made to delete either the second or the third phrase. In response, it was explained that draft article 3, paragraph 2 envisaged the upgrade of a negotiable or non-negotiable transport document into a negotiable cargo document and thus would not impede the use of a non-negotiable transport document as a negotiable cargo document as long as the applicable law did not preclude that. While the purpose of paragraph 3 was to allow the issuance of the negotiable cargo document as a separate document, it was clarified that the intention of the second phrase, referring to the situation when a transport document is not negotiable, was to avoid the risk of issuance of two negotiable documents by the same transport operator in respect of the same goods. Another suggestion was to replace the words "not negotiable" in the second phrase with "not able to be made negotiable". In response, it was noted that such a wording would not promote legal certainty and would impose on holders and banks the burden to determine whether certain documents would be legally made negotiable under their governing law.

34. With respect to the annotations, it was emphasized that both the negotiable cargo document issued as a separate document and the related transport document should acknowledge the issuance of the negotiable cargo document. Suggestions were made for the draft instrument to specify consequences if transport operators failed to insert an annotation in the transport document to acknowledge the issuance of a negotiable cargo document. It was noted that transport operators' failure to insert necessary annotations should not affect the validity of the negotiable cargo document. The practical difficulty for banks to check such annotations was also highlighted. It was added that issues concerning damages caused by transport operators' failure to insert necessary annotations should be dealt with in relevant national law, not in the draft instrument.

35. A question was raised as to whether a negotiable cargo document could be issued as a separate document when no transport document had been issued. Doubts were expressed regarding the desirability of allowing the issuance of a negotiable cargo

document in the absence of any transport document, considering that in practice the parties might not sell goods in transit when no transport document had been issued.

36. While paragraph 3 was drafted with article 6, paragraph 5 of the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) in mind, it was clarified that paragraph 3 could also apply to other situations, for example, when a transport document did not contain the information set out in draft article 4, paragraph 1 and the applicable rules under the Agreement on International Railway Freight Communications (SMGS) did not allow the insertion of any additional information in the transport document.

37. After discussion, the Working Group agreed to reflect in paragraph 3 that annotations should appear in both the negotiable cargo document issued as a separate document and in the related transport document to acknowledge the issuance of the negotiable cargo document. The secretariat was requested to revise the first sentence to make it more reader-friendly.

Paragraph 4

38. Suggestions were made to delete the whole paragraph in light of draft article 1, paragraphs 2 and 3, which already clarified that the draft instrument would not affect the rights and obligations of the parties under applicable international conventions or national law. The concern was expressed that, paragraph 4 might be read as allowing the issuance of two negotiable documents by the same transport operator when the multimodal transport included a sea leg, which would be undesirable. In response, it was noted that the risk was too limited and that under draft article 3, paragraph 3, a separate negotiable cargo document could only be issued if the transport document was not negotiable.

39. Concerns were expressed about deleting the first sentence as it expressly set out one key element of the dual-track approach adopted by the draft instrument. It was mentioned that such an express statement might be particularly important for the railway sector. The Working Group agreed to retain that sentence.

40. In turn, the Working Group agreed to delete the second sentence as being unnecessary.

Paragraph 5

41. Support was expressed for listing three different types of negotiable documents in the first sentence (namely, to the order of an unnamed person, to the order of a named person or to the bearer). However, it was noted that “straight” bills of lading (that is, a negotiable cargo document that only allowed delivery to a particular named person) would not be covered in the draft instrument.

42. A suggestion was made to delete the second and third sentences, leaving the issue for domestic laws and established industry practices. It was explained that the term “to order” was well-known in maritime trade. The presumption that, in case the name was not indicated, the negotiable cargo document should be deemed to be made out to the order of the consignor was considered problematic, noting that the freight carrier, not the consignor, was often the first holder of a negotiable cargo document. Some other delegations favoured keeping those sentences given that railway operators were not used to dealing with negotiable transport documents and were usually familiar with instructions from consignors. It was noted that the provision set out clear rules with the intention of creating less disruption to railway practice after the introduction of a negotiable cargo document.

43. Support was expressed for the issuance of bearer documents, despite the difficulty of ascertaining the legitimacy of the holders of bearer documents.

44. The Working Group agreed to retain the words “or to order of a named person” within the first set of square brackets and to delete the second and third sentences.

Paragraph 6

45. A question was raised in respect of the need for multiple originals of a negotiable cargo document. It was explained that, in maritime carriage, bills of lading were customarily issued in sets of three originals, each serving a different function. Typically, one original would be sent to the shipper, one original would be retained by the shipping agent, and one original would be sent to the buyer who present it to banks to support letters of credit.

46. A suggestion was made to revise the second sentence to state that copies were non-negotiable and should be marked as such. Another suggestion was made to include a note in the originals that copies would be non-negotiable.

47. The Working Group agreed to retain the current wording of the first sentence and requested the secretariat to revise the second sentence to clarify that copies could be "made", not "issued".

Draft Article 4. Content of the negotiable cargo document

Paragraph 1

Subparagraph (d)

48. As regards subparagraph (d), a concern was raised about the reference to the general nature of the goods, noting that such a requirement might be too general and more specifics would be desirable. In this respect, a suggestion was made to require the negotiable cargo document to indicate a description of the goods as referred to in article 36, paragraph 1 of the Rotterdam Rules. The Working Group was reminded of different requirements under various transport conventions on the issue. While the Rotterdam Rules required a description of the goods "as appropriate for the transport", some other conventions applicable to rail and road transport only required a description of the "nature of the goods". It was added that the United Nations Convention on International Multimodal Transport of Goods and the Hamburg Rules used the term "general nature" of the goods, which was considered as the common denominator and thus could be generally acceptable to parties involved in different modes of transport.

49. Support was expressed for retaining the phrase "as taken in charge by the transport operator", given that the status of the general nature of the goods might change at a later stage.

50. Support was also expressed for retaining the phrase "all such particulars as furnished by the consignor", emphasizing the need to ensure consistency with information in the sales contracts and requirements under letters of credit.

51. The Working Group requested the secretariat to retain the texts within square brackets and to revise the subparagraph to make it clear that all particulars referred therein were furnished by the consignor.

Subparagraph (e)

52. A view was expressed that the term "apparent condition of the goods" might be ambiguous without additional explanation such as provided in article 36, paragraph 4 of the Rotterdam Rules. It was noted that transport operators in rail and road transport were typically not required to check the apparent condition of the goods. A suggestion was made to insert the phrase "based on a reasonable external inspection" at the end of subparagraph (e).

53. Suggestions to delete subparagraph (e) or move it to the non-mandatory list in paragraph 2 did not receive sufficient support. The importance of the apparent condition of the goods in maritime trade was emphasized, particularly with reference to the requirement for a clean bill of lading to support letters of credit. In this respect, it was noted that draft article 5, paragraph 5 contained a presumption that, in the absence of an indication of the apparent condition of the goods, the negotiable cargo

document would be deemed to have stated that the goods were in apparent good order at the time the transport operator took charge of them. It was also pointed out that draft article 6 only allowed the transport operator to make reservations with respect to the particulars furnished by the consignor referred to in subparagraph (d). From a practical point of view, it was explained that transport operators would prefer stating the apparent condition of the goods in the documents to be issued to protect themselves.

54. When discussing draft article 6, paragraph 1, the Working Group revisited draft article 4, paragraph 1, subparagraph (e). A suggestion was made to include a reference to draft article 4, paragraph 1, subparagraph (e) so that the transport operator would be able to make a qualification regarding the apparent condition of the goods. It was reiterated that, in practice, transport operators might not have reasonable means to check the goods. In response, it was explained that the intention of draft article 6, paragraph 1 was to allow the transport operator to qualify information furnished by the consignor, but the apparent condition of the goods was a fact that should normally be ascertained by the transport operator. There was support for clarifying in draft article 4, paragraph 1, subparagraph (e) that if the transport operator had no reasonable means of doing so, it could insert a statement to that effect.

55. The Working Group agreed to revise subparagraph (e) to the effect that, if the transport operator had no reasonable means of checking the goods, it could insert a statement to that effect.

Subparagraph (h)

56. A concern was raised about the date of issue of the negotiable cargo document itself, noting that draft article 4, paragraph 1, subparagraph (h) only required the negotiable cargo document to indicate the date of issue of the negotiable cargo document, if issued separately. Suggestions were made to revise draft article 4, paragraph 1, subparagraph (h) to clarify that the date of issue of the negotiable cargo document should always be included. Another suggestion was to further shorten draft article 4, paragraph 1, subparagraph (h) to require only the place and date of issue of the negotiable cargo document, not that of the transport document. The Working Group was reminded that the place of issue of the transport document would be relevant for determining the law that would govern the liability of the carrier for loss of or damages to the goods, and the date of issue would be relevant for calculating the limitation period within which claims could be brought against the carrier (A/CN.9/1127, para. 38).

57. After discussion, the Working Group agreed to revise subparagraph (h) to read along the lines of “the place and date of issue of the negotiable cargo document and the transport document, if issued separately”.

Subparagraph (i)

58. The Working Group took up a suggestion to delete the phrase “when known to the transport operator”, noting the importance of the place of delivery for determining the applicability of the draft instrument as provided in draft article 1, paragraph 1. The difference between the place of delivery and the final destination of the goods was highlighted. It was explained that the place of delivery of the goods in the maritime context was often understood as the port of unloading, which was not necessarily the final destination of the goods.

Subparagraph (j)

59. Divergent views were expressed regarding the need for subparagraph (j) to require the negotiable cargo document to specify the number of originals in the light of a similar provision in draft article 3, paragraph 6. While some delegations suggested deleting subparagraph (j) so as to avoid overlap with draft article 3, paragraph 6, some other delegations were in favour of deleting draft article 3, paragraph 6 instead and retaining subparagraph (j) to ensure the completeness of the

checklist provided in draft article 4. There was also some support for retaining both provisions given the different intended purposes, noting that draft article 3 dealt with the issuance of a negotiable cargo document whereas draft article 4 focused on the contents of a negotiable cargo document. A suggestion was also made to clarify in subparagraph (j) that any copy of the negotiable cargo document should be made in accordance with the procedure set out in draft article 3, paragraph 6.

60. After discussion, the Working Group agreed to retain the current wording of subparagraph (j).

Paragraph 2

Subparagraph (c)

61. The Working Group did not take up a suggestion to replace the phrase "the law applicable to the transport contract" with "the law applicable to the negotiable cargo document". It was explained that the negotiable cargo document reproduced certain contents of the transport contract and, therefore, information concerning the law applicable to the transport contract would be important for banks.

Subparagraph (d)

62. It was suggested that any particulars that might be required under the law of the country where the negotiable cargo document was issued must be included in the negotiable cargo document and not left to the discretion of the parties. In response, it was explained that the draft instrument dealt with the contents of the negotiable cargo document, and not with the mandatory contents of the transport document pursuant to its own governing law, which was not displaced by the draft instrument. Given that a negotiable cargo document was a new document created by the draft instrument, no mandatory law on its content would exist.

63. Support was expressed for deleting the references to the law of the country where the negotiable cargo document was issued, as such references would be unnecessary and confusing.

64. In response to a suggestion that "notified party" should be added to paragraph 2, it was pointed out that such information should fall under subparagraph (d).

65. The Working Group agreed to revise the paragraph to read along the lines of "any other particulars which the parties may agree to insert in the negotiable cargo document."

Paragraph 3

66. A question was raised as to the legal consequences of the transport operator's failure to ensure that a separately issued negotiable cargo document reproduced the same particulars as stated in the transport document. It was noted that, in practice, FIATA multimodal bills of ladings were issued after the freight forwarder conducted its due diligence and before any transport was arranged. Moreover, in the maritime tramp trade, carriage of goods was often covered by a charter party and a bill of lading, which was similar to the situation when the same transport operator issued a non-negotiable transport document and a negotiable cargo document. The transport operator bore the risk of documentary inconsistency.

67. There was some support for the view that the risk of inconsistency between the negotiable cargo document and the transport document was, in practice, negligible, as most discrepancies were likely to be spotted by banks at their examination of letter of credit documentation. In response, the Working Group was reminded that sales of goods in transit were common in commodity trade and that it would be difficult to detect discrepancies at that stage.

68. Support was expressed for the view that, in case of inconsistency, the negotiable cargo document should prevail over the transport document. It was emphasized that

the holder of a negotiable cargo document should be able to rely on the information contained in the negotiable cargo document.

Paragraph 4

69. Support was expressed for deleting the paragraph, noting that the requirement for handwritten signature was too limited and did not reflect current business practices.

Draft Article 5. Deficiencies in the negotiable cargo document

Paragraph 1

70. It was explained that the structure of the paragraph followed the approach adopted in the Hamburg Rules, as earlier agreed by the Working Group (A/CN.9/1127, para. 55). Views were expressed that the paragraph should explicitly set out the minimum requirements for negotiability instead of cross referring to the definition of a negotiable cargo document in draft article 2, paragraph 4.

71. Questions were raised as to whether the paragraph was intended to address the validity of a negotiable cargo document or merely its legal character. While article 15, paragraph 3 of the Hamburg Rules referred only to the legal character of the bill of lading, it was pointed out that article 39, paragraph 1 of the Rotterdam Rules addressed the legal character or validity of the transport document.

72. As regards the minimum requirements for negotiability, while some delegations believed that the current wording in draft article 2, paragraph 4 was already sufficient, some other delegations suggested revising the definition to clarify that the document must be signed and issued by the transport operator and must indicate that the goods, as specified in the document, had been taken in charge by the transport operator. Different views were expressed on whether the absence of the number of originals in the negotiable cargo document would undermine its negotiability. The importance of including the number of originals in the negotiable cargo document was highlighted, given the practical difficulty for a holder to find out such information. Support was expressed for not including the number of originals as a minimum requirement for negotiability, on the understanding that draft article 3, paragraph 6 required the transport operator to indicate the number of originals if more than one original was issued; a holder of a negotiable cargo document should not bear the risk of such information being missing due to the transport operator's fault. For similar reasons, it was pointed out that the absence of any annotation in a non-negotiable transport document to acknowledge the issuance of a negotiable cargo document as contemplated in draft article 3, paragraph 3 should also not undermine the negotiability.

73. A suggestion to specify the required number of originals of negotiable cargo documents in the draft instrument did not receive support. Another suggestion was made to include an explicit provision to provide a presumption that the negotiable transport document would be deemed to have stated that only one original had been issued when the transport operator failed to indicate the number of originals in the negotiable cargo document.

74. The Working Group agreed to retain the current wording of paragraph 1 and to revise the definition of negotiable cargo document in draft article 2, paragraph 4 to clarify that the document must be signed and issued by the transport operator and must indicate that the goods as specified in the document had been taken in charge by the transport operator.

Paragraph 3

75. Divergent views were expressed on whether a transport document could become a negotiable cargo document after its issuance. One view was that the draft instrument should allow a negotiable or non-negotiable transport document to be upgraded by way of annotation at a later stage, given that the draft instrument was intended to

cover various modes of transport and in some circumstances, the shipper's demand for a negotiable cargo document might be made only a few days after the issuance of the transport document. It was noted that the need for letters of credit might only arise after the issuance of the transport document because an opportunity arose for the consignor to sell the goods in transit. It was also noted that the need for a negotiable document might only arise after the issuance of the transport document, when the goods were unexpectedly moving from countries that recognized the transport document as a negotiable document under the applicable international conventions to other countries that were not parties to the same international conventions. Another view was that a transport document could only be upgraded by way of annotation in accordance with draft article 3, paragraph 2 at the time it was issued. It was pointed out that, in practice, an annotation to state that the FIATA multimodal bill of lading would serve as a negotiable cargo document issued under the draft instrument could only be inserted on the same day when it was issued.

76. In the event that a transport document could be upgraded into a negotiable cargo document after its issuance, concerns were raised about the inclusion of a presumption rule that allowed a transport document to serve as a negotiable cargo document from the date of its issuance. The retroactive effect on the negotiability of the transport document was considered problematic, particularly when a negotiable transport document recognized by certain applicable international conventions was upgraded into a negotiable cargo document under the draft instrument after the date of its issuance. Allowing that transport document to serve as a negotiable cargo document from the date of its issuance would imply that two different sets of rules could govern the negotiability of that transport document at a given time.

77. A question was raised as to the industry demand for upgrading a non-negotiable transport document into a negotiable cargo document, not at the time of its issuance. The practical difficulty of upgrading certain non-negotiable transport documents into a negotiable cargo document was noted, considering that the originals of such non-negotiable transport documents would typically accompany the goods, not retained by the transport operator or the consignor. Another question was raised as to whether the place where the annotation would be made might affect the applicability of the draft instrument, considering that it might differ from the place of issuance.

78. The Working Group agreed to retain the current wording and revisit the paragraph at a later stage.

Paragraph 4

79. A suggestion was made to delete the paragraph, apparently unnecessary, since draft article 3, paragraph 1 already provided that the transport operator should issue the negotiable cargo document when it took the goods in charge. In response, the different purposes of draft article 3, paragraph 1 and draft article 5, paragraph 4 were emphasized. The Working Group agreed to retain the current wording.

Paragraph 5

80. The Working Group did not take up a suggestion to include an additional paragraph along the lines of "if it is not included in the declaration that the freight has been paid in advance, it will be understood that it will be paid by the consignee". In response, it was noted that normally services would be paid by the person who hired the services, that is, the consignor in the context of transport services.

Draft Article 6. Evidentiary effect of the negotiable cargo document

Paragraph 1

81. There was preference for option 1, which contained an autonomous regime with explicit rules on how qualifications could be made by the transport operator when issuing the negotiable cargo document. Support was expressed for replacing the connector "and" with "or" since, in practice, transport operators might not have

reasonable means to check the goods for a variety of reasons (e.g. goods delivered in sealed containers, health and security regulations preventing access to vehicles). It was noted that paragraph 1 did not limit the manner in which the transport operator might qualify the information.

82. The Working Group considered at length the risk of inconsistency between the information in the transport document and the negotiable cargo document, if issued separately. One proposed solution would require a separately issued negotiable cargo document to circulate always together with the transport document (e.g. as an annex to the transport document). In response, it was questioned that such a requirement might defeat the purpose of draft article 3, paragraph 3 to allow the issuance of a separate document. Support was expressed for further developing draft article 4, paragraph 3, which already required a separately issued negotiable cargo document to reproduce the particulars stated in the transport document to avoid documentary inconsistency. It was emphasized that banks should not be required to verify the same information twice.

Paragraph 2

83. The Working Group considered how to address the risk of documentary inconsistency, for example where the transport document contained a qualification made by the transport operator that was not reflected in the negotiable cargo document. It was noted that draft article 6, paragraph 2 allowed a third party acting in good faith to rely on the information contained in the negotiable cargo document and the qualification in the transport document would not be admissible. Concerns were raised about the interpretation of the term “good faith”, noting that the draft instrument should clarify that banks should not be considered as acting in bad faith if they failed to examine the transport document.

84. A suggestion was made to include the phrase “and in the ordinary course of business or financing” after “good faith”. Concerns were expressed that introducing such a phrase might undermine the acceptability of the draft instrument as a convention, which, unlike a model law, would be binding on its signatories. Moreover, it was pointed out that the term “good faith” was used in many international transport conventions and could be generally understood by the parties involved in the carriage of goods.

85. Doubts were expressed regarding the phrase “including a consignee” because a consignee, unlike other third parties, would have information about the goods and therefore would not need to act in reliance on the description of goods in the negotiable cargo document. It was pointed out that a consignee, defined in draft article 2, paragraph 2 as the person named in the transport contract as the person entitled to take delivery of the goods, might in some cases be the consignor, for instance, if under the trading terms agreed by the parties it was required to conclude the transport contract with the transport operator.

86. It was suggested that the paragraph should clarify that proof to the contrary by the transport operator in respect of any information in the negotiable cargo document should not be admissible only against a third party to whom a negotiable cargo document had been transferred. Reference was made to article 41, subparagraph (c), of the Rotterdam Rules, which provided that proof to the contrary by the carrier should not be admissible against a consignee that in good faith has acted in reliance on certain particulars in the transport document.

87. The Working Group agreed to delete the phrase “including a consignee” and to revise the paragraph to clarify that proof to the contrary by the transport operator should not be admissible only against a third party to whom a negotiable cargo document had been transferred. It was noted that the provision should also protect a subrogated insurer.

Draft Article 7. Extent of rights of the holder under a negotiable cargo document

Paragraph 1

88. A question was raised as to the meaning of "right of control", noting that the term "right of disposal" was often used in transport conventions and that "right of control" might be confused with the notion of "exclusive control" in the electronic context. In response, it was explained that the term "right of control" derived from the Rotterdam Rules which included the right to give instructions to the transport operator. Support was expressed for replacing the notion of "right of control" with "right of disposal". A suggestion was made to include a definition of "right of control" in draft article 2.

89. A concern was raised about the references to the transport contract in the paragraph. The practical difficulty for the holder to be made aware of the contents of the transport contract was highlighted, noting that the draft instrument did not require the transport contract to be circulated together with the negotiable cargo document. It was noted that, in practice, it might be challenging for various transport documents issued by actual carriers to be attached to the negotiable cargo document. However, in the context of the FIATA multimodal bill of lading, it was pointed out that the standard conditions of the transport contract could be found on the back of that document. It was also noted that, in practice, banks seldom required a copy of the transport contract to be presented for letter of credit transactions.

90. Another concern was that draft article 7, paragraph 1 implied that a holder of negotiable cargo document could enforce rights arising out of the transport contract to which it was not a party. The need for the draft instrument to explicitly state how the rights of the consignor under the transport contract could be transferred to a holder of negotiable cargo document was emphasized. It was, however, noted that the draft instrument should only spell out the rights of a holder of a negotiable cargo document that were inherent to the function of negotiability, but not all rights under the transport contract. Nevertheless, it was said that rights of suit might deserve special attention. A suggestion was made to include a provision to state that a transfer of the negotiable cargo document would be effective to transfer of right of suit under the transport contract to the new holder. References were made to the UK Carriage of Goods by Sea Act (1992) and Singapore Bills of Lading Act (1992).

91. It was noted that a holder of negotiable cargo document should be given the rights to control the goods during transit and, as a result, any pre-existing rights on the goods would cease to exist, which inevitably modified the rights of the consignor under applicable international conventions. It was pointed out that draft article 1, paragraph 3 contained a phrase "other than as explicitly provided for in this Convention". A question was raised as to which rights listed in draft article 7 would need to be exercised consistent with the transport contract.

92. It was also pointed out that the word "including" in the chapeau suggested that the right of control was not limited to those rights set out in the draft article, which deviated from article 50, paragraph 1, of the Rotterdam Rules, where the corresponding list was exhaustive. It was explained that the draft instrument envisaged that, by becoming a holder of negotiable cargo document, the holder might acquire rights under the transport contract in addition to those set out in draft article 7, paragraph 1.

Paragraph 2

93. The Working Group recalled its previous decision to include the right to pledge the goods given that an explicit statement could help ensure that the negotiable cargo document could function as a document of title in all jurisdictions (A/CN.9/1127, para. 75). Support was expressed for revising draft article 7, paragraph 4 to include a cross reference to paragraph 2, so that all originals should be produced to pledge the goods. Support was also expressed for deleting the phrase "creation of any security right" and for ensuring consistency with the terminology in the UNCITRAL Model Law on Secured Transactions.

Paragraph 3

94. The Working Group agreed to replace the word “rights” with “rights and effects” and to replace the word “listed” with “set out”.

Paragraph 4

95. The Working Group recalled its previous discussion on the number of originals and agreed to revise the paragraph to reflect that the production of all originals of the negotiable cargo document would be required for exercising the right of control only if the negotiable cargo documents indicated that more than one original had been issued. The need for the word “properly” was questioned. Some support was expressed for differentiated rules on the production of originals of negotiable cargo documents providing an exception for negotiable cargo documents endorsed to a named person. The secretariat was requested to place the word “properly” within square brackets, to include a reference in a footnote in the next working paper to the discussion on the exception to the rule to produce all originals that was presented to the Working Group and to consider formulating specific rules for negotiable cargo documents endorsed to a named person.

Paragraph 5

96. Some support was expressed for deleting the paragraph since the manner of communication would be subject to party autonomy and applicable domestic law. There was concern that the draft paragraph might be misinterpreted as allowing reservations to the content of the paper version of a negotiable cargo document to be made electronically. Noting the view of some delegations in favour of retaining the paragraph, the Working Group agreed to keep it within square brackets for further consideration in connection with chapter 3.

97. A suggestion was made to insert the phrase “through the channel of communication designated”. The Working Group agreed to place the proposed words at the end of the paragraph within square brackets pending consideration by the Working Group of the need for the provision.

Other issues

98. A concern was raised that the draft instrument did not contain any provision on who bore the costs incurred by the transport operator in carrying out instructions given by the holder of the negotiable cargo document. Reference was made to article 52 of the Rotterdam Rules. In response, it was reiterated that the consignor should be deemed to have waived its rights under the transport contract when transferring a negotiable cargo document to a subsequent holder. Support was expressed for revising draft article 11 to reflect that, by transferring a negotiable cargo document, the holder transferred its rights under the transport contract.

99. The Working Group heard a proposal to replace draft chapter 3 with a provision requiring States to put in place an appropriate legal framework, such as contained in the UNCITRAL Model Law on Electronic Transferable Records, to support the use of electronic negotiable cargo records. It was noted that such a general provision would have various benefits, including preserving the ability of a State to modernize its electronic commerce framework as needed, enhancing legal harmonization across borders by promoting the adoption of UNCITRAL texts, reducing obstacles to the adoption of the Convention, avoiding duplication of efforts or friction between different instruments, and expediting the conclusion of the project.