



**United Nations Commission on
International Trade Law**
Fifty-third session
New York, 6–17 July 2020**Possible future work on railway consignment notes****Note by the Secretariat****I. Introduction**

1. At the fifty-second session of the Commission, the Government of the People's Republic of China presented a proposal on possible future work by UNCITRAL towards the development of a negotiable transport document to facilitate multimodal carriage of goods, particularly by railway in the Euro-Asian space.¹ The proposal indicated that, unlike the ocean bill of lading, the railway consignment note (hereafter the "RCN") did not serve as a document of title and could not be used for the settlement and financing of letters of credit. The limited function of the RCNs also constrained the ability of banks and other institutions to provide financial services and increased the financial pressure on importers and the risks faced by exporters in collecting payments.²

2. The Commission considered with interest the proposal, which was felt to have considerable practical significance for world trade, in particular for the economic growth of developing countries. However, given the wide range of issues involved and their complexity, the Commission agreed, as a first step, to request the Secretariat to conduct research on legal issues related to the use of railway or other consignment notes, and to coordinate with other relevant organizations such as the Intergovernmental Organization for International Carriage by Rail (OTIF), the Organization for Cooperation between Railways (OSJD), the International Rail Transport Committee (CIT), the relevant United Nations regional commissions, in particular the Economic Commission for Europe (which was also working on legal standards for international railway transport), the Federation of Freight Forwarders Associations (FIATA) and the International Chamber of Commerce (ICC). In that connection, the Commission requested the Secretariat to report back to the Commission, at its fifty-third session, in 2020, on the progress made in that research.³

¹ Work programme - Possible future work regarding railway consignment notes - Proposal by the Government of the People's Republic of China (A/CN.9/998).

² *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 216.

³ *Ibid.*, *Seventy-fourth Session, Supplement No.17 (A/74/17)*, paras. 217 and 218.



3. This note summarizes the exploratory work done by the Secretariat in response to the Commission's request, the tentative conclusions it has drawn therefrom, and its proposals on the way forward for consideration by the Commission.

II. Overview of exploratory work by the Secretariat

4. The exploratory work conducted by the Secretariat since the fifty-second session of the Commission consisted essentially of (a) research on the subject matter, in particular as regards ongoing projects of a similar nature in other forums; and (b) consultations with experts and interested organizations, primarily through participation in two expert group meetings especially organized for that purpose.

A. Negotiable documents under existing transport conventions

5. As defined in the UNCITRAL Legislative Guide on Secured Transactions (LGST), a negotiable document is “a document, such as a warehouse receipt or a bill of lading, that embodies a right to delivery of tangible assets and satisfies the requirements for negotiability under the law governing negotiable documents”. The LGST distinguishes between “negotiable document” and “negotiable instrument”, which means “an instrument, such as a cheque, bill of exchange or promissory note, that embodies a right to payment and satisfies the requirements for negotiability under the law governing negotiable instruments.” Negotiable documents and negotiable instruments share many common features under domestic laws, including strict form requirements, special enforcement mechanisms and negotiability. While the LGST does not define “negotiability”, this term is used to refer to the fact that rights embodied by a negotiable document may be transferred by physical delivery of the document, as well as to the enhanced legal protection granted to the good faith holder of the negotiable document against claims of defences related to a defective title held by a previous holder of the document. Negotiable documents and negotiable instruments differ, however, in that the latter only embody a payment promise whereas the former entitle the holder to claim delivery of goods, a feature that in practice has enabled merchants to use those documents as financial collateral or as a means for trading in the underlying commodities. Domestic laws differ, however, in the conceptualization of the nature of the rights embodied by the negotiable document, and the effects that their delivery has in respect of (property) title to the underlying goods. These divergencies explain why the term “documents of title”, while common in some legal systems, is unknown to many others. Consistently with the LGST, this note uses only the term “negotiable documents”.

6. The reference in the LGST to a “bill of lading” and to no other transport documents in the definition of “negotiable document” is indicative of the fact that current international trade law recognizes only the (maritime) bill of lading as meeting the requirements of negotiability. This function of the bill of lading resulted from centuries of evolution of commercial law and was eventually codified in many domestic laws on carriage of goods and international instruments. Whereas previous maritime conventions are not explicit on this point, the possibility of transferring the right of control over the goods by transferring the transport document is expressly recognized in art. 51(3) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”).⁴ However, none of the international conventions on carriage of goods by other means,

⁴ United Nations document [A/RES/63/122](#), annex (with corrections in [C.N.563.2012](#) and [C.N.105.2013](#)).

be it by air,⁵ road,⁶ or rail⁷ contemplates the transfer of the right of control of the goods⁸ by transfer of the relevant transport document. The Uniform Rules concerning the Contract for International Carriage of Goods by Rail appended to the Convention concerning International Carriage by Rail (CIM-COTIF),⁹ even provide expressly, in article 6, paragraph 5, that “the consignment notes shall not have effect as a bill of lading”.

7. The situation described above could have changed if the United Nations Convention on International Multimodal Transport of Goods (the “MMT Convention”)¹⁰ had entered into force, since that convention had contemplated the negotiability of multimodal transport documents. However, the MMT Convention has not attracted a sufficient number of ratifications. Rules on multimodal transport were thereafter developed by the United Nations Conference on Trade and Development (UNCTAD) and the International Chamber of Commerce (ICC) in 1992. The UNCTAD/ICC Rules for Multimodal Transport Documents (the “UNCTAD/ICC Rules”)¹¹ contemplate the issuance of both negotiable and non-negotiable transport documents and are often incorporated by reference in transport documents, such as the standard bills of lading developed by FIATA.¹² However, the UNCTAD/ICC Rules are of contractual nature, and it is unclear how many jurisdictions would recognize the negotiability of a multimodal transport document only on the basis of a contractual provision if the contract of carriage did not include a maritime segment.

8. As regards specific modes of transportation, the Secretariat is not aware of any attempts to introduce negotiable transport documents into the existing conventions governing international carriage of goods by air and road. Experts in the railway sector consulted by the Secretariat have indicated that it might be possible for the parties to a contract of carriage governed by CIM-COTIF to use the duplicate of the RCN as a negotiable transport document (a “contractual bill of lading”), and that CIM-COTIF would already accommodate that possibility. The parties could achieve that result by agreeing on specific deviations from the default rules of CIM-COTIF, for instance: (a) that only the bearer of the duplicate of the RCN, acting in good faith, should have the right of disposal pursuant to Articles 18 and 19 of CIM-COTIF and that the carrier, if circumstances prevented carriage or delivery, must carry out instructions only against presentation of the duplicate of the RCN; and (b) that the carrier should deliver the goods against the surrender of the duplicate of the RCN. However, such a contractual solution would only be possible in contracts covered by

⁵ Convention for the Unification of Certain Rules Relating to International Carriage by Air Warsaw, 12 October 1929 (League of Nations Treaty Series, vol. 137, p. 1), as amended at the Hague, on 28 September 1955 and by Protocol No. 4 of Montreal, 25 September 1975 (ICAO Doc. 7632). See also Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 (United Nations Treaty Series, vol. 22249, p. 309).

⁶ Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956) (United Nations Treaty Series, vol. 399, p. 189), amended by the 1978 Protocol (CMR).

⁷ Convention concerning International Carriage by Rail (COTIF) (9 May 1980), as amended by the Protocol of Modification of 3 June 1999 (www.cit-rail.org/en/rail-transport-law/cotif/). COTIF applies in more than 50 States mainly in Europe, North Africa and the Middle East. The second main agreement in the railway sector is the Agreement on International Railway Freight Communications (SMGS) (1 November 1951), as amended and supplemented as of 1 July 2019, developed by the Organization for Co-operation between Railways (OSJD). SMGS applies in 29 countries, mainly in Asia and Eastern Europe.

⁸ The right of control, as specified in art. 50(1) of the Rotterdam Rules includes (a) the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; (b) the right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and (c) the right to replace the consignee by any other person including the controlling party.

⁹ Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix B to COTIF (CIM-COTIF), as amended by the Protocol of Modification of 1999 (www.cit-rail.org/en/rail-transport-law/cotif/).

¹⁰ United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980), U.N. Doc. TD/MT/CONF/16 (certified true copy).

¹¹ United Nations document [TRADE/WP.4/INF.117/CORR.1](#).

¹² See [Negotiable FIATA Multimodal Transport Bill of Lading](#).

CIM-COTIF and would not be available in the area subject to the Agreement on International Railway Freight Communications (SMGS) and in transcontinental rail transport between Europe and Asia and vice versa, since the SMGS does not seem to offer the same flexibility.

B. Ongoing efforts to modernize and harmonize railway law

9. Most international railway transportation takes place between Europe and Asia under either CIM-COTIF and SMGS. In order to promote legal interoperability and harmonize the railway transport documents, with the support of the two railway organizations administering those agreements, OTIF and OSJD, CIT developed a standard CIM/SMGS consignment note in 2006, and the technical specifications for the electronic CIM/SMGS consignment note became available for use in July 2019.¹³ It is expected that, once widely used in practice, the CIM/SMGS consignment note will greatly facilitate transit of cargo across the CIM-COTIF and SMGS areas without the need for reconsignment of cargo between the two areas. The CIM/SMGS consignment notes contemplate delivery of cargo to the consignee and currently do not provide for negotiable consignment notes.

10. A broader harmonization effort is currently advancing under the auspices of the United Nations Economic Commission for Europe (UNECE), which in November 2009 established an expert group under its Working Party on Rail Transport (SC.2) with the mandate to develop a unified railway law (URL).¹⁴ The expert group, which counts on the active participation of OTIF, OSJD, CIT and several other key stakeholders in the railway sector, has held several meetings since and eventually developed a draft contract of carriage convention covering a wide range of substantive issues, including transport documents, obligations of the parties, liability for loss or damage and delivery of goods.¹⁵

11. The URL is intended to offer “railway undertakings and their customers the opportunity to conclude a single contract of carriage for specific international transport of goods by rail (in particular between Europe and Asia) and to agree in this contract to apply a single international legal regime (known as an opt-in).¹⁶ The exact manners in which the URL will operate in conjunction with the existing conventions (and whether a new international binding instrument to ensure that is needed) are matters under consideration by the expert group.¹⁷

12. In its original version, the URL did not contemplate negotiable consignment notes. A proposal to insert provisions to that effect was submitted to the twenty-first session of the expert group (Geneva, 16–18 October 2019).¹⁸ Those provisions, which do not yet contemplate an electronic version of the RCN, have yet to be considered by the expert group.¹⁹

¹³ The technical specifications of the electronic CIM/SMGS consignment note are available at www.cit-rail.org/media/files/documentation/freight/cim/e-fb_cim-smgs_en_2019-07-01.pdf?cid=120604.

¹⁴ See UNECE, “Towards unified railway law in the pan-European region and on Euro-Asian transport corridors - Position paper by the Working Party on Rail Transport” (ECE/TRANS/2011/3).

¹⁵ The most recent version of the draft URL is contained in: “Towards unified railway law in the pan-European region and along Euro-Asian transport: Draft of relevant legal provisions” (ECE/TRANS/2016/15).

¹⁶ See UNECE, “Presenting the Unified Railway Law (URL) as a new UNECE statutory instrument for the international transport of goods by rail” (Information Note on URL).

¹⁷ See UNECE, “Options available for converting URL into a legally binding instrument – URL as contract of carriage’s convention” (ECE/TRANS/SC.2/GEURL/2019/5).

¹⁸ See UNECE, “Proposal on provisions about a negotiable transport document in the URL” (ECE/TRANS/SC.2/GEURL/2019/16).

¹⁹ Report of the Group of Experts towards Unified Railway Law at its the twenty-first session (ECE/TRANS/SC.2/GEURL/2019/14).

C. Consultations organized by the Secretariat

13. Since the fifty-second session of the Commission, the Secretariat has organized and participated in two events devoted to the discussion of ways to develop negotiable transport documents that could be used in carriage of goods by rail. The following paragraphs briefly summarize those consultations and the tentative conclusions arising out of them.

1. High-Level Symposium on the Use of Railway Consignment Note and the Future Legal Framework of International Trade (Chongqing (China), 11–12 December 2019)

14. The first expert group discussion of that proposal took place in connection with the High-Level Symposium on the Use of Railway Consignment Note and the Future Legal Framework of International Trade (hereafter “the Chongqing Symposium”) co-organized by the Ministry of Commerce (MOFCOM) of China, other Chinese Government entities and the UNCITRAL secretariat in Chongqing (China), on 11–12 December 2019, with the support of the Municipal Government of Chongqing.

15. The first day of the Chongqing Symposium was open to all participants and consisted of four panels comprised of renowned local and international experts, representing international intergovernmental and business organizations (UNCTAD, UNECE, CIT, FIATA, the Comité Maritime International (CMI), ICC), practitioners and academia. The first panel focused on the current challenges for railway transportation from the perspective of traders and the logistics industry. The experts highlighted the increase in carriage of goods by rail and the limited value of RCNs to support traders’ applications for export/import financing because RCNs did not constitute negotiable documents acceptable to banks. In the second panel, experts from logistics companies, port operators and banks provided an overview of innovative ways of solving the problems identified in the first panel and described related challenges, obstacles and potential legal risks. It was noted that, in domestic practice, some freight forwarders issued documents for transport by rail intended to fulfil the negotiable function of a bill of lading by using a so-called “dual track” system, under which the RCN was used for transport and customs clearance purposes and the freight forwarder transport document was used for access to finance, namely to control the goods by contracting with carriers, ports and traders. However, concerns were expressed that the existing legal regimes of RCNs might pose legal risks to the bearer of such a document, such as not being able to enforce its rights against a third party. The third panel discussed coordination and cooperation among international railway frameworks. The expert from the CIT illustrated the work on harmonization of railway rules and RCNs formalities between the two main railway organizations OTIF and OSJD, which enhanced the interoperability of railway regimes and transport efficiency. The expert from the UNECE explained UNECE’s work towards a URL, which might include the topic of transferability and negotiability of RCNs. After hearing a summary of the proposal submitted by the Chinese Government and of the deliberations thereon at the fifty-second session of UNCITRAL, the experts of the fourth panel discussed possible future work.

16. On the second day, experts from UNCITRAL, CIT, CMI, UNECE, UNCTAD, ICC, FIATA and other international organizations discussed with the local experts invited by MOFCOM the possible way forward for UNCITRAL future work in a closed meeting. It was suggested that the work undertaken by railway and other international organizations, especially within OSJD and UNECE, to amend the rules on the evidentiary function of RCNs and on control of goods, could provide a basis for railway transport documents functioning as negotiable documents that could be accepted by banks. It was also observed that the evidentiary function of transport documents would be essential for the banks, for whom a “clean” transport document and the bearer’s ability to claim delivery of the goods were of paramount importance as a means of exercising control over the goods. There was scope of improvement within the existing railway rules. Possible alternative solutions (not necessarily

mutually exclusive) included a “dual track” model or a multimodal transport document with the nature of documents of title acceptable by banks, but that model entailed significant legal risks in the absence of express recognition by international rules. It was also observed that new technologies, such as distributed ledger technology (DLT) might provide means to supplement the traditional rules on the above issues. It was further observed that many logistics companies and financial institution were developing pilot electronic platforms to monitor carriage of goods and to finance traders accordingly. The use of electronic documents issued by those platforms should be taken into consideration by any legislative works in the future.

17. In concluding the meeting, the Secretariat announced its intention to convene another expert group meeting before the fifty-third session of the Commission, which should again include participation from UNECE, OTIF, OSJD and CIT in view of their expertise and mandate on rail transport. There was agreement that the central questions to be discussed in the next expert group meeting included: (a) current banking practice regarding the acceptability of non-negotiable transport documents in documentary credit transactions; and (b) how the banking industry could react to the types of suggestions that were put forward at the Chongqing Symposium, in particular the suggestion that a possible solution for the difficulties faced by traders to obtain financing for foreign trade transactions when goods are carried by rail might be to develop a multimodal transport document with the nature of documents of title acceptable by banks, without touching existing carrier liability regimes. The latter point was particularly important in view of the wide discrepancies among liability rules and monetary ceilings in existing international unimodal conventions and the unsatisfactory experience with previous attempts at establishing a uniform liability regime for multimodal carriage.

2. Expert Group Meeting on the Use of Railway Consignment Notes and Possible Future Work by UNCITRAL on Documents of Title in Multimodal Transport (15–16 April 2020)

18. With a view to discussing further the ideas that emerged at the Chongqing Symposium and assisting the Secretariat in formulating concrete proposals for possible future work by UNCITRAL in this area, the Secretariat organized a second expert group meeting on 15–16 April 2020. The meeting took place via videoconference due to the measures put in place by States and the United Nations in response to the Coronavirus disease 2019 (COVID-19) pandemic.

19. The expert group meeting was attended by more than 20 experts representing UNCTAD, UNECE, OTIF, the ICC Banking Commission, CIT, FIATA, CMI, MOFCOM, the National Railway Administration of China (NRA), the China Merchants Group, the Industrial and Commercial Bank of China, as well as practitioners and academia. The experts were invited to consider in particular the following questions: the response of the railway industry and relevant organizations to the increasing demand of railway users for import/export credit; non-negotiable transport documents in international documentary credit practice; the compatibility of freight forwarders’ transport documents with existing railway rules; contents and functions of transport documents as negotiable documents; and the relationship between an international legal framework for multimodal transport documents and existing conventions.

20. It was reported that, in response to an increasing demand by railway users for import/export credit, Chinese transport enterprises relied on transport documents issued by freight forwarders (known as “railway forwarder bills”, as a contractual multimodal bill of lading for carriage of goods wholly or partly by railway) for purposes of financing, alongside with a RCN issued by the carrier and used for the carriage of goods. It was emphasized that the railway forwarder bill was a new document independent of the RCN. The experts further reported the practice of railway carriers by using one copy of the RCN as the “delivery certificate” and obtaining consent from customers and banks to use this as the method of delivery. However, it was pointed out that such practice only played a limited role, due to:

(a) the risks arising from the delivery mechanism of railway transport (e.g., delivered only to the actual consignee); (b) a lack of legal support for the property right of RCNs; and (c) lack of an established practice of using RCNs to support the issuance of letters of credit.

21. It was noted that, after extensive research to better understand the actual needs of railway users and the limitations perceived by them in the current RCN framework, NRA was promoting the resolution of such issue under the framework of the OSJD, which, during the forty-seventh session of its Ministerial Conference in June 2019, had agreed to set up an Interim Working Group on the Function of Documents of Title for RCNs (the “OSJD Working Group”) with participation from 10 OSJD member states (i.e., Azerbaijan, Belarus, Hungary, Georgia, Kazakhstan, China, Mongolia, Poland, Russia and Ukraine). The OSJD Working Group held its first meeting in Warsaw in February 2020. Currently, the OSJD Working Group was soliciting views from the participating member states on whether to choose a “single track” or a “dual track” approach to solve the issue. The next steps at OSJD included: (a) defining the overall challenge of using documents of title in international railway freight transport; (b) making clear what kind of cargo control mechanism should be adopted when using documents of title; (c) proposing essential elements for SMGS consignment notes to function as documents of title; and (d) putting forward specific suggestions to address the major obstacles in SMGS instruments.

22. The experts noted that CIM-COTIF, too, treated RCNs as non-negotiable transport documents. So far, OTIF (acting as the custodian of CIM-COTIF) had not received any requests to consider the “negotiability of railway transport documents” from either an OTIF member state or a railway association. However, OTIF had decided to consider the issue of negotiable documents in railway transport, taking into account various international initiatives. At the present stage, the issue of negotiable documents in railway transport had been included in the work plan of the Working Group of Legal Experts under the auspices of OTIF but no specific activities had been planned yet.

23. Turning to the financial sector, the experts noted that Chinese banks had identified the nature of RCNs as a source of additional legal risks. A comparison of negotiable and non-negotiable transport documents had revealed that negotiable transport documents offered more comfort for banks as they placed the holder effectively in control of the goods. As a result, banks were likely to offer more credit facilities and more favourable credit policy for clients. In the absence of a negotiable transport document, credit would be available primarily on a balance sheet basis, in the light of the applicant’s creditworthiness and the availability of personal guarantees. The reluctance of the banking sector to accept purely contractual alternatives to trade documentation recognized by law was exemplified with reference to electronic bills of lading or other documents, which, according to an ICC Global Survey, were accepted by only 24 per cent of banks, partly due to a lack of enabling legislation.

24. It was noted that the Uniform Customs and Practice for Documentary Credits (UCP600) admitted non-negotiable transport documents in support of a letter of credit and that a rail transport document marked “duplicate” would be accepted by banks as an original. However, given the contractual, non-binding nature of the UCP, this flexibility had little practical significance as long as the RCN was not recognized by law as a negotiable document.

25. The experts heard a detailed presentation on how the existing CIM-COTIF provisions could be applied to support contractual arrangements enabling the use of the CIM-COTIF RCN as a negotiable transport document (see above, para. 8). Under this proposal, the duplicate of the CIM-COTIF RCN could be used as a “contractual bill of lading”, provided that the parties to the contract of carriage and the consignee agreed to that arrangement. In this regard, the evidentiary value of the CIM-COTIF RCN was recalled (CIM-COTIF Rules, art. 12(1) and (2)), in particular its role as the *prima facie* evidence of: (a) the conclusion and the conditions of the contract of

carriage; (b) the taking over of the goods; (c) the condition of the goods and their packaging indicated on the RCN or, in the absence of such indications, of their apparently good condition at the moment they were taken over by the carrier; and (d) the accuracy of the statements in the RCN concerning the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed.

26. It was noted that in order to serve as a negotiable transport document, the evidential value of the CIM-COTIF RCN had to be strengthened so that the carrier could not rebut the presumptions mentioned above *vis-à-vis*: (a) a consignee designated in the RCN and acting in good faith, to whom the duplicate of the RCN had been handed over; and (b) any third party to whom the duplicate of the RCN had been transferred. Agreement had to be reached between the parties to the contract of carriage (and entered on the RCN and its duplicate) so as to allow the carrier to assume a greater liability and more burdensome obligations than those provided for in the CIM-COTIF.

27. In addition, the parties had to agree that only the bearer of the duplicate of the CIM-COTIF RCN (instead of the consignor or the consignee), acting in good faith, would have the right of disposal of the goods. The parties to the contract could then agree and enter on the RCN and its duplicate that the surrender of the duplicate of the RCN, in which the delivery was confirmed, would constitute the receipt of delivery of the goods. It was mentioned that the carrier would be liable for the resulting damage suffered by the bearer of the duplicate of the RCN, if he/she delivered the goods to a party other than the bearer who was acting in good faith.

28. The experts agreed that one of the key advantages of that proposal was that no amendment to CIM-COTIF would be required, which, in the view of OTIF, would be a lengthy process. However, the experts also noted that such a mechanism would currently only be available in the CIM-COTIF area and could not be used in the SMGS area and in transcontinental rail transport between Europe and Asia and vice-versa, at least not until the two systems were interoperable (see above, paras. 10–12).

29. Turning to the compatibility of freight forwarders' transport documents with existing railway rules, the experts focused on the role of the negotiable FIATA multi-modal transport bill of lading (the "FIATA multimodal bill"). The experts noted that over 1 million copies of FIATA multimodal bills were issued every year. The ICC Banking Commission regarded them as being in conformity with UNCTAD/ICC Rules and they were widely accepted by banks around the world for letter of credit transactions under UCP 600. It could be issued in negotiable form and could also be presented in exchange for the goods.

30. Moreover, the role of FIATA multimodal bills in a "dual track" system was explained in comparison with the role of RCNs. A FIATA expert pointed out that FIATA multimodal bills were not issued under the railway transport contract but by multimodal transport operators (MTOs) as a negotiable document under the multimodal transport contract between MTOs and their clients. The consignor and consignee (or to order) in FIATA multimodal bills were the actual consignor and consignee (or to order) under the contract of multimodal carriage (typically the seller and the buyer under the sales contract). FIATA multimodal bills were used in conjunction with RCNs, which were non-negotiable and issued by railway operators under the railway transport contract between MTOs and railway operators. The consignor and consignee in RCNs were MTOs or their agents. Whereas the delivery rules under FIATA multimodal bills contemplated the surrender of one original FIATA multimodal bills and/or proof of consignee's identity, delivery in the context of RCNs was only against proof of consignee's identity.

31. In the view of a FIATA expert, the use of the FIATA multimodal bill in conjunction with the RCN under the "dual track" approach offered a number of advantages given that: (a) the FIATA multimodal bill conformed to UCP 600 and had been widely accepted by banking institutions around the globe in letter of credit transactions; (b) the FIATA multimodal bill had been widely used in door-to-door

transport, which reflected the trend of development for logistics services and supported more streamlined operation for all stakeholders; and (c) the railway operator could maintain its current way of operation. Nevertheless, experts highlighted several obstacles for using the FIATA multimodal bill in conjunction with the RCN. Firstly, the function of the FIATA multimodal bill serving as a negotiable document was primarily based on its terms and conditions, namely the contractual agreement between the MTO and its client, not on any international convention or national laws in many jurisdictions. Secondly, it was not entirely clear whether banks and courts in different jurisdictions would recognize the validity of FIATA multimodal bills as a negotiable document akin to the bill of lading when it was used for a single mode of transport other than sea transport. Thirdly, in some jurisdictions, mainly some SMGS countries, the consignee and/or consignor on RCNs had to be the actual consignee and/or consignor under the contract of carriage by rail (in most cases the seller and the buyer under the sales contract), and the MTO was not allowed to be named as the consignee and/or consignor under a SMGS RCN.

32. The experts discussed the relationship between possible new instrument on negotiable multimodal transport documents and the existing transport conventions, especially the notion of “dual track” approach dealing only with transport documents that might apply to railway transport but not exclusively to railway transport. It was agreed that traders’ demand for door-to-door transportation, coupled with their financing needs, suggested that international trade could benefit from the availability of a negotiable transport document also for land carriage. In that connection, the experts discussed the work on a negotiable RCN under the URL framework being developed by UNECE (see paras. 10–12 above). It was said that under the additional provisions presented in 2019, the railway consignment notes could also serve as negotiable document. It was suggested that choosing to use such negotiable RCNs by opting in the URL might be a straight-forward solution for trading partners along the China-Europe railway corridor. It was also noted that the existing unified railway document - CIM/SMGS RCNs (see para. 9 above) could also serve as a flexible tool and could quickly function in parallel with the “dual track” approach if the additional functions of a negotiable document could be incorporated into the duplicate of the CIM/SMGS RCN.

33. The experts agreed that a purely contractual mechanism that replicated to some extent the function of negotiable documents could offer an effective and pragmatic solution. However, there were also concerns that without legislative recognition the transfer to a third party of rights and obligations arising out of the contract of carriage evidenced by a “contractual negotiable transport document” might face obstacles because of the principle of privity of contract. Therefore, several experts were of the view that a negotiable multimodal transport document should be regulated by law, at national, but ideally at the international level.

34. The relationship between the negotiable document and the liability of the carrier was also discussed among experts. Noting the variety and diversity of liability regimes, there was preference for a system that dealt only with the negotiability function of the transport document and relied on existing instruments either purely or partly unimodal for dealing with liability for loss or damage to goods. Expert made repeated references to the FIATA multimodal bill and the UNCTAD/ICC Rules, as well as the Rotterdam Rules as possible models for a network liability regime.

35. In their discussion on negotiable documents recognized by existing international conventions, the experts also considered the relationship between the sales contract and the contract of carriage. It was recalled that bills of lading could be “negotiable” and “non-negotiable”. In the first cases, bearer or order bills of lading could be traded down a chain of buyers by transfers and endorsements, while the non-negotiable (or “straight”) bill of lading was issued to named consignees and the underlying rights were not transferable, but the requiring of the physical surrender of the bill of lading still provided for documentary security which was different from the ordinary sea waybill.

36. It was suggested that the solution for the current shortcomings of the RCNs required careful consideration of the real needs of traders. Indeed, the function of security and control of goods was relatively easy to replicate by adding a presentation clause to the transport document, and no negotiable transport document would be required for that purpose. Negotiable transport documents were, in turn, really needed for more complex trades, for instance where independent documentary security was required, where sale of goods in transit was envisaged, or where the parties required trade finance. The advantage of a negotiable transport document was that the buyers could sell goods in transit because it provided control over goods and independent documentary security, and this was especially important for commodity trade: the buyers, the sellers and the banks could all benefit from independent documentary security.

37. The experts also discussed the use of electronic transport documents. It was recognized that a few systems were using electronic bills of lading with the help of modern technologies, but there was still no electronic equivalent in wide-spread commercial use. The experts noted the various instruments developed by UNCITRAL in the area and agreed that the biggest challenges in developing electronic alternatives to negotiable transport documents were to replicate the function of the electronic records as the original, to develop an electronic mechanism for identifying the holder of the electronic records and to create a mechanism for the negotiability of electronic records that replicated the possession of traditional documents. The first two aspects were not particularly problematic, since they had already been addressed in the early generation of UNCITRAL instruments, such as the UNCITRAL Model Law on Electronic Commerce²⁰ and the United Nations Convention on the Use of Electronic Communications in International Contracts.²¹ The legal standards for electronic negotiability aspects, too, had been addressed in more recent instruments, such as the Rotterdam Rules and the UNCITRAL Model Law on Electronic Transferable Records (MLETR).²²

38. So far, negotiability models in an electronic environment using a trusted third-party solution, namely electronic registries, had been widely used in the financial sector because of its closed environment where all participants were authenticated. This was different from the carriage of goods where it was essential to make transactions enforceable against third parties who might not be participants in the registry-based trading system. This could be a problem where the applicable law might not recognize the electronic equivalence of an electronic bill of lading. In addition to electronic registries, another negotiability model in an electronic environment was to use electronic tokens to replicate tangible documents. Before the more advanced use of distributed ledger technology (DLT) through blockchains in recent years, there were concerns about the challenges for creating electronic tokens in terms of integrity and singularity. DLT could enable much wider and more secure use of electronic transferable records.

39. UNCITRAL instruments, in particular the Rotterdam Rules and the MLETR accommodated any of those models. The central element of the Rotterdam Rules was the notion of “right of control” and associated provisions, which created a functional equivalence to the physical possession of a negotiable transport document, while recognizing party autonomy in developing security rules and other measures necessary for operating the system they chose. Similar provisions could be found in the MLETR.

²⁰ United Nations publication Sales No. E.99.V.4.

²¹ United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 23 November 2005) (United Nations, *Treaty Series*, vol. 2898, p. 3).

²² United Nations publication Sales No.

E.17.V.5. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf

40. Another instrument that expressly contemplated electronic transport documents was the Additional Protocol to the CMR on the Electronic Consignment Note.²³ However, that Protocol only provided standards for the integrity and authentication of the electronic consignment notes and contained no provisions on transferability.

41. In conclusion, there was agreement that currently no international instrument clearly recognized negotiable multimodal transport documents covering railway transport, even if some of them (CIM-COTIF) might accommodate contractual solutions. Legislative recognition of a negotiable multimodal transport document would be well received by banks and the relevant parties in trade financing and could play an important role in promoting door-to-door logistics services. It was agreed that the purpose of any possible future legislative work should focus on solving the issue of the negotiability of transport documents and avoid interference with the liability regime mandatorily applicable pursuant to existing conventions. At the same time, the experts were aware of the UNECE-led extensive efforts already made and still ongoing to harmonize and modernize railway law and promote legal interoperability between the CIM-COTIF and the SMGS areas (see paras. 9–12 and 25–28 above). It was noted that the incorporation of the issue of negotiability of RCNs might also contribute towards the development of a solution for the problems identified. Future work by UNCITRAL on negotiable transport documents should aim at compatibility with sector-specific solutions being developed elsewhere and ideally support their completion and operation.

III. Future work by the Secretariat

42. The exploratory work and the consultations carried out by the Secretariat have so far indicated that there seems to be a demand for negotiable transport documents that could cover carriage by other modes than sea carriage, in particular by railway. If the Commission agrees with that assessment, the Commission may wish to consider that its established record in developing global instruments on transport law and electronic commerce – as evidenced by the extensive codification of practice concerning the evidentiary and negotiability function of transport documents (including in electronic form) achieved by the Rotterdam Rules, as well as highly influential texts in the area of electronic commerce (most recently through the MLETR) – makes UNCITRAL a well-suited body for developing a uniform regime for such multimodal negotiable transport documents, taking into account existing conventions, rules and business practices.

43. The Commission may also wish to consider that it should be feasible to undertake such work using a so-called “dual track” approach, in which the envisaged negotiable instrument would ultimately co-exist with unimodal transport documents without interfering with liability regimes mandatorily applicable under existing international conventions. Such work could cover types of transport document (negotiable and non-negotiable), issuance and contents of transport documents, rights and obligations of the carriers or MTOs in respect of contents and evidentiary function of documents, delivery of goods, and electronic transport documents. The inclusion of electronic transport documents could be particularly timely to support the new types of supply chain and logistics models expected to develop in response to the widespread business disruptions caused by the COVID-19 pandemic.

44. If the Commission endorses the above suggestions, it may wish to request the Secretariat to start preparatory work towards the development of a new international instrument on multimodal negotiable transport documents that could be used also for contracts not involving carriage by sea. The initial work by the Secretariat could take the form of expert group meetings and, resources permitting, a UNCITRAL colloquium. The Commission may also authorize the Secretariat to conduct wide

²³ Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road concerning the Electronic Consignment Note (Geneva, 20 February 2008) (United Nations, *Treaty Series*, vol. 2767, p. 23).

consultations with member States in all geographic regions, in particular with those States which might have special legal or regulatory requirements for the implementation of such a negotiable transport document. The Commission may wish to request the Secretariat to report to the Commission, at its fifty-fourth session, in 2021, on the progress made, including on the preliminary draft of a new instrument on multimodal transport documents. The Commission may further wish to give this topic high priority for assignment to the first available working group.

45. The Commission may further wish to request the Secretariat to work in close coordination and cooperation with all relevant international organizations, in particular UNECE, OTIF, OSJD and CIT, with a view to ensuring that UNCITRAL work would be without prejudice to, and would not interfere with, any ongoing work of those international organizations.
