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1. Cargo pledge bond

The Secretariat proposed introducing a new Chapter X. "Cargo pledge bonds". It is proposed to state that (article X(XX)):

"The security right over the goods shall be made effective against third parties by the secured creditor's possession of the cargo pledge bond and has priority over a competing security right made effective against third parties by any other method."

The proposal to grant automatic priority to a cargo pledge bond introduces significant risks and challenges and must be carefully thought over.

The obvious idea under the similar provision of UNCITRAL Model Law on Secured Transactions, article 49(1) is that this priority is the same as possessory pledge priority based on the simple fact that possession is obvious to everybody else, including other creditors of the debtor.

However, the proposed cargo pledge bond lacks the attributes of a negotiable document, such as title transfer or public notice of possession. Without these, there is no clear indicator of control over the goods, which weakens the rationale for prioritising the bond over other secured interests.

Established priority systems, such as FIFO (first in, first out) or first-to-perfect, reward creditors who secure their interests first. Granting a cargo pledge bond automatic priority contradicts these principles, creating uncertainty and unpredictability in secured transactions. Creditors who follow traditional filing or possession processes could be unfairly disadvantaged.

Automatic priority for a cargo pledge bond conflicts with bankruptcy laws, which aim to ensure equitable treatment of creditors. Key issues include:

- A cargo pledge bond could challenge the automatic stay provisions in bankruptcy, leading to disputes over its enforceability. Introducing a new instrument with priority could seriously disrupt the existing hierarchy of claims, reducing predictability in the distribution of assets.
- Registry-based systems for secured interests provide transparency and predictability. Introducing priority for a cargo pledge bond, which does not align with these systems, undermines their reliability. This lack of transparency could lead to disputes and challenges, especially in cross-border contexts where legal standards vary.
- Granting automatic priority to a non-negotiable instrument introduces market unpredictability. Creditors accustomed to the current system may lose confidence in secured transactions, potentially reducing credit availability and increasing disputes.

It seems that the introduction of automatic priority for cargo pledge bonds is not advisable. It lacks a clear legal and practical basis, disrupts established principles like FIFO, and significantly interferes with national laws, particularly in bankruptcy. A more balanced approach would involve aligning the cargo pledge bond within the existing priority framework (applicable law), respecting established rules and ensuring it does not undermine creditor confidence or market stability.

2. Uniform usage of negotiable cargo document and negotiable cargo record consistency throughout the document

Both terms are uniformly used alongside each other throughout the document. This seems to be an unnecessary repetition.

To avoid repetition, since most of the time, "negotiable cargo document" is used alongside "negotiable cargo record," adding a statement in the definitions section clarifying that the term "negotiable cargo document" encompasses both "negotiable cargo document" and "negotiable electronic cargo record" would be an efficient and effective way to maintain consistency without repetitive phrasing.

Here's how this could be implemented:

Definition of "negotiable cargo document":

"For the purposes of this Convention, the term 'negotiable cargo document' includes both physical documents and negotiable electronic cargo records. Unless otherwise specified, references to 'negotiable cargo document' shall also apply to 'negotiable electronic cargo record' and are subject to the same legal regime."

Definition of "negotiable electronic cargo record":

Following the definition of "negotiable electronic cargo record," a cross-reference could reinforce this interpretation, such as: "See the definition of 'negotiable cargo document' for applicability."

This approach would streamline the text, removing the need to repeatedly state both terms in each article while ensuring both formats are equally recognized and regulated across all provisions.

3. Article 1. Scope of application

It is an idea to delete 1(b) altogether and leave only 1(a) since this is the country of taking in charge of the goods by the transport operator where a negotiable cargo document comes into existence.

Option (a) is the better choice because, as a new document introduced by this convention, the negotiable cargo document's legal validity must stem from its issuance in a country that is a party to the convention. This ensures that the document is created under the legal framework established by the convention, which provides the necessary rules and standards for its recognition and enforceability.

Issuing the document in a non-contracting state would undermine its foundational connection to the convention, potentially creating uncertainties about its validity and applicability. By requiring issuance in a contracting state, we ensure that the document is firmly anchored in the legal regime of the convention, thereby fostering consistency, predictability, and trust in its use across international trade.

4. Article 2. Definitions

Having two definitions, a "transport contract" and a "transport operator," is unnecessary and could be considered circular. Having a separate definition of "transport operator" may be unnecessary and even impractical: "Transport contract" naturally implies the role of the transport operator.

In legal frameworks, the concept of a "transport contract" inherently includes the notion of a party responsible for the transportation. In most jurisdictions, this responsibility falls to an entity known as a "carrier" or "transporter" within the contract's framework.

By defining only the "transport contract," it's implied that there is an entity (the transport operator, carrier, or transporter) bound by the obligations of the contract. This approach reduces redundancy,

as there's no need to introduce a new term where the role is clear from the context of the contract itself.

Existing legal codes don't define "transport operator" separately. Many civil law systems avoid defining a "transport operator" because the term "carrier" (or an equivalent term) is sufficient to cover any party that assumes responsibility under a transport contract. For example, German, French, and Italian codes define "carrier" within the contract itself without needing a separate definition for "transport operator."

Defining "transport operator" as a standalone term could conflict with these well established terms, leading to potential interpretation issues in jurisdictions with established legal doctrines around "carrier."

Legal systems in both civil and common law jurisdictions are accustomed to framing responsibilities around the transport contract itself, not around a separate "operator" definition. Introducing a separate "transport operator" term could disrupt harmonization, as countries may interpret or apply this term inconsistently.

In summary, a separate definition of "transport operator" may create more confusion than clarity, as the responsibilities of the transporting party are adequately implied within the concept of the "transport contract." By focusing on the "transport contract" alone, the convention can align with existing legal principles, avoid redundancy, and support clearer interpretation across jurisdictions. This approach preserves both the simplicity and the adaptability of the convention in different legal contexts.

5. Article 3. Issuance of a negotiable cargo document or negotiable electronic cargo record

The provision in article 3(6) seems to create a fallback rule where, if the negotiability type (e.g., "to order," "to order of a named person," or "to bearer") is not specified, the document will default to a negotiable form "to order" or "to the order of" a specified party. However, this fallback mechanism might contradict article 2(4)'s definition of a "negotiable cargo document," which requires an explicit designation like "to order" or "negotiable" to qualify as negotiable.

Here's how the contradiction arises:

article 2(4) defines a negotiable cargo document as one that includes explicit language like "to order" or "negotiable." This is a strict requirement for the document to be recognized as negotiable under the convention;

However, article 3(6) allows for a negotiable document, even without such explicit language, through the fallback provision that deems the document negotiable if it fails to specify the negotiability type.

If a document is deemed negotiable by article 3(6) without explicitly meeting article 2(4)'s requirement, it creates ambiguity about whether the document genuinely qualifies as a negotiable cargo document.

To resolve this contradiction, article 3(6) could be amended to align strictly with article 2(4), removing the fallback provision and requiring that negotiable cargo documents explicitly state "to order" or "negotiable." This change would:

- Ensure that all negotiable documents meet the same criteria as defined in article 2(4).
- Remove any ambiguity or implied negotiability, thus enhancing legal certainty and enforceability.

This approach would maintain consistency across the document's provisions and clarify that negotiability requires an explicit designation, avoiding reliance on a fallback mechanism.

6. Article 4. Contents of the negotiable cargo document or negotiable electronic cargo record

There seems to be a slight inconsistency between article 1(8), which uses the term reward and article 4(1)(j), which uses the term freight. These terms seem to mean the same thing.

The inconsistency between "reward" in article 2 and "freight" in article 4 creates ambiguity. "Reward" broadly covers compensation for transport, while "freight" specifically refers to payment for carriage. This inconsistency may lead to interpretation challenges, particularly in disputes.

To resolve this, the convention could:

Use "reward" in both articles for consistency. For instance, article 4 could state: "The negotiable cargo document shall indicate whether the reward has been prepaid or is payable by the consignee."

Clarify the Relationship: Specify that "freight" is a subset of "reward" by revising article 4 to read: "Freight (or other reward) has been prepaid or is payable by the consignee."

Either approach ensures clarity and prevents legal uncertainties.

Also, since nothing prevents the parties to the transport contract from stipulating that the amount of the reward should be partially paid by the consignor and partially paid by the consignee (the holder of a negotiable cargo document), i.e. split between two parties, it could be said in article 4(1)(j): "The amount of a "reward" to be paid by the holder," since this document allocates the rights to the holder and not to the consignee.

7. Article 6. Evidentiary effect of the negotiable cargo document or negotiable electronic cargo record

The current wording of paragraphs 2 and 3:

article 6(2): "Except to the extent that the information furnished by the consignor has been qualified, the negotiable cargo document or negotiable electronic cargo record shall be *prima facie* evidence..."

article 6(3): "...proof to the contrary by the transport operator in respect of any information in the negotiable cargo document or negotiable electronic cargo record shall not be admissible against that third party, except to the extent that the information furnished by the consignor has been qualified."

The current wording of paragraphs 2 and 3 does not explicitly state who qualifies the information. While paragraph 1 discusses the transport operator's ability to qualify information, paragraphs 2 and 3 refer to information that "has been qualified," potentially leading to ambiguity.

Proposed addition: Add "by the transport operator" after "qualified" in both paragraphs.

article 6(2): "Except to the extent that the information furnished by the consignor has been qualified by the transport operator, the negotiable cargo document or negotiable electronic cargo record shall be *prima facie* evidence of taking in charge of the goods **by the transport operator** as stated in the negotiable cargo document or negotiable electronic cargo record."

article 6(3): "...proof to the contrary by the transport operator in respect of any information in the negotiable cargo document or negotiable electronic cargo record shall not be admissible against that third party, except to the extent that the information furnished by the consignor has been qualified **by the transport operator**."

8. Article 7. Rights of the holder under a negotiable cargo document or negotiable electronic cargo record

Article 7(1)

Indicating specific rights in article 7(1) deserves further consideration.

Enumerating only certain rights in article 7 could potentially create unintended limitations or hierarchy among rights. By listing just these rights (a, b, and c), the article might imply that these are the holder's only or most important rights, potentially overshadowing the broader entitlement of "all rights."

If the intention is to convey that the holder steps fully into the shoes of the consignor or consignee, having "all rights" under the transport contract without restriction, then specifying certain rights could lead to the following problems:

Legal interpretations might focus on these rights at the expense of other rights not explicitly mentioned, narrowing the document's practical scope.

Enumerating some rights may suggest these are prioritized or treated differently, which could create confusion in cases where other rights under the transport contract need to be exercised.

A cleaner approach might be to state simply that the holder "acquires all rights under the transport contract" and remove paragraphs (a), (b), and (c).

This will allow avoiding any implication that certain rights are more fundamental or that other rights might be excluded.

There will be no possible redundancy and no potential for conflicting interpretations, making the instrument more straightforward and universally applicable.

In summary, to fully convey that the holder inherits all contract rights equally and unconditionally, it would likely be better to omit these specific paragraphs altogether, thus preserving the intended breadth of the holder's rights without risk of limitation or prioritization.

Article 7(2)

This paragraph, if properly drafted, could solve or at least reduce the problem of interaction with existing transport conventions.

The problem with possible contradictions with existing transport conventions is still unresolved. On the one hand, it is obvious that this new convention should absolutely avoid possible contradictions with existing transport conventions. On the other hand, this caveat should not impede the freedom of contract and the application of the future convention to actual carriers.

In the current draft in article 7(2) it is said:

"Any entitlement to the rights referred to in paragraph 1 above that is conferred upon the consignor or the consignee, as applicable, [shall extinguish] upon the issuance of a negotiable cargo document or negotiable electronic cargo record."

This provision is a crucial element in defining the rights of the holder under a negotiable cargo document or electronic cargo record. The rule clarifies that once such a document or record is issued, the holder becomes the exclusive party entitled to exercise the specified rights under the transport contract.

The provision aligns with the principle of freedom of contract, a cornerstone in contract law, which permits parties to alter or redefine the terms of their contractual obligations and rights by mutual agreement. This principle is widely recognized, even under transport conventions, which are designed

to regulate and standardize transport practices but do not eliminate parties' ability to agree on certain contractual modifications. Under this principle, any contract may be altered or terminated with mutual consent. This flexibility is implicitly more accommodating than contract termination itself, as it does not sever all contractual obligations but reallocates specific rights in line with the issuance of a negotiable document or record.

Moreover, this reallocation of rights upon issuance of a negotiable document or record does not violate transport conventions. While transport conventions impose mandatory standards on certain aspects of carrier and cargo-owner relationships, they do not typically prohibit the consensual adjustment of rights under a contract.

In essence, this provision reflects an important principle in international trade and contract law. It ensures that the issuance of a negotiable document or electronic record fully transfers specific rights to the holder without altering these rights, creating certainty and efficiency in commercial transactions without contradicting the framework established by transport conventions.

It is well established that parties to a contract are free to terminate the contract at any time by an express agreement if it does not violate the right of third parties expressly conveyed to such third parties by the contract.

It is then fairly obvious that if they want to vary the contract, they can do this as well since the variation of a contract is a lesser change than its termination. Anyway, the transport contract, in the same way as any other transport contract, concerns only the rights and obligations of the parties to this contract.

For example, if the consignor, the transport operator, and the consignee decide to change the contract, nothing should prevent them from doing so, including existing transport conventions. To think otherwise would be to violate the fundamental principle of freedom of contract unjustifiably.

It is then an idea to expressly state that the issuance of a negotiable cargo document acts as a variation of the original transport contract by agreement.

Here's how this approach could be articulated in the document:

1. Introduce a contract мariation clause:

Article 3 (Issuance of a negotiable cargo document) includes a provision explicitly stating that the issuance of a negotiable cargo document overrides prior transport documents or consignment notes as a formal variation of the transport contract. For example: "The issuance of a negotiable cargo document or negotiable electronic cargo record shall constitute a variation of the transport contract, superseding any transport."

2. Define exclusive right of the holder:

Article 7 (Rights of the holder) specifies that once a negotiable cargo document is issued, only its holder is entitled to demand delivery, with other parties named in the original consignment note or transport document losing this right. "Upon issuance of a negotiable cargo document or negotiable electronic cargo record, any right to delivery previously vested in the person indicated in a transport document or consignment note shall be extinguished, conferring exclusive right to delivery on the holder of the negotiable cargo document."

3. Provide a notification requirement:

To reinforce the contract variation and ensure parties are aware of the new hierarchy, the transport operator could be required to notify any party named in the initial consignment note or transport document about this shift in rights. For instance: "The transport operator shall notify any party indicated in the transport document or consignment note of the issuance of a negotiable cargo document, clarifying that the negotiable cargo document holder now holds the sole right to demand delivery."

This approach would not only align with the concept of contract variation but also establish a clear chain of control, ensuring that the negotiable cargo document supersedes previous delivery instructions and that the holder has an unambiguous right to demand delivery.

There is another aspect of article 7(2) that should be addressed as well. It concerns the power to give instructions.

Article 7(2) provides that any rights conferred upon the consignor or consignee are "extinguished" once the negotiable cargo document is issued and transferred to the holder. This language implies a complete transfer of all rights to the holder, leaving no residual rights for the consignor or consignee.

However, without residual or fallback rights in situations where the holder might be unreachable, it may be difficult to resolve certain issues that could arise (e.g., delays or lack of instructions).

The complete "extinguishment" of rights may be too rigid if there are practical scenarios where the consignor or consignee could step in for limited purposes, such as giving instructions if the holder is unreachable or unable to communicate.

Since article 8 mandates that the transport operator must follow the contract, this could imply that, in scenarios where the holder is unreachable or fails to provide information, the transport operator may still need to take action based on the original terms, i.e. seek instruction from the original consignor or consignee.

However, article 8 doesn't provide for any clear fallback mechanism for instructions in these cases, meaning the transport operator might face challenges in meeting its obligations without guidance.

A potential solution would be including a fallback provision allowing the transport operator to act based on contractual terms when the holder is unreachable and seek instructions from the original consignor or consignee.

Also, the "extinguishment" of rights language in article 7 implies that the holder exclusively bears both rights and corresponding liabilities. However, without a mechanism in article 8 for handling missing instructions or information from the holder, the transport operator may face operational risks.

Stating that the transport operator should follow the transport contract in such cases or introducing a provision for acting in the best interest of the goods could help ensure operational continuity and clarify that liabilities are contained within the holder's role. This would prevent the need to rely on the extinguished rights of the consignor or consignee.

The ambiguity lies in the practical implementation of the "extinguishment" of rights in article 7 without adequate mechanisms in article 8 to guide the transport operator if holder instructions are missing.

Article 7(3)

The current text uses the words "physical handing." However, the purpose of this rule is not to underline that the goods are of a physical nature and can be physically handed over but to point out the functional equivalence between transferring a paper document and transferring physical goods.

Thus, it is worth considering replacing "physical handing over" with "transfer', as an idea to clarify that the purpose of this rule is to establish functional equivalence rather than to describe or explain the process of transferring the document. Using "transfer" instead would emphasize that this provision is about creating an equivalency between physical and electronic transfers, rather than focusing on the specifics of how a transfer is physically or electronically executed.

This would help to focus on achieving the same end result, whether through physical or electronic means, reinforcing that both methods should have equal legal effect. "Transfer" is a broader term that

can encompass both physical and electronic exchanges, making it more universally applicable in modern trade contexts where electronic records are increasingly common.

Thus, changing "physical handing over" to "transfer" would make the rule clearer, underlining that the provision is about equivalency in legal effect rather than describing specific methods of exchange. This could be particularly useful in aligning traditional legal concepts with modern digital practices.

Moreover, it aligns with the words "taking in charge" in article 1(1)(a), which have replaced the word "receipt" in the previous version.

Article 7(4)

If the paragraph is interpreted strictly as saying that **all rights to claim delivery cease upon surrender**, then it would indeed create an absurd situation where a holder, who has surrendered the negotiable cargo document to the transport operator in good faith, would have no recourse if the operator refused to release the goods. This interpretation would be nonsensical and against the fundamental purpose of the negotiable cargo document, which is meant to secure the right to claim delivery.

The paragraph, as currently worded, seems to imply that the right to claim delivery is irrevocably lost upon surrender.

In standard trade and transport practice, surrendering a negotiable cargo document to the transport operator should initiate the delivery process, not terminate the holder's rights to claim delivery if the operator fails to comply.

This wording could create legal ambiguity and practical difficulties, as the holder may still need to rely on the document to prove their right to demand delivery if there is an issue.

To address this problem, the paragraph could be rephrased to clarify that the holder's right to claim delivery does not "cease" upon surrender but rather transitions to a stage where delivery is expected. This would preserve the holder's ability to enforce delivery if the transport operator fails to perform as expected.

Here's a possible revision:

"The rights and effects set out in paragraphs 1 and 3 above remain in force upon issuance of the negotiable cargo document or negotiable electronic cargo record. Upon surrender to the transport operator, the holder's rights to instruct delivery transition to a claim for delivery, which the holder retains until delivery is completed."

This revised wording clarifies that the rights do not cease upon surrender but transition from rights of control and disposal to an enforceable claim for delivery. The holder retains the right to demand delivery if the transport operator, having received the document, fails to deliver the goods as agreed.

Another possible option would be deleting article 7(4) altogether.

The rights indicated in this paragraph are the rights stemming from the transport contract and only from the transport contract. Thus, the existence of these rights is governed by the transport contract and only by the transport contract. If the paragraph creates more ambiguity than clarity, omitting it might actually enhance the clarity of the document by avoiding unintended limitations on the holder's rights, especially regarding the right to claim delivery after surrendering the document.

Article 7(5)

It is an idea to state expressly in this paragraph that all originals must be produced except when exercising the right to demand delivery. It would be a clearer and more concise way to address the requirement. This phrasing directly highlights the exception for delivery without introducing unnecessary complexity.

This phrasing makes it immediately clear that the only exception to the rule is when the holder is demanding delivery, which helps avoid any potential misinterpretation. By using "except when exercising the right to demand delivery," the wording keeps the focus on the primary requirement while simply and effectively noting the exception.

Suggested wording for article 7(5):

"The holder must produce all originals of the negotiable cargo document or negotiable electronic cargo record, if multiple originals have been issued, except when exercising the right to demand delivery."

This revised wording offers a straightforward, unambiguous solution, ensuring that article 7(5) is both clear and practical. It allows for efficient delivery while maintaining the security and consistency required for other rights associated with the negotiable document or record.

9. Article 8. Missing information, instructions or documents

It would be reasonable to introduce a requirement for each new holder to notify the transport operator of their status as the current holder. Such a requirement could enhance clarity and operational efficiency, allowing the transport operator to have an updated record of whom to contact for instructions or necessary information.

This would align more closely with frameworks like the Rotterdam Rules, where there is more structured communication between the holder and the transport operator. By requiring holders to notify the transport operator upon acquiring the negotiable document, the operator could ensure they know the rightful party for instructions without compromising the negotiable and transferable nature of the document. Additionally, this requirement could mitigate risks associated with lost or stolen documents, providing a clearer chain of custody and enhancing security for all parties involved in the transport process.

This change would balance the negotiable document's flexibility with the need for clear communication in logistics and could be added as a supplementary provision in the draft document.

A requirement for the new holder to notify the transport operator could be integrated effectively within article 8 ("Missing information, instructions or documents") or article 11 ("Transfer of rights"). Here's how it could be reformulated:

Article 8.

This article deals with situations where the transport operator may need to contact the holder for additional information or instructions. A new clause could specify that the current holder is obligated to notify the transport operator of their status upon acquiring the negotiable cargo document or electronic record. This placement would make it clear that such a notification is necessary to ensure smooth communication when information or instructions are needed.

Article 11.

Since article 11 governs the transfer of rights under the negotiable cargo document or electronic cargo record, adding a clause here could require that each new holder notify the transport operator as part of the rights transfer process. This would ensure that the operator always has an up-to-date record of the holder, aligning the notification with the formal transfer of rights.

Both placements could work, but article 11 might be more fitting as it would embed the notification within the process of rights transfer itself, clarifying that notification is a critical step in recognizing a new holder's rights.

Risk option

Another possible solution would be to introduce a risk allocation rule.

Since there was a clear wish in the Working Group not to impose an obligation on the holder to give instructions and reply to the transport operator's requests, it is an idea to introduce an explicit "risk" clause by adding a provision to article 8 that places the responsibility on the holder to notify the transport operator of their status as the new holder could be a practical addition. Such a provision would clarify the parties' obligations and mitigate potential risks, particularly those related to miscommunication or delayed delivery. Here's why this addition could be beneficial and how it might look:

"The holder of a negotiable cargo document or negotiable electronic cargo record bears the risk of failing to notify the transport operator of their status as the new holder. In the absence of such notification, the transport operator shall not be liable for any loss, delay, or incorrect delivery resulting from reliance on the information previously provided regarding the holder's identity."

Adding a provision to article 8 that assigns the risk of non-notification to the holder would enhance clarity, protect the transport operator, and promote an orderly delivery process. It would also support a transparent chain of custody, aligning with the goals of both traditional and electronic negotiable documents.

10. Article 10. Delivery of the goods

Article 10(1) does not make clear enough that the right to demand delivery is vested in the holder of the document and the holder only. It is an idea to state it explicitly, as in article 47 of the Rotterdam Rules.

The absence of a requirement for the holder of a negotiable cargo document issued to the bearer to identify themselves under article 10(1) poses significant risks. This lack of identification could lead to the misuse of such documents, enabling fraudulent or unauthorized transactions. The bearer format facilitates anonymous transfers, making it challenging to trace ownership and verify the legitimacy of claims. This situation could potentially result in disputes over ownership, complicate the enforcement of rights, and undermine the security of transactions in international trade. Strengthening identification requirements could mitigate these risks and enhance accountability and transparency.

It would also allow the transport operator to know and be able to prove at a later date to which specific person it had issued the goods. This would increase the likelihood of the transport operator agreeing to issue a negotiable document.

11. Article 14. Possession of a negotiable electronic cargo record

To enhance the clarity and effectiveness of article 14 on possession of negotiable electronic cargo records, it is recommended to include a definition of "reliable method" based on the principles outlined in article 12 of the UNCITRAL Model Law on Electronic Transferable Records (MLETR). Specifically, article 14 should incorporate the criteria from MLETR article 12(a) and (b), which assess the reliability of a method by considering:

(a) The purpose of the electronic record: Whether the method achieves the intended function of ensuring exclusive control and maintaining the integrity of the electronic record.

(b) All relevant circumstances: This includes the operational characteristics of the system, the availability of safeguards against unauthorized alteration, and any agreements between the parties regarding the use of the method.

Since it is not possible to insert a reference to MLETR in the convention and bearing in mind that the term "reliable method" cannot be considered as immediately clear, incorporating these criteria would ensure proper coordination with MLETR.

Such an addition would provide a clear and adaptable framework for determining the reliability of methods used to establish possession, ensuring consistency across jurisdictions while accommodating evolving technologies.

12. Article 16. Replacement of a negotiable cargo document with a negotiable electronic cargo record and vice versa

In traditional systems for negotiable cargo documents, "surrender" serves as a critical mechanism. The holder of a physical negotiable cargo document is required to surrender the document to the transport operator, signifying a transfer of rights and enabling the operator to deliver the goods to the rightful party. This process relies on the physical transfer of the document, which is well-established and universally recognized in trade and transport law.

With the adoption of electronic systems, the concept of surrender poses challenges.

The UNCITRAL Model Law on Electronic Transferable Records (MLETR) provides a framework for electronic records but replaces the traditional concept of "possession" and "endorsement" with "exclusive control." In this framework, transfer of control replaces the need for physical possession or endorsement, serving as the digital equivalent. However, the need remains to define a clear equivalent of "surrender" as a holder obligation for electronic negotiable cargo records, particularly for scenarios governed by provisions like article 16.

In article 16(1)(a) of the existing framework, the holder of a negotiable cargo document is obligated to "surrender" the document to the transport operator. This obligation ensures that the transport operator receives the document, marking the transfer of rights and responsibilities.

For negotiable electronic cargo records, however, there is currently no explicit requirement for the holder to transfer control to the transport operator in a manner equivalent to surrender. This absence may create ambiguity, as there is no clear, enforceable obligation for the holder to complete the transfer of control in a way that parallels physical document surrender. This lack of clarity could lead to disputes over the point at which control is transferred and over the recognition of the transport operator's right to the electronic record.

To address this issue, it is recommended that article 16(2) (or a corresponding provision) be amended to include a clear obligation for holders of negotiable electronic cargo records. The new clause would establish a functional equivalent of "surrender" for electronic records by mandating the transfer of exclusive control to the transport operator.

A significant issue arises if the electronic cargo record remains under the exclusive control of a prior holder who fails to transfer it to the transport operator upon issuance of a physical document replacing the electronic record. In this scenario, the prior holder could theoretically transfer control of the electronic cargo record to a third party, who may be unaware that the electronic record has been replaced by a document. This unauthorized transfer could lead to multiple parties claiming rights to the same goods, which would undermine the integrity of the record and create legal disputes over rightful ownership.

The following wording is proposed to serve as a functional equivalent to the surrender obligation for electronic negotiable cargo records:

"The holder shall transfer exclusive control of the negotiable electronic cargo record to the transport operator using a reliable method that ensures the transport operator gains exclusive control and the

prior holder relinquishes all rights to the record. If more than one electronic original has been issued, the holder shall transfer exclusive control of all originals to the transport operator."