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**HARMONIZATION OF REQUIREMENTS CONCERNING INTERNATIONAL
ROAD TRANSPORT AND FACILITATION OF ITS OPERATION**

Protocol additional to the CMR: EDI-CMR Protocol

**Note transmitted by Professor Jacques Putzeys,
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After studying the considerations and proposals prepared at its request by the International Institute for the Unification of Private Law, Rome, UNIDROIT (TRANS/SC.1/2000/9 and TRANS/SC.1/2001/7), the Working Party on Road Transport (SC.1) of the Inland Transport Committee requested the secretariat to seek the opinions of the Contracting Parties to the CMR on the follow-up to the UNIDROIT draft (TRANS/SC.1/369, paras. 44 and 45).

The secretariat's questionnaire, drafted in collaboration with us, can be found in document TRANS/SC.1/2002/1 of 15 February 2002.

The analysis of the replies is the subject of document TRANS/SC.1/2002/2 of 30 July 2002, together with the individual replies of Germany (Add.1 of 25 July 2002) and France (Add.2 of 30 July 2002).

The aim of this note, requested by the secretariat, is to comment on the replies and its purpose is to enable the Working Party to take a decision during its ninety-sixth session in 2002.

A. Use of electronic communications

1. The draft additional EDI-CMR Protocol is not intended to organize the use of an electronic consignment note but to enable it to be used instead of the paper-based version.
2. Since the adoption of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L13 of 19 January 2000), the majority of European Union member States have adopted¹ this framework in their national legislation.

These are:² Austria (14 May 1999), Belgium (20 October 2000 and 9 July 2001³), France (13 March 2000), Germany (22 May 2001), Greece (decree 960; 948.150/2001(?)), Ireland (July 2000), Luxembourg (14 August 2000), Portugal (2 August 1999), Sweden (18 May 2000), United Kingdom (25 May 2000).

Other member States are preparing to comply: Finland, Italy (which has had relevant national legislation since 15 March 1997), Netherlands, Spain (which has had relevant national legislation since September 1999).

The European Union framework has also been adopted by: Belarus (10 January 2000), Croatia (17 January 2002), Czech Republic (June 2000), Estonia (December 2000), Hungary (29 May 2001), Norway (1 July 2001), Russian Federation (22 March 2001), Slovakia (Republic of) (15 March 2002), Slovenia (22 August 2000). In preparation: Bulgaria, Malta (18 May 2000), Poland, Switzerland (but Order of April 2000). Some countries are preparing to adopt the 1996 UNCITRAL Model Law.⁴

It can therefore be said that at the present time the electronic signature is uniformly accepted in Europe; certification of the signature still depends on national law, within a framework established in particular by the European Union. Consequently, the question of the validity of this procedure should not be addressed in the context of the draft EDI-CMR Protocol.

For an overall view, document A/CN.9/WG.IV/WP.94 of the thirty-ninth session of the UNCITRAL Working Group on Electronic Commerce, New York, 11-15 March 2002, can be consulted:

“Legal aspects of electronic commerce. Legal barriers to the development of electronic commerce in international instruments relating to international trade” (Note by the secretariat, in particular chapter 11).

B. Electronic communications in transport operations

3. Provisions having the same aim as the EDI-CMR Protocol have already been included in the international conventions on rail, air and inland waterway transport.⁵

The Final Act of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI),⁶ of 8 February 2002, adopted two inter-American uniform through bills of lading for the international carriage of goods by road, one negotiable, the other non-negotiable.

Article 2.1.9 defines “Writing” as follows: *“Includes, but is not limited to, a written document, a telegram, telex, telephonic facsimile (fax), electronic data interchange or a document created or transferred by electronic means.”*

Article 18.01 concerning signatures provides that: *“The parties agree that any signature on or by this Bill of Lading may appear handwritten, printed on facsimile, perforated, stamped in symbols or registered in any other mechanical or electronic means authorized by the applicable law. The parties agree to be bound by the same as if they had physically handwritten their signatures.”*

As regards the negotiability of the bill of lading, there is only one provision (article 14.2: *“The right of the Shipper or Consignor to dispose of the Goods in transit shall cease as soon as the right of the Consignee to the Goods begins, that is to say, from the moment when the Shipper or Consignor negotiates the Bill of lading or transfers title to the rights arising out of it.”*).

In the case of a non-negotiable bill of lading, *“Neither the Contracting Carrier nor any Performing Carrier shall divert or reassign the Goods except upon written amendment of this Bill of Lading by the Shipper with the consent of the Contracting Carrier, which shall not be unreasonably withheld.”*

This OAS draft makes EDI a “written” medium like any other, leaving all technical questions relating to its use to be dealt with by the parties to the contract.

4. Two aspects should nevertheless be distinguished here: commercial relationships and relations with the public authorities where they have control over the documents and the consignment note in particular.

5. As regards commercial relationships, the electronic consignment note is considered to have the same legal value as the paper-based consignment note, naturally provided the conditions of consent to the procedure are met.

According to our investigations, this is the case in: Spain, Italy, France (Ministerial Decree of 9 November 1999),⁷ Germany (Signaturgesetz, 16 May 2001, in force: 22 May 2001 and Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderen vorschritten an den modernen Rechtsgeschäftsverkehr, 13 July 2001), United Kingdom (Electronic Communication Act 2000).

6. The monitoring authorities, however, are far more reticent. While Spain accepts monitoring on a mobile screen, as does the United Kingdom and France,⁸ this is not the case in Italy and the Netherlands. The situation in Germany is unclear, since no legal provisions exist.

C. Documents in road transport

7. It is useful to remember that any “data transmission” involves an instrument, ranging from the pencil or ballpoint pen to the laptop. Without an instrument there is only oral tradition, which leaves no written trace.

In addition, correspondents need to use the same language and the same characters. In order to ease this problem, the International Road Transport Union (IRU) drew up a checklist some 20 years ago, to enable carriers to make model entries in the consignment note.

As from now, written communications, other than the consignment note the CMR requires from the parties, can be made electronically, including the signature. This concerns:

- article 20.2: the request for notification should the goods be recovered;
- article 27.1: claim for interest on the compensation payable;
- article 30.1/2: reservations in the case of loss or damage which is not apparent;
- article 30.3: reservation concerning delay;
- article 32.2: written claim suspending the period of limitation (*in addition: all communications with liability and cargo insurers*).

D. The consignment note in particular

8. Numerous lawsuits arise as the result of defects, including the illegibility of reservations and dates in the particulars entered in the consignment note by drivers and consignees.

It is obvious that EDI is only possible if adequate instruments are available, including their availability on board the vehicle. It may be noted, however, that in the present state of this technology, a mobile phone is sufficient if it can receive SMS (PDA screens).

It is equally obvious that using this technology is possible only with the consent of the parties to the contract.

9. The Federal Government of Germany has expressed a number of concerns regarding the specific application of the draft Protocol (TRANS/SC.1/2002/2/Add.1, 25 July 2002 of the Inland Transport Committee). The reply to these comments is given in the general observation above that the Protocol should permit the use of EDI as already authorized by the conventions on other transport modes; the aim is not to organize that use.

9.1 Article 5.1, third sentence, of the CMR requires (article 41) that the consignment note shall be made out “in three original copies” and that a copy of the consignment note “shall accompany the goods”.

The electronic consignment note system is so designed that a “copy”, electronically signed by the sender and by the carrier when the goods are taken over (article 5.1, first sentence), is available in legible form, or can even be printed,⁹ on board the vehicle at any time during transit.

In technological terms, the electronic consignment note is safer than the current consignment note which can be altered, deliberately or not, during carriage. The content of the electronic consignment note can be checked at any time by the transport company, the sender or the consignee, who can further oversee the progress of the transport operation in real time.

Security systems preventing any modification without the consent of the parties are available.

9.2 It is true that in order for the consignment note to provide prima facie evidence as required in article 9.1 of the CMR, it must be signed by the initial parties to the contract, i.e. the sender and the carrier.

The CMR does, however, refer to “the law of the country in which the consignment note has been made out” as regards permitting the printing of the signatures or their replacement by stamps (article 5.1). The unification demanded by the note analysed has not therefore been achieved.

It is nevertheless the case that the technical conditions required for the use of EDI can only be the province of domestic laws in the absence of valid universal legislation (UNCITRAL Model Law). As was said above, the European Union has drawn up legislation which will become standard when it has been incorporated by all member States; a very large number of other States have done so or envisage doing so.

The adoption of the Protocol will not provide a cure-all since it is not certain that all States which have ratified the CMR to date will do the same for the Protocol.

It will be up to the users to ascertain the validity of their electronic signature on a case-by-case basis.

9.3 Article 11.1 of the CMR requires the sender to “*attach the necessary documents to the consignment note or place them at the disposal of the carrier*”, “for the purposes of the Customs or other formalities which have to be completed before delivery of the goods”.

Two possibilities are offered to the parties:

(a) The documents are to be made available in their traditional form (their attachment is not mandatory);

(b) They are attached electronically to the electronic consignment note. As things stand, many administrations, particularly customs administrations, already use this form of document transmission, thus avoiding mistakes in transcription and expediting the processing of the information. Links are created between sources of information.

9.4 The right of disposing of the goods is governed by article 12 of the CMR; this right is passed on from the sender to the consignee and is linked to conditions rendered difficult by the fact that the consignment note cannot be made negotiable like a bill of lading.

One of the formal conditions is the handing over (article 12.2) or production (article 12.5) of one of the copies of the consignment note. How is this condition to be met?

As the CMR stands, it may be noted in the first place that the difficulties of implementing the right of disposal concern the technicalities of the means of communication between the parties. They can be related to the situation which will emerge with the use of an electronic consignment note.

The simplest situation, because it is immutable, is that of the right of disposal belonging to the consignee, under an entry to that effect inserted by the sender in the consignment note (article 12.3 and article 6.3 of the CMR). The use of the electronic consignment note does not prevent this practice; it makes it impossible for the sender to alter.

The sender may change his instructions during carriage (article 12.1). The CMR took its inspiration in 1956 from the CIM which contains a similar provision (currently article 30 of the 1980 CIM), but the railways have their own telephone lines which permit contact between the sender and the railways and the “*transmission of orders*” in the form prescribed by the railways. It may be wondered how, in 1956, a Portuguese shipper could transmit orders to a driver from the Netherlands at the border between Turkey and Iran.

Recourse to electronic methods via the transport company on the other hand makes it possible to transmit instructions instantaneously during the transport operation; this is completely safe since the modifications to the instructions have been made secure¹⁰ and are inaccessible to unauthorized persons (the carrier in all cases, the sender in the case of article 13.3 and the consignee until the consignment note is “*handed to*” him in accordance with the communication agreement - article 12.2).

In the system currently practised, which we have been able to see in operation, an electronic consignment note is so designed that the instructions entered in it on issue can only be modified by the party authorized by the contract to do so and during the period in which that party may so act and only if the other parties are immediately informed of these modifications.

In actual fact, the use of the electronic consignment note permits the instantaneous and safe circulation of the instructions and their immediate inclusion in all the “*copies*” of the consignment note.

9.5 Observations e. and f. concern the application of articles 34 and 35 of the CMR.

We would point out, with Mr. R. Loewe (Explanatory note, 1975, ECE/TRANS/14, No. 274) that according to the experience gained to date, the provisions of chapter VI are not of great practical importance. After 48 years of experience in road transport, the undersigned has never encountered a single case of a “*succeeding carrier*” in the sense of article 34 of the CMR.¹¹

Whatever the practical uses of the electronic consignment note, its current designers have provided boxes for the “*transmission*” - electronic naturally - of the documents (if the succeeding carrier is not equipped, it will be necessary to go back to a paper-based issue).

The following system has been proposed:

- First mandatory stage: the carrier (first or previous) must first confirm electronically his arrival at the place of transfer of the cargo on the electronic consignment note, including his reservations and remarks (signed electronically by him);
- Second stage: after confirmation of the first stage, the succeeding carrier confirms taking over the goods and his acceptance with or without reservations and signs;
- A similar procedure, supervised by the sender and consignee, ensures that the operations have taken place in accordance with the rules.

9.6 The last issue concerns question [2a] and the words “*Unless the parties concerned provide otherwise*”.

In view of the imperative nature of the CMR (article 41), can this negative choice be left to “*the parties concerned*” and who are these “*parties*”?

First of all, it may be observed that although “*any stipulation which would directly or indirectly derogate from the provisions*” of the CMR would be null and void, this is not the case for the form in which the consignment note could be drafted, since “*The 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*” (article 4).

People cannot, however, be forced to have recourse to EDI, if only because of a lack of electronic transmission equipment (in the sub-Moroccan Sahara or Mongolia). The “*parties concerned*” may therefore agree among themselves to use only older methods, including papyrus or stone-carving. The condition mentioned is included in article 1.8 of the 1999 CMNI. It would certainly be possible to invert the sense of the phrase to read: “*Provided that the parties concerned agree [...]*”.

Wording of this nature may, however, seem contrary to practice and to existing law, in which EDI is the first method to be authorized and used.¹² It is only at the express request of a party that there is any reason to resort to a paper version that can be transmitted manually.

As for identifying the “*parties concerned*” in a contract of carriage, this is a traditional academic discussion, particularly as regards the consignee and his inclusion among the parties to the contract.

10. The French Government has made some drafting comments (TRANS/SC.1/2002/Add.2, 30 July 2002):

1. The phrase “*so as to be usable for subsequent reference*”, taken from the 2000 CMNI, is indeed not the most felicitous.
2. The phrase “*access to the information contained in the record preserved by such other means*” comes from the 1999 Montreal Convention.

3. The phrase “*from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by those data*” is taken from the 1999 COTIF.

We shall not conceal our preference for a concise text referring to the explanatory report for all consequent obligations. Piecemeal copying of recent conventions is not an adequate method, even if it is an attempt to be exhaustive.

Wording such as “*the consignment note may also be established by any other means for the transmission of information, particularly electronic, permitting data storage*” could be included.

It seems clear that:

- the “*parties (necessarily) concerned*” may not be in favour, otherwise there could be no consent;
- the “*procedures [...] must be equivalent from the functional point of view*”, otherwise they would not be basically valid;
- a “*reliable identification procedure*” is needed, but that this depends on the legislation on the electronic signature;
- issue in paper form must - as is the case - always be possible both from an administrative point of view and for the needs of traditional archiving.

11. If the table annexed to the secretariat document (TRANS/SC.1/2002/2 of 30 July 2002) is consulted, it may be seen that:

- all countries, including Germany, consider that an addition should be made to article 5 of the CMR;
- while the majority of countries are in favour of a broad-based wording (7 out of 13), others prefer the wording to be succinct or expressed differently.

In view of this unanimity on the substance of the text, it is proposed that the Working Party on Road Transport should indicate its agreement in principle to the EDI-CMR Protocol, provide guidelines concerning its content and establish a drafting group.

We should like to draw the Working Party’s attention to the urgency of adopting the Protocol. Private initiatives are being taken at the present time, without instructions and with no legal basis. Anarchy would be damaging to the parties to contracts of carriage and should be avoided.

Notes

- ¹ Sometimes anticipating the future.
- ² The information reproduced here was taken from our own documentation or the web site <http://rechten.kub.nl/simone> (Dig.Sig.Law Survey) updated to 1 July 2002.
- ³ Act of 9 July 2001 (M.B., 29 September 2001) establishing certain rules concerning the legal framework for electronic signatures and certification services.
- ⁴ See also UNCITRAL Model Law on Electronic Signatures, 2001, A/CN.9/493 of 17 May 2001.
- ⁵ Drafts are under consideration within UNCITRAL and the Comité maritime international (CMI) on the subject of negotiable ocean bills of lading. See the Report of the Working Group on Transport Law on the work of its ninth session, New York, 17-21 June 2002, A/CN.9/510, 7 May 2002, p. 11.
- ⁶ SLADLCIWEBMaster@oas.org (French text published by the Organization of American States).
- ⁷ “The form of the consignment note is free. It may be produced by computerized means on board the vehicle.”
- ⁸ “The consignment note (...) or, for each of these documents, their computerized equivalent, shall be presented when requested by State agents responsible for roadside checks.” (Ministerial Decree of 9 November 1999.)
- ⁹ In Belgium, consignment notes carry a number allocated by the administration. This is already the case for electronic consignment notes.
- ¹⁰ Codes, keys, cryptograms, electronic signatures, as regulated by national legislation.
- ¹¹ For there to be successive “*carriers*”, a single contract, a single cargo, a single consignment note and mutual responsibility among carriers for the entire operation are needed.
- ¹² Thus, the Belgian Civil Code in its new article 2281 (1 January 2001) expressly provides that an electronic message is the equivalent of a registered letter by post.
