

CMR-AC Advice No. 1 – Advice on relation of the Draft Convention on Negotiable Cargo Documents and CMR

Peter Csoklich; Vienna; Tobias Eckardt, Bremerhaven; Cécile Legros, Rouen; Frank Smeele, Rotterdam¹

I. Introduction

Upon request of the UNCITRAL Secretariat we will below set out our views on the interplay between the Draft Convention on Negotiable Cargo Documents² (hereinafter: DC in the footnotes) and the CMR.³ In this advice we will focus primarily on negotiable cargo documents and CMR consignment notes and leave electronic cargo records and electronic consignment for another day. For easy reference, the consolidated text of the CMR Convention 1956 as amended by the SDR-Protocol,⁴ is attached to this document as an annex.

II. Preliminary Observations

1. Mandatory nature

Firstly, it must be emphasized that the CMR provides a mandatory regime for the legal subject matter that it regulates and that any stipulation that derogates from the provisions of the CMR shall be considered null and void.⁵ It follows from this mandatory nature of the CMR that the parties to a contract of carriage that is subject to the CMR can only derogate from the provisions of the CMR if the CMR expressly allows this.⁶ Furthermore, case law shows that the mandatory nature of the CMR regime tends to be enforced rather strictly by the courts in the CMR contracting states.

2. Scope of application CMR

Secondly, as an international convention holding provisions of uniform private law, the CMR determines its own scope of application.⁷ This implies that the question whether or not a contract falls within the scope of CMR, is not a matter for the parties to that contract (subjectively) to decide, but rather a matter of characterization of the legal relation to be decided by the court objectively.

3. Relation between Draft Convention and CMR

According to Article 1 (3) Draft Convention, the »rights and obligations of the transport operator, consignor and consignee and their liability ... under applicable international conventions or national law« are not modified by the Draft Convention unless the Draft Convention explicitly provides for this. This implies that the provisions of the CMR will (continue to) apply to the extent that the Draft Convention does not expressly derogate from these provisions.

This raises the question where exactly the Draft Convention explicitly derogates from the CMR. We have duly analyzed

the contents of the Draft Convention but have found only few instances⁸ where the Draft Convention implicitly references the CMR at all and no instances where the Draft Convention explicitly provides that it modifies specific »rights and obligations of the transport operator, consignor and consignee and their liability ...« under the CMR.

Arguably, Article 1 (3) Draft Convention must be understood to mean that where the Draft Convention provides rules over-

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Marta Katarzyna Kolacz, Secretary

Note: The CMR Advisory Council (CMR-AC) was approached by the UNCITRAL Secretariat on behalf of the UNCITRAL Working Group VI. This Working Group is preparing a convention aimed at creating negotiable cargo documents which could perform an analogous function as a maritime bill of lading for the carriage of goods for any mode of transport in a multimodal or unimodal context. The new instrument also provides a legal framework for the recognition and use of negotiable electronic cargo records. For further information on this project see https://uncitral.un.org/en/working_groups/6/negotiablecargodocuments.

2 Our observations relate to the draft as reflected in A/CN.9/WG.VI/WT.107. Given that the concept of a pledge bond is only a suggested topic for further deliberation within the Working Group, we have not considered it further.

3 Convention on the Contract for the International Carriage of Goods by Road (CMR), done at Geneva 19 May 1956.

4 Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), done at Geneva on 5 July 1978.

5 Art. 41 CMR.

6 Examples are provided by Articles 24 and 26 CMR which allow the sender to declare a higher value of the goods, respectively a special interest in delivery in return for a surcharge on the freight to be agreed between the sender and the carrier. The Articles 24 and 26 CMR expressly permit the parties to derogate from the rules in Article 23 CMR concerning the recoverable damages and the applicable limits of liability.

7 See Articles 1 and 2 in Chapter 1 (Scope of application of the CMR), Articles 28 CMR (extra-contractual claims), Article 31 CMR (jurisdiction, lis pendens, recognition and enforcement of judgments), Article 32 CMR (period of limitation), Article 33 CMR (arbitration) and Article 34 CMR (successive carriers).

8 See Article 1 (3); Article 4 (2) (c) Draft Convention.

lapping with the CMR without explicitly derogating from it, the provisions of the CMR are to prevail.

It seems that some of the effects of the negotiable cargo document intended by the Draft Convention overlap with provisions of the CMR, see below in III. The effect that the apparent prevalence of the CMR over the Draft Convention has on the negotiable cargo document would not seem to be addressed in the draft. As a result, it is submitted that the co-existence of the negotiable cargo document and the CMR consignment note may be the cause of uncertainty, which is undesirable, see below at IV.

4. Terminology

We have duly reviewed the »Note of the Secretariat«⁹ and the Annex thereto containing the Draft Convention on negotiable cargo documents. Regarding the terminology used in the Draft Convention we note that in relation to certain key terms, i.e. »contract of carriage« and »carrier« the Draft Convention departs from the customary terms used in all other transport law conventions (including the CMR), and replaces these by new terms of its own, i.e. »transport contract«,¹⁰ respectively »transport operator«.¹¹ In our view there is no need for such a change in terminology, which seems to bring no benefit and may give rise to issues of interpretation.

One further terminological difference between the Draft Convention and the CMR concerns the name of the party with whom the transport operator/carrier concludes the contract of carriage. The Draft Convention uses the term »consignor« whereas CMR¹² uses »sender«. Here however, the terminology used in the Draft Convention is unproblematic since the term »consignor« is also used in other transport law conventions,¹³ whereas the shipping related conventions use the term »shipper«.¹⁴

5. Definitions

Furthermore, the way in which the obligation undertaken by a »transport operator« is described in the definition of »transport operator« (i.e. »undertakes to perform«)¹⁵ differs from that of »transport contract« (i.e. »assumes responsibility for the performance of the contract, irrespective of whether or not that person performs the carriage itself.«). It is suggested that it may be preferable to align the two definitions with each other.

III. The CMR Consignment Note

1. Issuance of negotiable cargo document/consignment note

Both the Draft Convention and the CMR presuppose the issuance of a transport document, i.e. a negotiable cargo document in the case of the Draft Convention and a consignment note under the CMR. The creation of these documents is not a chance event but follows from a pre-existing contract of carriage concluded between the consignor/sender and the transport operator/carrier.

In this regard, the approach taken in the Draft Convention diverges from that taken in the CMR. Under the Draft Convention, a negotiable cargo document shall be issued if this has been so agreed between the consignor and the transport operator.¹⁶ Failing such an agreement, it seems that the Draft Convention cannot apply.

The CMR on the other hand applies to contracts for the international carriage of goods by road.¹⁷ Although the CMR pre-

scribes that the contract of carriage shall be *confirmed* by the making out of a consignment note, the absence, irregularity or loss of the consignment note does not affect the existence or validity of the contract of carriage which remains subject to the CMR.¹⁸

2. Single-party or multiparty statement

In the Draft Convention, negotiable cargo documents are conceived as written statements/declarations signed¹⁹ and issued by the »transport operator«.²⁰ Thus, the Draft Convention differs from the approach taken in Article 5 (1) CMR where the consignment note is conceived as a transport document to be made out in three original copies signed by both the sender and the carrier.²¹

This difference in conceptualization is also reflected in the different ways in which the Draft Convention and the CMR attribute responsibility for the particulars to be included in the negotiable cargo document, respectively the consignment note. The Draft Convention attributes these particulars in principle²² to the transport operator, whereas the CMR differentiates concerning the particulars that shall or may be entered into the consignment note,²³ between some statements that are attributable to the sender²⁴ and others that are

9 UNCITRAL, Working Group VI (Negotiable Cargo Documents), Forty-fifth session, Vienna 9–13 December 2024, A/CN.9/WG.VI/WR.107, dated 19 September 2024.

10 See: Article 2 (8) Draft Convention.

11 See: Article 2 (10) Draft Convention.

12 See e.g. in Articles 5, 6 and 7 CMR.

13 See: Article 3 (a) CIM 1999; Article 4 (a) Montreal Convention 1999.

14 See: Article 1 (a) Hague (-Visby) Rules 1924 and 1968; Article 1 (1) Hamburg Rules 1978; Article 1 (2) CMNI 2000; Article 1 (8) Rotterdam Rules 2008.

15 See: Article 2 (8) Draft Convention.

16 See: Article 3 (1) Draft Convention.

17 See: Article 1 (1) CMR.

18 See: Article 4 CMR. This is in line with Article 41 (1) CMR which provides that the nullity of a (contractual) stipulation that derogates from the provisions of the CMR shall not involve the nullity of the other provisions of the contract.

19 See the definition of »negotiable cargo documents« in Article 2 (4) Draft Convention which as far as relevant here reads »a document signed and issued by the transport operator ...«.

20 See further: Article 3 (1), (3) (a), (b) and (c), (5) Draft Convention.

21 Article 5 (1) CMR.

22 This follows from the fact that pursuant to Article 2 (4) Draft Convention it is the transport operator who issues and signs the negotiable cargo document, in combination with the contents requirements in Article 4 Draft Convention and *e contrario* from the limited exception made in Article 6 (1) Draft Convention which allows the transport operator to qualify the information referred to in Article 4 (1) (d) Draft Convention if he has actual knowledge or reasonable grounds to believe the information false or misleading or if he has no reasonable means of checking such information.

23 See: Article 6 CMR.

24 See Article 7 (1) which refers to the particulars stated in Article 6 (1) (b), (d), (c), (f), (g), (h) and (j), in Article 6 (2) and to any other particulars or instructions given by the sender to enable the consignment note to be made out or for the purpose of their being entered therein. See also Article 7 (2) CMR. Furthermore, the carrier is obliged pursuant to Article 8 (2) CMR to enter into the consignment note any reservations (and the grounds for these) concerning the accuracy of the statements in the consignment note and the apparent condition of the goods and their packaging. Similarly, Article 8 (3) CMR provides that if pursuant to a request of the sender, the gross weight of the goods or the contents of packages has been checked, then the results of the checks must be entered into the consignment note.

attributable to the carrier.²⁵ Finally, under the CMR certain additional particulars may be entered into the consignment note by the driver²⁶ and/or by successive carriers²⁷ during the performance of the road transport, hence (long) after the issuance of the consignment note. Under the Draft Convention this possibility does not seem to exist.

It follows from the above that the negotiable cargo document under the Draft Convention represents a written statement made by the transport operator (alone), which, through its evidentiary effect,²⁸ is (in principle) binding upon him, whereas the consignment note under the CMR constitutes a multiparty statement in writing containing representations made by different persons, and which through its evidentiary effect or otherwise may be binding upon the sender,²⁹ the carrier,³⁰ successive carriers³¹ and even the consignee.³²

3 Contents

There exist also some differences between the Draft Convention and the CMR concerning the lists of particulars that the negotiable cargo document/consignment note must contain³³ and the indicative list of particulars that these documents may contain.³⁴ As the Draft Convention and the CMR both allow the parties to include any particulars that they wish,³⁵ the latter difference seems unproblematic.

The differences with regard to the required particulars mainly concern their order of presentation and in some cases also their substance and wording (see below). For easy reference, first the below tables #1 and #2 show how the provisions in the Draft Convention and the CMR concerning the particulars to be included in the negotiable cargo document, respectively the consignment note correspond.

Draft Convention	CMR
Article 4 (1)(a)	Article 6 (1)(c)
Article 4 (1)(b)	Article 6 (1)(e)
Article 4 (1)(c)	Article 6 (1)(b)
Article 4 (1)(d)	Article 6 (1)(f), (g) and (h), Article 8 (3)
Article 4 (1)(e)	Article 8 (2)
Article 4 (1)(f)	Article 6 (1)(d)
Article 4 (1)(g)	Article 6 (1) (a)
Article 4 (1) (h)	Article 6 (1) (d)
Article 4 (1) (i)	Article 5 (1) and (2)
Article 4 (1) (j)	Article 6 (1) (i)
Article 4 (1) (k)

Table 1

CMR	Draft Convention
Article 6 (1) (a)	Article 4 (1) (g)
Article 6 (1) (b)	Article 4 (1) (c)
Article 6 (1) (c)	Article 4 (1) (a)
Article 6 (1) (d)	Article 4 (1) (f) and (h)
Article 6 (1) (e)	Article 4 (1) (b)
Article 6 (1) (f)	Article 4 (1) (d)
Article 6 (1) (g)	Article 4 (1) (d)
Article 6 (1) (h)	Article 4 (1) (d)
Article 6 (1) (i)	Article 4 (1) (j)
Article 6 (1) (j)
Article 6 (1) (k)	Article 4 (2) (c)
Article 8 (2)	Article 4 (1) (e)
Article 8 (3)	Article 4 (1) (d)

Table 2

4. Freight, charges and expenses

The main difference³⁶ as to the substance of the particulars to be included, concerns the particulars regarding freight and other transport related charges. Pursuant to the CMR³⁷ the consignment note must state the »charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery)« and may state the amount of »cash on delivery« charges.³⁸ In addition, under the CMR the consignment note may state the charges which the sender undertakes to pay.

The Draft Convention on the other hand merely requires a »statement as to whether the freight has been prepaid or an indication as to whether the freight is payable by the consignee«³⁹ and makes no reference to any other charges or expenses relating to the transport to be entered into the negotiable cargo document.

5. Liability of consignee for freight and charges

Under the CMR, the significance of the inclusion of particulars concerning freight and transport-related charges in the consignment note is that freight and charges shown to be due

25 See: Article 6 (1) (a), (c), (i) and (k), Article 6 (2) (f) and (g) CMR.

26 In particular, the amounts of the charges listed in Article 7 (1)(i) CMR will only become apparent during the execution of the road transport.

27 It follows from Article 35 CMR in connection with Article 8 (2) CMR that a successive carrier who accepts the goods from a previous carrier may make reservations on the second copy of the consignment note concerning the accuracy of the statements in the consignment note as to the number of packages, their marks and numbers and to the apparent condition of the goods and their packaging.

28 See: Article 6 (2) and (3) Draft Convention.

29 See: Article 7 (1) and (2) CMR.

30 See: Article 8 (3) and Article 9 (2) CMR.

31 See: Article 34, Article 35 (2) j° Article 9 (2) and Article 36 CMR.

32 See: Article 13 (2) CMR which provides that the consignee who avails himself of the right to demand delivery from the carrier pursuant to Article 13 (1) CMR, shall pay the charges shown to be due on the consignment note.

33 Under Article 5 (1) Draft Convention the absence of particulars prescribed in Article 4 (1) Draft Convention does not itself affect the legal character of a document as a negotiable cargo document if it falls within the definition of Article 2 (4) or (6) Draft Convention. A similar rule in Article 4 CMR provides that the »absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract of carriage«. It is submitted that the failure to include any of the particulars listed in Article 6 (1) and Article 8 (2) and (3) CMR would fall under the notion of »irregularity« of the consignment note.

34 See: Article 4 (2) (a) to (d) Draft Convention and Article 6 (2) (a) to (g) CMR.

35 See: Article 4 (2) (d) Draft Convention and Article 6 (3) CMR.

36 A further difference concerns Article 4 (1) (k) of the Draft Convention, which prescribes, but within brackets, that the negotiable cargo document should make reference to the Draft Convention, whereas Article 6 (1) (k) CMR prescribes mandatorily that the consignment note shall contain a statement that the carriage is subject to the provisions of the CMR. See also: Article 7 (3) CMR which provides that if the carrier fails to make the statement of Article 6 (1) (k) CMR, he shall be liable for all expenses loss and damage sustained through such omission by the person entitled to dispose of the goods. Pursuant to Article 4 (2) (c) Draft Convention a negotiable cargo document may indicate the »law applicable to the transport contract, in particular any international convention to which the transport contract is subject«.

37 See: Article 6 (1) (i) CMR and Article 13 (2) CMR.

38 See: Article 6 (2) (c) CMR.

39 See: Article 4 (1)(i) Draft Convention.

on the consignment note are payable by the consignee if he demands delivery of the goods at destination or enforces any rights arising from the contract of carriage.⁴⁰

The Draft Convention provides expressly that the negotiable cargo document may state that freight is payable by the consignee.⁴¹ Whether in addition to this, the consignor and transport operator may agree that the consignee shall pay other transport-related charges as well and include a statement to that effect in the negotiable cargo document,⁴² is less clear. Unlike the CMR, the Draft Convention does not contain a provision to the effect that only freight and charges »shown to be due« on the negotiable cargo document are payable by the third-party holder. Article 9 (1) and (2) Draft Convention even seem to imply the contrary as these provisions envisage that the third-party holder assumes liability under the transport contract, without requiring that some notice of these liabilities is given in the negotiable cargo document.

As follows from Article 9 (1) Draft Convention, a third-party holder⁴³ does not assume any liability under the transport contract (presumably including the obligation to pay freight and possibly other charges) solely by being a holder of a negotiable cargo document, but (presumably) when he exercises a right under the transport contract, such as by demanding delivery of the goods at destination or by bringing a claim against the transport operator.

Further, Article 9 (2) of the Draft Convention provides that if the third-party holder exercises the right of disposal,⁴⁴ he »assumes any liability that may arise in connection with the exercise of that right under the transport contract.«⁴⁵ As is explained in the Note by the Secretariat,⁴⁶ Article 9 (2) Draft Convention was added to address the concern that the Draft Convention did not contain any provision on who bore the costs incurred by the transport operator in carrying out the instructions given by the holder of the negotiable cargo document.⁴⁷

This is however not the only situation where a third-party holder may cause the transport operator to incur costs. What if the truck with the cargo arrives at destination and no holder comes forward to present the negotiable cargo document to the transport operator and to demand delivery of the goods? In such a case the transport operator may be compelled to put the goods in storage at a local warehouse or terminal for the time being. It is likely that the said warehouse/terminal will require that the carrier agrees to pay its invoices. If at a later moment a third-party holder would come forward to demand delivery at last, it seems only fair that the carrier can demand payment of the storage costs and possibly waiting days of the truck from the third-party holder of the negotiable cargo document.

It is noteworthy that the Articles 14, 15 and 16 CMR provide a detailed and balanced set of rules for the situation where circumstances prevent performance of the contract of carriage as originally envisaged⁴⁸ or where after arrival at the place designated for delivery circumstances prevent delivery.⁴⁹ In both cases, the carrier must seek instructions from the sender⁵⁰ and is authorized to dispose over the goods, to unload the goods and to entrust these to a third party⁵¹ or even to publicly sell the goods⁵² if their perishable nature or damaged condition warrants this or where the storage expenses would be out of proportion to the value of the goods. In such a case

the carrier is entitled to deduct the freight, charges due under the consignment note and all other expenses from the sale proceeds of the goods.

As the Draft Convention includes no provisions of this kind, the question arises whether the Articles 14, 15 and 16 CMR should apply also in relation to a negotiable cargo document issued pursuant to the Draft Convention.

6. Carrier's right of retention?

Under Article 13 (2) CMR the carrier is entitled to withhold the goods from the consignee if the latter refuses to pay or furnish security for the charges shown to be due on the consignment note. As the Draft Convention does not contain a provision to the same effect, it seems to follow from Article 10 Draft Convention that the transport operator does not have a right of retention over the cargo under the Draft Convention. This clear contradiction between the Draft Convention and the CMR on this point may give rise to issues of interpretation and practical problems.

IV. Unknown delivery address

The creation of a negotiable cargo document as envisaged by the Draft Convention gives rise to an issue that is somewhat new to international road transport and that needs to be addressed. It follows from both the easily transferable nature and the commercial purpose of a negotiable cargo document that at the time of issuance of the said document the ultimate recipient of the goods as well as the delivery address may be uncertain or even unknown.

This poses serious practical and operational problems for the transport operator as he needs to know to which destination the goods are to be transported in order to be able to perform the transport contract at all. A possible solution to this problem may be derived from what is already customary in other modes of transport where transport often takes place between transport »hubs« such as seaports, inland ports, airports and railway stations and where specialized terminals and warehouses facilitate the temporary storage of the cargo prior to, during and/or after the transport.

It seems possible, also in case of international carriage of goods by road, to involve a (third-party) terminal or warehouse-

40 See: Article 13 (2) and (1) CMR.

41 See: Article 4 (1) (j) Draft Convention. This is in line with other transport law conventions which may apply to bills of lading, see Article 15 (1)(k) Hamburg Rules 1978; Article 11 (5)(h), Article 15 (c) and (d) CMNI 2001; Article 42 Rotterdam Rules 2008.

42 See: Article 4 (2) (d) Draft Convention.

43 The Draft Convention in Article 9 (1) and (2) speaks of a »holder that is not the consignor«.

44 See: Article 7 (1)(b) Draft Convention.

45 See: Article 9 (2) Draft Convention.

46 See Negotiable Cargo Documents Note by the secretariat, A/CN.9/WG.VI/WT.107, dated 19 September 2024, footnote 77.

47 A/CN.9/1164, para 98.

48 See: Article 14 CMR.

49 See: Article 15 CMR.

50 See: Articles 14 (1), 15 (1) CMR.

51 See: Article 16 (2) CMR.

52 See: Article 16 (3) CMR.

se facility in the performance of the transport contract. This would allow the unknown »delivery address« to be substituted by a known »discharge address«, to which the transport operator should bring the cargo, where he can discharge the goods from the truck and where the goods can be stored in anticipation of the ultimate presentation of the negotiable cargo document by its holder in order to obtain the delivery of the goods.

Consequently, (unless this issue is addressed by the Draft Convention itself) when used for road transport, the parties may want to address topics such as:

- The legal relation between the carrier and the third-party terminal.
- The liability regime applicable to a storage period before, during and/or after the road transport.
- Who is responsible for the storage costs towards the third-party terminal?
- Can the storage costs be claimed from the holder who presents the negotiable cargo document to obtain delivery of the goods?

Unless this issue is addressed in the Draft Convention itself, it is suggested that such aspects be mentioned in the documents (such as the fact sheet) accompanying the Draft Convention, to ensure that the parties to the transport contract are made aware of the (potential) need to come to additional arrangements.

V. Co-existence of CMR-Consignment Note and Negotiable Cargo Document?

The Draft Convention seems to contemplate the possibility of a co-existence between a negotiable cargo document and a non-negotiable »transport document«.⁵³ As the non-negotiable transport document could relate to road transport pursuant to a contract for the international carriage of goods by road, it is submitted that this implies that the said »transport document« may very well qualify as a consignment note under the CMR. If our above understanding is correct, it is submitted that this creates a serious problem indeed as then a direct conflict between the regimes of the Draft Convention and the CMR is not only possible, but even almost inevitable.

Since the aim and tenor of the Draft Convention is not to modify »the rights and obligations of the transport operator, consignor and consignee and their liability« under *inter alia* the CMR, unless expressly provided for in the Draft Convention,⁵⁴ it follows that the CMR regime is fully applicable to such a non-negotiable transport document or consignment note. This implies firstly that the second original copy of the consignment note shall accompany the goods⁵⁵ and – after arrival of the goods at destination – be handed over to the consignee,⁵⁶ who acquired the right of disposal over the goods.⁵⁷ It is difficult to see how the provisions in the Draft Convention concerning the rights and liabilities of the holder⁵⁸ of a negotiable cargo document can be aligned with these CMR-provisions.

Further, under CMR the second original copy of the consignment note that accompanies the goods may include details that are not included in the negotiable cargo document, and which were added during the performance of the road transport such as:

- »Charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery)«;⁵⁹
- Reservations made by a successive carrier as to the number of packages, their marks and numbers, and the apparent condition of the goods and their packaging.⁶⁰

This may give rise to the issue whether the holder of the negotiable cargo document is bound to the contents of the second original copy of the consignment note, and which of these two documents ultimately prevails.

While the CMR consignment note is not considered a document of title, it contains information (e.g. about the parties to the contract) and serves as proof (e.g. the terms of the contract of carriage; taking over of the goods in a certain condition), the right to dispose over the goods to is also linked to the CMR consignment note in Article 12 CMR. The right of disposal under the CMR may thus come into conflict with the right of disposal under the Draft Convention.

Further still, under the CMR a consignee (#1) who has obtained the right of disposal over the goods,⁶¹ may order the delivery of the goods to another consignee (#2), however this latter consignee (#2) does not have the power to order delivery of the goods to yet another consignee (#3).⁶² It is difficult to see how the idea of a negotiable cargo document can be aligned with these rules under the CMR.⁶³

Finally, the evidentiary effects granted by the Draft Convention to a negotiable cargo document are not the same as those granted by the CMR to a consignment note. Whereas the CMR grants »prima facie«, respectively »unless the contrary is proved« evidential value to consignment note,⁶⁴ the Draft Convention »prima facie«, respectively »no proof to the contrary shall be admissible«⁶⁵ value to the negotiable cargo document.

53 See: Article 3 (3)(a), (b) and (c) Draft Convention.

54 See: Article 1 (2) and (3) Draft Convention.

55 See: Article 5 (1) CMR.

56 See: Article 13 (1) CMR and Article 12 (2) CMR.

57 While the CMR consignment note is not considered a document of title, it contains information (e.g. about the parties to the contract) and serves as proof (e.g. about the terms of the contract of carriage and about the taking over of the goods in a certain condition). However, the CMR also links the right to dispose over the goods to the CMR consignment note in Art. 12 CMR. The sender's power to dispose of the goods ceases, when the CMR-CN is handed to the consignee; Art. 12 (2) CMR. Alternatively, the sender may already grant the right of disposal to the consignee upon issuance of then CMR consignment note; Art. 12 (3) CMR. The CMR also contains rules of how the right to dispose of the goods is to be exercised (Art. 12 (5) CMR) and the carrier's liability in connection with such instructions is set out in Art. 12 (7) CMR, both linked to the CMR consignment note. Further the CMR attaches evidential value to the CMR consignment note.

58 See: Articles 7 and 9 Draft Convention.

59 See: Article 6 (1)(i) CMR.

60 See: Article 35 (1) jo Article 8 (1) CMR.

61 See: Article 13 (1) CMR and Article 12 (2) CMR.

62 See: Article 12 (4) CMR.

63 See: Article 13 (1) CMR and Article 12 (2) CMR.

64 See: Article 9 CMR.

65 See: Article 6 II and III Draft Convention.

In view of the above it is submitted that the co-existence of a consignment note and a negotiable cargo document needs to be avoided and further that a negotiable cargo document pursuant to the Draft Convention cannot simultaneously serve as consignment note under the CMR.

VI. Implications of Non-Issuance of a CMR Consignment Note

1. Introduction

As it is our view that co-existence of the negotiable cargo document and a consignment note should be avoided, we shall explore the consequences of not issuing a consignment note. It is noted that the below outlined consequences would also be brought about under the CMR if the parties to the contract of carriage decide not to issue a consignment note or if such note should lack validity (e.g. not being signed). These consequences are thus if not common, then at least not unheard of.

As mentioned above in III.1, the absence of a consignment note does not affect the existence or validity of the transport contract.⁶⁶ Below, the consequences of a scenario are analyzed in which the parties agree not to issue a CMR-consignment note and to opt for the sole issuance of a negotiable cargo document. It seems that not all consequences which the CMR attaches to the consignment note are fully reflected in the Draft Convention in its current form.

It should be noted that choosing to not issue a consignment note and issue a negotiable cargo document instead may come with some risks. The first is that despite the agreement not to issue a consignment note, nevertheless such a consignment note besides a negotiable cargo document is brought into use, simply out of force of habit and because the parties not fully grasping the interplay between the CMR and the Draft Convention. The second risk is that a court may interpret the negotiable cargo document as a consignment note under the CMR notwithstanding an agreement of the parties to the contrary. It is suggested that this be mentioned in the documents such as the fact sheet accompanying the Draft Convention.

In relation to this approach, we further note that by taking this route, the Draft Convention may be seen as inducing a deliberate disregard of the requirement under the CMR to issue a consignment note. Such inducing may be problematic from the point of view of public international law.

2. Incorrect or missing information supplied by the sender

Under the CMR the sender is liable for costs and damages in case information in the CMR consignment note is found to be incorrect or missing.⁶⁷ Such a rule is not included in the Draft Convention and may give rise to analogous application

of the CMR or possibly of application of national law. On the other hand, currently, cases centering around Art. 7 CMR would seem to be scarce, so not being able to rely on Art. 7 CMR might not lead to a substantial disadvantage.

3. Article 17 CMR – exemption from liability

Article 17 (4) (a) CMR allows the carrier to escape liability for loss or damage arising from the use of open unsheeted vehicles, provided such was allowed in the consignment note. If the consignment note were replaced by a negotiable cargo document, it would seem that the carrier could not escape liability in such circumstances.

4. Article 22 (1) CMR – dangerous goods

Article 22 (1) CMR contains a rule that shifts the burden of proof relating to the carrier's knowledge about the dangers of the goods transported to the sender/consignee, in case such information was not entered in the consignment note. If the consignment note were replaced by a negotiable cargo document, the burden of evidence would be on the consignor/consignee regardless of whether such information was contained in the negotiable cargo document.⁶⁸

5. Articles 24 and 26 CMR – value declaration and special interest in delivery

Article 24 CMR and Article 26 CMR both allow the sender to make a declaration of value, respectively to fix the amount of a special interest in delivery, in return for a surcharge on the freight to be agreed with the carrier, which declarations have the effect of increasing the carrier's limit of liability accordingly. CMR requires both declarations to be entered into the CMR consignment note to be of effect.⁶⁹ If the CMR consignment note were replaced by a negotiable cargo document, such increase in liability would not be possible.

6. Articles 34 et seq. CMR – successive carriage

Based on the concept of successive carriage as set out in the CIM, the CMR provides rules on successive carriage. While Articles 34 and 35 CMR call for a consignment note, there are differing interpretations related to the precise prerequisites of successive carriage. Depending on how these requirements are interpreted, to replace the consignment note by a negotiable cargo document, may make successive carriage impossible.

⁶⁶ See: Article 4 CMR.

⁶⁷ See: Article 7 CMR.

⁶⁸ Although it is to be expected, that if the said information were contained in the negotiable cargo document, the consignor/consignee should be quite able to provide the necessary proof.

⁶⁹ See Articles 24, 26 (1) and 6 (2) (d) CMR.