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Work programme

Results of the preparatory work by the UNCITRAL secretariat towards the development of a new international instrument on negotiable multimodal transport documents

Note by the Secretariat

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I. Introduction

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

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

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

4. At its fifty-fourth session, the Commission considered the note by the secretariat summarizing the preparatory work done in response to the Commission's request at its fifty-third session (A/CN.9/1061). The Commission was informed, in particular, of the results of: (a) the research done by the secretariat on provisions addressing negotiable and non-negotiable transport documents found in international conventions and national laws regulating multimodal transport; and (b) the consultations with experts and interested organizations, primarily through an expert

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

² *Ibid.*, paras. 217 and 218.

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

⁴ *Ibid.*, para. 82.

group meeting on a new international instrument on NMTDs that took place online on 2 and 3 February 2021,⁵ and an open webinar on “International experiences with the dematerialization of negotiable transport documents” that took place on 13 and 14 April 2021.⁶ After discussion, the Commission requested the secretariat to report to the Commission, at its next session, on the progress made, including on the preparation of a preliminary draft of a new instrument on NMTDs. The Commission agreed to give high priority to the project for assignment to the next available working group.⁷

5. This note updates the Commission as regards relevant developments in other organizations and summarizes the preparatory work done by the secretariat in response to the Commission’s request at its fifty-fourth session, conclusions it has drawn therefrom and its proposals on the way forward for consideration by the Commission. It builds on the notes by the Secretariat that were before the Commission at its fifty-third and fifty-fourth sessions (A/CN.9/1034 and A/CN.9/1061) and supplements the note by the Secretariat on coordination activities (A/CN.9/1107) that reports about the secretariat’s participation at the meeting by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) referred to below (see paras. 8–9) under the subheading “Preparatory work on negotiable multimodal transport documents”. An initiative by several organizations to promote the standardisation of electronic bill of lading was also incorporated in this note.

II. Updates on relevant developments in other organizations

A. UNECE: unified railway law (URL)

6. As was mentioned in the previous note by the Secretariat on this topic (A/CN.9/1061, paras. 5–7), knowledge materials were developed and transmitted by UNECE’s Group of Experts towards Unified Railway Law (URL) to its parent body, the Working Party on Rail Transport, to facilitate discussions on the way forward. These knowledge materials included a draft convention on the contract for international carriage of goods by rail as the first convention of a system of URL conventions,⁸ which contained draft articles dealing with the definition, issuance and effect of a consignment bill as a negotiable transport document.

7. At its last session in November 2021, the Working Party on Rail Transport considered the knowledge materials and agreed on the conclusion of the mandate of the group of experts. Two approaches to the development of URL were reiterated during the discussion as to whether URL should become an interface law that would co-exist with the COTIF/CIM⁹ and SMGS¹⁰ systems or it should replace those systems with a single legal regime. According to the suggestions from the Group of Experts, the Working Party was invited to “take stock of the two approaches and decide on a possible way forward”. Considering all the positions and views expressed

⁵ Attended by more than 30 invited experts from academia, private practice and interested Governments. Presentations were made by representatives of UNCTAD, the Economic Commission for Europe, the Economic and Social Commission for Asia and the Pacific, the Organization for Cooperation of Railways, CIT, CMI and FIATA.

⁶ The web page of the webinar may be found at <https://uncitral.un.org/en/webinar-dematerialization-negotiable-transport-documents>.

⁷ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, para. 224.

⁸ ECE/TRANS/SC.2/GEURL/2021/3.

⁹ Stands for the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) – Appendix B to the Convention concerning International Carriage by Rail (COTIF) (found at https://otif.org/fileadmin/new/3-Reference-Text/3A-COTIF99/COTIF_1999_01_03_2019_corrected_31.07.2019_en.pdf). The Convention applies in Europe, the Maghreb and the Middle East.

¹⁰ Stands for the Agreement on International Goods Transport by Rail (found in Russian at <https://osjd.org/ru/8978/page/106077?id=2247>), applicable in the former Eastern bloc of countries.

at the session, the Working Party agreed that decisions on the way forward on URL were to be decided following the consultations of member States of UNECE and other stakeholders till its next session in November 2022.

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

8. Up to date, three virtual meetings have been convened by UNESCAP's ad hoc expert group working on harmonization of legal frameworks for multimodal transport operations.¹¹ As was mentioned in the previous note by the Secretariat (A/CN.9/1061, para. 8), at its meetings in August 2020 and March 2021, the ad hoc expert group agreed on a step-by-step approach and considered options for further harmonization of a legal framework for multimodal transport operations in the region, including with respect to a transport document that could serve as evidence of a contract and digitalization of a consignment note. The need to ensure synergies with the related work by other organizations, including UNCITRAL, was acknowledged.

9. The third meeting, convened in March 2022, focused on a proposed structure of guidelines on harmonization of legal frameworks for multimodal transport operations in the region (hereinafter "the guidelines") as an optimal immediate output of the expert group. It is envisaged that guidelines would serve to harmonize key provisions of national laws for multimodal transport in the region. Based on the research of the existing national laws in the region and other regional and international instruments on multimodal transport operations, the draft guidelines considered at the meeting proposed elements and contents for national law on multimodal transport, including on multimodal transport documents in negotiable and non-negotiable forms. The meeting recommended the examination of best practices concerning the digitalization of multimodal transport with the potential to create a blockchain-based single liability regime for multimodal transport corridors. The importance of synergizing efforts of UNESCAP with parallel initiatives by other organizations (including UNCITRAL) on the harmonization of multimodal transport regulations and documentation has been highlighted.

10. The revised guidelines are expected to be presented to the member States of UNESCAP for consideration at the final expert meeting under this project in mid-2022.

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

11. As was mentioned in the previous note by the Secretariat (A/CN.9/1061, para. 9), the topic of negotiable documents in railway transport had been included in the work plan of the Working Group of Legal Experts under the auspices of OTIF. At its fourth session, held on 15 April 2021, after consideration of the topic on the basis of an inception note on the bill of lading prepared by OTIF's Secretariat, the Working Group of Legal Experts instructed OTIF's Secretariat: (a) to initiate consultations with OTIF's members and relevant stakeholders on whether it was necessary to introduce the possibility of using transport documents with a document of title function under CIM; (b) to continue cooperation regarding this matter with relevant international organizations and associations, in particular UNCITRAL, ICC, OSJD and CIT, within the competence of OTIF; and (c) to prepare an inception paper on the digitalisation of freight transport documents for the first meeting in 2022. A close link between those projects and projects of the World Customs Organization and the

¹¹ Meeting materials may be found at www.unescap.org/events/virtual-expert-group-meeting-legal-frameworks-multimodal-transport-operations-asia-and, www.unescap.org/events/2021/second-virtual-expert-meeting-legal-frameworks-multimodal-transport-operations-asia-and and www.unescap.org/events/2022/third-virtual-expert-meeting-legal-frameworks-multimodal-transport-operations-asia-and.

European Union (EU) on the dematerialization of customs procedures and electronic freight transport information was noted.¹²

12. In September 2021, the General Assembly of OTIF set up an ad hoc Committee on Legal Affairs and International Cooperation (ad hoc Committee) for a three-year period to take up the activities of, among others, the Working Group of Legal Experts. At its first session on 9–10 November 2021, the ad hoc Committee adopted its work programme for 2022–2024. Two topics from the Working Group of Legal Experts mentioned above have been incorporated into the work programme: (a) the digitalisation of international transport, particularly freight transport documents; and (b) a bill of lading. At its second session on 5–7 April 2022, the ad hoc Committee attributed high priority to the digitalisation of transport documents and medium priority to the bill of lading. At this session, the ad hoc Committee considered a preliminary inception paper on digitalisation, which gave an overview of OTIF's recent work on the electronic consignment note, the relevant provisions of other conventions on the contract of carriage and some relevant developments in the EU. As a result of the discussion, the ad hoc Committee instructed the OTIF Secretariat to carry out a survey of OTIF members and stakeholders on electronic railway transport documents.

13. The OTIF Secretariat plans to launch the surveys on digitalisation and negotiable transport documents in 2022.

D. OSJD: a negotiable transport document under SMGS

14. As was mentioned in the previous note by the Secretariat (A/CN.9/1061, para. 10), the Ad Hoc Working Group on Negotiable Transport Documents of the OSJD Commission on Transport Law (the "Ad Hoc Working Group") considers the possibility of introducing a transport document with a document of title function under SMGS. The draft proposal under discussion takes the form of an additional annex to SMGS and envisages the development of a SMGS bill of lading. To facilitate the function of a negotiable transport document, the draft proposal sets out detailed provisions regarding the definition, legal basis and contents of the SMGS bill of lading, as well as the rights and responsibilities thereunder. Regarding medium of the document, it is envisaged that the SMGS bill of lading could take the form of either a paper document or an electronic record. The work has also commenced on modifications and supplements to SMGS to address issues arising from the use of a negotiable transport document, including terminology related to a negotiable transport document and authorization for the use of such a document.

15. At its meeting in February 2022, the Ad Hoc Working Group was informed of the preparatory work and recent progress by the UNCITRAL secretariat on the development of an international instrument on NMTDs, in particular the report of the 4th expert group meeting convened by the UNCITRAL secretariat (see below, paras. 23–31), the draft provisions considered at that meeting as annexed to the meeting report, and the arrangements for the 5th expert group meeting to be convened by the UNCITRAL secretariat in March 2022 (see below, paras. 32–36).

E. CIT: electronic CIM/SMGS consignment note

16. As was mentioned in the previous note by the Secretariat (A/CN.9/1061, para. 11), CIT developed a standard CIM/SMGS consignment note in 2006 and the technical specifications for the electronic CIM/SMGS consignment note in 2019.¹³ However, due to the COVID-19 Pandemic, pilot projects to test the effectiveness of

¹² See e.g., Regulation (EU) 2020/1056 of the European Parliament and of the Council of 15 July 2020 on electronic freight transport information at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1056>.

¹³ www.cit-rail.org/media/files/documentation/freight/cim/e-fb_cim-smgs_en_2019-07-01.pdf?cid=120604.

the electronic CIM/SMGS consignment note and to ensure its compliance with the EU electronic customs requirements and its acceptance by banks, courts, insurance agencies and other bodies have not been carried out.

17. Data exchange with customs authorities is among the important aspects of the electronic CIM/SMGS consignment note. In this context, the CIT General Secretariat coordinates with the Customs Working Group of the Community of European Railway and Infrastructure Companies (an association representing the majority of EU rail business), while the CIM/SMGS Steering Group coordinates with customs authorities in certain countries and the World Customs Organization on a global level.

F. ICC: Uniform Rules for Digital Trade Transactions

18. On 1 October 2021, ICC published the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0. The preparation of the URDTT started in December 2018 with a mandate given by the ICC Banking Commission to develop a high-level structure outlining rules, obligations, and standards for the digitalisation of trade transactions.

19. The URDTT was intended: (a) for a fully digital environment; (b) to be neutral with regard to technology and messaging standards; and (c) to extend into the corporate space, including commercial transactions and the growing community of non-bank providers of financial services. In addition, the rules will serve as an overarching framework for digital trade transactions thereby providing global standardisation, consistency and conformity, providing a collective understanding of terms and definitions, whilst promoting and supporting the usage of electronic records, documents and data.

20. The electronic supplements to the existing Uniform Rules for Collections (URC 522) and Uniform Customs and Practice for Documentary Credits (UCP 600), which had been approved and issued by the ICC Banking Commission, were not yet fully digitalised owing to an ongoing reliance on manual reconciliation process. The URDTT instead envisages transactions that were evidenced in a manner that was totally digitised. The URDTT was designed to be compatible with UNCITRAL instruments including Model Law on Electronic Commerce, Model Law on Electronic Signatures and Model Law on Electronic Transferable Records (MLETR).

G. FIT Alliance: standardisation of electronic bill of lading

21. On 25 February 2022, the Future International Trade (FIT) Alliance was established by the Digital Container Shipping Association (DCSA, a non-profit group founded by several of the largest container shipping companies), Baltic and International Maritime Council (BIMCO, a non-governmental shipping organization), FIATA, ICC and the Society for Worldwide Interbank Financial Telecommunication (SWIFT). The FIT Alliance commits to collaborating to standardize the digitalisation of international trade and to generate awareness about the importance of common and interoperable data standards and common legislative conditions across international jurisdictions and platforms. The aims of the collaboration include: (a) facilitation of the acceptance and adoption of electronic bill of lading by regulators, banks and insurers; and (b) unification of communication between these organizations and customers, physical and contractual carriers, and all other stakeholders involved in an international trade transaction.

III. Overview of the preparatory work by the secretariat

22. Since the fifty-fourth session of the Commission, the secretariat has organized two expert group meetings devoted to the preparation of a preliminary draft of a new instrument on NMTDs. The meeting held in November 2021 discussed negotiability

aspects while the meeting held in March 2022 discussed dematerialization aspects. The deliberations at those meetings were based on a set of preliminary draft provisions prepared in two parts by the secretariat to facilitate a focused discussion of policy options involved. The following paragraphs briefly summarize those consultations and the tentative conclusions arising therefrom.

A. The fourth expert group meeting on the development of a new international instrument on NMTDs (10–11 November 2021)

23. The fourth expert group meeting on the development of a new international instrument on NMTDs was convened online on 10–11 November 2021 and was attended by around 30 experts representing government authorities, international and regional organizations, practitioners and academia.¹⁴ The experts discussed the first part of a set of preliminary draft provisions dealing with the main aspects of a possible draft instrument on a negotiable cargo document (NCD), such as the scope of its application, definitions, issuance and the contents of an NCD, its evidentiary value and transferability and negotiability functions (hereafter the “preliminary draft provisions”).

24. The first part of the preliminary draft provisions was drafted mainly on the basis of a “dual track” approach, i.e., the autonomous existence of an NCD on top of a transport document (TD) and its use solely for documentary credit. The understanding was that adjustments would need to be made, or a separate set of provisions on an NCD would need to be prepared, to accommodate situations where an NCD would be used for both documentary credit and transportation and customs clearance purposes. The preliminary draft provisions drew on provisions of existing international conventions,¹⁵ surveyed domestic laws (see [A/CN.9/1061](#), chapter III.A) and contractual rules on multimodal, unimodal or combined transport.

25. Regarding the scope of a new instrument, the experts considered that it should apply to the issuance, transfer and legal effects of NCDs only in connection with international carriage of goods where the place of receipt and delivery of the goods by the transport operator, as provided for in the transport contract, were located in two different contracting States. Support was expressed for the approach to cover all modes of transport and both unimodal and multimodal carriage of goods including or excluding a sea leg, and to avoid interfering with transport operations and rights and obligations of the carrier, consignor and consignee under the transport contract and applicable law.

26. As for the issuance of NCDs, the prevailing view was that an NCD should be issued not only upon request of the consignor but upon agreement of both the consignor and the transport operator. The experts also considered that, to be universally applicable, a new instrument should accommodate the practice with the use of different types of NCDs, including a bearer NCD that was considered particularly useful and attractive for banks and sellers/consignors in documentary credit transactions, as well as the practice of issuing more than one original NCD.

27. Different views were expressed as to the interrelationship between an NCD and the transport document (TD). One view was that they should be issued in parallel but

¹⁴ Attendees included experts from UNCTAD, UNECE, UNESCAP, OSJD, OTIF, CIT, CMI, FIATA, ICAO, Ministry of Commerce of China, the Federal Ministry of Justice of the Federal Republic of Germany, China Merchants Group, Industrial and Commercial Bank of China, Bank of China, China International Freight Agency Association, China Shippers’ Association, Commerzbank, Bolero International Limited, essD°CS and academia.

¹⁵ The Convention on International Multimodal Transport 1980, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (“Rotterdam Rules”), the Convention for the Unification of Certain Rules for International Carriage by Air (the “Montreal Convention”), the COTIF/CIM Uniform Rules concerning the Contract of International Carriage of Goods by Rail (the “CIM-COTIF 1999”) and the Agreement on International Railway Freight Communications (“SMGS Agreement”).

for different purposes. Concern was expressed about risks of introducing inconsistencies between them in such case. It was considered that issuing one document fulfilling both NCD and TD functions eliminated that risk. Two options were considered for issuing such a single document: (a) an NCD provided for in a new instrument would replace the TD; or (b) an NCD provided for in a new instrument could be incorporated into the TD by a note stating that the TD served also as NCD (in other respects, the TD would comply with all applicable requirements as regards its form, content, etc.).

28. Regarding the content of an NCD, some experts were in favour of keeping the contents of an NCD issued “in addition to” the TD as short as possible, focusing only on negotiability aspects. The other view was that the NCD should contain all pertinent information related to the goods and the transport contract so that third parties (including banks and holder of the NCD) could make an informed business decision based on the document of title alone, without the need to check the underlying transport contracts. Giving primacy to the TD in case of conflicts with the content of the NCD was considered to undermine the value of the NCD as a document of title and therefore unacceptable. For the same reason, it was considered inappropriate to require notification of the carrier about the transfer of the NCD and for the holder of the NCD to produce or surrender anything else to the carrier in addition to the NCD for the exercise of the right of control (except for payment of freight when required).

29. In the context of the rights acquired by the holder of NCD, it was considered that a new instrument should not attempt to establish equivalence with the physical possession of the goods and that a reference to the rights of control over the goods, including claiming their delivery, would be sufficient. The countervailing view was that the acquired rights of control over goods, including the right to claim delivery of the goods, would not automatically mean acquiring rights in the goods. It was also reminded that for the exercise of certain rights of the holder of an NCD, the time frame would not coincide with the period of responsibility of the transport operator under the transport contract.

30. The following additional issues were proposed for regulation in a new instrument: (a) qualifications of NCD issuers (a new instrument could provide that States should regulate that aspect properly in their domestic law to mitigate risks of fraud); and (b) the position of an intermediate NCD holder, in particular the consignee that would be expected to maintain residual rights and obligations even if it ceased to be the holder of NCD.

31. The liability issue in a new instrument was mentioned as an aspect which deserves careful consideration. The Commission may recall that in an earlier note, the secretariat had noted the views of experts on the importance of addressing that issue especially in the multimodal transport context where the liability regime is fragmented and uncertain for non-localized damage, loss or delay (A/CN.9/1061, para. 41), while acknowledging, however that the project should only deal with questions of liability to the extent strictly necessary. The liability of the transport operator for delivery of the cargo to the wrong person would probably be the central issue to address, but not the only one. Some experts have insisted on the need to consider the relationship between the new instrument and the carrier’s general liability for cargo loss or damage and that a general deferral to the applicable law might expose shippers to unilateral limitations of liability by transport operators with stronger bargaining power. In addition, it has also been suggested that a new instrument should deal with the liability of the holder of the NCD for unpaid freight or for failure to take delivery of the goods.

B. The fifth expert group meeting on the development of a new international instrument on NMTDs (30–31 March 2022)

32. The fifth expert group meeting on the development of a new international instrument on NMTDs was convened online on 30-31 March 2022 and was attended

by more than 40 experts representing government authorities, international and regional organizations, practitioners and academia.¹⁶ The experts discussed the second part of the preliminary draft provisions, which dealt with aspects of a negotiable electronic cargo record (NECR). That part was drafted on the basis of MLETR, articles 1, 8–10 and 38 of the Rotterdam Rules and articles 1–5 of the Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road concerning the Electronic Consignment Note (“e-CMR”). It also reflected some provisions of the ICC’s Uniform Customs and Practice for Documentary Credits (Supplement for Electronic Presentation) (“e-UCP”) and the United States Uniform Commercial Code (UCC).

33. The second part of the preliminary draft provisions dealt with the main questions arising from the use of electronic communications as an equivalent to NCDs in paper form, including, among others, definitions, issuance, control, transfer and replacement of NECRs. Although there had been suggestions to draft a new instrument from the outset with only an electronic NCD in mind, which would entail departing from traditional paper-based notions such as “document” and “possession”, the secretariat chose a more cautious approach, considering that a new instrument was intended to operate in parallel with existing international conventions, which were still structured on the premise of the issuance of a “document” rather than on a system of information management.¹⁷

34. The experts focused on: (a) the interaction of NECR and NCD and thus parts one and two of the preliminary draft provisions; (b) provisions for non-discrimination of NECR and technology neutrality; (c) methods of authentication and identification and other functional equivalent requirements that would ensure that NECR reliably performs the same functions as NCD; (d) conditions for use of NECR and issues arising from changing of a medium or system; and (e) designation of reliable methods and standards for assessing reliability. Reference was made in several of those contexts to a draft model law on the use and cross-border recognition of identity management and trust services (MLIdM) being discussed in UNCITRAL Working Group IV. It was considered that solutions adopted by UNCITRAL in that text would influence some provisions on NECRs, in particular on authentication, identification and reliability. Moreover, it was expected that a new instrument would delineate carefully issues that would be appropriate to treat at the international level and those that would need to be left for regulation at the domestic level, such as reliability standards and designation of reliable methods and service providers. It was also considered necessary to achieve the right balance between government intervention and market choice in a new instrument, especially in the light of rapidly evolving technological solutions.

35. In response to concerns about the appropriateness of considering NECRs before resolving fundamental issues related to NCDs treated in the first part of the preliminary draft provisions (see paras. 23-31 above), it was explained that the intention was to merge both parts of the preliminary draft provisions so as to ensure that all issues related to an NCD, regardless of whether an NCD is issued in a paper or electronic form, are treated consistently and coherently. The need to ensure such consistency and coherence was emphasized in particular in the context of the use of definitions, transferability and negotiability and the required minimum content of the NCD. In addition, while some liability aspects specific to the NECR context were identified (e.g., loss of data or unauthorized access to NECRs), including attribution and level of liability, it was considered that others would arise regardless of the medium used for an NCD, for example those arising from the delivery of goods to the

¹⁶ In addition to experts who attended the fourth expert group meeting, experts from the ICC Banking Commission, the Russian Railways, CargoX, BIMCO, DCSA and the International Center for Transport Diplomacy attended the fifth expert group meeting.

¹⁷ A similar approach was taken by the England and Wales Law Commission in the project on electronic trade documents which followed closely the MLETR (for more information on that project, see www.lawcom.gov.uk/project/electronic-trade-documents/).

illegitimate holder. It was expected that all liability issues would be considered carefully in due time.

36. It was recognized that some other provisions would need to be drafted solely for NECRs, and solutions might be different from those adopted for paper-based NCDs, for example as regards originals and copies, circulation of more than one originals, change between a medium or system and rights and obligations arising therefrom. In addition, although transport conventions required the carrier's signature in the TD (and the first part of the preliminary draft provisions referred to the signature in the NCD context), reference to electronic signatures in the context of NECRs was considered outdated. Preference was expressed for the use of other terms that would reflect evolution of authentication and identification methods in the digital world. As regards the issuance of NECR, it was considered that the uneven penetration of technologies across transport operators and means of transport might justify requiring the consent of both parties for the use of NECR regardless of the legal regime that might be applicable in that context to the paper-based NCDs. Furthermore, it was noted that the relationship between the holder and the NECR would be established, and transferability and negotiability of NECR would be achieved, by means other than the physical possession of a paper-based NCD, as was already envisaged in MLETR. It was suggested that a new instrument might set out autonomous standards that would give guidance to courts in assessing the reliability of methods used to achieve those essential functions of an NCD through an NECR, which would aim at ensuring at least some level of consistency in the assessment of reliability across jurisdictions.

IV. Conclusions

37. In the course of its preparatory work, the secretariat has been able to identify most of the essential issues that would need to be addressed in a new international instrument on NMTDs. The preparatory work carried out by the secretariat has confirmed the potential practical benefits that may be expected from such a new instrument. At the same time, the results of that work indicate that, while much progress has been achieved with respect to many purely technical aspects related to NMTDs, various fundamental policy choices would need to be made to provide international legislative recognition to NMTDs. In particular, a proper coordination and interface between TD and NCD (and its electronic equivalent) and applicable legal regimes, including on liability aspects, would need to be achieved. As most of those issues are not only of a technical nature, but also involve policy choices for the design of an NMTD and its relation to existing international instruments, the secretariat believes that such work should be entrusted to a working group for intergovernmental negotiation.

38. The Commission may wish to recall that, at its fifty-fourth session, in 2021,¹⁸ it decided to give high priority to this topic and assign it to the next available working group. Should the Commission decide to assign the topic to a working group, intergovernmental negotiations on a draft text to be prepared by the secretariat reflecting most recent expert consultations may commence already in autumn 2022. Should the Commission decide that the topic requires further preparatory work by the secretariat, the secretariat will continue working closely with all relevant experts with the aim to resolve as many open issues as possible and will report to the Commission, at its fifty-sixth session, in 2023, on the further progress made in preparation of the preliminary draft of a new instrument on NMTDs. The secretariat, however, expects that some fundamental issues would need to be deferred to inter-governmental negotiations.

39. The future work by the secretariat or in a working group should proceed in close coordination with international organizations that work on or explore solutions to enable the use of a negotiable transport document in the rail plus or other multimodal

¹⁸ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, para. 224.

context as well as on digitalization of TDs with a view to avoiding duplication and ensuring coherence of the solutions being considered.
