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## Negotiable Cargo Documents

### Note by the Secretariat

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## I. Introduction

1. The background information about the project on negotiable multimodal transport documents referred to the Working Group by the Commission at its fifty-fifth session<sup>1</sup> may be found in the provisional agenda of the forty-third session of the Working Group ([A/CN.9/WG.VI/WP.99](#), paras. 5–8). This note contains a revised annotated set of preliminary draft provisions for a new instrument on negotiable cargo documents, which have been prepared by the secretariat to reflect the deliberations of the Working Group at its forty-first and forty-second sessions.

## II. Organization of future work

2. The Working Group may wish to use the revised preliminary draft provisions for a new instrument on negotiable cargo documents in the annex to this note as a basis for its deliberations at its forty-third session. After conclusion of its deliberations, the Working Group may wish to request the secretariat to prepare a further revised version of the preliminary draft provisions for consideration by the Working Group at its forty-fourth session, scheduled to be held in New York from 6 to 10 May 2024.

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

## Annex

# Preliminary draft provisions for a new instrument on negotiable cargo documents

## CHAPTER 1. GENERAL PROVISIONS

### *Article 1. Scope of application*

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

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

(b) The place of delivery of the goods by the transport operator as provided for in the transport contract is located in a Contracting State.<sup>1</sup>

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

3. Other than as explicitly provided for in this Convention, this Convention does not modify the rights and obligations of the transport operator, consignor and consignee and their liability under applicable international conventions or national law.

### *Article 2. Definitions<sup>3</sup>*

For the purposes of this Convention:

1. “Consignor” means any person by whom the transport contract has been concluded with the transport operator.<sup>4</sup>

2. “Consignee” means the person named in the transport contract as the person entitled to take delivery of the goods.<sup>5</sup>

3. “Holder” means a person that is in possession of a negotiable cargo document and is identified in it as the consignor or the consignee or is the person to which the document is duly endorsed; or if the document is a blank endorsed order document or bearer document, is the bearer thereof;<sup>6,7</sup> [or a person who has control of a negotiable electronic cargo record].<sup>8</sup>

<sup>1</sup> Convention on International Multimodal Transport 1980 (the “MT Convention”), article 2. In the consultations held by the secretariat, it was considered that a new instrument should apply to the issuance, transfer and legal effects of negotiable cargo documents only in connection with the international transport of goods where the place of receipt and the place of delivery of the goods by the transport operator as provided for in the transport contract were located in two different Contracting States. In addition, for a new instrument to apply, some experts were of the view that the parties to the transport contract should opt into its application, failing which the otherwise applicable law would apply. The Working Group may wish to consider these suggestions.

<sup>2</sup> MT Convention, article 4 (1).

<sup>3</sup> The secretariat has deleted the definitions of “actual carrier” and “international transport of goods” in line with the decisions of the Working Group at its forty-second session (A/CN.9/1134, paras. 28 and 38).

<sup>4</sup> The secretariat has revised this definition in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, paras. 30 and 31).

<sup>5</sup> The secretariat has revised this definition in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 33).

<sup>6</sup> The secretariat has deleted the square brackets in line with the decision of the Working Group at its forty-second session to allow the issuance of bearer documents (A/CN.9/1134, paras. 36 and 73).

<sup>7</sup> Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (the “Rotterdam Rules”), article 1 (10)(a).

<sup>8</sup> The Working Group may wish to consider the additional phrase “or a person who has control of a negotiable electronic cargo record” to accommodate the electronic context.

4. “Negotiable cargo document” means a document issued by the transport operator that indicates by wording such as “to order” or “negotiable” or an equivalent expression that the goods have been taken in charge by the transport operator and consigned to the order of the holder.<sup>9</sup>

5. “Electronic record” means information generated, communicated, received or stored by electronic means including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.<sup>10</sup>

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

7. The “transfer” of a negotiable electronic cargo record means the transfer of exclusive control over the record.<sup>11</sup>

8. “Transport contract” means a contract whereby a transport operator undertakes to perform international transport of goods for reward.<sup>12</sup>

#### *Option 1*

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

(a) Evidences the taking in charge of the goods by the transport operator under a transport contract; and

(b) Evidences or contains a transport contract.<sup>13</sup>

#### *Option 2<sup>14</sup>*

9. “Transport document” means a document that evidences a transport contract, the taking in charge of the goods by the transport operator, and an undertaking by the transport operator to deliver the goods in accordance with the terms of that contract.<sup>15</sup>

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

## **CHAPTER 2. NEGOTIABLE CARGO DOCUMENTS**

### *Article 3. Issuance of a negotiable cargo document*

1. The consignor and the transport operator may agree that when the goods are taken in charge by the transport operator, the transport operator shall issue a negotiable cargo document in accordance with the provisions of this Convention.<sup>16</sup>

2. A transport document that contains information set out in article 4, paragraph 1, shall serve as a negotiable cargo document for the purpose of this Convention if it

<sup>9</sup> The secretariat has revised this definition in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, paras. 39, 41, 42 and 76). In particular, the secretariat has replaced the term “received” with “taken in charge” in this definition and other relevant provisions for consistency (A/CN.9/1134, para. 41).

<sup>10</sup> UNCITRAL Model Law on Electronic Transferable Records (MLETR), article 2.

<sup>11</sup> Rotterdam Rules, article 1 (22).

<sup>12</sup> The secretariat has revised this definition in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 47).

<sup>13</sup> Rotterdam Rules, article 1 (14); see also MT Convention, article 1 (4).

<sup>14</sup> The secretariat has added option 2 in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 51).

<sup>15</sup> MT Convention, article 1 (4).

<sup>16</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 56).

contains an annotation to that effect and an appropriate reference to this Convention on its face.

3. Notwithstanding paragraph 2 above, if the transport document referred to in paragraph 2 is not negotiable, instead of using it as a negotiable cargo document, the parties may agree that the transport operator shall issue the negotiable cargo document as a separate document.<sup>17</sup> The transport operator who issues a negotiable cargo document as a separate document in addition to a non-negotiable transport document shall acknowledge the issuance of such negotiable cargo document by inserting a corresponding annotation in the transport document.<sup>18</sup>

4. The negotiable cargo document that is issued as a separate document pursuant to paragraph 3 does not substitute any transport document which the transport operator may be required to issue pursuant to the law applicable to the transport contract or to the terms of the contract.<sup>19</sup> The issuance of the negotiable cargo document does not preclude the issuance, if necessary, of any other documents relating to transport or other services involved in international transport of goods, in accordance with applicable international conventions or national law.<sup>20</sup>

5. A negotiable cargo document shall be made out to order [or to order of a named person]<sup>21</sup> or to bearer.<sup>22</sup> [A negotiable cargo document that is made out to order shall contain the name of the person to whose order the goods are to be delivered. If the name is not indicated, the negotiable cargo document shall be deemed to be made out to the order of the consignor.]<sup>23</sup>

6. A negotiable cargo document that is issued in a set of more than one original shall indicate the number of originals in the set. If any copies are issued, each copy shall be marked as “non-negotiable” copy.<sup>24</sup>

#### *Article 4. Content of the negotiable cargo document*

1. The negotiable cargo document shall be signed by the transport operator and shall indicate:<sup>25</sup>

- (a) The name and address<sup>26</sup> of the transport operator;

<sup>17</sup> The secretariat has redrafted this provision in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 64).

<sup>18</sup> The secretariat has revised this paragraph in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 72).

<sup>19</sup> The secretariat has revised this sentence in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, paras. 28, 66 and 68).

<sup>20</sup> MT Convention, article 13.

<sup>21</sup> In the expert consultations held by the secretariat, it was suggested that the phrase “or to the order of a named person” was needed to ensure consistency with draft article 10, paragraphs 1 and 3. In addition, it was explained that in letter of credit transactions a negotiable transport document might be required to be made out to order or to order of a named person. In case the letter of credit required the negotiable transport document to be made out to order, the document would be considered discrepant if it was made out to order of a named person, and vice versa.

<sup>22</sup> MT Convention, article 6 (1)(a).

<sup>23</sup> The secretariat has retained the phrase “or to bearer” without square brackets and placed the second and third sentences within square brackets in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 73).

<sup>24</sup> The secretariat has retained this option in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 74).

<sup>25</sup> The secretariat has revised this sentence in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 76).

<sup>26</sup> The secretariat has replaced the phrase “principal place of business” with the term “address” in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 32).

(b) The name and address of the consignee, if required by the law applicable to the transport contract<sup>27</sup> or named by the consignor;<sup>28</sup>

(c) The date of taking in charge of the goods by the transport operator;<sup>29</sup>

(d) The general nature of the goods [as taken in charge by the transport operator], the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, [all such particulars as furnished by the consignor];<sup>30,31</sup>

(e) The apparent condition of the goods;

(f) The name and address of the consignor;<sup>32</sup>

(g) The place of taking in charge of the goods by the transport operator;<sup>33</sup>

(h) The place and date of issue of the transport document and of the negotiable cargo document, if issued separately;

(i) When known to the transport operator,<sup>34</sup> the place of delivery of the goods;<sup>35</sup>

(j) The number of originals of the negotiable cargo document, when more than one original is issued;<sup>36</sup> and

(k) A statement as to whether the freight has been prepaid or an indication as to whether the freight is payable by the consignee.<sup>37</sup>

2. The negotiable cargo document may further indicate:

(a) The date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;

(b) The intended journey route, mode of transport and places of trans-shipment, if known at the time of issuance of the negotiable cargo document;

(c) The law applicable to the transport contract, in particular any international convention to which the transport contract is subject; and

(d) Any other particulars which the parties may agree to insert in the negotiable cargo document, if not inconsistent with the law of the country where it is

<sup>27</sup> The secretariat has replaced the phrase “applicable law” with “the law applicable to the transport contract” for clarity.

<sup>28</sup> Rotterdam Rules, article 36 (3). The Working Group may wish to consider the differences across different modes of transport as regards this item.

<sup>29</sup> Rotterdam Rules, articles 36 (2)(c) and 36 (3)(c).

<sup>30</sup> Rotterdam Rules, article 36 (1); Convention for the Unification of Certain Rules for International Carriage by Air (the “Montreal Convention”), article 5 (c); the COTIF/CIM Uniform Rules concerning the Contract of International Carriage of Goods by Rail (the “CIM-COTIF 1999”), article 7 §1; Agreement on International Railway Freight Communications 2020 (SMGS), article 15 §1. As regards dangerous goods, see e.g., CIM-COTIF 1999, article 7 §1 (h), and SMGS, article 9 and annex 2.

<sup>31</sup> The secretariat has revised this item in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 77).

<sup>32</sup> CIM-COTIF 1999, article 7 §1 (b) and SMGS, article 15 §1 (1).

<sup>33</sup> Rotterdam Rules, articles 36 (2)(c) and 36 (3)(c). The secretariat has deleted the reference to “loading” in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 36).

<sup>34</sup> Rotterdam Rules, article 36 (3)(c).

<sup>35</sup> CIM-COTIF 1999, article 7 §1 (f) and SMGS, article 15 §1 (5). The Working Group may wish to consider differences across different modes of transport as regards this item.

<sup>36</sup> Rotterdam Rules, article 36 (2)(d).

<sup>37</sup> The secretariat has revised this item in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 47).

issued, or which may be required to be inserted in that document under the law of the country where it is issued.<sup>38</sup>

3. A negotiable cargo document that is issued as a separate document in accordance with article 3, paragraph 3, shall reproduce the particulars indicated in paragraph 1 above as stated in the transport document.<sup>39</sup>

4. [The signature on the negotiable cargo document must be in handwriting.]<sup>40</sup>

*Article 5. Deficiencies in the negotiable cargo document*<sup>41</sup>

1. The absence of one or more of the particulars referred to in article 4 does not of itself affect the legal character of the document as a negotiable cargo document provided that it nevertheless meets the requirements set out in article 2, paragraph 4.<sup>42</sup>

2. If the negotiable cargo document includes a date but fails to indicate its significance, the date is deemed to be the date of issue of the negotiable cargo document. Unless otherwise indicated, a negotiable cargo document issued as a separate document pursuant to article 3, paragraph 3, is deemed to have been issued simultaneously with the transport document.<sup>43</sup>

3. If the annotation as referred to in article 3, paragraph 2 does not state the date from which the transport document shall serve as negotiable cargo document, the transport document is deemed to serve that function from the date of its issuance.

4. If the negotiable cargo document does not include the date of taking in charge of the goods by the transport operator, the goods are deemed to have been taken in charge by the transport operator on the date of issue of the negotiable cargo document.<sup>44</sup>

5. If the negotiable cargo document fails to state the apparent order and condition of the goods at the time the transport operator takes charge of them, the negotiable cargo document is deemed to have stated that the goods were in apparent good order and condition at the time the transport operator took charge of them.<sup>45</sup>

<sup>38</sup> E.g. the Rotterdam Rules require naming the ship in the transport document, including a negotiable transport document and specifying there also the port of loading and the port of discharge, if specified in the transport contract (see article 36 (3)(d)).

<sup>39</sup> The secretariat has added this provision in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 75).

<sup>40</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 51–52). The Working Group may wish to consider whether the requirement for handwritten signature, which derives from existing international conventions, is still realistic in practice.

<sup>41</sup> The secretariat has deleted the paragraph concerning the liability of the transport operator with the intent to defraud in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 65).

<sup>42</sup> Hamburg Rules, article 15, paragraph 3. The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 57).

<sup>43</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 61).

<sup>44</sup> The secretariat has added the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 61).

<sup>45</sup> Rotterdam Rules, article 39 (3). The Working Group may wish to consider whether the question of the holder's legitimate reliance should be treated separately from claims for cargo loss or damage under the transport contract as a warranty to a subsequent holder that the goods had been received in good order (A/CN.9/1127, para. 63).



*Article 6. Evidentiary effect of the negotiable cargo document**Option 1*<sup>46</sup>

1. The transport operator may qualify any of the information referred to in article 4, paragraph 1 (d) as furnished by the consignor and contained in the negotiable cargo document in a manner that indicates that:

(a) The transport operator does not assume responsibility for the accuracy of such information because it has either actual knowledge or reasonable grounds to believe that any such information is false or misleading; and

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

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

*Option 2*

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

2. Proof to the contrary by the transport operator in respect of any information in the negotiable cargo document shall not be admissible if the negotiable cargo document has been transferred to a third party [, including a consignee,] acting in good faith in reliance on the description of the goods therein.<sup>47</sup>

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

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

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

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

(c) The right to replace the consignee; and

(d) The right to assert, in its own name, any rights against the transport operator under the transport contract for loss or damage to the goods as well as for delay in delivery.<sup>48</sup>

2. The issuance and transfer of the negotiable cargo document to the holder shall have the same effect, for the purpose of acquisition and disposition of rights to the goods, including for the creation of any security right in the goods, as a physical handing over of the goods, provided that the transport operator is in possession of the goods.<sup>49</sup>

<sup>46</sup> Rotterdam Rules, articles 40 and 41; MT Convention, article 10 (a); see also CIM-COTIF 1999, article 12. The secretariat has drafted two options for consideration by the Working Group in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 67–68).

<sup>47</sup> Rotterdam Rules, article 41 (c); MT Convention, article 10 (b); and Multimodal Transport Act of Singapore, article 11 (2). The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 70).

<sup>48</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 73–75).

<sup>49</sup> The secretariat has added the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 75).

3. The rights listed in paragraphs 1 and 2 above exist after the issuance of the negotiable cargo document and cease, except for that listed in subparagraph 1 (d), when the negotiable cargo document is surrendered.<sup>50</sup>

4. In order to exercise the rights listed in paragraph 1 above, the holder shall produce the negotiable cargo document to the transport operator and shall properly identify itself.<sup>51</sup> If more than one original of the negotiable cargo document was issued, all originals shall be produced, failing which the right of control cannot be exercised.<sup>52</sup>

5. [Any demand, declaration, instruction, request, reservation or other communication relating to the transfer of a negotiable cargo document or the delivery of the goods mentioned in the negotiable cargo document, may be made out by electronic communication].<sup>53</sup>

#### *Article 8. Channel of communication*

If the transport operator needs information, instructions or documents relating to the goods in order to perform its obligations under the transport contract, the transport operator shall seek those information, instructions or documents from the holder of the negotiable cargo document. If the transport operator is unable to obtain those instructions within a reasonable time, the transport operator shall proceed in accordance with the transport contract.<sup>54</sup>

#### *Article 9. Liability of holder*

A holder of the negotiable cargo document that is not the consignor and that does not exercise any right under the transport contract does not assume any liability under the transport contract [and this Convention] solely by reason of being a holder of the negotiable cargo document.<sup>55</sup>

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

<sup>51</sup> The Working Group may wish to consider whether the paragraph needs to be adapted to the electronic context (A/CN.9/1127, para. 78). The Working Group may also wish to consider whether different requirement(s) should apply to the holder when exercising the right listed in article 9, paragraph 1 (d).

<sup>52</sup> Rotterdam Rules, article 51.

<sup>53</sup> e-CMR, article 2 (1). The Working Group may wish to recall that some support was expressed during its forty-first session for deleting the paragraph on the ground that the manner of communication would be subject to party autonomy and applicable domestic law. It was noted that the purpose of the paragraph was unclear and it might be misinterpreted as not allowing electronic communication to be made out for situations not explicitly referred to in the paragraph. There was also some concern that the draft paragraph might be misconstrued to suggest that electronic communications might suffice in all instances where the holder exercised the right of control irrespective of specific mechanisms for exercising the right of disposal under existing international conventions concerning carriage of goods (e.g. inserting instructions on the transport document itself) (A/CN.9/1127, para. 79).

<sup>54</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 89).

<sup>55</sup> Rotterdam Rules, article 58 (1). The secretariat has added the provision in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 90).

*Article 10. Delivery of the goods*

1. Delivery of the goods may be demanded from the transport operator only against surrender of the negotiable cargo document duly endorsed where necessary [and upon the holder properly identifying itself].<sup>56</sup>
2. If more than one original of the negotiable cargo document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity.<sup>57,58</sup>
3. On request of the transport operator, the holder shall acknowledge receipt of the goods from the transport operator.<sup>59</sup> The transport operator may refuse delivery if the holder refuses to acknowledge such receipt.<sup>60</sup>
4. [The law applicable to the transport contract shall govern other aspects of delivery of the goods to the holder.]<sup>61</sup>

*Article 11. Transfer of rights under a negotiable cargo document*<sup>62</sup>

1. The holder may transfer the rights incorporated in the negotiable cargo document to another person by:
  - (a) Delivering the negotiable cargo document duly endorsed either to such person or in blank, if an order document;<sup>63</sup> or
  - (b) Delivering the negotiable cargo document without endorsement, if: the negotiable cargo document is (i) made out to the order of a named person and the negotiable cargo document is delivered by the consignor identified in the negotiable cargo document to the named consignee; or (ii) a document made out to bearer or endorsed blank.<sup>64,65</sup>
2. If more than one original of a negotiable cargo document was issued, all originals shall be delivered to the person in order to effect a transfer of rights under a negotiable cargo document.<sup>66</sup>

<sup>56</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, paras. 91 and 93).

<sup>57</sup> Rotterdam Rules, article 47 (1)(c).

<sup>58</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 15).

<sup>59</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 16).

<sup>60</sup> Rotterdam Rules, article 44.

<sup>61</sup> The secretariat has placed the paragraph within square brackets in line with the decision of the Working Group at its forty-second session (A/CN.9/1134, para. 17).

<sup>62</sup> The Working Group may wish to consider which documents the customs and other authorities of the countries concerned would be expected to examine (i.e. whether the transport document or the negotiable cargo document or both) and the extent to which they would be expected to acknowledge transfers of rights to the goods under a negotiable cargo document (A/CN.9/1127, para. 85).

<sup>63</sup> Rotterdam Rules, article 57 (1); Standard Conditions (1992) governing the FIATA Multimodal Transport Bill of Lading, 3.1.

<sup>64</sup> Rotterdam Rules, article 57 (1).

<sup>65</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 84). The secretariat has deleted the square brackets to reflect the decision of the Working Group at its forty-second session to allow the issuance of bearer documents (A/CN.9/1134, para. 73).

<sup>66</sup> The secretariat has revised the paragraph in line with the decision of the Working Group at its forty-first session (A/CN.9/1127, para. 86).

*Article 12. Replacement of a negotiable cargo document with  
a negotiable electronic cargo record*<sup>67</sup>

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

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

(b) The transport operator shall issue to the holder a negotiable electronic cargo record that reproduces [all] information as recorded in the negotiable cargo document, consistent with article 4, paragraph 1<sup>68</sup> and includes a statement that it replaces the negotiable cargo document; and

(c) For the change of medium to take effect, a reliable method for such change shall be used.<sup>69</sup>

2. Upon issuance of the negotiable electronic cargo record in accordance with paragraph 1, the negotiable cargo document shall be made inoperative and ceases to have any effect or validity.<sup>70</sup>

3. A change of medium in accordance with paragraph 1 shall not affect the rights and obligations of the parties.<sup>71</sup>

### CHAPTER 3. NEGOTIABLE ELECTRONIC CARGO RECORDS<sup>72</sup>

*Article 13. Legal recognition of a negotiable electronic cargo record*<sup>73</sup>

A negotiable electronic cargo record shall have the same legal effect of a negotiable cargo document and shall not be denied legal effect on the sole ground that it is in electronic form.<sup>74</sup>

*Article 14. Conditions for use of a negotiable electronic cargo record*

1. A negotiable electronic cargo record can be issued if the issuance and subsequent use of a negotiable electronic cargo record is with the consent of the transport operator and the consignor.<sup>75</sup>

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

<sup>67</sup> Rotterdam Rules, article 10; MLETR, article 17.

<sup>68</sup> In the consultations held by the secretariat, some experts noted the need to add a provision that explicitly required all the information contained in a negotiable cargo document (see article 4) to be accurately reflected in a negotiable electronic cargo record and vice versa when carrying out a change of medium. Support was expressed as such a requirement would be appealing to the banking industry, especially considering the difficulty for banks to check and ensure the completeness and accuracy of the information. However, in the view of some other experts, “mirroring” the content of the previous document or record in the converted one was not considered necessary but preserving the minimum required contents as stipulated in article 4 was considered essential. The Working Group may wish to consider which approach is more appropriate.

<sup>69</sup> Rotterdam Rules, article 10 (1); MLETR, articles 17 (1) and 17 (2).

<sup>70</sup> MLETR, article 17 (3).

<sup>71</sup> MLETR, article 17 (4).

<sup>72</sup> The secretariat has restructured the draft instrument and placed all provisions relating to negotiable electronic cargo records in one chapter.

<sup>73</sup> The secretariat has split draft article 5, paragraph 1 of the preliminary draft provisions for a new instrument on negotiable cargo document as contained in the annex to the previous working paper (A/CN.9/WG.VI/WP.98) into two separate articles to address concerns expressed during the Working Group’s forty-second session (A/CN.9/1134, para. 21).

<sup>74</sup> MLETR, article 7 (1).

<sup>75</sup> Rotterdam Rules, article 8 (a).

its link with the negotiable electronic cargo record.<sup>76</sup> The reliability of an electronic signature method is presumed, unless otherwise proved, if the electronic signature is:

- (a) Uniquely linked to the signatory;
- (b) Capable of identifying the signatory;
- (c) Created using means that the signatory can maintain under its exclusive control; and
- (d) Linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.<sup>77</sup>

3. A negotiable electronic cargo record may also be signed by any other electronic authentication method permitted by the law of the country in which the negotiable electronic cargo record has been made out.<sup>78</sup>

4. Where the Convention requires or permits the issuance and transfer of the negotiable cargo document,<sup>79</sup> that requirement is met by an electronic cargo record if:

(a) The electronic cargo record contains all information required by article 4, paragraph 1<sup>80</sup> in a manner that is accessible so as to be usable for subsequent reference;<sup>81</sup>

(b) The electronic cargo record indicates the method by which confirmation could be given to indicate that delivery of the goods to the holder has been effected, or that, pursuant to article 10, or article 17, paragraph 2 the negotiable electronic cargo record, if any, has ceased to have any effect or validity;<sup>82</sup>

(c) A reliable method is used:

(i) To identify that electronic record as the negotiable electronic cargo record;<sup>83</sup>

(ii) To render that negotiable electronic cargo record capable of being subject to exclusive control from its creation until it ceases to have any effect or validity;<sup>84</sup>

(iii) To permit the identification of the holder and the transfer of exclusive control over the negotiable electronic cargo record to another holder<sup>85</sup> [including by endorsement or to the bearer];

<sup>76</sup> e-CMR, article 3 (1).

<sup>77</sup> e-CMR, article 3 (1).

<sup>78</sup> e-CMR, article 3 (2).

<sup>79</sup> The secretariat has inserted this phrase to reflect the deliberation of the Working Group at its forty-second session (A/CN.9/1134, para. 20).

<sup>80</sup> The Working Group may wish to consider whether including a date on the negotiable electronic cargo record (as required by article 4, paragraph 1 (h)) might cause confusion as the date of issue of electronic records would typically be automatically generated by the system (A/CN.9/1127, para. 38).

<sup>81</sup> MLETR, articles 8 and 10 (1)(a); Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road concerning the Electronic Consignment Note (e-CMR), article 4 (1); Rotterdam Rules, article 8 (a).

<sup>82</sup> The secretariat has relocated the paragraph as it relates only to the negotiable electronic cargo record, not the negotiable cargo document. This paragraph was previously included in draft article 4, paragraph 3 of the preliminary draft provisions for a new instrument on negotiable cargo document as contained in the annex to the previous working paper (A/CN.9/WG.VI/WP.98).

<sup>83</sup> MLETR, article 10 (1)(b)(i).

<sup>84</sup> MLETR, articles 10 (1)(b)(ii) and 11 (1)(a); Rotterdam Rules, articles 1 (21) and 1 (22).

<sup>85</sup> MLETR, article 11 (1)(a); see e-CMR, article 5 (1)(c) ("The manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement.").

(iv) To provide confirmation that delivery of the goods to the holder has been effected, or that, pursuant to article 10, or article 17, paragraph 2 the negotiable electronic cargo record has ceased to have any effect or validity;<sup>86</sup> and

(v) To retain the integrity of that negotiable electronic cargo record.<sup>87</sup>

5. The criterion for assessing integrity shall be whether information recorded in the negotiable electronic cargo record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display.<sup>88</sup>

*Article 15. Reliability requirements of negotiable electronic cargo records*

In determining the reliability of the method used for the purposes of this Convention, all relevant circumstances shall be taken into account, which may include:<sup>89</sup>

(a) Compliance of the operational rules, policies and practices used in the method with any applicable internationally recognized standards and procedures;

(b) Any relevant level of reliability of the method used;

(c) Any applicable industry standard;

(d) The security of hardware and software;

(e) Financial and human resources, including existence of assets;

(f) The regularity and extent of audit by an independent body; and

(g) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method.<sup>90</sup>

*Article 16. Transfer of rights under a negotiable electronic cargo record*

When a negotiable electronic cargo record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person,<sup>91</sup> by transferring the exclusive control of the electronic cargo record.<sup>92</sup>

*Article 17. Replacement of a negotiable electronic cargo record with a negotiable cargo document<sup>93,94</sup>*

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

<sup>86</sup> Rotterdam Rules, article 9 (1)(d); e-CMR, article 5 (1)(d). In the consultations held by the secretariat, it was noted that the negotiable electronic cargo record might still have some evidentiary value after the transfer although it would cease serving the primary purpose.

<sup>87</sup> MLETR, article 10 (1)(b)(iii); e-CMR, article 5 (1)(b); Rotterdam Rules, article 9 (1)(b).

<sup>88</sup> MLETR, article 10 (2); e-CMR, article 4 (2).

<sup>89</sup> The Working Group may wish to consider whether the chapeau of this article needs to be further revised to explicitly refer to specific situations where reliable methods need to be employed, including the identification of the holder and exclusive control.

<sup>90</sup> MLETR, article 12; UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, article 10.

<sup>91</sup> The secretariat has deleted the square brackets to reflect the decision of the Working Group at its forty-second session to allow the issuance of bearer documents (A/CN.9/1134, para. 73).

<sup>92</sup> Rotterdam Rules, article 57 (2).

<sup>93</sup> Rotterdam Rules, article 10; MLETR, article 18. The Working Group may wish to note the existing practice with the use of transport documents comprising several copies, each of which performed a particular function and consider whether the same could be achieved in the use of a negotiable electronic cargo record.

<sup>94</sup> In the consultations held by the secretariat, a suggestion was made to introduce provisions dealing with the transfer of a negotiable electronic cargo record from one system to another system with a different technology, considering that different technologies might be employed by different systems.

negotiable cargo document]/[When a negotiable electronic cargo record has been issued, the holder may request the transport operator to replace that negotiable electronic cargo record by a negotiable cargo document]:<sup>95</sup>

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

(b) For the change of medium to take effect, a reliable method for such change shall be used.<sup>96</sup>

2. Upon issuance of the negotiable cargo document in accordance with paragraph 1, the negotiable electronic cargo record shall be made inoperative and ceases to have any effect or validity.<sup>97</sup>

3. A change of medium in accordance with paragraph 1 shall not affect the rights and obligations of the parties.<sup>98</sup>

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<sup>95</sup> The Working Group may also wish to note that current commercial practice would require the use of a paper document in some circumstances, and consider whether it would be preferable to ensure that the holder of a negotiable electronic cargo record has the right to require the change of medium instead of seeking an agreement with the transport operator.

<sup>96</sup> Rotterdam Rules, article 10 (2); MLETR, articles 18 (1) and 18 (2).

<sup>97</sup> MLETR, article 18 (3).

<sup>98</sup> MLETR, article 18 (4).