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Working Party on Road Transport
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**HARMONIZATION OF REQUIREMENTS
CONCERNING INTERNATIONAL ROAD TRANSPORT AND
FACILITATION OF ITS OPERATION**

**Consideration of the development of a Protocol to the Contract for the Carriage
for the International Carriage of Goods by Road (CMR)**

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Requested by the United Nations Economic Commission for Europe “to comment on the problems concerning the exchange of electronic data in the framework of the CMR Convention”, the Governing Council decided that, having promoted the CMR Convention, it wished to participate in the work. The undersigned was entrusted with the task of representing Unidroit within the Economic Commission for Europe.

This memorandum aims to inform the Working Party on the appropriateness of undertaking the development of a protocol to the CMR (1956) authorising the utilisation of electronic data (EDI) in place of paper-based consignment notes.

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I. The CMR Consignment Note

1. All modes of transport of goods use numerous documents to accompany the goods from the moment they are taken over by the carrier to when they are delivered to the consignee.

These documents are of differing nature: fiscal, customs, social, economic and commercial.

Attempts have been made to harmonize the presentation of these documents, so as to at least permit the uniform utilization of the data they contain, without the need for repetition.

Recourse to information technology has facilitated this process. It is widely used between enterprises and between enterprises and administrations.

2. Of these documents, one which appears to be essential in the commercial operation of transportation is the waybill. The primary function of the waybill is to attest to the taking over of the goods, i.e. to determine the legal, and subsequently physical, moment in time when the carrier (contracting or actual) takes on the responsibilities which form part of its duties. Similarly, the waybill will attest to the end of this period of responsibility.

In certain modes of transport, the waybill has other functions which are derived from the primary one. Thus, in maritime transport, the bill of lading may become a negotiable instrument in the hands of an “(third) holder or bearer”. The same applies to transport by waterway.

In rail transport, the CIM consignment note ^{1/} is indispensable for the application of the COTIF Convention. The negotiability of the waybill is authorised in air transport (but is hardly ever used), whereas in 1956 it was expressly rejected for CMR road transport consignment notes.

3. In the international transport of goods by road ^{2/}, which is subject to the 1956 Geneva Convention in its own right, the consignment note constitutes proof of the contract of carriage:

“Article 4. The contract of carriage shall be confirmed by the making out of a consignment note”.

However, while under the terms of Article 41 of the CMR:

“any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract”,

Article 4 of the CMR adds that:

^{1/} In the 1980 – 1990 version of CIM; with the 1999 Protocol the contract becomes consensual and this function disappears: see *ULR*, NS, Vol. IV, 1999-3, p. 736, under 3 (d).

^{2/} The same applies in all domestic transport which is subject to the CMR under national legislation.

“[t]he absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention”.

A first observation to be made is that the consignment note described in Article 6, the utilisation of which is prescribed in Article 5 and following, and which “*shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier*” (Article 9(1)), is not the only instrument of evidence imposed by the CMR.

4. It may however be recalled that when there is a consignment note, the CMR imposes:

- (a) that it shall be made out in three original copies signed by the sender and by the carrier (Article 5(1));
- (b) that “[t]he first copy shall be handed to the sender, the second shall accompany the goods and the third shall be retained by the carrier” (Article 5(1));
- (c) that the consignment note must contain precise indications (Article 6) for which the sender is responsible (Article 7);
- (d) that it is in the consignment note, and, in accordance with case law, only in the consignment note that the “*reservations*” of the carrier, the sender and the consignee are to be entered (Articles 8, 9 and 30);
- (e) that in the absence of “*specific reservations*” in the consignment note, the carrier is presumed to be liable for any damage (Article 9);
- (f) that possession of the consignment note, even if it does not constitute title to the goods, has consequences on the right of disposal (Article 12).

5. As regards the signatures of both the sender and the carrier, the CMR provides (Article 5(1)) that they may “*be printed or replaced by the stamps of the sender and the carrier if the law of the country in which the consignment note has been made out so permits*”.

The question is to know if, by citing printing and stamps, the authors of the CMR excluded other ways and means of expressing intention, ways and means that were unknown in 1956.

II. Electronic Mail

6. Since the adoption of the CMR in 1956, modes of exchange of information have developed, particularly with electronic mail or electronic data interchange (EDI).

These processes consist in the exchange of information without having recourse to paper (at least in the first stage, as this information is normally subsequently printed on paper, of which computers are major consumers).

The need for recourse to EDI makes itself felt in all modes of transport, also in view of the fact that frequently the consignee receives the goods before the documents (particularly if the documents are bills of lading).

The storage of data in the memories of computers and the exchanges that take place between computers avoid the need to transcribe this information, which saves time and to a large extent reduces the occurrence of errors.

7. Recourse to this process is not without pitfalls. Paper is relatively safe (even if numerous instances of fraud, due to ease of reproduction, and consequently of cutting, are known); it is tangible and susceptible to retention; once written on, it is difficult to modify its content.

It is moreover indispensable that, in legal relations, operators are provided with the best conditions for the protection and security of the data:

- the impossibility to alter the message, without the agreement of the parties, but also the possibility to alter it if there is agreement;
- the comprehension and acceptance of the message by the addressee;
- the identification of the parties and security for the authentication of their signature.

It is clear that EDI presupposes the use of appropriate materials. It could never be anything other than a back-up.

8. There is no doubt that the operators of the different modes of transport seek a regulation of this subject-matter.

It is not possible here to describe in a manner even approaching completeness the initiatives that this demand has given rise to. Below, only a few examples are given.

(a) In June 1996 UNCITRAL issued a Model Law on Electronic Commerce.^{3/}

We do not have information on the number of countries that have adopted this model law or on which countries have been able to translate it into national law.

This model law is particularly elaborate and, in accordance with its second Part, applies “*to any action in connection with, or in pursuance of, a contract of carriage of goods*” (Article 16). Furthermore, “*where the law requires that any action referred to in Article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages*” (Article 17(1)).

The UN/ECE Working Party made the following considerations at its 92nd session:^{4/}

^{3/} See *ULR*, NS, Vol I, 1996-4, pp. 716 – 730.

^{4/} 19 – 21 October 1998, TRANS/SC.1/363, 4 December 1998.

"(iii) Consideration of revision or a Protocol to the C.M.R.

40. Recalling its request to the secretariat at its ninety-first session, the Working Party was informed that the secretariat had contacted the Legal Rapporteurs Group of the Centre for Facilitation Practices and Procedures for Administration, Commerce and Transport (CEFACT), regarding the integration of electronic data interchange (E.D.I.) into the Convention on the Contract for the International Carriage of Goods by Road (C.M.R.). The Legal Rapporteurs Group had recommended the drawing up of a Protocol to the C.M.R. rather than a revision and suggested that the draft Model Trade Law developed by the United Nations Commission on International Trade LAW (UNCITRAL) might provide some of the elements required in such a Protocol.

41. The Working Party agreed that a protocol to the C.M.R. to incorporate E.D.I. was a complex issue that would require further analysis by experts on E.D.I., transport and private law, and asked the secretariat to contact UNIDROIT, based in Rome, for their views on the matter. The Working Party would take up this issue again at its next session".

It may be observed that the Working Party would like to integrate this adaptation of the CMR into a broader legislative movement concerning all conventions likely to use EDI processes.

(b) The International Chamber of Commerce has established "*Uniform rules of conduct for interchange of trade data by teletransmission*",^{5/} but even if these rules form a good basis on which to build in the preparation of a "*Communication agreement*", they do not constitute a complete legal framework.

(c) In September 1999 the Hague Conference on Private International Law organised a "*Round Table discussion on issues of jurisdiction and applicable law arising out of electronic commerce and Internet transactions*".^{6/}

It may be noted that the Round Table recommended that "*instead of the creation of new norms for electronic commerce*", recourse be had to principles of "*functional equivalents*".

(d) In the maritime sphere, the solution to the problems posed was all the more difficult to find as the bill of lading is a title which represents the goods and as the holder of the bill of lading is legally in possession of the goods. The transfer and the endorsement of the bill of lading create a problem that the *Comité maritime international* has considered at length,^{7/} notably at the Centenary Conference of the CMI in Antwerp in 1997.^{8/}

^{5/} UNCID Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, Paris, ICC, Publication No. 452, 1988.

^{6/} *ULR*, NS, Vol. IV, 1999-3, pp. 686 – 692.

^{7/} CMI Yearbook 1997, Part II, p. 211, presentation by J. RAMBERG.

^{8/} See CMI Yearbook 1997, Antwerp II, Documents of the Centenary Conference, and *ETL*, Antwerp 1997, pp. 643 ff.

(e) In rail transport, the 1999 Protocol to the CIM permits the replacement of the signature on the consignment note in “*any other appropriate manner*”, without reservation “*as to admissibility in accordance with national law*”.^{9/}

“The possibility to make out the consignment note, as well as its duplicata, in the form of the electronic registration of data is expressly provided for. Such a provision does not exist in the CMR. This new provision of the CIM uniform rules is based on the idea of functional equivalence. The principle of the same legal effects applies to all the functions of the consignment note, even if the problems of evidence have been stressed, as it is in this area that the greatest difficulties arise in certain national laws”.^{10/}

The text accepted by the General Assembly held in Vilnius on 15 November 1998 reads as follows:

“Article 6 – Contract of carriage

§ 9 *The consignment note and its duplicate may be established in the form of electronic data registration which can be transformed into legible written symbols. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by those data”.*

(f) In the sphere of air transport, the Convention for the Unification of Certain Rules for International Carriage by Air signed in Montreal on 28 May 1999 provides in its

“Article 4 – Cargo:

1. *In respect of the carriage of cargo, an air waybill shall be delivered.*
2. *Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means”.*

(g) In inland navigation (river and lake), a draft Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)^{11/} was finalised on 1 July 1999 by the Central Commission for Navigation on the Rhine (CCNR), the *Commission du Danube* and the UN/ECE. The text of this draft will shortly be submitted to a Diplomatic Conference. In it, one reads:

“Article 1 – Definitions

^{9/} See G. MUTZ, *Evolution du droit du transport international terrestre: une comparaison des RDU, CIM et de la CMR*, in *ULR*, NS, Vol. III, 1998-2/3, p. 620, at para. 23 (translation by the Secretariat).

^{10/} Translation by the Secretariat.

^{11/} CMNI/CONF (99) 2 – ECE/TRANS/CMNI/CONF/2, 1 July 1999.

For the purposes of this Convention (...)

8. *unless otherwise agreed by the persons concerned, the expression “in writing” includes the situation in which information is transmitted by electronic, optic or any other similar means of communication, including, but not limited to, telegram, telecopy, telex, electronic mail or electronic data interchange (EDI), to the extent that the information remains accessible for further use for reference purposes*.^{12/}

9. The subject of the authentication of the electronic signature is not investigated here. Up to now, it belongs to the national^{13/} or the E.U.^{14/} legislations.

III. Provisional Conclusions

A first analysis leads to the conclusion that, if EDI and “electronic” consignment notes were to be accepted, no major legal difficulties would result from the linking of the means of proof to the CMR paper-based consignment note. This conclusion is based on a teleological interpretation of the CMR (“functional equivalence”) which however the case law of certain countries would admit with difficulty.

The same conclusion may be reached in relation to the other modes of transmission, such as telecopy, telegram and telex. Certain national legislations have incorporated these instruments into their provisions on evidence.

Legal security would consequently require the possibilities analysed above to be based, in legal terms, on a substantive uniform law.

It is currently unanimously admitted that only an additional protocol would constitute an appropriate instrument. A protocol modifying the Convention would involve serious difficulties in consideration of the system of connecting factors of the CMR (place of take over or designated place for delivery). An additional protocol could moderate this criterion, for example, by not having it apply unless the parties to the contract of carriage have concluded a communication agreement.

12. Following the example of existing conventions (1999 CIM Protocol, Montreal Convention and CMNI draft) the CMR Protocol should be limited to what has been analysed and should not involve more than a provision permitting the functional equivalence of EDI (possibly also of other modes of transmission) to the paper-based consignment note.

^{12/} Translation by the Secretariat.

^{13/} See inter alios, Sénat (France), Les documents de travail du Sénat, LC67, December 1999 : “La signature électronique”.

^{14/} Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signature, O.J. L 013, 19 January 2000.

13. If the present situation of the road transport enterprises deriving from the CMR is considered, it may be observed that in practice EDI is already used extensively. It is therefore urgent to fill the legal void.
