

Distr.  
GENERAL

UNCTAD/SDTE/TLB/2003/3  
26 November 2003

ENGLISH ONLY

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**THE USE OF TRANSPORT DOCUMENTS IN INTERNATIONAL TRADE**

*Report by the UNCTAD secretariat*

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## **A. BACKGROUND**

1. The UNCTAD Expert Meeting on Electronic Commerce and International Transport Services, held in Geneva, in September 2001 discussed the role of transport documents in international trade, particularly bills of lading, as well as their replacement by electronic alternatives. The functions of the negotiable bill of lading, as a receipt for the goods, as evidence of a contract and as a document of title were highlighted. The experts discussed the advantages and disadvantages of the use of the bill of lading in international trade. Difficulties, as well as costs associated with the use of bills of lading have led to calls by the international community<sup>1</sup> for the increased use of non-negotiable transport documents such as seawaybills, in particular whenever there is no intention to transfer ownership of the goods while in transit. Discussions at the Expert Meeting suggested that negotiable bills of lading were frequently used even in cases where no negotiable document of title was required. In view of this, experts encouraged commercial parties to revise their commercial practices with respect to the use of traditional negotiable documents.

2. Furthermore, the experts considered that in the context of electronic commerce, it was the document of title aspect of the negotiable bill of lading, which constituted a major obstacle in establishing electronic alternatives to traditional paper documents. Under existing rules and regulations electronic alternatives to traditional transport documents are not yet recognized as documents of title. Thus, while some legislative initiatives are underway, experience has shown that it could take many years before a complete legal framework is in place.<sup>2</sup>

3. In conclusion, the experts recommended that UNCTAD "undertake studies on the use of traditional transport documents in international trade, particularly on the extent to which negotiable bills of lading are necessary for modern-day international trade and the extent to which they can be substituted by non-negotiable transport documents, such as seawaybills, and by electronic alternatives"<sup>3</sup>.

## **B. METHODOLOGY**

4. The UNCTAD secretariat developed a questionnaire, which was widely circulated to the industry. The questionnaire was divided into three parts. Part I focused on (a) the current rate and pattern of use of different types of transport documents and (b) on factors relevant to the choice of document. Part II sought to assess (a) the degree to which the use of electronic alternatives to traditional transport documents is already practiced or is being contemplated and (b) the main obstacles and advantages perceived to be associated with the use of such electronic alternatives. Part III of the questionnaire focused on the legal characteristics and effects of different types of transport documents, trying to identify national differences as well as relevant perceptions among respondents from different jurisdictions.

5. Respondents were asked to identify themselves as falling into one of several groups of stakeholder, i.e. transport provider, intermediary, transport user, bank, liability or cargo insurer or

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<sup>1</sup> See the UN/CEFACT Recommendation No. 12, 2<sup>nd</sup> ed. 2001, *Measures to facilitate maritime transport documents procedures*, ECE/TRADE/240, available at <http://www.unece.org/cefact>.

<sup>2</sup> For more detailed information, see UNCTAD document TD/B/COM.3/EM.12/2, part II, legal and documentary aspects, paras. 30-50.

<sup>3</sup> This recommendation was endorsed by the Commission on Enterprise, Business Facilitation and Development, see the report of the Commission at its sixth session, see TD/B/EX(28)/5, para. 13(6).

legal adviser. Overall, 82 replies to the questionnaire were received from respondents representing banks, transport users (including shippers' associations) and a large number of transport providers or intermediaries (including relevant associations). No responses were received from the insurance sector or from independent legal advisers.

6. Respondents to the questionnaire from the sector of transport providers include several of the world's leading container service operators (representing, according to recent data<sup>4</sup>, around 21% of global TEU capacity) as well as large freight forwarders and several national shipping lines. As transport providers and, in many cases, intermediaries are responsible for the issue of transport documents, the large number of responses received from representatives of these sectors are of particular interest in considering current practice and opinions related to the use of transport documents in global trade.

7. This report presents the results of the secretariat's study, together with an overview over the role and function of transport documents in international trade and developments relating to the use of electronic alternatives. A complete copy of the questionnaire and a breakdown of responses are annexed. Some figures and tables showing responses to individual questions have been integrated in the text as appropriate. In general, the percentage rates indicated relate to the number of respondents. In cases where more than one answer was possible, the percentage rates thus do not add up to 100%. However, where not all respondents answered a particular question, the percentage rates indicated relate to the overall number of answers received in respect of the question (= 100%).

8. The secretariat wishes to express its deep appreciation to all those who took time to reply to the questionnaire.

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<sup>4</sup> Containerisation International (CI-online), Fleet statistics as of 24.10.2003.

## C. INTERNATIONAL TRADE AND TRANSPORT DOCUMENTS

### I. The role and function of transport documents in international trade

9. International sale of goods, i.e. the sale of goods across national borders, poses different challenges to sales in a domestic environment. Sellers and buyers are typically located in different countries and the goods sold are often not in the physical possession of the seller, but in the hands of a third party, possibly in yet another country or on board a vessel. Invariably, international sales involve transportation of the goods, often over large distances. This means that either the seller or the buyer needs to make arrangements relating to the transportation and insurance of the goods sold. Above all, both parties to the sale contract need to perform their respective main obligations, that is, the delivery of goods in accordance with the contract (seller) and payment of the agreed price (buyer), while at the same time seeking to ensure contractual performance by the other party. Sales on shipment terms, such as CIF and FOB<sup>5</sup>, have evolved to enable the international sale of goods to be performed, to a considerable extent, by way of documentary means, i.e. by the tender of documents in exchange for payment. Often, banks play an important part in this process as payment under a letter of credit provides added security to both buyer and seller.

10. Although no uniform international law exists to define the characteristics and effects of different transport documents, the relevant rules, having been established by the custom of merchants, appear to be remarkably similar in most jurisdictions (see also Box 1).

#### 1. Negotiable bills of lading, non-negotiable seawaybills and other transport documents in use: general overview

##### (a) *Negotiable bill of lading*

11. Traditionally, the so-called "**negotiable**" **bill of lading**, issued by a carrier upon shipment of goods, has played a key role in international trade, as it fulfils a number of functions facilitating trading in an international environment. First, it operates as a receipt providing evidence that goods conforming to the contract have been shipped as agreed and are in the physical possession of the carrier for delivery to the consignee at destination. This evidentiary aspect of the document is important, both as between seller and buyer, in relation to obligations under the sale contract, and as between a potential cargo-claimant and the carrier, should goods be lost or damaged during transit. Secondly, the bill of lading contains or evidences the relevant terms of contract with the carrier. Where goods are lost or damaged in transit or are short-delivered, these terms are the basis on which cargo interests may be able to pursue a claim against the carrier.

12. Thirdly, the negotiable bill of lading operates as a transferable document of title, and it is this aspect, which sets the document apart from non-negotiable seawaybills. A document of title in this context is a document, which provides its holder with the exclusive right to demand delivery from the carrier. As the goods will only be released at the port of discharge against surrender of the bill of lading, possession of the document amounts to constructive possession of the goods. If the document is "negotiable", i.e. is made out "to order", or to the order of a named party, or to the bearer, the right embodied in the document can be transferred along a chain of

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<sup>5</sup> See also INCOTERMS, published by the International Chamber of Commerce, a contractual set of rules which is based on international commercial terms as established by the custom of merchants, such as CIF (cost, insurance, freight) and FOB (free on board).

sale contracts by delivery, with any necessary endorsement, of the document alone. Thus, while goods are in the physical possession of a carrier during transit, a seller is able to pass possession and property in the goods to a subsequent buyer simply by passing on the negotiable document of title<sup>6</sup>. By the same token, the document can be pledged to a bank and thus may be used as a security to raise finance.

**BOX 1**

*Features and effects of negotiable transport documents: survey results*

The questionnaire asked respondents to identify the features of a negotiable document (Q. 13) and the effects of a negotiable document (Q. 14) under the law of their country and/or under the law commonly chosen to govern a transaction. Tables 1 and 2 show the responses in descending order. As not all respondents provided answers, percentage rates relate to the overall number of answers received and add up to 100%. It is interesting to note that in the view of respondents the title and/or identification of the document as negotiable or non-negotiable bears significance.

**Table 1. Answer summary (Q. 13)**

<b>What are the features of a negotiable transport document? (more than one answer possible)</b>	<b>Responses (%)</b>
Document is made out to “named consignee or order”	22
Document is made out “to order”	18
Title of the document	15
Document <u>is</u> marked “negotiable”	14
Document contains a statement for good delivery against document surrender	13
Document is <u>not</u> marked “nonnegotiable” or “not negotiable”	10
Document is made out to “bearer” or no party is indicated in consignee box	7
Other	1

**Table 2. Answer summary (Q. 14)**

<b>What are the effects of using a negotiable transport document? (more than one answer possible)</b>	<b>Responses (%)</b>
Right to demand delivery of goods may be transferred by endorsement/transfer of the document	22
Only lawful holder of the document can demand delivery, i.e. document provides security	22
Carrier is only entitled to release the goods against surrender of the document	20
Property in the goods may be transferred by endorsement/transfer of the document	19
Goods may be sold in transit and endorsement/transfer of document has the same effect as physical delivery of the goods	16
Other	1

<sup>6</sup> In some jurisdictions, the negotiable bill of lading is truly negotiable in the sense of providing any transferee with good title, i.e. property in the goods, free from any existing defect in ownership. In other jurisdictions, such as the U.K., the same effect is achieved through statutory provisions, but the document itself is not considered to have the same inherent proprietary value.

13. Negotiable bills of lading and similar documents of title may also be subject to the mandatory application of the minimum standards of liability established in *The Hague Rules of 1924*<sup>7</sup> and the *Hague Rules, as amended by the Visby and SDR protocols 1968 and 1979 (Hague-Visby Rules)*. Both sets of rules apply mandatorily only to contracts covered by a "bill of lading or any similar document of title"<sup>8</sup>.

14. The reason for this is that where goods are carried under bills of lading, the terms of the contract are contained in or evidenced by the bill of lading, i.e. in a standard form document issued and signed by the carrier, and usually drafted in terms favourable to the carrier, with no scope for negotiation. Where such bills are negotiable, i.e. are intended for sale of the goods in transit, the need for protection of a third-party consignee becomes particularly urgent. In international trade on shipment terms, risk usually passes on shipment and the final endorsee in possibly a long chain of different buyers will have to sue the carrier in case of loss of or damage to the goods on the terms of the bill of lading.

(b) *Non-negotiable seawaybill*

15. A **seawaybill** is a non-negotiable document that also functions as a receipt for shipment and as evidence of the contract of carriage. However, the document need not be presented in order to obtain delivery of the goods from the carrier. Seawaybills, therefore, do not provide constructive possession of the goods covered, an aspect, which has a number of consequences.

16. On the one hand, the utility of this type of document is limited by the fact that the document itself cannot be used to transfer possession and property. Seawaybills are thus not suitable (a) if sale of the goods in transit is envisaged or (b) if independent, documentary security is required by a buyer or by a bank involved in a letter of credit or other finance arrangement.

17. Moreover, the document may not - at any rate without express contractual incorporation - attract the mandatory application of the Hague or Hague-Visby Rules, which is restricted to "bills of lading or similar documents of title"<sup>9</sup>. Non-negotiable seawaybills are not expressly covered by the Hague and Hague-Visby Rules. However, as they are also standard form documents, issued by a carrier and operating as a receipt and as evidence of a contract of carriage, the national legislation of some States extends the protection of the Hague and Hague-Visby Rules to non-negotiable seawaybills<sup>10</sup>.

18. In some cases, such (statutory) application is, however, only triggered if the contract evidenced in the document effectively incorporates the Rules<sup>11</sup>. Moreover, where -under national law- the Rules are applicable to seawaybills, the evidentiary value of statements in the document relating to the goods shipped may be less strong. This is, for instance, the position in English law. A third-party endorsee of a bill of lading may, in a cargo claim, rely conclusively on the

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<sup>7</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924.

<sup>8</sup> See the definition of "contract of carriage" in Art. I(b) of the Hague and Hague-Visby Rules. This provision needs to be considered in context with Art. X of the Hague and Hague-Visby Rules, according to which the substantive provisions of the Rules apply to "every bill of lading relating to the carriage of goods between ports in different States" if either the bill of lading is issued in a contracting State, shipment is from a contracting State or the contract expressly incorporates the Rules or legislation giving effect to them.

<sup>9</sup> See fn. 8, above and accompanying text.

<sup>10</sup> For an overview over relevant legislation in different jurisdictions, see *Tetley, International Maritime and Admiralty Law*, Cowansville, 2002, fn. 76 at p. 80.

<sup>11</sup> See e.g. S. 1(6)(b) UK Carriage of Goods by Sea Act 1971; *The European Enterprise* [1989] 2 Lloyd's Rep. 185.



description of the goods in a bill of lading<sup>12</sup>. In contrast, the description of the goods in a seawaybill is, in cases where the Hague-Visby Rules apply, only *prima facie* evidence<sup>13</sup>. Views of respondents on the wisdom of this distinction between negotiable bills of lading and seawaybills are reflected in Box 2. *The Hamburg Rules 1978*<sup>14</sup> apply to all contracts for the carriage of goods by sea, other than charterparties<sup>15</sup> and thus include contracts covered by negotiable as well as non-negotiable transport documents.

19. On the other hand, as presentation of a non-negotiable seawaybill is not required to obtain release of the goods from the carrier, the issue of delayed arrival of documents at destination, which may be a particular problem in the context of short sea transit times, does not arise.

#### BOX 2

##### *Should there be a difference in the evidentiary effect of a document depending on whether it is negotiable?*

Respondents were asked (Q. 16) to express their views as to whether the evidentiary effect of statements regarding the goods (e.g. weight, quantity, container contents) should differ, depending whether the transport document is negotiable or non-negotiable. Of those indicating their views (85%), the overwhelming majority (93%) believe that there should be no such difference and only a small minority (7%) believe there should. Relevant comments include the following:

*"Both documents are evidence of the contract and in that respect serve the same purposes vis-à-vis a third party (as named consignee or lawful holder/endorsee...respectively) and accordingly both documents should offer that 3<sup>rd</sup> party the same comfort/assurance as regards such statements";*

*"There is no reason why there should be any difference between the evidentiary effect of statements in the two documents where waybills have the same or similar status to B/Ls ";*

*"Since the negotiable transport document represents the title over the goods and can be made out "to order" for the purpose of re-sale of goods or for their pledging as security in respect of L/C finance, financing Banks and Third Party Buyers rely on negotiable BL details to a much greater extent than a Seller involved in a long-term relationship-where the non-negotiable B/L serves primarily as a transport document, similar to the CMR-WB".*

#### (c) *Straight bill of lading*

20. Bills of lading made out to a named consignee, so-called "straight" or "**straight consigned**" bills of lading, are not transferable and can thus not be "negotiated" along a chain of

<sup>12</sup> Art. III, r. 4 of the Hague-Visby Rules. Note that under the same provision in the Hague Rules, the bill of lading is only *prima facie* evidence of the description of goods.

<sup>13</sup> S. 1(6)(b) UK Carriage of Goods by Sea Act 1971. It should be noted that the *CMI Uniform Rules for Seawaybills*, designed for incorporation into seawaybills, seek to ensure that any international or national law compulsorily applicable to bills of lading shall also apply to the seawaybill and that as between carrier and consignee, the seawaybill shall be conclusive evidence of the receipt of the goods as described in the document. Whether this is sufficient to trigger application of the Hague-Visby Rules depends on the relevant national law. In English law, the requirements for effective incorporation have been strictly interpreted in *The European Enterprise*, see fn. 11, above.

<sup>14</sup> United Nations Convention on the Carriage of Goods by Sea, 1978.

<sup>15</sup> Arts. 1(6), 2(1) and (3) Hamburg Rules. Charterparties are also excluded from the scope of application of the Hague and Hague-Visby Rules, see Art. V.

sale contracts. As a consequence, these documents are, similarly to seawaybills, not suitable where sale of goods in transit is envisaged. However, a separate question is, whether these types of documents need to be produced to obtain delivery of the cargo and may thus be considered documents of title.

21. The answer to this question matters, primarily for two reasons. First, if a straight bill of lading is a "non-negotiable document of title", it may be used to transfer ownership from a seller to a buyer, albeit on only one occasion. At the same time, it also provides independent documentary security to a seller, buyer or a bank. Secondly, if recognized as a document of title, a straight consigned bill of lading attracts, without more, the mandatory application of the Hague and Hague-Visby Rules.

22. Views on whether a straight bill of lading is a document of title appear to differ between jurisdictions and may depend on the characteristics of any particular document in question (see Box 3).

23. In US law, where the term "straight bill of lading" was first used to identify a bill of lading made out to a named consignee and marked non-negotiable, the carrier is entitled to deliver the goods to the named consignee without production of the document<sup>16</sup>. In English Law, a bill of lading made out to a named consignee has traditionally been regarded akin to a non-negotiable seawaybill but, until recently, there was no clear legal authority on whether production of the document by the named consignee was required to obtain delivery of the goods.

24. In an important recent decision, the English Court of Appeal has clarified the position. In *The Rafaela S*<sup>17</sup>, the Court of Appeal held that where a bill of lading was made out to a named consignee ('straight consigned bill of lading'), but contained a general clause or proviso on its face, according to which surrender of the bill of lading was required to obtain delivery of the goods from the carrier, the bill of lading was a document of title, albeit not a negotiable document<sup>18</sup>. As a result of the judgment, a straight bill of lading needs to be produced to obtain delivery of the goods and is subject to the mandatory application of the Hague-Visby Rules<sup>19</sup>. It may also be used to transfer possession and ownership in the goods to the named consignee and offers (limited) security in the financing of a sale contract. However, in contrast to negotiable bills of lading, straight bills of lading cannot be transferred to any other party but the named consignee and are thus not suitable for use in a succession of sale contracts.

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<sup>16</sup> S. 89 of the US Federal Bill of Lading Act 1916 (Pomerene Act). While the term "straight bill of lading" has more recently been substituted in the relevant legislation with "nonnegotiable bill of lading", the position has otherwise remained unchanged (49 USC ss. 80103, 80110).

<sup>17</sup> *J.I. Macwilliam Co. Inc. v. Mediterranean Shipping Co. S.A. , The Rafaela S* [2002] EWCA Civ 556; [2003] 2 Lloyd's Rep. 113.

<sup>18</sup> The Court of Appeal did not need to decide whether the position would be the same in the absence of an express clause/proviso requiring surrender of the bill of lading. However, Lord Justice Rix, in an obiter dictum suggested that the position should be the same, see [2002] EWCA Civ. 556 at para. 145.

<sup>19</sup> The position appears to be similar in other jurisdictions. See for instance *The Rafaela S* [2002] EWCA Civ. 556, where reference is made to the position in France, Singapore and the Netherlands.

### BOX 3

#### *How clear are the differences between straight bills of lading and seawaybills?*

In order to ascertain whether, in the perception of respondents from different jurisdictions, a clear difference exists between a seawaybill and a straight bill of lading, the questionnaire asked respondents for their views on the question (Q. 15). As regards the law of their own country, 51% of respondents who answered the question thought there was a clear difference, with 20% stating there was no clear difference. 29% of respondents stated they did not know what the position was. As regards the law commonly chosen to govern transactions, the majority, 62% of respondents providing an answer, stated they did not know whether there was a clear difference between a straight bill of lading and a seawaybill. 19% of respondents thought there was and 19% of respondents thought there was no clear difference. Further comments supplied by respondents include the following:

*"Delivery of goods is made at destination without production of original Seaway Bill but only to named consignee on identification whereas "Straight Bill of Lading" provides for delivery of goods only to the named person without or with surrender of the bill of lading";*

*"[A] waybill is not negotiable";*

*"Under English Law a bill of lading is always a document of title and must always be surrendered in exchange for the goods, whether it is negotiable or not. A seawaybill is evidence of contract, but not a document of title. Under US Law, a B/L consigned to a named party and marked "non negotiable" is a straight bill";*

*"In some jurisdictions e.g. USA there is a clear/defined (ruled) opinion on both documents (and their differences and similarities) – in other jurisdictions there is not at all. It begs the question of what a straight consigned B/L really is and in what consideration other features[...] must also be considered";*

*"A seawaybill is "not negotiable" and no "originals" are issued accordingly. A straight "consignment" B/L showing consigned to: ABC Company "if" issued in one or more originals will be dealt with as a negotiable B/L;"*

*"Only an original document is accepted to take delivery of the cargo";*

*"The customs will not accept a seawaybill to process an application for clearance";*

*"A 'straight' bill of lading cannot be issued to order, it has to be issued to a named consignee, it cannot be transferred by endorsement";*

*"The clear practical difference between a straight bill and a waybill is that the straight B/L has limited use as security for payment, a waybill does not. A document titled "Bill of Lading" will be subject to UK COGSA 1971 (Hague-Visby Rules), a waybill will not unless specifically contracted in".*

#### *(d) Other transport documents*

25. In carriage of goods by road, rail and air, consignment notes are used. However, these documents do not operate as documents of title. Equally, other documents which may be issued in relation to sea-carriage, such as ship's delivery orders or freight forwarders' receipts do not share the document of title function.

26. In recent years, the growth in multimodal transportation has given rise to an increase in the use of **multimodal or combined transport documents**. Standard form documents are often designed to be used both for carriage of goods by sea (port of loading to port of discharge) and for transport from point-to-point (receipt to delivery). Documents for multimodal transport may

be made out in negotiable form ("to order"), so as to operate as a negotiable document of title. In some jurisdictions, such as the UK, the legal status of these documents is not entirely clear, but it is likely that courts would recognize a multimodal document made out in negotiable form as a document of title, similar to a negotiable bill of lading<sup>20</sup>. Both the 1980 *United Nations Convention on International Multimodal Transport of Goods* (1980 MT Convention) and the 1992 *UNCTAD/ICC Rules for Multimodal Transport Documents* envisage the issue of negotiable multimodal transport documents<sup>21</sup>, as do existing national, regional and subregional laws and regulations on multimodal transport, which are often based on either or both of these international sets of rules<sup>22</sup>.

## 2. Summary of central functional differences between different types of transport document

27. As has become apparent, a main functional distinction applies in respect of transport documents commonly used:

28. (a) A **document of title** needs to be presented in order to obtain delivery of the goods from the carrier. This type of document provides constructive possession, i.e. exclusive control over the goods. If the document is made out in negotiable form, the rights inherent in the document may be transferred by delivery of the document, with any necessary endorsement.

29. A **negotiable document of title**, such as a negotiable bill of lading, thus provides clear advantages, if sale of goods in transit is envisaged and/or if documentary security is required by banks or buyers involved in an international sale or its financing. As, however, the document needs to be physically transferred to the final consignee, possibly along a chain of buyers and banks, a number of problems may be associated with the use of negotiable bills of lading. These include high administrative costs related to the issue, processing and transfer of paper documentation and additional costs due to delayed arrival of the document at the port of discharge, in particular where travel times are fast, e.g. in short-sea shipping. If a negotiable document is not available by the time a vessel is ready to discharge the cargo at destination, costly delays may arise. While in practice, a carrier may frequently agree to release the goods against a letter of indemnity, this may seriously compromise the position of an unpaid seller or bank. Moreover, where delivery is made against a letter of indemnity to the wrong consignee, the carrier faces a claim for misdelivery by the lawful consignee and may not in all cases be able to enforce the indemnity.

30. (b) A non-negotiable "straight" bill of lading, if recognized as a **non-negotiable document of title**, as is now the case in English law, offers the same advantage as a negotiable bill of lading in terms of documentary security, but, due to its non-negotiable character, is not suitable where sale of goods in transit is envisaged. Delayed arrival of the document at the port of discharge may be less likely, if still possible. The legal effects of a non-negotiable "straight"

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<sup>20</sup> *Goode*, Commercial Law, 2<sup>nd</sup>.ed. London 1995, 1083; *Reynolds* in: Carver on Bills of Lading, London 2001, para. 8-080.

<sup>21</sup> See Art. 6 of the 1980 MT Convention; Art. 2.6 and 4.3 UNCTAD/ICC Rules. It should be noted that the 1980 MT Convention has not entered into force. The UNCTAD/ICC Rules are a set of standard terms intended for incorporation into commercial contracts, but without statutory force.

<sup>22</sup> For an overview over existing national, regional and subregional laws and regulations see UNCTAD Report and comparative table *Implementation of Multimodal Transport Rules* UNCTAD/SDTE/TLB/2 and Add.1. See also *The Feasibility of an International Legal Instrument* UNCTAD/SDTE/TLB/2003/1.

bill of lading are, however, not entirely clear in all jurisdictions and may differ depending on the specific features of the document itself.

31. (c) **Non-negotiable seawaybills** and other documents, which do not qualify as documents of title, are advantageous where the distinct characteristics of a document of title are not required, as the need for physical transmission of the document and thus the potential for delayed arrival of the document does not arise. As a consequence, the use of non-negotiable seawaybills may be considered advisable if sale of goods in transit is not envisaged and independent documentary security is not required by the parties.

32. In an effort to minimise the problems associated with delayed arrival of bills of lading, commercial parties have, over recent years, been increasingly encouraged to use seawaybills rather than bills of lading in all cases where sale of goods in transit is not envisaged<sup>23</sup>. A number of standard contractual clauses have been developed, which seek to equip seawaybills with some 'security features' by providing contractually for limits to the shipper's right of control over the goods. Examples are:

(i) the so-called NODISP clause (No Disposal clause), which provides: "*By acceptance of this Waybill, the Shipper irrevocably renounces any right to vary the identity of the Consignee of the goods during transit*";

(ii) a so-called CONTROL clause, which provides: "*Upon acceptance of this Waybill by a Bank against a Letter of Credit transaction (which acceptance the Bank confirms to the Carrier) the Shipper irrevocably renounces any right to vary the identity of the Consignee*".

33. The *CMI Uniform Rules for Sea Waybills*<sup>24</sup>, which are designed for incorporation into commercial contracts, also set out a mechanism for the transfer of the right of control from shipper to consignee. Rule 6(ii) provides: "*The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above [right to give instructions to the carrier in relation to the contract of carriage] and the shipper shall cease to have such rights*"<sup>25</sup>.

34. While a number of standard form seawaybills used by some major container carriers now include "control" clauses, there does not yet seem to have been much litigation in which "control" clauses were put to the test. At present, it is therefore not entirely clear to which degree clauses of this kind achieve their objective<sup>26</sup>.

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<sup>23</sup> See UN/CEFACT Recommendation 12, 2nd ed. 2001, ECE/TRADE/240.

<sup>24</sup> The CMI Uniform Rules for Sea Waybills are available at <http://www.comitemaritime.org> under "CMI Documents".

<sup>25</sup> The CMI Rules are expressly incorporated into many of the modern seawaybills, e.g. Genwaybill, Linewaybill, Combiconwaybill, Multiwaybill, K-Line Waybill and the P&O Nedlloyd Non-Negotiable Waybill.

<sup>26</sup> For a discussion of potential problems associated with the use of contractual "control" clauses, see *N.J.J. Gaskell* in: *Gaskell, Asariotis, Baatz, Bills of Lading, Law and Contracts*, at 22 B. 1(ii) and 22 B. 3.

## II. Electronic alternatives to traditional transport documents: an overview over recent developments<sup>27</sup>

35. It is clear that the successful development of electronic alternatives to traditional paper transport documents could offer a number of potential benefits to commercial parties in terms of speed, efficiency and transaction costs. In particular, the problems and additional costs presently associated with the delayed arrival of negotiable bills of lading at destination would no longer arise, if a suitable electronic alternative or equivalent to the negotiable bill of lading were available for use in commercial practice<sup>28</sup>. However, despite significant technological advances over the last decade, efforts at creating practical electronic alternatives, which are supported by an appropriate enabling legal framework, have to date only been partially successful.

36. The main challenge in any effort to develop electronic alternatives to traditional transport documents is the effective replication of the documents' functions in a secure electronic environment, while ensuring that use of electronic records or data messages enjoys the same legal recognition as the use of paper documents.

37. In respect of the two functions common to all transport documents discussed above, i.e. those of a receipt and a contract, significant progress has been made. Several web-based platforms now offer secure services, which enable commercial parties to generate customized standard form transport documents electronically or allow for remote printing of 'original' documents issued by a carrier and transmitted electronically to the customer's printer. The *UNCITRAL Model Law on Electronic Commerce*, adopted in 1996<sup>29</sup>, as well as other legislation<sup>30</sup> has been implemented by a number of States to remove legal barriers, such as requirements for "writing" "original" or "signatures", recognizing the evidentiary effect of data messages, and permitting incorporation by reference of the terms and conditions of the contract of carriage. More recently, in 2001, the *UNCITRAL Model Law on Electronic Signatures*<sup>31</sup> was adopted and currently, a "*Preliminary draft convention on the use of data messages in [international trade] [the context of international contracts]*", aimed at providing a more comprehensive legal framework for contracting in an electronic environment, is under discussion within the UNCITRAL Working Group on Electronic Commerce<sup>32</sup>.

38. A key challenge, however, remains the replication of the document of title function, unique to bills of lading, in an electronic environment. Under existing national and international laws, legal rights attach to the physical possession of the paper document. The exclusive right to delivery of the goods is "locked up" in the document, thus physical possession of the original document represents constructive possession of the goods. As yet, existing legal regimes do not adequately ensure that the same legal rights may attach to electronic alternatives. The *UNCITRAL Model Law on Electronic Commerce* contains two specific provisions (Articles 16

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<sup>27</sup> See in greater detail UNCTAD Report *Electronic Commerce and International Transport Services* TD/B/COM.3/EM.12/2 Part II and *Electronic Commerce: Legal Considerations*, UNCTAD/SDTE/BFB/1, available at <http://www.unctad.org>. See also a note by the UNCITRAL secretariat, *Possible future work on electronic commerce. Transfer of rights in tangible goods and other rights*, A/CN.9/WG.IV/WP.90.

<sup>28</sup> This has been recognized for a number of years, see only a preliminary study in 1996 by the UNCITRAL secretariat of the issues of transferable bills of lading in an electronic environment (A/CN.WG.IV/WP.69).

<sup>29</sup> The text of the *UNCITRAL Model Law on Electronic Commerce*, as well as information on its implementation by States is available at <http://www.uncitral.org>.

<sup>30</sup> See e.g. European Commission *Directive on Electronic Signatures* 1999/93/EC of 13 December 1999.

<sup>31</sup> For the text of the *UNCITRAL Model Law on Electronic Signatures*, see <http://www.uncitral.org>.

<sup>32</sup> The proposed legislative text and all relevant working documents are available at <http://www.uncitral.org>.

and 17), which aim at establishing a legal framework recognizing the functional equivalent of transfer of rights and title in an electronic environment. However, the effectiveness of the provisions has been questioned and while other aspects of the Model Law have been widely adopted by States, Articles 16 and 17 have received only very limited support. The continuing need for legal reform has been recognized and an important part of the work currently being undertaken within the UNCITRAL Working Group on Transport Law focuses on the transfer of rights through electronic communication<sup>33</sup>.

39. In the absence of a uniform legal framework, several contractual approaches, supported by voluntary rules binding on the parties, have been developed to emulate the document of title aspect of the bill of lading in an electronic environment. These include central registry systems, such as the *SeaDocs Registry*, which, however, was abandoned after a short time, and, more recently, the *Bolero* system<sup>34</sup>, which provides a mechanism for the transmission of secure authentic electronic messages between a central registry and successive parties, who have an interest in the goods. Although the *Bolero* system has been operational since 1999, the "Bolero Bill of Lading" (BBL) does not yet appear to play a significant role in commercial practice. Among the potential drawbacks of *Bolero* is the fact that it operates a "closed" subscription-based system, designed for use by its members and that any liability arising from fault on the part of the central registry is limited to USD 100.000 per user per occurrence<sup>35</sup>.

40. The *CMI Rules for Electronic Bills of Lading*<sup>36</sup> also provide a contractual framework for the substitution of bills of lading with electronic messages but are, in contrast to the *Bolero* approach, not based on a central registry system with a membership of participating parties. Instead, the Rules envisage the creation of "electronic bills of lading" which may be endorsed/negotiated through the use of a secret code or "private key", unique to its holder. The *CMI Rules for Electronic Bills of Lading* have, however, not received wide support from the industry.

41. More recently, another system, *@GlobalTrade Secure Payment and Trade Management System*, has been created, primarily focusing on letter of credit operations and offering a mechanism whereby documentary credits may be negotiated and "documents" tendered, via the Internet<sup>37</sup>. One of the features of the *@GlobalTrade* system is an "electronic" seawaybill, which, through the contractual incorporation of a CONTROL clause<sup>38</sup> and of the *CMI Uniform Rules for Sea Waybills*, aims at offering its customers advantages similar to those of a bill of lading, albeit not by providing an electronic equivalent to a genuine document of title.

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<sup>33</sup> The draft legal instrument currently being considered by the UNCITRAL Working Group on Transport Law includes a chapter on electronic communication together with provisions on the transfer of rights. For the text and relevant working documents, see <http://www.uncitral.org>. For a commentary on the provisions by the UNCTAD secretariat, see UNCTAD/SDTE/TLB/ 4, available at <http://www.unctad.org>.

<sup>34</sup> See <http://www.bolero.net> for further information. An overview over the legal aspects of the Bolero Bill of Lading can be found at <http://www.bolero.net/downloads/bbls.pdf>. See also UNCITRAL document A/CN.9/WG.IV/WP.90 at paras. 75-86.

<sup>35</sup> It appears that the International Group of P&I Clubs has arranged additional insurance of P&I liability arising from paperless trading and otherwise excluded from normal Club cover, see Swedish Club Circular 2384/1999.

<sup>36</sup> A copy of the CMI Rules is available at <http://www.comitemaritime.org>, under the heading "CMI documents".

<sup>37</sup> See <http://www.ccweb.com> for further information. The *@GlobalTrade* system also incorporates the e-UCP, a supplement, in force since 1.4.2002, to the most recent edition of the ICC's Uniform Customs and Practice for Documentary Credits (UCP 500), the standard set of rules applicable to documentary credits. The e-UCP enables parties to conduct letter of credit operations in an electronic environment.

<sup>38</sup> The CCEWeb Waybill clause is similar to the CONTROL clause, set out in para. 32, above.

42. Thus, although important legislative initiatives are under way and contractual systems are increasingly emerging, the transition to an electronic environment has been slow and, in commercial practice, transactions continue to be conducted largely on the basis of traditional paper documentation.

**D. THE USE TRANSPORT DOCUMENTS AND ELECTRONIC ALTERNATIVES: CURRENT PRACTICE AND OPINIONS**

43. In view of the background outlined above and in the light of current developments aimed at facilitating the use of electronic alternatives, the UNCTAD Secretariat has circulated a questionnaire to (a) establish the status quo regarding the use of transport documents and electronic alternatives in current commercial practice; (b) obtain the views of commercial parties regarding the benefits and obstacles relevant to electronic alternatives.

**I. The use of transport documents in international trade: current practice**

44. In order to obtain a picture of the current rate and pattern of use of different types of transport documents and identify the main factors relevant to the choice of document, respondents were asked a number of questions on their current practice.

**1. Types of transport documents used, issued or required**

45. Respondents were asked to indicate which types of transport documents they mainly use, issue or require and, where possible, to also provide approximate percentage rates. Table 3 shows which types of transport documents are used and Figures 1,2 and 3, show estimated rates of usage as indicated by respondents.

**Table 3.** Answer summary (Q. 1)

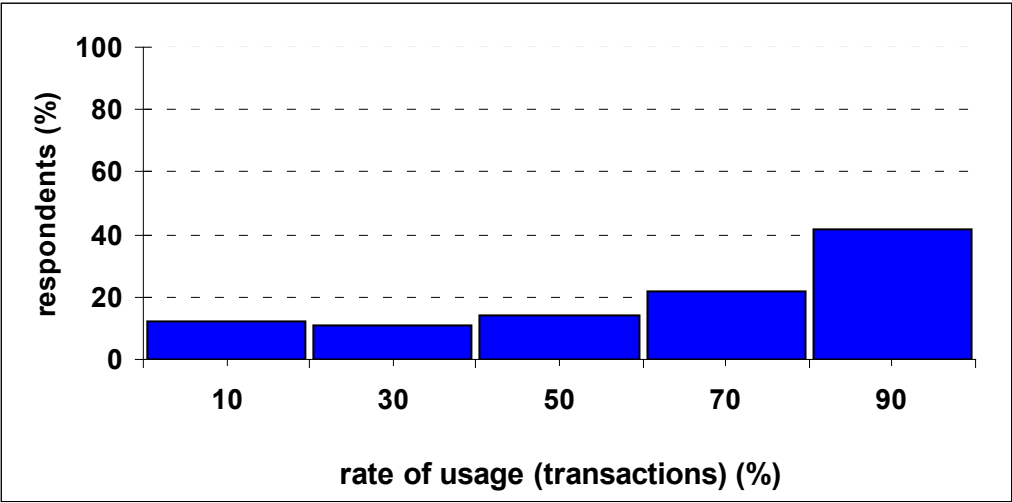
<b>Which transport documents do you mainly use/issue/require? (more than one answer possible)</b>	<b>Responses (% of respondents)</b>
Negotiable bill of lading	88
Non-negotiable seawaybill	51
Multimodal / combined transport document	53
- negotiable	37
- non-negotiable	27
Other	20

*Negotiable bills of lading*

46. The great majority of respondents, 88%, use negotiable bills of lading to a greater or lesser extent. Of those, 70% state that they mainly or exclusively use negotiable bills of lading (50%-100% of transactions). Indeed, 18% of the respondents indicate that they use or issue only negotiable bills of lading (99%-100% of transactions) (Figure 1).



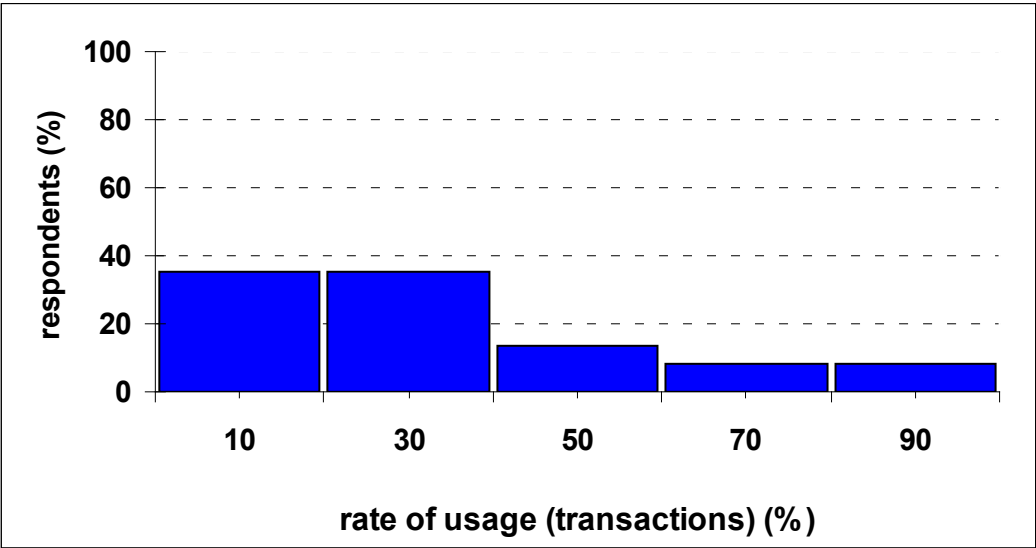
**Figure 1.** Estimated rate of usage (in percentage of transactions) of **negotiable bills of lading** by respondents. Note that 8% of respondents using bills of lading did not provide details as to their estimated rate of usage.



*Non-negotiable seawaybills*

47. Of all respondents, 51% indicate that they use, issue or require non-negotiable seawaybills. However, responses also suggest that the use of seawaybills in international trade is limited. Only 23% of respondents using seawaybills state that seawaybills account for the majority of transactions (50%-100% of transactions), whereas around 18% of respondents place their rate of use of seawaybills at 10% or less (Figure 2).

**Figure 2.** Estimated rate of usage (in percentage of transactions) of **non-negotiable seawaybills** by respondents. Note that 12% of respondents using seawaybills did not provide details as to their estimated rate of usage.



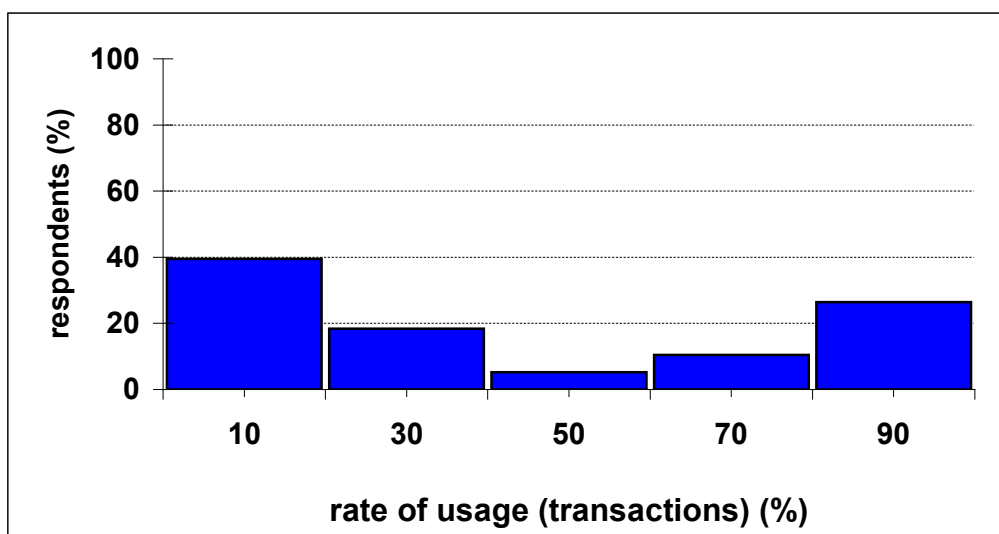
### *Multimodal/combined transport documents*

48. As regards multimodal/combined transport documents (MTDs), responses suggest that these types of documents are quite commonly used in modern trade. A majority of respondents (53%) use such documents in either negotiable or non-negotiable form. As to the estimated rate of use, around 40% of respondents using multimodal/combined transport documents state that MTDs account for more than 50% of transactions, while a further 40% of respondents indicate that MTDs account for less than 20% of transactions (Figure 3).

49. It is interesting to note that those respondents, which represent some of the globally leading container service operators place their rate of issue of MTDs at 55%-100%, with *negotiable* bills of lading and/or MTDs accounting for 40%-80% of transactions. One leading container operator, however, indicates that *non-negotiable* seawaybills or MTD's are issued in 60% of transactions.

50. As regards the meaning of the term "multimodal/ combined transport document", it should be noted that the term was not defined in the questionnaire. In Art. 1(4) of the *1980 MT Convention*, the term "Multimodal Transport Document" is defined as a document evidencing a multimodal transport contract and the taking in charge of goods by a Multimodal Transport Operator (MTO). A central characteristic of multimodal transport contracts covered by the Convention is that a MTO undertakes responsibility for the entire transport. On this basis, a multimodal transport document evidences a contract under which a MTO is responsible as carrier throughout a transport by different modes and means of transportation. However, in current commercial practice, the term "multimodal transport document" is sometimes more liberally used and a document may bear the title "Multimodal Transport Document / Bill of Lading" although under the contract covered by the document the contracting carrier is responsible only for parts of the transport carried out by itself (through transport).

**Figure 3.** Estimated rate of usage (in percentage of transactions) of **multimodal/combined transport documents** (negotiable and non-negotiable) by respondents. Note that 12% of respondents using these documents did not provide details as to their estimated rate of usage.



### Other documents

51. Around 20% of respondents indicate that they also use, issue or require other types of transport documents, such as air waybills, truck receipts, railway receipts, forwarding receipts, etc.

52. Clearly, the above usage rates are only approximate and may thus only serve to indicate certain trends. Based on the assessments made by respondents, however, it appears that (i) multimodal/combined transport documents are increasingly being used and (ii) in the majority of transactions negotiable, rather than non-negotiable transport documents are being used. This appears to be in accordance with commonly made assumptions.

## 2. Reasons for the use of negotiable documents

53. One of the purposes of the questionnaire was to seek to identify the factors affecting the choice of transport documents in commercial practice. Respondents were thus asked to indicate the reasons why they were using, issuing or requiring a negotiable document. The main reasons indicated by respondents are reflected, in descending order, in Table 4.

**Table 4.** Answer Summary (Q. 2)

<b>Reasons for using/issuing/requiring negotiable documents (more than one answer possible)</b>	<b>Responses (% of respondents)</b>
Required as security under letter of credit (or other finance requirement)	75
Requested/suggested by trading party (seller/importer/shipper/consignee)	35
Document ensures application of mandatory transport legislation	31
Goods covered by document are intended for sale during transit	25
No particular reason / standard practice	20
To be on the safe side	14
Other	5

54. Additional comments provided include the following:

- *"Primary reason for negotiable documents is security under documentary credits and/or re-sale of goods in transit";*
- *"We are a shipping line and issue B/L or waybills as required by our customers";*
- *"In [country] it is mandatory to use original negotiable bills of lading";*
- *"Requirements of regulatory authorities;*
- *"Not possible to issue seaway bills to North Africa, South America, [middle-eastern developing country], Black Sea countries";*
- *"Practice of the ports require originals for release of cargo. Facilitates credit management, helps avoid misdelivery";*
- *"Tradition/convention (market practice); custom of trade; ignorance; control over goods associated with title/constructive possession; advantage for consignee".*

55. As has been pointed out before, negotiable transport documents are in particular required in cases where sale of goods in transit is envisaged and/or where documentary security is a vital

concern to the parties involved in an export transaction. In considering the reasons indicated by respondents for their use of negotiable documents, it is interesting to note that banking or finance requirements appear to be a main factor, with sale of goods in transit playing an important, albeit a less prominent role. The responses also suggest that the application of mandatory transport legislation, such as the Hague-Visby Rules, is a relevant consideration. In this context, it should, however, be recalled that national legislation may extend the mandatory application of the Hague-Visby Rules to non-negotiable seawaybills<sup>39</sup>.

56. Interestingly, the responses also suggest that in many instances negotiable transport documents may in fact be used as a matter of course, i.e. as a matter of standard practice or "to be on the safe side". It is particularly in this context, where there may be no substantive reasons for the use of a negotiable transport document, that the use of a non-negotiable alternative would appear to be more appropriate.

### **3. Estimate of negotiation rates for negotiable documents**

57. One of the main advantages of using negotiable, rather than non-negotiable transport documents is that the goods covered by a negotiable document may be sold while in transit. More specifically, the bill of lading as a document of title enables a seller to transfer constructive possession in the goods to his buyer and to pass title, i.e. ownership in the goods, by way of endorsement and transfer of the document. Ownership in the goods may thus be passed down a string of sale contracts while the goods are in transit. In order to obtain an indication of the perceived practical relevance of this particular aspect of the use of negotiable transport documents in modern trade, respondents were asked to provide an estimate of the percentage of negotiable transport documents used or issued which were in fact negotiated to at least one other party (Question 3).

58. Only around 70% of respondents using negotiable documents were able to provide an estimate. Nevertheless, it is interesting to note that experiences and/or views on the matter appear to differ widely among respondents. Around one third of respondents estimate that less than 20% of negotiable transport documents are in fact negotiated to at least one other party while a similar proportion of respondents estimate that more than 80% of negotiable documents are later negotiated. At the extreme end of the spectrum, 8% of respondents estimate that none of the relevant documents (0%) are in fact negotiated, while another 10% estimate that all negotiable documents (100%) are negotiated.

### **4. Assessment of continued need for use of negotiable documents**

59. Against the background of problems associated with the delayed arrival of negotiable bills of lading at destination and of calls by the international community for the increased use of non-negotiable alternatives in commercial practice,<sup>40</sup> the questionnaire sought the views of stakeholders on the extent to which the use of negotiable bills of lading was still required in modern international trade.

60. While a very small number of respondents suggest that negotiable bills of lading were in general no longer needed, the great majority of respondents consider that the negotiable bill of lading continues to play a crucial role in international trade.

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<sup>39</sup> See part I.1.(b), above.

<sup>40</sup> See UN/CEFACT Recommendation No. 12, fn. 1, above.

- *"It is of paramount importance as it allows the flow of international trade and facilitates transactions";*
- *"The negotiable bill of lading is still a very effective aid to international trade".*

61. Of the main substantive reasons cited by respondents for the continued relevance of the negotiable bill of lading, the document of title function of the document stands out. Respondents emphasize the security inherent in the use of a negotiable bill of lading both in relation to delivery of the goods to the rightful consignee and in relation to payment. Negotiable bills of lading are described by one respondent as *"security tools"*, while another respondent characterizes the negotiable bill of lading as the only means of ensuring security in relation to *"both goods and the parties in question"* and to *"avoid any misuse of the documents"*. Another respondent describes the use of negotiable bills of lading as an *"essential requirement because shipping companies do not allow delivery of goods without surrendering original bill of lading"*. The use of negotiable bills of lading, it is said, gives *"security under L/C or payment of goods requirements"* and *"ensures payment between the parties"*. Also, the negotiable bill of lading, as *"the main security for a bank [...] should [...] continue to be required"*. Further related comments include the following:

- *"For a number of years to come, payment in the international trade between the industrialized and the less developed countries, as well as between the less developed countries themselves, will be accomplished by means of documentary Letters of Credit. In order to pre-finance the trade deal (e.g. establish a L/C not covered with funds by the Orderer) Banks often require goods to be consigned to their order as security. Therefore as long as the "non-covered" Letters of Credit remain an important financial instrument in the international trade, the negotiable B/L will remain indispensable (save where the B/L can be replaced by other negotiable transport or forwarding documents providing the same degree of security)";*
- *"Although containerized shipments are very seldom sold in transit, many of these are secured under letter of credit. Shippers also require negotiable documents to ensure that they will receive payment for their goods".*

62. A significant number of respondents indicate that negotiable bills of lading are, however, not in all cases needed and should therefore not be used systematically when other alternatives are available. In this context, it is being pointed out by several respondents that negotiable bills of lading may, for instance, not be required when parties are well known to one another or when the goods are not intended for sale in transit. Relevant comments by respondents include the following:

- *"It depends mainly on the financial relation between shipper and consignee";*
- *"Less essential where parties are known to each other";*
- *"In fact there is no necessity, unless the goods are intended to be sold en route";*
- *"It depends on the type of commodity. In liner shipping, usually there is not transfer of ownership of goods while in transit, therefore the negotiable character of the documents in use is superfluous".*

63. A considerable number of respondents express the view that negotiable bills of lading continue to be required when dealing with particular parties or countries. Once again, some respondents refer to national regulation as an obstacle to the use of alternatives. Comments include, for instance, the following:

- *"Use as required by letters of credit, use against fraud and theft. Requirement in some countries who charge extra to a consignee if a waybill is used";*
- *"FX regulations in [developing country in Asia] require B/L to be 100% negotiable and that it should be made to the order of negotiating/opening bank/shipper to have better control over the goods";*
- *"[To do] business with developing countries; where the legislation of a country requires original documents, for example [developing country in South America], where the customs-authorities ask for [...] original ocean bill of lading";*
- *"Local custom offices of some countries requires this as per law";*
- *"Only when dealing with parties & countries who do not have advance communication methods. Otherwise a proper EDI system could replace bill of lading issued on paper".*

64. Finally, a number of respondents emphasize the continued importance of the negotiable bill of lading in relation to sale of goods in transit. Representative comments include the following:

- *"Judging by our experiences, the negotiable bill of lading is still very much a part of modern commercial trade enabling the controlling party to transfer ownership of the consignment";*
- *"Commodities, particularly those shipped in bulk and break bulk, are regularly traded while under carriage, therefore, negotiable b/l's are very important";*
- *"Still necessary, especially if LC involved until such time as another medium of documentation can be found, providing ownership of the product/cargo";*
- *"As long as letters of credit are [...] established by purchasers or shippers will ship out their cargo before having sold the cargo, use of negotiable B/L will be required";*
- *"It depends on Customer's demands and is still likely to be required extensively";*
- *"If it is possible to eliminate its use given the different modes of transport to which it cannot work, e.g. air cargo, it should be possible to use a similar process to increase the use of seawaybills, for example 99% of this company's customers on the USA service require sea waybills of lading although, for all trades it is 30%. The fact that there are traditionally long enough transit times within which to negotiate documents is probably a disincentive to the further use of seaway bills of lading. However port storage and container demurrage is an incentive to change to seawaybills and the use of them is gradually growing".*

65. Overall, the responses suggest that the document of title function of the negotiable bill of lading continues to be considered as important in modern international trade. Not surprisingly, the possibility of sale of goods in transit appears to be a central relevant consideration. However, the documentary security afforded by negotiable bills of lading also continues to be regarded as an important factor, in particular in relation to trade with developing countries and where payment is by letter of credit. This emphasis on documentary security among respondents to the questionnaire does not seem to accord with recommendations made at the international level by UN/CEFACT<sup>41</sup>, urging commercial parties to adapt their practice and to avoid using negotiable bills of lading unless sale of goods in transit is intended. In particular, it appears that the possibility of using non-negotiable seawaybills incorporating a "control clause", advocated in

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<sup>41</sup> *Ibid.*

UN/CEFACT Recommendation No. 12, does not appear to be widely considered to transform seawaybills into suitable substitutes for negotiable bills of lading.

## **5. Transactions where non-negotiable transport documents are used and relevant characteristics**

66. Depending on a number of factors, the use of non-negotiable transport documents, such as seawaybills, is associated with certain advantages and disadvantages. A number of questions in the questionnaire were aimed at identifying commonly held views among respondents and the degree to which these affect commercial practice. To this end, respondents were asked to indicate in respect of which transactions (trades/routes) they were regularly using, issuing or requiring non-negotiable transport documents, such as seawaybills, (Question 5) and which characteristics of these transactions made the use of non-negotiable documents advantageous or desirable (Question 6).

### *(a) Transactions where non-negotiable transport documents are mainly used/issued/required*

67. Several respondents indicate that they use non-negotiable transport documents in cases where transit times are short and the transport documents may arrive later than the carrying vessel, e.g. coastal traffic and short sea voyages. Also in connection with feeder services or where a document is issued by a connecting carrier or freight forwarder. As far as specific routes and trades are concerned, a majority of the replies suggests that non-negotiable alternatives are primarily used for trade to and from North America and the Far East<sup>42</sup>, as well as for intra-European routes and to some extent for trade between Europe and Middle East and North Africa. Some representative comments include the following:

- *"Wherever a freight forwarder/NVOCC is issuing his own house bill";*
- *"Sea waybills are normally issued to multinational companies who export or import from their affiliate companies overseas. Letters of credit are not required and the goods are not intended for sale in transit";*
- *"Regular sales between companies well known each other and suppliers of big firms";*
- *"Non-negotiable Bs/l are used mainly: as "second-tier" transport documents issued by NVOCCs to consign shipments to their overseas Agents on basis of the Lines' Bs/L (the latter usually being negotiable); in the trade between overseas Multinationals and their local affiliates and/or traditional Suppliers";*
- *"Short sea trades because of the transit times; inter-company shipments; ongoing business between one shipper and one receiver";*
- *"There are a few customers that prefer to work with seawaybills in order to make their transaction more expeditable";*
- *"Ultimately more user (seller/buyer) specific than necessarily trade/route specific, but some geographical corridors such as Europe/N. America has a relatively higher WB usage than others";*
- *"Only used for connecting carrier transactions where an original has already been issued by the first carrier, non-negotiable becomes an accounting document".*

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<sup>42</sup> See also the Bolero Project document *The Bolero Service , Business Requirements Specification 1.0*, 1997, Figure A2, showing 1995 data by the ICS on the use of transport documents across international trade routes. The main trade routes for the use of non-negotiable documents identified there include Europe/North America, Intra European Routes and, to a lesser extent, Europe to South Africa and Australia/New Zealand as well as North America/Far East.

*(b) Characteristics of transactions making use of non-negotiable transport documents desirable/advantageous*

68. As regards the characteristics of transactions making the use of non-negotiable transport documents desirable, responses clearly suggest that the primary factor is the absence of a need for a document of title. Thus, respondents indicate that seawaybills are used in cases where sale of goods in transit is not intended, where no letter of credit is in place or where the parties' relationship is close and documentary security is not required.

69. Some respondents also highlight as a specific advantage of the use of non-negotiable transport documents that goods are released without production of the document. Accordingly, it is said, procedures associated with the discharge and delivery of the cargo are simple, speedy and cost-efficient, in particular as the issue of delayed arrival of documents does not arise.

70. Relevant representative comments include the following:

- *"Goods are not to be paid on L/C";*
- *"Negotiable document not required as parties typically trade on open invoice basis";*
- *"When business partners trust each other for a long time (financially), when the consignee is a branch of the exporting company or when the purchased goods have been prepaid";*
- *"Where payment is not an issue the short transit times eliminate the need to forward original documentation enabling the consignee to pick up his consignments prior to demurrage accruing on his shipments";*
- *"[Where] there exist established trade relationships and conditions of trust and assurance";*
- *"[Where] (a) the form of payment is not a [...] documentary L/C and no bank pre-financing of trade deals is involved; (b) goods are intended for a declared consignee (usually the Buyer himself), therefore there is no need to re-sell goods en-route and/or to disguise the chain suppliers-buyer-consignee; (c) fast release of goods to a named consignee is required and possible;*
- *"Short sea leg - cumbersome and lengthy dispatch of documents";*
- *"Short seetime; credit worthiness of the consignor and consignee; known buyer before shipment";*
- *"Trust (between trading partners) combined with underlying supply agreements; inter/intra-company sales; open account trading; on-sales not relevant";*
- *"Short transit; shipment to distribution centers; inter-office stock transfer; agent to agent shipments";*
- *"On short sea trades, where time spent with cargo on board is less than time spent to issue documentation and mail it";*
- *"The issuance of seawaybills is advantageous to save [...] costs";*
- *"Simplification of cargo delivery procedure";*
- *"Avoid delay in cargo delivery at destination port and one less step for clearance of cargoes";*
- *"Reducing costs: both documentation & potential demurrage & quay rent";*
- *"Saves time and money on couriers. Decreases the risk of handling original documents";*
- *"Speed of delivery after customs clearance";*
- *"Convenience-Flexibility-Cost savings at destination";*



- *"There is no doubt about identification of consignee".*

71. Overall, the responses suggest that commercial parties are very much aware of the respective advantages and disadvantages associated with non-negotiable transport documents. In particular, responses indicate that non-negotiable transport documents, such as seawaybills, are typically used when no document of title is needed, i.e. when documentary security and constructive possession of the goods are not required by the parties involved in a transaction because the business partners are known to each other or are part of the same organization and where sale of goods in transit is not envisaged.

## 6. Reasons why non-negotiable transport documents may not be used

72. Respondents were also asked to indicate the reasons why they were not using, issuing or requiring a non-negotiable transport document. The main reasons indicated by respondents are reflected, in descending order, in Table 5.

**Table 5.** Answer Summary (Q. 7)

<b>Reasons for <u>not</u> using /issuing/requiring non-negotiable documents (more than one answer possible)</b>	<b>Responses (% of respondents)</b>
Banking requirements make use inappropriate	31
Inadequate security	28
Government requirements make use inappropriate	17
Prohibited by law	15
Other documents required by law	15
Non-negotiable character of document	14
Lack of interest/knowledge	9
Otherwise not suitable or advantageous	4

73. Some relevant further comments include the following:

- *"Bills of lading are frequently requested when non-negotiable documents or electronic messages would meet the contract requirements, often due to the lack of knowledge of the parties";*
- *"The continued use is governed by the need for an international familiar negotiable document of title. The Bill of lading meets this requirement because it is issued subject to International Convention; the format is clear and familiar; its use is supported by a very strong body of case and statute law in most maritime trading countries; it therefore provides for certainty in contracts for carriage of goods by sea";*
- *"We basically follow our Principals' instructions. Very few shipping lines use non-negotiable transport documents. Besides, our customs regulations do require the presentation of 2 printed transport documents";*
- *"We do not have any objection in principle, to non-negotiable sea waybills, however, we have concerns about sea waybills that contain a "control" clause allowing the shipper to retain the right to amend instructions regarding the consignee of the goods until he has been paid and that therefore require a bank authorized to take up documents under a documentary credit to notify the carrier upon the bank fulfilling its obligations under the said documentary credit".*

74. Not surprisingly, the responses suggest that in particular banking requirements and security considerations may make the use of non-negotiable inappropriate. However, it is interesting to note that a considerable number of respondents also indicate that legal and regulatory requirements may prevent more widespread use of non-negotiable transport documents in circumstances where a document of title is not required by commercial parties. Several respondents also suggest that lack of interest and/or knowledge may be a factor preventing more extensive use of non-negotiable alternatives in international commercial practice.

## **II. Electronic alternatives**

75. Given that the use of electronic alternatives to traditional transport documents (e-alternatives) may, potentially, offer considerable advantages, the questionnaire posed a number of questions aimed at identifying (a) the status quo regarding the use of electronic alternatives and of electronic means of communication (Questions 8 and 10) and (b) respondents' views and perceptions, both on the main benefits of and the main obstacles to a successful transition to an electronic environment (Questions 9, 11, 12).

### **7. Use of e-alternatives to traditional transport documents**

76. Respondents were asked to indicate the extent to which they employ electronic means of communications in their trading relations. Moreover, respondents were asked whether they currently use or consider the use of e-alternatives to traditional transport documents.

77. Not surprisingly, all respondents currently use electronic means of communication, in particular e-mail, for "*quicker response times*". Virtually all respondents use EDI, for instance for the transmission of vessel manifests and bill of lading data (remote printing of bills of lading). One respondent states: "*electronic communication by e-mail, and electronic data transfer is almost universal in [the] shipping business*". Respondents also refer to Internet based tracking and tracing systems and customs clearing programs. Of course, all respondents also continue to use more traditional means of communication, such as fax, telephone or telex.

78. Despite the generally widespread use of electronic means of communications, electronic alternatives to traditional transport documents do not currently appear to play a significant role in commercial practice. Only a minority of respondents indicate that they currently use any e-alternatives (22%) or are actively considering the use of e-alternatives (32%). Some relevant comments are reproduced here:

- "*Necessary legal cover is not available to issue/accept electronic alternatives to traditional transport documents*";
- "*[In] developing electronic bills of lading, [the] biggest difficulty is banking industry acceptance of electronic signature for letter of credit transactions*";
- "*Our volumes are not large enough to justify any investments for the present*";
- "*Our customers are mainly in under-developed/developing countries. Hence Bolero or similar unlikely to be practical at present*";
- "*The existing electronic systems such as Bolero are developing well and can meet most of the requirements of the major traders and carriers. The biggest single disadvantage is the need for all the parties in the chain to be "members" of the network. This is vital for security, both financial and commercial, but is disadvantageous to the smaller user*";

- *Actually, our company is using the automatic manifest transfer";*
- *"Not pursuing electronic transport documents at this time, except for the transmission of manifests and BLs to agents for customs and for customer notification of arrivals";*
- *"We are members of Bolero and have looked at this system, however at present there is little interest".*

## 8. Obstacles to the use of e-alternatives

79. Following this initial snapshot of the status quo regarding the use of e-alternatives, respondents were asked to indicate which factors they considered as obstacles to the use of e-alternatives. The main factors identified by respondents are reflected, in descending order, in Table 6.

**Table 6:** Answer Summary (Q. 9)

<b>Obstacles to the use of electronic alternatives</b> (more than one answer possible)	<b>Responses</b> (% of respondents)
Infrastructure/market/trading partners not yet ready	51
Legal framework is not clear enough or is not adequate	44
Electronic equivalents are not sufficiently secure	25
Technology and/or switch to electronic environment is too costly	12
Confidentiality concerns	10
Other reasons	2

80. Some representative further comments are reproduced here:

- *"The visions exist but the road is blocked with various obstacles (generally perceived) such as market not being ready, legal framework inadequate/non-existent, costly investments, general lack of resources a/o mistrust a/o "the glue of tradition/convention = the known", banking community as crucial player in promoting e-solutions is not showing any proactive stance generally (take e-UCP as example), who should be first runner!";*
- *"Lack of genuine market demand in respect of the use of electronic documents";*
- *"Port authorities and customs do not have the infrastructure and systems to cope with electronic data";*
- *"Lack of knowledge of this technology";*
- *"Until there is an easily accessible secure public electronic infrastructure in place we cannot see how electronic transport documents could be regularly used in documentary credit transactions";*
- *"The legal framework has been addressed in most of the key places although there are many jurisdictions where there is uncertainty if not actual barriers. Electronic means cannot catch up with 200 or more years of bill of lading precedence that quickly. Where there are concerns about confidentiality and security these are often the result of a lack of appreciation or information regarding the state of the art. There are still cost implications and concerns regarding membership and handling fees. The costs of using bills of lading are low and transparent".*

81. While most respondents believe that infrastructure, market and/or trading partners are not yet ready for the use of e-alternatives, the answers also suggest that the lack of a sufficiently clear and adequate legal framework is perceived as a main obstacle to the substitution of transport documents with electronic alternatives. A significant, albeit smaller proportion of respondents also believe that electronic equivalents are not sufficiently secure. In contrast, adverse cost implications or confidentiality concerns appear to be perceived as much less of an issue.

**9. Main benefits of transition to e-alternatives**

82. Respondents were asked to indicate the potentially main benefits of substituting traditional paper documents with electronic equivalents (see Table 7).

**Table 7.** Answer Summary (Q. 11)

Main potential benefits of electronic equivalents to transport documents (more than one answer possible)	Responses (% of respondents)
Speed	84
Cost	68
Avoiding liability arising from late arrival of documents	56
Competitiveness	43
Other	6

83. As may have been expected, most respondents consider increased speed as a main advantage. The use of electronic alternatives, it is said, would be "*much more convenient*", "*minimize delays in the delivery of the cargo*" and "*allow document examination to be automated*". A clear majority of respondents also consider that using electronic alternatives would reduce costs and many believe that the use of electronic equivalents would offer competitive advantages. Examples referred to by respondents include potential cost savings in relation to demurrage and container-hire through the avoidance of delays at ports of discharge as well as quicker turn-over and thus more efficient use of containers.

84. Other potential benefits referred to by respondents in their comments include: "*efficiency, accuracy, security*"; "*ease of use and expedience; security enhancements; data and document reusability; saving paper; increasing visibility in supply chain; reducing / eliminating errors; improving supply chain by means of improved / faster documents processing; driving [down] costs; avoiding redundant and/or overlapping work and processes*".

85. Interestingly, a large number of respondents see as a main benefit of e-alternatives that their use may avoid liability arising from delayed arrival of documents at destination. This suggests that problems currently associated with the use of negotiable transport documents in the context of short sea-voyages are of considerable concern. However, a word of caution is raised by one respondent who states: "*While there certainly will be some speed and costs advantages, it is possible that the late arrival of documents will not be overcome. The main area of delay for documents is the time spent checking and processing information during negotiation through banking and trading houses. The extent to which this can be improved is to be seen.*"

86. Several respondents believe that using electronic alternatives would help create a more secure trading environment, as it would be *"easier to track the movements of goods"*, avoid *"human error"* and *"prevent fraud"*. Also, it is said, the possibility of physical loss of documents would no longer arise. Others, however are more cautious as to the benefits of e-alternatives. One respondent *"would not recommend electronic equivalents so as to avoid fraud"* and another respondent states: *"To improve the confidence of parties handling the transport documents especially with regard to banks, who pay/negotiate substantial value against such transport documents, the electronic substitute must ensure genuineness and originality of the documents. The chances of forgery [must] be brought down to zero"*.

#### **10. Perceived ease of transition to e-environment for different types of transport documents**

87. Finally, respondents were asked to give their opinion on whether the transition to an electronic environment would be easier for non-negotiable documents than for negotiable transport documents (Question 12).

88. Of those providing an answer (90%), the great majority (85%) believe that the transition would indeed be easier for non-negotiable documents. As one respondent points out: *"for non-negotiable [documents], it's as simple as attaching scanned copies to an e-mail"*.

89. Other comments provided by respondents include the following:

- *"As long as transport documents represent the title over the goods, security in the E-space must go a long way before banks and buyers will accept an electronic message instead of an original paper document. Presently the World-Wide Web does not present a secure media – which is illustrated by the fact that international electronic bank transactions continue to use specifically secured intra-nets. Generally, such media seems to be too costly and complicated for the common freight forwarder, excluding the multinationals";*
- *"No doubt, the actual legal framework, in most of the countries, is not clear enough for electronic transactions and also the concerns about confidentiality, make easier any transition to an electronic environment for non-negotiable documents";*
- *"If banks changed their views within L/Cs and P/I Clubs viewed Electronic in the same way as paper, there may be a move forward";*
- *"A lot more issues would need to be addressed for negotiable transport documents such as legitimacy, title registry, etc"*.

## **E. SUMMARY AND DISCUSSION OF RESPONSES**

### **1. Current rate and pattern of use of different types of transport documents**

90. The great majority of respondents use negotiable bills of lading to a greater or lesser extent, with more than two thirds of relevant respondents stating that they mainly or exclusively use negotiable bills of lading. Just over half of all respondents also use non-negotiable seawaybills, but answers suggest that the rate of use of seawaybills is limited, with less than one quarter of relevant respondents stating that they mainly or exclusively use seawaybills. As regards multimodal/combined transport documents, responses suggest that these types of documents are quite commonly used in place of negotiable bills of lading or non-negotiable seawaybills.

91. The usage rates emerging from responses to the questionnaire are only approximate and thus only serve to indicate certain trends. However, the results confirm that (a) multimodal/combined transport documents are increasingly being used and (b) in the majority of transactions negotiable rather than non-negotiable documents are being used.

### **2. Main factors affecting the choice of document**

92. Respondents were asked to indicate main reasons for their use of negotiable transport documents and, where possible, to provide an estimate of the proportion of documents actually negotiated. Moreover, they were asked to express their views on the continued need for negotiable bills of lading in international trade.

93. As concerns the reasons indicated by respondents for their use of negotiable transport documents, banking and finance requirements clearly appear to be a main factor, with sale of goods in transit playing an important, albeit considerably less prominent role. In this context, it is interesting to note that the estimates provided by respondents of actual negotiation rates of negotiable documents used vary widely, suggesting that negotiable transport documents may often be used in cases where sale of goods in transit is not envisaged. The responses also indicate that the application of mandatory transport legislation, such as the Hague-Visby Rules, is a relevant consideration in opting for the use of negotiable transport documents and that in many cases negotiable documents are used at the request of the party with an interest in the cargo (seller/buyer/shipper/consignee). Interestingly, the responses also suggest that negotiable documents may often be used as a matter of course, i.e. as a matter of standard practice or "to be on the safe" side. It is particularly in this context, where there may be no substantive reasons for the use of a negotiable transport document, that the use of non-negotiable alternatives would appear to be more appropriate.

94. As regards views on the continued need for the use of negotiable transport documents in international trade, the responses suggest that the document of title function of the negotiable bill of lading remains an important consideration. Not surprisingly, the possibility of sale of goods in transit is a factor frequently mentioned in this context. However, the documentary security afforded by negotiable bills of lading also continues to be regarded as an important aspect, in particular in relation to trade with developing countries and where payment is by letter of credit.

95. This emphasis on documentary security as emerging from responses to the questionnaire does not seem to accord with recommendations made at the international level by UN/CEFACT, urging commercial parties to adapt their practices and to avoid using negotiable bills of lading

unless sale of goods in transit is a distinct possibility. It is not clear whether this reflects a genuine disagreement of respondents with the UN/CEFACT recommendation or whether it is a reflection of "erroneous commercial and administrative thinking", as criticized in the relevant UN/CEFACT Recommendation No. 12<sup>43</sup>. However, it appears that - among respondents to the questionnaire - the possibility of using non-negotiable seawaybills incorporating "control" clauses (limiting the shipper's right to substitute the name of the consignee) as advocated in UN/CEFACT Recommendation 12, is not widely considered to offer an appropriate alternative to the use of negotiable bills of lading.

96. A number of questions in the questionnaire were aimed at identifying the types and characteristics of transactions in connection with which non-negotiable transport documents, such as seawaybills, are currently being used.

97. Responses indicate that non-negotiable documents may be used where transit times are short and the transport documents may arrive later than the carrying vessel (e.g. in coastal traffic and short sea voyages) as well as in connection with feeder services or connecting carriage. In terms of specific trades/routes, responses indicate that non-negotiable alternatives are primarily used for trade to and from North America and the Far East, as well as for intra- European traffic. As regards the characteristics making the use of non-negotiable transport documents desirable or advantageous, responses clearly suggest that a primary factor is the absence of a need for a document of title and independent documentary security. Thus respondents indicate that seawaybills are used where sale of goods in transit is not envisaged, but also in cases where no letter of credit is in place and/or where the parties' relationship is close. In considering responses to the question of reasons/factors, which make the use of non-negotiable documents inappropriate, it is interesting to note that, once again, banking requirements and security concerns appear to be key factors. Responses also suggest that legal and regulatory requirements may prevent more widespread use of non-negotiable transport documents in cases where the parties themselves do not require a document of title. Thus, as part of an initiative aimed at encouraging increased use of seawaybills by commercial parties at the international level, governments may, *inter alia*, consider reviewing any relevant existing regulatory and legislative requirements.

98. Overall, the responses suggest that commercial parties are very much aware of the respective advantages and disadvantages associated with the use of non-negotiable transport documents. However, it is interesting to note that the use of "control" clauses is not mentioned as a way of making the use of seawaybills in place of negotiable bills of lading more appropriate. It may be that the creation of relevant supportive legislation, preferably at the international level, and further efforts at refining contractual "control mechanisms" are required, before parties who require a certain degree of security will more readily consider the use of non-negotiable seawaybills as alternatives to bills of lading. In this context it should be noted that recent English case law, clarifying the legal position with respect to "straight" bills of lading<sup>44</sup>, may lead to an increase in the use of non-negotiable bills of lading.

### **3. Use of electronic alternatives: status quo and views on main obstacles and benefits relevant to electronic alternatives**

99. Given that the use of electronic alternatives to traditional transport documents may, potentially, offer considerable advantages, the questionnaire posed a number of questions aimed

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<sup>43</sup> UN/CEFACT Recommendation No. 12 (para.35), see fn. 1, above.

<sup>44</sup> See paras. 23-24, above.

at identifying (a) the status quo regarding the use of electronic alternatives and of electronic means of communication and (b) respondents' views and perceptions, both on the main benefits of and the main obstacles to a successful transition to an electronic environment.

100. Despite the generally widespread use of electronic means of communication, including the use of EDI, e.g. for transmission of vessel manifests and bill of lading data (remote printing of bills of lading), electronic alternatives to traditional transport documents do not currently appear to play a significant role in commercial practice. Currently, only a minority of respondents indicate that they use or are actively considering the use of electronic alternatives. While most respondents believe that infrastructure, market and/or trading partners are not yet ready for the use of e-alternatives, the responses also suggest that the lack of a sufficiently clear and adequate legal framework is considered a main obstacle to the substitution of transport documents with electronic alternatives. A significant proportion of respondents also believe that electronic equivalents are not sufficiently secure. In contrast, adverse cost implications or confidentiality concerns appear to be perceived as much less of an issue.

101. As regards views on the main benefits of substituting transport documents with electronic alternatives, most respondents consider increased speed and reduced costs main advantages. A majority of respondents also consider it of importance that the use of electronic alternatives may help avoid liability arising from delayed arrival of documents at destination. This suggests that problems, currently associated with the use of negotiable transport documents, in particular in the context of short sea voyages, are of considerable concern to commercial parties. While several respondents believe that electronic alternatives would help create a more secure trading environment, others are more cautious and emphasize the need for mechanisms, which ensure the security of electronic transactions. The great majority of respondents consider that the transition to an electronic environment is easier for non-negotiable transport documents than for negotiable transport documents. This suggests that there is broad recognition of the fact that the document of title aspect of negotiable transport documents continues to present a major challenge in the effort to encourage the use of electronic alternatives.

#### **4. Final remarks**

102. Negotiable transport documents facilitate the sale of goods in transit along a chain of contracts and provide documentary security to parties involved in a commercial transaction. As such, they clearly play a key role in the conduct of international trade. By the same token, however, their use is increasingly associated with certain problems. Moreover, the successful transition to an electronic environment, which would potentially provide a number of considerable benefits, is made more difficult for negotiable transport documents by the need for (a) secure "electronic replication" of the unique document of title function and (b) full legal equivalency of any electronic alternatives. Against this background, there is general agreement that negotiable transport documents should only be used in cases where a negotiable document of title is required. In fact, commercial parties have been encouraged to use non-negotiable alternatives in all cases where sale of goods in transit is not envisaged.

103. The results of the survey confirm that in current commercial practice negotiable bills of lading are, nevertheless, frequently used even where sale of goods in transit is not envisaged. While respondents appear in general to be aware of the relative advantages and disadvantages associated with the use of negotiable and non-negotiable transport documents, it seems that negotiable bills of lading may sometimes be used as a matter of standard practice, without there



being a need for the use of a document of title. This is clearly an area where commercial parties should consider reviewing their practice.

104. However, responses to the questionnaire also suggest that considerable emphasis is placed on the documentary security afforded by the use of negotiable transport documents. Thus, negotiable bills of lading may often be used where sale of goods in transit is not intended, but where the parties require a document title which provides its holder with constructive possession of the goods, i.e. with independent documentary security. In this context, it does not seem that seawaybills, which include a contractual "control" clause, are as yet widely regarded as genuine alternatives. In order to encourage the increased use of seawaybills in cases where sale of goods in transit is not intended, it appears that further efforts are needed to refine contractual "control" mechanisms relevant to seawaybills and to create appropriate supportive legislation. Moreover, governments may need to consider reviewing any existing legal and regulatory requirements, which currently necessitate the use of negotiable transport documents even in cases where the commercial parties may not require a document of title.

105. In this context, attention should also be drawn to the fact that a number of major container lines now issue "negotiable" transport documents where, according to the terms of the document itself, surrender of the document is no longer required, but shall be at the carrier's option. Clearly, the aim of this type of provision is for liner companies to avoid as far as is possible any adverse effects which may arise from delayed arrival of the documents at destination. However, the approach taken gives rise to concern and is likely to lead to much litigation. Whether courts will give effect to clauses of this type is far from clear, in particular as they are highly unusual, effectively seeking to convert a document, made out to order and bearing the title "negotiable" into a non-negotiable document. Nevertheless, shippers and consignees who require a negotiable document of title, for the purposes of an international sale contract or a letter of credit, should take care to request a genuine negotiable document of title from the carrier and to carefully read the provisions of the document.

106. Finally, as regards the successful transition to an electronic environment, the results of the survey confirm that electronic alternatives are not yet in widespread use. In this context, it is worth noting that one of the major obstacles identified by respondents is the fact that the legal framework is not sufficiently clear or is otherwise inadequate. Therefore, efforts at the international level towards the creation of an appropriate enabling legal framework should be pursued as a matter of priority and with some urgency.

**Table A.1: BREAKDOWN OF RESPONSES TO UNCTAD QUESTIONNAIRE ON TRANSPORT DOCUMENTS IN INTERNATIONAL TRADE**  
(N.B. Where indicated (\*), percentages relate to the overall number of answers (=100%) received in respect of a question)

<p><b>1. Which transport documents do you mainly use/issue/require?</b></p> <ul style="list-style-type: none"> <li>- negotiable bill of lading</li> <li>- non-negotiable seawaybill</li> <li>- multimodal/combined transport document <ul style="list-style-type: none"> <li>negotiable</li> <li>non-negotiable</li> </ul> </li> <li>- other</li> </ul>	<p>88%</p> <p>51%</p> <p>53%</p> <p>37%</p> <p>27%</p> <p>20%</p>									
<p><b>2. Please indicate the reasons why you may use/issue/require a negotiable document. (More than one answer possible)</b></p> <ul style="list-style-type: none"> <li>- document is required as security under a letter of credit (or other finance requirement)</li> <li>- goods covered by the document are intended for sale during transit</li> <li>- document ensures application of rules of mandatory transport legislation</li> <li>- no particular reason / standard practice</li> <li>- requested / suggested by trading party</li> <li>- to be on the safe side</li> <li>- other</li> </ul>	<p>75%</p> <p>25%</p> <p>31%</p> <p>20%</p> <p>35%</p> <p>14%</p> <p>5%</p>									
<p><b>3. * If possible, please provide an estimate of the percentage of negotiable transport documents, which are in fact negotiated to at least one other party. (More than one answer possible)</b></p> <p>None</p> <p>1 % - 19 %</p> <p>20 % - 49 %</p> <p>50 % - 79 %</p> <p>80 % - 99 %</p> <p>100 %</p>	<p>% of answers</p> <p>8%</p> <p>27%</p> <p>17%</p> <p>16%</p> <p>22%</p> <p>10%</p>									
<p><b>4. To what extent is, in your view, the use of a negotiable bill of lading still required in modern international trade?</b></p>	<p>N/A</p>									
<p><b>5. Please indicate in respect of which transactions (e.g. trades and/or routes) you regularly use/issue/require non-negotiable transport documents, such as seawaybills?</b></p>	<p>N/A</p>									
<p><b>6. Which characteristics of these transactions make the use of non-negotiable transport documents desirable or advantageous?</b></p>	<p>N/A</p>									
<p><b>7. If you do not use/issue/require non-negotiable transport documents, please indicate why, by marking one or more choices:</b></p> <ul style="list-style-type: none"> <li>- prohibited by law</li> <li>- other documents required by law</li> <li>- government requirements make use inappropriate</li> <li>- banking requirements make use inappropriate</li> <li>- non-negotiable character of document</li> <li>- inadequate security</li> <li>- lack of interest/knowledge</li> <li>- otherwise not suitable or advantageous</li> </ul>	<p>15%</p> <p>15%</p> <p>17%</p> <p>31%</p> <p>14%</p> <p>28%</p> <p>9%</p> <p>4%</p>									
<p><b>8. Do you currently:</b></p> <p>(a) use any electronic alternative to traditional transport documents?</p> <p>(b) consider the use of electronic alternatives to traditional transport documents or are you investing or taking other measures in this respect?</p>	<table border="1"> <thead> <tr> <th></th> <th>Yes</th> <th>No</th> </tr> </thead> <tbody> <tr> <td>(a) use any electronic alternative to traditional transport documents?</td> <td>22%</td> <td>79%</td> </tr> <tr> <td>(b) consider the use of electronic alternatives to traditional transport documents or are you investing or taking other measures in this respect?</td> <td>32%</td> <td>68%</td> </tr> </tbody> </table>		Yes	No	(a) use any electronic alternative to traditional transport documents?	22%	79%	(b) consider the use of electronic alternatives to traditional transport documents or are you investing or taking other measures in this respect?	32%	68%
	Yes	No								
(a) use any electronic alternative to traditional transport documents?	22%	79%								
(b) consider the use of electronic alternatives to traditional transport documents or are you investing or taking other measures in this respect?	32%	68%								

<p>9. If your answer to question 8 is no, please indicate if you consider one or more of the following as obstacles.</p> <ul style="list-style-type: none"> <li>- infrastructure/market/trading partners not yet ready for use of electronic alternatives</li> <li>- legal framework is not clear enough or is not adequate</li> <li>- technology and/or switch to electronic environment is too costly</li> <li>- electronic equivalents to transport documents are not sufficiently secure</li> <li>- concerns about confidentiality</li> <li>- other</li> </ul>	<p>51%</p> <p>44%</p> <p>12%</p> <p>25%</p> <p>10%</p> <p>2%</p>		
<p>10. Do you currently use any electronic means of communication in your trading relations? If so, to what extent and for which purpose?</p>	<p>N/A</p>		
<p>11. What in your view are potentially the main benefits of substituting traditional paper transport documents with electronic equivalents?</p> <ul style="list-style-type: none"> <li>- speed</li> <li>- cost</li> <li>- competitiveness</li> <li>- avoiding liability arising from late arrival of documents</li> <li>- other</li> </ul>	<p>84%</p> <p>68%</p> <p>43%</p> <p>56%</p> <p>6%</p>		
<p>12. * Do you believe that the transition to an electronic environment is easier for non-negotiable than for negotiable transport documents?</p>	<p>Yes</p> <p>85%</p>	<p>No</p> <p>15%</p>	
<p>13. * What are the features of a negotiable transport document? (under the law of your country and/or under the law typically chosen to govern the transaction)</p> <ul style="list-style-type: none"> <li>- document is made out "to order"</li> <li>- document is made out to "named consignee or order"</li> <li>- document is made out to "bearer" or no party is indicated in consignee box</li> <li>- document contains a statement that goods will be delivered against surrender of the document.</li> <li>- document is <u>not</u> marked "nonnegotiable" or "not negotiable"</li> <li>- document <u>is</u> marked "negotiable"</li> <li>- title of the document</li> <li>- other</li> </ul>	<p>% of answers</p> <p>18%</p> <p>22%</p> <p>7%</p> <p>13%</p> <p>10%</p> <p>14%</p> <p>15%</p> <p>1%</p>		
<p>14. * What are the effects of using a negotiable transport document? (under the law of your country and/or under the law typically chosen to govern the transaction)</p> <ul style="list-style-type: none"> <li>- the right to demand delivery of the goods from the carrier may be transferred by endorsement and/or transfer of the document</li> <li>- the property of the goods may be transferred by endorsement and/or transfer of the document</li> <li>- only the lawful holder of the document is entitled to demand delivery of the goods from the carrier. The document provides security.</li> <li>- the goods may be sold in transit and endorsement and/or transfer of the document to another party has the same effect as physical delivery of the goods</li> <li>- the carrier is only entitled to release the goods against surrender of the document</li> <li>- other</li> </ul>	<p>% of answers</p> <p>22%</p> <p>19%</p> <p>22%</p> <p>16%</p> <p>20%</p> <p>1%</p>		
<p>15. * Is there a clear difference between a seawaybill and a so-called "straight" bill of lading?</p> <p>(a) under the law of your country.</p> <p>(b) under the law typically chosen to govern the transaction, if different.</p>	<p>Yes</p> <p>51%</p> <p>19%</p>	<p>No</p> <p>20%</p> <p>19%</p>	<p>Don't know</p> <p>29%</p> <p>62%</p>
<p>16. * In your view, should there be a difference in the evidentiary effect of statements regarding the goods (e.g. weight, quantity, container contents) in a non-negotiable as opposed to a negotiable transport document?</p>	<p>Yes</p> <p>7%</p>	<p>No</p> <p>93%</p>	

## ANNEX II

### Questionnaire

on

### Transport Documents in International Trade

Please indicate which of the following most accurately describes your organization or the part of your organization that you represent.

- |                                       |                          |                   |                          |
|---------------------------------------|--------------------------|-------------------|--------------------------|
| Transport provider                    | <input type="checkbox"/> | Transport User    | <input type="checkbox"/> |
| Intermediary (agent/broker/forwarder) | <input type="checkbox"/> | Bank              | <input type="checkbox"/> |
| Legal adviser                         | <input type="checkbox"/> | Liability Insurer | <input type="checkbox"/> |
| Cargo Insurer                         | <input type="checkbox"/> | Other             | <input type="checkbox"/> |

Please answer Parts I, II and III as appropriate.

#### ***Part I. Use of Transport Documents***

1. Which transport documents do you mainly use/issue/require? If possible, please also indicate approximate percentage.

- |  |                          |        |
|--|--------------------------|--------|
| - negotiable bill of lading              | <input type="checkbox"/> | .....% |
| - non-negotiable seawaybill              | <input type="checkbox"/> | .....% |
| - multimodal/combined transport document | <input type="checkbox"/> | .....% |
| - negotiable                             | <input type="checkbox"/> | .....% |
| - non-negotiable                         | <input type="checkbox"/> | .....% |
| - other                                  | <input type="checkbox"/> | .....% |

2. Please indicate the reasons why you may use/issue/require a negotiable document. If you do not use negotiable documents, please go to question 4:

- |  |                          |
|--|--------------------------|
| - document is required as security under a letter of credit (or other finance requirement) | <input type="checkbox"/> |
| - goods covered by the document are intended for sale during transit                       | <input type="checkbox"/> |
| - document ensures application of rules of mandatory transport legislation                 | <input type="checkbox"/> |

- no particular reason / standard practice
- Requested / suggested by trading party.  
Please indicate by which party: .....
- To be on the safe side
- Other. Please explain:

.....  
 .....  
 .....  
 .....

3. If possible, please provide an estimate of the percentage of negotiable transport documents, which are in fact negotiated to at least one other party.

..... %

4. To what extent is, in your view, the use of a negotiable bill of lading still required in modern international trade?

.....  
 .....  
 .....

5. Please indicate in respect of which transactions (e.g. trades and/or routes) you regularly use/issue/require non-negotiable transport documents, such as seawaybills? If you do not use non-negotiable documents, please go to question 7.

.....  
 .....  
 .....

6. Which characteristics of these transactions make the use of non-negotiable transport documents desirable or advantageous?

.....  
 .....  
 .....

7. If you do not use/issue/require non-negotiable transport documents, please indicate why, by marking one or more choices:

- prohibited by law
- other documents required by law
- government requirements make use inappropriate
- banking requirements make use inappropriate
- non-negotiable character of document
- inadequate security
- lack of interest/knowledge
- otherwise not suitable or advantageous. Please explain:

**Part II. Electronic alternatives**

8. Do you currently:

- (a) use any electronic alternatives to traditional transport documents?
- (b) consider the use of electronic alternatives to traditional transport documents or are you investing or taking other measures in this respect?

Further comments, if any:

.....  
.....  
.....  
.....  
.....

9. If your answer to question 8 is no, please indicate if you consider one or more of the following as obstacles:

- infrastructure/market/trading partners not yet ready for use of electronic alternatives
- legal framework is not clear enough or is not adequate
- technology and/or switch to electronic environment is too costly
- electronic equivalents to transport documents are not sufficiently secure

- concerns about confidentiality
- other. Please explain:

.....  
 .....  
 .....

10. Do you currently use any electronic means of communication in your trading relations? If so, to what extent and for which purpose?

.....  
 .....  
 .....

11. What in your view are potentially the main benefits of substituting traditional paper transport documents with electronic equivalents? Please indicate one or more choices.

- speed
- cost
- competitiveness
- avoiding liability arising from late arrival of documents
- other.

.....  
 .....  
 .....

12. Do you believe that the transition to an electronic environment is easier for non-negotiable than for negotiable transport documents?

**Yes**  **No**

Further comments, if any:

.....  
 .....  
 .....

**Part III. Legal aspects**

13. What are the features of a negotiable transport document? Please indicate one or more:

- (a) under the law of your country (.....). Please mark **BOX A**.
- (b) under the law typically chosen to govern the transaction, if different (.....). Please mark **BOX B**.

	A	B
- document is made out “to order”	<input type="checkbox"/>	<input type="checkbox"/>
- document is made out to “named consignee or order”	<input type="checkbox"/>	<input type="checkbox"/>
- document is made out to “bearer” or no party is indicated in consignee box	<input type="checkbox"/>	<input type="checkbox"/>
- document contains a statement that good will be delivered against surrender of the document.	<input type="checkbox"/>	<input type="checkbox"/>
- document is <u>not</u> marked “nonnegotiable” or “not negotiable”	<input type="checkbox"/>	<input type="checkbox"/>
- document is <u>is</u> marked “negotiable”	<input type="checkbox"/>	<input type="checkbox"/>
- title of the document	<input type="checkbox"/>	<input type="checkbox"/>
- other	<input type="checkbox"/>	<input type="checkbox"/>
.....		
.....		
.....		
.....		

14. What are the effects of using a negotiable transport document? Please indicate one or more:

- (a) under the law of your country (.....). Please mark **BOX A**.
- (b) under the law typically chosen to govern the transaction, if different (.....). Please mark **BOX B**.

	A	B
- the right to demand delivery of the goods from the carrier may be transferred by endorsement and/or transfer of the document	<input type="checkbox"/>	<input type="checkbox"/>
- the property of the goods may be transferred by endorsement and/or transfer of the document	<input type="checkbox"/>	<input type="checkbox"/>
- only the lawful holder of the document is entitled to demand		



delivery of the goods from the carrier. The document provides security.

- the goods may be sold in transit and endorsement and/or transfer of the document to another party has the same effect as physical delivery of the goods

- the carrier is only entitled to release the goods against surrender of the document

- other

.....  
.....  
.....  
.....

15. Is there a clear difference between a seawaybill and a so-called "straight" bill of lading?

**Yes No Don't know**

(a) *under the law of your country.*     
Please indicate country:.....

(b) *under the law typically chosen to govern the transaction, if different. Please indicate relevant law:.....*

**Yes No Don't know**

Further comments, if any:

.....  
.....  
.....  
.....

16. In your view, should there be a difference in the evidentiary effect of statements regarding the goods (e.g. weight, quantity, container contents) in a non-negotiable as opposed to a negotiable transport document?

**Yes No**

Further comments, if any:

.....  
.....  
.....  
.....

Organization / Company: .....

Contact details:

Thank you for your co-operation. Your replies will be treated confidentially.

Please return to: UNCTAD Secretariat  
Ms. Mahin Faghfour  
Chief, Legal Section, SITE  
Palais des Nations,  
CH-1211, Geneva 10