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## **Legal barriers to the development of electronic commerce in international instruments relating to international trade**

### **Compilation of comments by Governments and international organizations**

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## II. Compilation of comments

### B. Intergovernmental organizations

#### 1. International Road Transport Union

[Original: French]  
[25 November 2002]

1. The International Road Transport Union (IRU) is following with interest the work of UNCITRAL to eliminate legal barriers to the development of electronic commerce in international instruments relating to international trade. It appreciates the high-quality analysis of legal instruments—including those relating to carriage by road—contained in document A/CN.9/WG.IV/WP.94.

2. It has examined closely the preliminary draft convention on [international] contracts concluded or evidenced by data messages. In the light of the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) of 19 May 1956, we wish to make the following comments:

#### 1. Preliminary draft convention

##### Article 1

###### *Variant A*

3. The provision stating that “this Convention applies to contracts concluded or evidenced by means of data messages” may raise problems of interpretation. All the means of communication between parties to a contract of carriage are complementary to one another and non-exclusive in character. Thus, a contract of international carriage by road may be concluded orally by telephone, confirmed by an exchange of correspondence on paper and evidenced by a CMR consignment note in electronic form. It is not clear whether, in such a case, the future Convention is applicable or not. If it were confirmed that it was applicable to such a case, this would imply standardization of the rules for contract formation, not only when the contract is concluded electronically but also when it is concluded orally or by exchange of correspondence on paper, solely because one of the contractual documents (in this case the CMR consignment note) is exchanged electronically. However, if it were not confirmed that the future Convention applied to the case in question, this would mean there was a conflict between the scope of application as formulated and the content of the future Convention.

4. Paragraph 3 of the preliminary draft, which allows the contracting parties the right to declare that they will apply the future Convention only to contracts concluded between parties having their places of business in two different States, would exclude a large number of contracts of carriage that are subject to the CMR Convention and concluded between parties having their places of business in the same State. A distinction should therefore be made between “international contracts” and “international carriage”.

###### *Variant B*

5. The term “international” as defined in the preliminary draft is incompatible with the term “international” as defined in the CMR Convention. The CMR

Convention (art. 1.1) considers international any carriage in which the place of taking over of the goods and the place designated for delivery are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties to the contract of carriage. The definition in the preliminary draft, which states that a contract is considered international (the future Convention therefore being applicable to it) if, at the time of conclusion of the contract, the parties have their places of business in different States, would exclude a large number of contracts of carriage that are subject to the CMR Convention and concluded between parties having their places of business in the same State.

### Article 3

6. A contract of international carriage by road “evidenced” by a CMR consignment note established electronically could be considered subject, in terms of its formation, to the future Convention, even in cases where the contract was concluded orally or on paper. In order to avoid problems of interpretation, the scope of application of the future Convention should be better defined (see the comments on article 1).

### Article 5

7. The definition of the term “data message” includes, inter alia, “telegram, telex or telecopy”. However, variants A and B of article 13, paragraph 3,\* of the preliminary draft do not seem to take account of this definition.

8. Under variant A, the signature would not be valid unless “a method” were used to identify the signatory. If this provision were kept in its current form, it could imperil practices such as the exchange of contractual documents by fax. Under variant B, the requirement for a signature is met if “a data message” bears “an electronic signature ... which is as reliable as was appropriate ...”. Telegram, telex and telecopy do not presuppose the use of electronic signatures.

### Article 8

9. This article states that “an acceptance of an offer becomes effective at the moment the indication of assent is received by the offeror”—that is, pursuant to article 5 (g), by “a natural person or legal entity that offers goods or services”.

10. Unlike public transport operators, which offer their services on an ongoing basis, road carriers must consent to a contract. The principal is generally the offeror (cf. J. Putzeys, *Le contrat de transport routier de marchandises (The contract for the carriage of goods by road)*, p. 113 and 114). The principal’s order for a means of transport must be accepted by the road carrier.

11. It follows that, contrary to the provisions of article 8, the time of formation of the contract of carriage most often corresponds to the time when the “indication of assent” is received by the principal.

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\* *Translator’s note:* The reference to the paragraph has been added in the English translation for clarity.

## **2. Other problems**

12. Ms. Geneviève Burdeau, Professor of the University of Paris, proposes (annex to document A/CN.9/WG.IV/WP.89) an interpretative agreement, which she believes would be sufficient to eliminate the barriers to electronic commerce in existing treaties.

13. France, on the other hand, believes (A/CN.9/WG.IV/WP.93, para. 7) that an agreement that interprets existing treaties would not achieve the intended objective. It is not a case of negotiating an agreement that would interpret, modify or amend existing treaties, but of concluding a new agreement allowing for electronic equivalents.

14. As the Swiss delegation rightly states (A/CN.9/WG.IV/WP.98/Add.4, para. 7), the question of whether an amendment or simply a supplement to existing treaties is needed cannot be decided a priori. To answer it, the treaties involved would have to be looked at individually. The Swiss delegation therefore also sees no possibility of avoiding the need for a revision by choosing the form of an authentic interpretation. The delegation believes that changing the rules for the interpretation of a legal instrument means amending it; therefore, such an action has to be treated as a revision.

15. With regard to considering the CMR Convention, as the Swiss delegation advises, IRU must emphasize that the drafters of that Convention wanted to prevent it from meeting the same fate as the Warsaw Convention and the rules of maritime law concerning bills of lading and the contract of carriage by sea.

16. Article 1, paragraph 5, of the CMR Convention therefore provides that “the Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them”. Thanks to this provision, there is a single text that governs uniformly the contract of international carriage by road between the Atlantic and the Pacific. In respect of the CMR Convention, therefore, the only remaining option is a supplementary agreement allowing for electronic equivalents. This option, in the form of a protocol on electronic data interchange (EDI) to the CMR Convention, is currently being used by the Working Group on Road Transport of the United Nations Economic Commission for Europe (ECE), which is considering the supplement to the CMR Convention drafted and proposed by Professor Jacques Putzeys and the International Institute for the Unification of Private Law (Unidroit).

## **Conclusions**

17. Bearing in mind:

(a) That, in order to cater for specific characteristics of road transport set out above, several principles already adopted by the drafters of the preliminary draft convention on [international] contracts concluded or evidenced by data messages need to be thoroughly amended, by analogy with the United Nations Sales Convention; and

(b) That ECE has already begun work on the supplementary agreement to the CMR Convention allowing electronic equivalents,

IRU considers that it would be appropriate not to include international carriage by road in the preliminary draft convention but, as suggested in the Note by the Secretariat (A/CN.9/WG.IV/WP.94, para. 104), to continue, within UNCITRAL, “monitoring the current efforts being undertaken under the auspices of ECE” and to consider “their progress at a later stage”. This would avoid duplication of effort, which would cause confusion and produce incoherent results.

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