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Intergovernmental Organisation for International Carriage by Rail

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Inception paper on bill of lading (extract)

I. INTRODUCTION

1. The 2019-2021 Work Programme of the Working Group of Legal Experts includes the following item:

‘12. Bill of lading

Objective and scope of work. [to be decided].

Activities: [to be decided].

Priority: 1 (to be included on the agenda of the 4th session).’

2. The item of ‘bill of lading’ has been included in the Work Programme, taking into account the fact that the United Nations Commission on International Trade Law (UNCITRAL) and the Organisation for Cooperation between Railways (OSJD) have recently started discussions on the necessity for and regulation of a bill of lading (transport document which is a document of title) in railway transport. Both organisations invite the OTIF Secretariat to take part in their respective meetings on the subject. For the time being, OTIF has not received any proposal from OTIF members or the railway sector to consider the regulation of bills of lading.
3. Item 12 ‘Bill of lading’ of the Work Programme in part concerns ensuring ‘interfaces’ with other international instruments and, in part, assessment of the application of specific provisions of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM UR)¹. In particular, Article 6 § 5 of the CIM UR states that ‘**[t]he consignment note shall not have effect as a bill of lading**’. More importantly, other provisions on the delivery of goods, the right to dispose of goods etc. confirm that the CIM consignment note is not a document of title.
4. Item 12. ‘Bill of Lading’ is linked to a few other items of the Work Programme: item 3, ‘UNECE initiative on Unified Railway Law’, item 4, ‘Interfaces between customs and transport regulations’ and item 5, ‘The digitalisation of international transport, particularly freight transport documents’.
5. Document LAW-19052-GTEJ 2 entitled ‘Draft Decision on the monitoring and assessment of legal instruments (text as endorsed)’, Article 2 § 2 ‘Scope’, provides that ‘*[t]he OTIF organs referred to in COTIF Article 13 §§ 1 and 2 or organs established by them shall be entitled to initiate monitoring and assessment of the application of a particular legal instrument within the sphere of their competence or specific provisions thereof. The Secretary General may initiate monitoring and assessment of any legal instrument.*’
6. Article 3 § 1 ‘Planning and prioritisation’ of document LAW-19052-GTEJ 2 provides that ‘*[t]he Secretary General shall prepare an inception paper for each initiative to launch monitoring and assessment of a legal instrument.*’ This inception paper is not a comprehensive report, but presents a general overview of the issue and formulates suggestions concerning possible follow-up actions. It is structured as follows: general overview of the functions and usage of international transport documents (II), historical overview of CIM UR and bill of lading (III), recent international developments (IV), conclusions and follow-up (V).

¹ For the sake of simplicity, in this paper the abbreviation ‘CIM UR’ is used to refer to the original Convention on the carriage of goods by rail (‘Convention internationale sur le transport des marchandises par chemin de fer’) of 1890, including all subsequent modifications to it, as well as the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM UR) as an appendix to COTIF.

II. GENERAL OVERVIEW OF THE FUNCTIONS AND USAGE OF INTERNATIONAL TRANSPORT DOCUMENTS

7. Goods are transported for reward on the basis of contracts of carriage. In order to evidence the receipt of goods, transport documents have been developed. Nowadays, such documents are used for various purposes in relation to contracts of carriage, sale contracts, trade finance, insurance and administrative control proceedings (e.g. customs) etc.
8. Transport documents may be described by the following core functions:
 - 1) evidence of the receipt of goods and their condition;
 - 2) evidence of the terms of a contract of carriage;
 - 3) document of title to the goods, which provides constructive possession of goods (supplementary function).
9. A supplementary function (document of title) enables the sale of goods in transit ('documentary sales' without physical possession of goods) and trade finance (letters of credit etc.) as goods may be pledged as collateral. Moreover, goods must be delivered only to a holder of such a document of title. Documents of title may be negotiable or non-negotiable, depending on whether rights are transferable or not.
10. Based on the above three functions, transport documents may be classified into two basic types:
 - consignment notes or waybills perform the first two functions;
 - bills of lading perform all three functions.
11. Contracts of carriage and transport documents are regulated by national and international law. None of the transport modes benefit from a single universal legal framework.

A. Land transport

12. Contracts of international carriage by rail transport are regulated by:
 - The Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM UR)² and
 - The Agreement on International Railway Freight Communications (SMGS)³.
13. It should be mentioned that within the UNECE, draft 'Legal provisions of Unified Railway Law' applicable to contracts of carriage of goods have been prepared. However, the status, scope of application and adoption of the above draft are very uncertain.
14. Contracts of international carriage by road transport are regulated by:
 - The Convention on the Contract for the International Carriage of Goods by Road (CMR)⁴;

² See the list of contracting parties ([French](#), [German](#) and [English](#)).

³ See the list of contracting parties in the preamble of the Agreement (consolidated version of 1 July 2020) ([English](#)).

⁴ See the list of contracting parties ([French](#) and [English](#)).

- The OHADA Uniform act on the contract for the Carriage of goods by road⁵.
15. In accordance with the above international instruments, consignment notes are not used as documents of title. Nevertheless, with regard to the CMR it is worth noting that ‘the intention was that the consignment note might be used, like the bill of lading, as a document of title, if permitted by national law. However, this is generally considered to be superfluous in view of the relative rapidity of carriage by road.’⁶

B. Air transport

16. Contracts of international carriage by air are regulated by
- The Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention of 1999) and
 - The Warsaw System on air carriers’ liability consisting of the Convention for the Unification of certain rules relating to international carriage by air (the Warsaw Convention of 1929) and a number of modifying and supplementary treaties.
17. In accordance with the above-mentioned international instruments⁷, air consignment notes/ air waybills which are not documents of title are used.

C. Inland waterway transport

18. Contracts of international carriage by inland waterways are regulated by the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)⁸.
19. In accordance with the above Convention, bills of lading are used, which are documents of title, or other documents are used, such as consignment notes, which are documents of title as well.

D. Maritime transport

Legal basis

20. Maritime law is particularly complex as it has developed from *lex mercatoria*, various maritime usages and customs. Nowadays, contracts of carriage of goods by sea and transport documents (primarily the bill of lading) are subject to varying mandatory rules based on international conventions and national laws. To illustrate the complexity of maritime transport, it is worth referring to the work of the UNCITRAL working group on electronic data interchange (EDI), in particular:

‘[T]he specific function of the negotiable bill of lading as a document of title, although recognized throughout the world, was of uncertain legal origin in many countries, and that it seemed to be rooted in established practice more than in any rule of law. [...] [T]he legal regime of negotiable bills of lading was essentially a combination of various maritime usages and practices that had developed over a long period of time. While those various usages and practices were reflected in statutory law in certain countries and in case law in most countries, the area of maritime transport documents was characterized by a lack of uniformity in the applicable legal regimes, and practice suffered from such a lack of uniformity. As an example of the difficulties encountered in practice, it was stated that

⁵ See the list of State Members of the Organization for the harmonization of business law in Africa (OHADA) ([French](#) and [English](#)).

⁶ M. A. Clarke. *International Carriage of Goods by Road: CMR*. Informa Law from Routledge. 6th Edition, 2014, p. 22.

⁷ See list of parties to the conventions ([French](#) and [English](#)).

⁸ See list of parties to the conventions ([French](#) and [German](#)).

conflicts might arise as to which party had the right to stop the goods during transit. The carrier might be faced with conflicting court orders from two different countries, based on differing interpretations as to which party held the right of control and the title to the goods. It was noted that there existed no international convention dealing with the rights and obligations of the various parties involved [...]’⁹

21. There are several international regimes regulating the carriage of goods by sea:
 - The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (‘Hague Rules’) of 1924.¹⁰ The Hague Rules apply only to contracts of carriage covered by a bill of lading or any similar document of title;
 - The Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (a consolidated version known as the ‘Hague-Visby Rules’) of 1968¹¹. It was modified by the Protocol (SDR Protocol) amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 (The Hague Rules), as amended by the Protocol of 23 February 1968 (Visby Rules).¹² The Hague-Visby Rules apply only to contracts of carriage covered by a bill of lading or any similar document of title;
 - The United Nations Convention on the Carriage of Goods by Sea (the ‘Hamburg Rules’) of 1978 (entered into force in 1992).¹³ The Hamburg Rules apply to contracts of carriage covered by bills of lading (document of title) or other transport documents (which are not documents of title).
22. The ‘Hague Rules’, ‘Hague-Visby Rules’ and ‘Hamburg Rules’ primarily govern liability under contracts of carriage and do not regulate the transfer of rights to the goods.
23. In 2008 the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the ‘Rotterdam Rules’, was adopted. This Convention applies to the international carriage of goods when the journey includes an international sea leg. The Rotterdam Rules contain detailed provisions on the contract of carriage as well as the transfer of rights to the goods. However, it has not yet entered into force¹⁴.

Some aspects of the usage of maritime transport documents

24. As bills of lading (documents of title) have been predominantly used in maritime transport, it is worth presenting some aspects of usage of these transport documents in maritime transport.
25. ‘There has always been some controversy about the exact meaning of terms such as “document of title”, “negotiability” and “transferability” when applied to bills of lading and some care must be taken with their use in this context. It is generally accepted that the bill of lading is negotiable in the sense that it is transferable (but not that it is negotiable instrument, such as a bill of exchange). For it to be negotiable, it must be made out “to order” or equivalent. The traditional view about the particular nature of a bill of lading was authoritatively explained by Mustill LJ in *Enichem Anic S.p.A. v. Ampelos Shipping Co Ltd (The Delfini)*. He stated that when the expression “document of title” is applied to a bill of lading:

⁹ Report of the working group on electronic data interchange (EDI) on the work of its thirtieth session ([A/CN.9/421](#)) (Vienna, 26 February-8 March 1996), point 33.

¹⁰ See the status of the Convention on [the website of the Depositary](#) (French only).

¹¹ See the status of the Convention on [the website of the Depositary](#) (French only).

¹² See the status of the Convention on [the website of the Depositary](#) (French only).

¹³ See the status of the Convention on website of the Depositary ([French](#) and [English](#)).

¹⁴ See the status of the Convention on the website of the Depositary ([French](#) and [English](#)).

“it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between shipper and shipowner, the bill of lading fulfils two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable ‘key to the warehouse’. 2. It is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed” [see [1990] 1 Lloyd’s Rep. 252, 268]¹⁵

26. ‘The bill of lading’s ability to give its holder symbolic possession of the goods to which it relates results from three factors:

(1) First, the bill of lading contains an undertaking by the carrier to deliver the goods only to its holder. The bill, therefore, gives the holder sufficient control over the goods for its holder to be given the same legal rights as a person with actual custody of the goods. It also evidences the carrier’s intention not to interfere with the presenter of the bill’s ability to obtain custody of the goods on arrival.

(2) Secondly, the transfer of the bill raises a presumption that the transferor no longer intends himself to exercise any control over the goods or to interfere with the transferee’s ability to obtain actual possession of them.

(3) Thirdly, the transfer of the bill raises the opposite presumption, that is that the transferee intends to exercise control over the goods and to exclude others from doing so.¹⁶

27. ‘Although bills of lading are documents of title, this does not mean that possession of the document gives or evidences ownership of the goods. The position [...] is complex but, in essence, the retention or transfer of a bill of lading gives rise to various presumptions as to the intention of the transferor and transferee with regard to the property in the goods.’¹⁷ ‘Although the seller’s transfer of the bill of lading might raise a presumption of an intention to pass the property in the goods, if this presumption is rebutted, as it often is (the condition of reservation being that the buyer pay the price or provide security for payment), the seller retains the property in the goods despite his having transferred bill.’¹⁸

28. ‘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.’¹⁹

¹⁵ N. Gaskell, R. Asariotis, Y. Baatz. Bills of Lading: Law and Contracts. LLP, 2000, p. 118.

¹⁶ R. Aikens, R. Lord, M. Bools. Bills of Lading. Informa Law from Routledge. 2nd Edition, 2016, p. 146.

¹⁷ Ibid., p. 151.

¹⁸ Ibid., p. 154.

¹⁹ The use of transport documents in international trade. Report by the UNCTAD Secretariat. [UNCTAD/SDTE/TLB/2003/3](#). 26 November 2003, paragraph 29.

29. ‘This practice [of ‘letters of indemnity’] strongly undermines the value of bills of lading as negotiable documents of title and the whole bill of lading system. Another serious problem is that “paper bills of lading constitute a considerable source of maritime fraud. An entire bill of lading may be counterfeited, the signature may be forged, the quantity of the goods may be altered, and the consignor may fraudulently sell the same goods two or three times to different buyers.”²⁰
30. ‘The documents, and especially the bill of lading, also play an important part in securing that the purchase price is in fact paid. Thus [...] the seller will not wish to part with possession of the goods, or even ship the goods to the buyer’s country, without being certain that the purchase price will be paid. Such concurrent performance of the parties’ obligations is often secured by using the system of letters of credit. In very simple terms the system works in the following way. In accordance with the terms of the sales contract, the buyer will open a letter of credit with a bank typically in the buyer’s own country. This bank, the issuing bank, undertakes to pay the purchase price on presentation of certain documents, including a bill of lading, in accordance with the instructions of the buyer. The issuing bank instructs a bank typically in the seller’s country to advise the seller of the credit opened in the seller’s favour. This bank, the advising bank, can also confirm the letter of credit whereby it gives its own undertaking to pay against presentation of the documents. It is then called the confirming bank. When the seller has shipped the goods and obtained a bill of lading from the carrier he will then tender the bill of lading and the other prescribed documents to the advising/ confirming bank. The bank will then check that the documents conform to the instructions given under the letter of credit and if they do, pay the purchase price. The bank will then send the documents to the issuing bank that will perform their own check of the documents and in turn pass the documents on to the buyer who can then use the bill of lading to obtain delivery of the goods from the carrier. In this way the seller ensures that it does not part with the control over the goods without obtaining the purchase price and the buyer knows that the purchase price will not be paid without the seller giving up its control over the goods. [...] The letter of credit will be governed by the terms and conditions therein and almost invariably the Uniform Customs and Practice for Documentary Credits (UCP). The UCP, like the INCOTERMS, is a set of rules developed by ICC [International Chamber of Commerce] to govern documentary credits. It must be - and almost always is - incorporated into the letter of credit by the parties. The current version is the UCP 600. It contains inter alia important provisions as to the required contents of bills of lading and to what extent the bank will examine the documents.’²¹
31. ‘It is important to note that the letter of credit is a contract separate from the sales contract. It is thus the instructions given by the buyer when applying for the opening of the credit with the issuing bank and not the documentary requirements as specified in the sales contract that the bank will act upon. If there is a discrepancy between the two, the seller may end up in a situation where he tenders documents that comply with the requirements of the sales contract and yet is denied payment under the letter of credit. Needless to say this creates various problems and possible claims.’²²
32. ‘In a variety of trades there is no need for a negotiable bill of lading, for example where goods are being sold to a consignee who does not wish to resell the goods, or where in-house transfers take place within large multinational companies. Further, delays are often caused by bills of lading being unavailable in the port of discharge, partly because modern container ships can operate so quickly that they arrive before the documents have been processed through the shipping and banking systems. Carriers have responded to the problems caused by the traditional bill of lading by issuing “waybills”, or “sea waybills”. In effect, a waybill is non-negotiable receipt which contains contractual terms’.²³

²⁰ Electronic commerce and international transport services. [TD/B/COM.3/EM.12/2](#). Report by the UNCTAD Secretariat. 31 July 2001, paragraph 33.

²¹ A. Møllmann. *Delivery of Goods under Bills of Lading*. Routledge, 2017, p. 15.

²² *Ibid.*, p. 16.

²³ N. Gaskell, R. Asariotis, Y. Baatz. *Bills of Lading: Law and Contracts*. LLP, 2000, p. 20.

33. '[T]he survey [conducted by the International Chamber of Shipping (ICS)] had showed that negotiable bills of lading had virtually passed out of use in certain trades, for example on the Short Sea Liner routes in North Western Europe. On the North Atlantic routes, between North America and Western Europe, non-negotiable documents were also used for a very significant majority of shipments. It was pointed out that these were high-volume trades where transit times were short and where the consequent requirements for fast modern documentary procedures encouraged the use of non-negotiable documents.'²⁴ '[N]egotiable bills of lading continued to predominate in many other routes or trades.'²⁵
34. The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT)²⁶ recommends:
- '(a) To sellers and buyers of goods:** to appreciate the advantages of, and to consider actively and positively, the use of the sea waybill in preference to the bill of lading, except when the goods are intended to be sold in transit or where there is a strong and valid case for independent documentary security.
- (b) To carriers (and their agents):** to advise on the benefits and disadvantages of available maritime transport documents and continue the well-established commercial practice of offering either the sea waybill or the bill of lading at the request of their customers while discouraging the unnecessary use of the bill of lading.
- (c) To banks, insurers and other financial institutions:** to appreciate the advantages and encourage the use of the non-negotiable sea waybill instead of the bill of lading whenever possible and feasible for the issuance of Documentary Credits and other payment instruments.
- (d) To Governments:** to encourage and accept the use of the sea waybill (or other non-negotiable documents) including its electronic equivalents and to ensure that national legislation does not prevent or hinder the use of such documents or the electronic exchange of its data.'²⁷
35. Lastly, the issue of electronic Bills of Lading should be briefly addressed. '[I]n 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. [...]'²⁸ Nevertheless, there have recently been positive developments, as the International Group of P&I Clubs has approved six electronic Bills of Lading systems²⁹ which are 'capable of performing the three functions of a bill of lading namely as a receipt, as a document of title and as a contract of carriage which incorporates the Hague or Hague-Visby Rules.'³⁰ In addition, there are the usual gains in terms of time and costs associated with the management of paper documents, where the use of electronic bills of lading effectively solves the main problems of the paper bills of lading:

²⁴ Report of the working group on electronic data interchange (EDI) on the work of its thirtieth session ([A/CN.9/421](#)) (Vienna, 26 February-8 March 1996), point 27.

²⁵ Ibid., point 28.

²⁶ The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) is a subsidiary, intergovernmental body of the United Nations Economic Commission for Europe (UNECE) which serves as a focal point within the United Nations Economic and Social Council for trade facilitation recommendations and electronic business standards. It has global membership and its members are experts from intergovernmental organizations, individual countries' authorities and also from the business community.

²⁷ ECE/TRADE/C/CEFACT/2011/4 Recommendation N°. 12 - Third Edition. Measures to Facilitate Maritime Transport Documents Procedures, paragraph 8 ([French](#) and [English](#)).

²⁸ The use of transport documents in international trade. *Report by the UNCTAD Secretariat. UNCTAD/SDTE/TLB/2003/3*. 26 November 2003, p. 4 (paragraph 2).

²⁹ See [UK P&I Club. Legal Briefing. Electronic Bills of Lading. May 2017](#), [Electronic Bills of Lading - An Update Part I \(26 March 2020\)](#) and [Electronic Bills of Lading - An Update: Part II \(1 April 2020\)](#).

³⁰ See [UK P&I Club. Legal Briefing. Electronic Bills of Lading. May 2017](#), p. 3.

- delivery of goods in case of late arrival of paper bills of lading: demurrage claims, storage costs, use of letters of indemnity and associated costs and
- security risks in case of forgery, theft, loss of paper bills of lading.³¹

E. Multimodal transport

36. Without going into a discussion on terminology, it is sufficient to state that multimodal transport is carriage by two or more modes of transport usually under a single contract. Currently, only unimodal conventions whose application can be extended to multimodal carriage are in force, for instance, the CIM UR.
37. The United Nations Convention on International Multimodal Transport of Goods of 1980 would apply to all contracts of multimodal transport, but it has not entered into force³².
38. In the absence of international conventions, commercial practices of a contractual nature have developed. It should be noted that such contractual solutions remain subject to mandatory law. In particular, it is worth referring to the UNCTAD/ICC Rules on Multimodal Transport Documents.³³
39. The International Federation of Freight Forwarders Associations (FIATA) created, among other documents and forms, a negotiable FIATA Multimodal Transport Bill of Lading (FBL) and a non-negotiable FIATA Multimodal Transport Waybill (FWB). ‘*The ICC logo on the FBL and the FWB denotes that these documents are in conformity with the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents.*’³⁴ FBL and FWB are carrier-type transport documents for use by freight forwarders acting as Multimodal Transport Operators and conform to the relevant requirements of the “Guide for the Uniform Customs and Practice for Documentary Credits (UCP 600)” of ICC.³⁵

III. HISTORICAL OVERVIEW OF CIM UR AND BILL OF LADING

40. The question of the negotiability of rail transport documents is not new. It arose as early as **1878** when there were preliminary discussions with a view to the unification of international railway law.
41. In 1890, the matter was placed on the agenda of the conference which led to the creation of the International Convention on the Transport of Goods by Rail of 14 October 1890, which entered into force on 1 January 1893. The conference did not support the creation of an endorsable transport document. Article 8 of the Convention expressly provided that the duplicate of the consignment note, on which the railway undertaking was required to certify receipt of the goods and their handing over for transport by the consignor, **was not valid as a consignment note accompanying the consignment or as a bill of lading.**
42. At subsequent conferences to revise the Convention³⁶, official or informal attempts made with a view to adopting the consignment note to order were also unsuccessful.
43. At the Amsterdam Conference in **July 1929**, the ICC unanimously supported studying negotiable rail transport documents. In this case, it was to be a document transferable by endorsement, incorporating the right of ownership of the goods. In addition, to counter the

³¹ Ibid., p. 4.

³² See the status of the Convention on the website of the Depository ([French](#) and [English](#)).

³³ See the [French](#) and [English](#) versions.

³⁴ [FIATA Documents and Forms, 5 March 2018](#), p. 3.

³⁵ See paragraph 30 above. For more details see [FIATA Documents and Forms, 5 March 2018](#), p. 13 and 16.

³⁶ By virtue of Article 59 of the Convention, a revision conference was organised at least every three years in order to make any improvements or modifications to the provisions of the Convention that were judged necessary.

difficulties highlighted by the railway administrations, this document would have to include an address for notification.

44. The International Railway Union (UIC) was informed of the ICC's request and instructed its "Goods Traffic Committee" to examine the issue.
45. Also in 1929, particularly in line with the request it had received from its Permanent Committee on Transport by Rail, the "League of Nations Advisory and Technical Committee for Communications and Transit (LON)" dealt with the matter and in 1929, entrusted a special committee of enquiry with the task of examining the question of the negotiability of railway transport documents.³⁷
46. At its first session in **October 1930**, this special committee found that the creation of negotiable transport documents, which were prohibited by the CIM signed at Berne on 23 October 1924, would be greatly to the advantage of production and trade for the following reasons:
- "(a) There would be every guarantee for the payment to the seller of the price of the goods, which the recipient could not claim from the transporter without producing the negotiable document received by him in exchange for payment;
 - (b) The goods could be sold in the course of transport, delivery being effected by handing over the document to the purchaser;
 - (c) The bearer of the negotiable document could raise money on the goods transported, and in particular offer this document as security for bills issued by him."³⁸
47. While admitting the desirability of the creation of negotiable railway transport documents, at the same time the special committee found that it would be likely to involve a number of legal, administrative and technical difficulties. It was agreed to refer these difficulties to the UIC and ICC for further examination.
48. At the beginning of its 2nd session (November 1931), the special committee took note of the resolution adopted by the Fourth General Conference on Communications and Transit on 22 October 1931. In this resolution,

"The Conference,

Recognising the utility from the economic and commercial point of view of the creation of a negotiable transport document for the international transport of certain goods by rail over certain routes;

Recognising further that the introduction of such a transport document may involve certain difficulties of a legal, administrative, technical and financial nature in certain countries; but hoping that it will prove possible to surmount these difficulties;

Having noted the progress of the studies undertaken in this connection by the Special Committee of the Communications and Transit Organisation of the League of Nations on the one hand, by the International Chamber of Commerce and the International Railway Union on the other, from which a concrete result may be hoped for in the near future:

1. Requests the Advisory and Technical Committee for Communications and Transit to continue the work in connection with this question, in cooperation with

³⁷ C. 981. M. 546. 1931 VIII. League of Nations. Organisation for communications and transit. Report of the special committee of enquiry on the negotiability of railway transport documents.

³⁸ Ibid.

the International Chamber of Commerce and the International Railway Union and to communicate the result of this work to the Governments and to the Central Office for International Railway Transport for any action that may be necessary³⁹;

2. Recommends that the Council of the League of Nations draw the attention of the Governments to the importance of the problem in order that a practical solution may be adopted within the shortest period compatible with the provisions of the International Convention on the Transport of Goods by Rail.”⁴⁰

49. The special committee also had before it the results of the studies undertaken by the UIC and ICC.
50. The UIC stated that the introduction of a way-bill to order would involve a far-reaching disturbance of the system of international transport, but that in order to meet the views of the ICC, it was prepared to consider the creation of a special transport document intended to allow the right to dispose of the goods.
51. The ICC submitted a preliminary draft of additional provisions to the CIM. The essential feature of these was the creation of transport documents to order giving the bearer to whom the document is endorsed the right to take over the goods at the place of destination. This document would only be created in respect of certain goods and for certain categories of transport, and only for complete loads. It would enable consignors to sell or pledge the goods from the moment of their consignment.
52. Comparative study of the two proposals submitted to the special committee by the UIC and ICC showed that there was a considerable amount of common ground between the views of the UIC and ICC, but also that the concept behind the two proposals differed. UIC did not agree to the designation of a new consignee except by way of notification by the local addressee (reference address instead of delivery address), while, in the proposal of the ICC, the new consignee is designated by endorsement of the document to order.
53. Without entering into a detailed examination of the provisions that would have to be made, the special committee merely proposed some general provisions, on the understanding that in order to implement them, a number of indispensable technical rules would have to be clarified.
54. These general provisions were as follows:
 - “1 The creation, in respect of goods transport, of a negotiable document which can be transferred by endorsement, would present definite advantages.
 - 2 For the time being, and subject to such extensions as may subsequently be suggested by the interests concerned, such documents would only be introduced in respect of complete loads of certain goods transported between certain stations; such goods and stations would be specified in the tariffs.
 - 3 Such documents would be drafted by the consignor and signed by the transporter, who would then return them to the consignor; negotiable documents should preferably be drawn on special paper or in some distinctive form which would leave no doubt as to their character.
 - 4 All negotiable documents should make mention of a local addressee (a person domiciled in the place of destination of the goods). The transporter would duly advise the addressee of the arrival of the goods and would ask him for the necessary

³⁹ Predecessor of the OTIF Secretariat.

⁴⁰ C. 981. M. 546. 1931 VIII. League of Nations. Organisation for communications and transit. Report of the special committee of enquiry on the negotiability of railway transport documents.

instructions regarding the modification of the transport contract.

- 5 At the request of the consignor, the transporter would be required to mention in the document the weight and number of packages after verification or weighing at the expense of the consignor. The transporter would also be required to mention in the document such reservations as he may desire to make regarding the state and packing of the goods.
 - 6 The endorsement of the negotiable document would transfer the right of disposing of the goods to the bearer.
 - 7 The transporter's responsibilities would terminate on the delivery of the goods on arrival at their destination to the bearer of the document named in the endorsement.
 - 8 The right of modifying the transport contract would belong to the bearer of the negotiable document; if necessary, the transporter would apply for instructions to the local addressee and would take his instructions from the local addressee who, in his turn, would be responsible for obtaining instructions from the bearer of the document. The bearer would be entitled to make himself known to the local addressee with a view to being advised in due course.
 - 9 Goods transported under a document to order should only be subjected to supplementary charges in so far as such charges are justified by the additional expense or responsibility, which documents of this kind would entail upon the transporter."⁴¹
55. The special committee submitted its report on examining the question of the negotiability of railway transport documents **in November 1931**. The League of Nations communicated this report to governments and to the Central Office in Berne, particularly in view of the **IVth CIM Revision Conference (1933)**.
56. In addition, at its session in **January 1932**, the Council of the League of Nations adopted the following resolution:

“The Council,

Having noted the resolution adopted by the Fourth General Conference on Communications and Transit concerning the creation of a negotiable transport document for international transport by rail;

Draws the attention of the Governments to the importance of this problem, particularly for transport subject to the provisions of the International Convention on the Transport of Goods by Rail (CIM), and requests them to examine it in the most favourable spirit, and to take the necessary measures with a view to enabling the next revision conference for the Berne Convention to deal with this problem and to find a suitable solution.”

The Danube-Save-Adriatique Railway Company (DOGSA) also campaigned actively for the development of “*Draft special provisions on the consignment note to order*”. The states that operated this company's lines, i.e. Austria, Hungary, Italy and Yugoslavia, carried out a preliminary study, the aim of which was the adoption of negotiable consignment notes. They then convened a mixed conference comprised of delegates from the governments of these four states and railway experts.

These four states and, at their invitation, Poland⁴², met twice in Budapest **between May**

⁴¹ Ibid.

⁴² Germany and Czechoslovakia were also invited to these meetings, but sent their apologies for not being able to attend.

and October 1932. At their last meeting, there was an agreement on a text for “*Special provisions for the transport of goods consigned with a consignment note to order*”. These were in fact modifications to the articles of CIM with a view to adapting them to the desired regime. The five signatory states to this agreement deferred to the request of the LON and each of them submitted the text of the “Budapest Provisions” for discussion at the CIM Revision Conference held in Rome **between October and November 1933**. This draft contained a detailed regulation which impinged substantially on the area of private law (bill of exchange law) and authorised the creation of a security affording real rights.

UIC also submitted a draft, which was adopted by some states and submitted on their behalf as a proposal to the CIM Revision Conference. This draft had a significantly narrower scope. All it did in fact, within the limits of the existing legal regulations, was to allow the possibility of selling or pledging the goods during the journey. It was based on the fundamental idea that delivery of the goods to the consignee must only take place if the latter hands the railway the duplicate of the consignment note. This would therefore make it possible to obtain advances during transport for the goods being carried, or even, in certain circumstances, to sell them to a third party, who would nevertheless have to be shown as a consignee in the consignment note or be designated as such by a modification to the contract of carriage.

It was not possible to reach agreement on the adoption of one or other of these two drafts. Having noted that the differences were so fundamental that it seemed difficult to reach a single solution, in the end the Polish delegation proposed simply to insert an **authorisation clause** in CIM which would “enable states to adopt the regime that suited them best. This would help gain experience in this matter, in the hope that in the near future, a uniform regulation can be adopted in CIM by common agreement.”

57. This authorisation clause was worded as follows:

“§ 3 Two or more Contracting States, by special agreement, or the railways by appropriate clauses in their tariffs, may agree on certain conditions adapted to this traffic and derogating from this Convention; in particular, a transport document that differs from the form comprising Annex II [CIM consignment note] to this Convention may be used.

This concerns the following types of consignments:

1 consignments under cover of a negotiable document;

2 consignments to be delivered only against return of the duplicate of the consignment note;

[...]”.

58. At the time, this was paragraph 3 of Article 61 (Special provisions for certain types of transport. Supplementary provisions) of CIM of 23 November 1933, which was applicable from 1 October 1938.

59. Also at the IVth CIM Revision Conference in 1933, the Italian government invited those delegations that were participating to a special conference whose task was to develop a detailed regulation on the carriage of goods sent by rail with the consignment note to order. The basis of this regulation was to be found in the draft submitted to the Revision Conference by the five states listed above. This special conference prepared a detailed draft agreement on this issue, which was signed by 10 states on 31 March 1934. However, this agreement was only ratified by two states. As a result, it never entered into force.

60. The authorisation clause was maintained in subsequent versions of CIM, including the COTIF/CIM UR of 9 May 1980, which was applicable from 1 November 1996. It was

deleted from the CIM UR during the revision of COTIF which led to the 1999 Vilnius Protocol, and was replaced by the following provision in Article 6 (Contract of carriage): “§ 5 The consignment note shall not have effect as a bill of lading.”

IV. RECENT INTERNATIONAL DEVELOPMENTS

61. At a conference on international railway transport law in Beijing, Jiaotong University on 26-27 October 2018, the OTIF Secretariat learnt that there is strong demand for the use of bills of lading (documents of title) in international railway transport between China and Europe. Since then, China has submitted official proposals on the subject to UNCITRAL and OSJD.
62. At international level, apart from other solutions, two main approaches are being considered with regard to establishing negotiable railway transport documents.
63. Firstly, a so-called ‘single document system’ or ‘single track’: negotiable transport documents should be included in the existing or new international treaties governing the contract of carriage by rail. In this case, a single negotiable transport document would be issued for transport and trade purposes. Implementation of this approach requires modification, possibly substantive, of the CIM UR and/or SMGS.
64. Secondly, a so-called ‘dual document system’ or ‘dual track’: a railway consignment note and a negotiable transport document are used in parallel. In this case, interfaces (both connections and disconnections) between two sets of rules should be considered and established, whenever necessary, particularly with regard to the acceptance, possession, control and delivery of goods and the rights of a bill of lading holder. This would probably mean that the consignment note would no longer be used for the delivery of goods; instead, the consignor would hold it for the purposes of financing, settlement and negotiation. The consignee would present it for delivery of the goods after payment.

F. UNCITRAL

65. In June 2019, China suggested including a topic on railway consignment notes in UNCITRAL’s work programme⁴³. In particular, it was stated that:

‘ [...] [Railway consignment note] cannot be used for the settlement and financing of letter of credit (L/C) as an ocean bill of lading (B/L) does, thus limiting the ability of banks and other institutions to provide financing services, and increasing the financial pressure on importers and the risk of payment collection for exporters. Specifically, as a railway consignment note is not a document of title and is required to accompany cargo, it cannot be transferred or pledged, and it is impossible for the holder to claim the right to possession and disposal of cargo by virtue of a consignment note. Due to risk management, banks are reluctant to treat a railway consignment notes as a negotiable document under L/C, leaving buyers and sellers unable to settle with financing through their railway consignment notes. Therefore, buyers have to make advance payment for goods under huge financial pressure while sellers are unable to receive payment in time. Apart from these, the non-negotiable nature of railway consignment notes makes it impossible for buyers to resell the goods in transit, which further limits the transfer of goods and efficiency of transactions. [...]

Although it is provided in the Uniform Customs and Practice for Documentary Credits (UCP600) that banks can accept railway consignment notes, these notes are not of the same nature as documents of title, which therefore makes it impossible to address the issue of controlling and taking delivery of cargo by presentation. As banks are exposed to huge risks, they are basically unwilling to accept railway consignment notes to engage in L/C

⁴³ See document [A/CN.9/998](#) dated 14 June 2019.

business in practice, therefore railway consignment notes cannot be used for the purposes of financing and settlement. [...]

By creating new rules to address trade barriers caused by the fact that a railway consignment note is not of the same nature as a document of title, trading risks and transaction costs can thus be reduced, and sustainable economic development and trade prosperity can also be promoted, which will benefit both inland countries and countries around the world. This demand may not only exist in railway transport, but also in road and air transport. Documents of title used for international trade and transport services need to be circulated and applied among different countries. Since one country's legislation alone cannot solve this problem, the parties concerned are calling for the formulation of new international rules. [...]. For instance, possibilities could be explored by creating rules on a unified bill of lading (B/L), which would apply to railway, road and air transport in one or more modes, so as to achieve the goal of using a single through B/L for controlling and taking delivery of cargo. Such an attributed function would enable B/L to perform settlement-financing function. Rules on issuer's qualifications, conditions for issuance, the intended users, as well as the format and validity of issuance could also be considered. It is worth noting that such new rules are not intended to change the current substantive rules on transportation. [...]

66. At the 52nd session (8–19 July 2019) of UNCITRAL⁴⁴:

‘[...] It was suggested, for instance, that the Commission could explore the possibility of creating a rule on a bill of lading for one or more modes of transport, including railway, road and air, to achieve the goals of using a single bill, controlling the cargo with the bill and taking delivery of goods with the bill, giving that new transport document the nature of a document of title in order to enable it to perform the financial settlement function. The future instrument should include new rules on issues such as the issuer's qualifications, the conditions for issuance and the object, format and validity of the issuance. [...]

The Commission considered with interest the proposal, which was felt to have considerable practical significance for world trade, in particular for the economic growth of developing countries. However, given the wide range of issues involved and their complexity, the Commission agreed, as a first step, to request the Secretariat to conduct research on legal issues related to the use of railway or other consignment notes, and to coordinate with other relevant organizations such as the Intergovernmental Organization for International Carriage by Rail, the Organization for Cooperation between Railways, the International Rail Transport Committee, the relevant United Nations regional commissions, FIATA and the International Chamber of Commerce. [...]

67. Afterwards, the UNCITRAL Secretariat carried out research on the subject matter and consultations with experts and interested organisations, primarily through participation in two expert group meetings (December 2019 and April 2020) organised specially for that purpose⁴⁵.
68. At its 53rd session (6–17 July 2020 and 14–18 September 2020), UNCITRAL ‘[...] requested its secretariat to start preparatory work towards the development of a new international instrument on multimodal negotiable transport documents that could also be used for contracts not involving carriage by sea. Such work should be conducted in close coordination and cooperation with all relevant international organizations, in particular the Economic Commission for Europe, OTIF, OSJD and the International Rail Transport Committee, with a view to ensuring that UNCITRAL work complement and support, but not interfere with, any ongoing work of those international organizations. The initial work

⁴⁴ See Report of the 52nd session of UNCITRAL ([A/74/17](#)).

⁴⁵ See document [A/CN.9/1034](#) dated 11 May 2020.

by the UNCITRAL secretariat could take the form of expert group meetings and, resources permitting, a UNCITRAL colloquium.’⁴⁶

69. In February 2021, the UNCITRAL Secretariat organised the third experts’ meeting to consider the interface between a multimodal transport document and unimodal transport conventions. Potential issues to be addressed in an international instrument on multimodal transport documents were discussed.
70. In view of the above, UNCITRAL intends to start drafting a new international instrument on multimodal negotiable transport documents, i.e. the ‘dual track’ approach is preferred. The new instrument should cover different transport modes and should avoid conflicts with underlying unimodal transport conventions.

G. OSJD

71. At its 47th session, the OSJD Ministerial Conference (4-7 June 2019) established an ad hoc Working Group on Negotiable Transport Documents. The objective of the ad hoc Working Group is to draft and propose modifications and supplements to the SMGS Agreement that would address the issues associated with a negotiable transport document.
72. The ad hoc Working Group had two sessions in 2020. It considered two approaches on regulating documents of title in SMGS: 1) amend SMGS and add an additional page to the SMGS consignment note and 2) prepare an annex to the SMGS, which would define the form of a negotiable transport document as well as the circumstances and procedure of its application. The majority of the ad hoc Working Group’s members were in favour of the second option.
73. At its 3rd session in March 2021, the ad hoc Working Group will consider a manual on the SMGS bill of lading prepared by China.
74. In view of the above, it might be concluded that the ad hoc Working Group prefers a ‘single track’ approach and intends to prepare relevant modifications to SMGS.

H. UNECE

75. The UNECE Group of Experts towards Unified Railway Law prepared draft ‘Legal provisions of Unified Railway Law’ applicable to contracts of carriage of goods (see paragraph 13 above). The initial draft followed the CIM UR and SMGS on the consignment notes, i.e. they are not documents of title. In 2019, Professor Freise made proposals on negotiable transport documents⁴⁷. However, they have not been discussed in substance.

V. CONCLUSIONS AND FOLLOW-UP

76. All transport documents (consignment notes, waybills, bills of lading) perform two core functions (evidence of the receipt of goods and their condition and evidence of the terms of a contract of carriage). Some transport documents (bills of lading) also perform a third function, i.e. a document of title.
77. Bills of lading have developed in maritime transport and are still mainly based on *lex mercatoria*, international usage and practices, rather than any international transport convention which is in force. Unimodal international land and air transport conventions apply to transport documents which are not documents of title.

⁴⁶ See Report of the 53rd session of UNCITRAL ([A/75/17](#)).

⁴⁷ See documents ECE/TRANS/SC.2/GEURL/2019/16 ([French](#) and [English](#)) and SC.2/GEURL No. 8 (2019) ([English](#)).

78. At least for international railway transport between China and Europe, there is demand to facilitate trade and financial settlement by using transport documents which are documents of title. However, such transport covers a geographical area under both CIM UR and SMGS. Therefore, only a harmonised approach on the usage of transport documents which are documents of title would function properly. However, the requirements and views of railway undertakings and their clients in the geographical area of the CIM UR still have to be identified. It must also be taken into account that transport times in Euro-Asian rail relations have been reduced enormously, which may mitigate the credit problem in future.
79. In principle, the advantages and challenges relating to the use of transport documents which are documents of title are the same now as they were more than 100 years ago. However, the use of electronic bills of lading could effectively address the risks in connection with using paper bills of lading. Even though digitalisation of the function of 'document of title' is a complex issue, a new international instrument or modification of the existing one should be based on digital solutions. Moreover, the time usually necessary for the adoption and entry into force of new conventions or modifications to the existing conventions would not justify work on paper-based solutions.
80. Sustainable and efficient transport is multimodal transport. The CIM UR is a unimodal convention applicable to multimodal carriage. Consequently, the function of 'document of title' in transport documents should not be limited to railway transport and should cover multimodal transport.
81. The topic of attributing the function of documents of title is a complex issue requiring strong international cooperation between different international organisations and associations from the field of transport, trade, finance and customs, etc. In view of the number of international organisations and associations which have already been involved in this subject, there is a serious risk of duplication of work and even potentially conflicting solutions.
82. Bearing in mind the human and financial resources available in the OTIF Secretariat, it would not be efficient or even feasible to work independently in parallel with other international organisations. Such an approach might potentially contribute to the unwanted fragmentation of international railway law.
83. At this stage at least, the most reasonable and effective approach would appear to be to concentrate the work within UNCITRAL on a new international instrument on multimodal negotiable transport documents. It is important to emphasise that conflicts with the CIM UR must be avoided and necessary interfaces must be established. To this end, modification of the CIM UR might be considered at a later stage.