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CO-ORDINATION OF WORK

International Transport Documents

Report of the Secretary-General

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INTRODUCTION

1. The Commission, at its fourteenth session, decided that, to further strengthen the co-ordinating role of the Commission, the Secretariat should select a particular area of international trade law for consideration and submit a report on the work of other organizations in that area. ^{1/} The subject of international transport documents has been chosen for the fifteenth session in response to the decision of the Commission. Because of the developments in transport and data communication technology, the manner in which transport documents are prepared and issued is changing rapidly with consequent effects on the governing legal regime.
2. In the past, each mode of transport was independent of the others. If the goods had to move by several different modes from the point of origin to the ultimate destination, each portion of the total journey was treated as a separate journey to be governed by its own legal regime. These legal regimes were established by national law, by bilateral agreements where trade between two adjoining States was involved, or by multilateral agreements where many States were affected.
3. The multilateral agreements, with which this report is concerned, can be divided into two major groups. There are world-wide agreements covering two major forms of transportation, sea and air. The acceptance of these conventions is so extensive that for all practical purposes they establish the documentary requirements for all international transport carried by them. Land-based transport is by its nature a regional affair. The only major multilateral international agreements governing rail or road transport are in Europe with, in the case of rail transport, extensions into Asia and North Africa.
4. All of these conventions have two basic purposes. They establish the responsibility of the carrier to the shipper for loss or damage to the goods. They also establish the requirements as to the transport document to be issued in connexion with the carriage of the goods. Although the main lines of these conventions are similar, reflecting the similarity of problems to be considered in the carriage of goods by any mode of transport, the fact that each form of transportation was considered to be independent of the others and in large measure served a different market led to a separate evolution of the information to be contained in the transport document and the significance of the document as a means of controlling the goods.
5. This situation, which basically continues today, has been disturbed by a number of developments, of which four deserve mention here. The first is the use of unitizing devices, and especially of containers, to consolidate break-bulk cargo. In order to obtain maximum benefit from the use of a container, cargo is consolidated as close as possible to the place of origin of the goods and delivered to a container yard as close as possible to the ultimate destination before the container is opened. What previously had been a series of separate journeys has become - from the point of view of the shipper at any rate - one continuous journey over several modes of transport. Mechanisms have had to be found to issue documents satisfactory to the commercial parties in this situation.
6. A second development arising out of the use of containers is that in certain trades the turn-around time from the loading of a ship in one port to

^{1/} Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 100.

the unloading of it in another has been shortened to such an extent that the goods often are ready for delivery before the bill of lading has arrived authorizing release of the goods. The resulting terminal delay adds extra costs and reduces the value of containerization. There have been similar, though not identical, problems with clearing air freight out of the airport of destination.

7. A third development to affect the documentary requirements has been the trade facilitation movement. A series of studies had shown that a single shipment of goods might require the seller to create as many as 40 separate documents for a domestic trade transaction and over 100 for an international trade transaction. Other studies had shown that the cost of documentation for international sales ran about 7 per cent of the selling price of the goods. 2/ The purpose of the trade facilitation movement has been to reduce this cost by reducing the number of required documents and to simplify the preparation of those documents which remain. The central organ for international trade facilitation is the Working Party on Facilitation of International Trade Procedures, a joint effort of the Economic Commission for Europe (ECE) and of UNCTAD. 3/

8. The first major accomplishment of the trade facilitation effort was the publication in 1963 of a basic standard for the layout of information that is repeated on most of the forms needed to initiate and complete an international trade transaction. In 1973 the standard was formally recommended by the Working Party as the ECE Layout Key for Trade Documents. It was re-named in 1978 as United Nations Layout Key for Trade Documents. 4/

9. The development of the United Nations Layout Key is having a profound effect on the documentation aspects of international trade. As various national and international organizations have aligned their documents on the Layout Key, it has become possible for the seller-shipper to type the basic information on a master copy or into automatic data processing equipment and from that single typing to produce a series of documents needed for the sale and shipment of the goods. The unneeded data for any given document is blocked out through masking or similar devices. These techniques of document production permit a significant saving in the cost of producing the documents and reduce the number of possible clerical errors. Moreover, any clerical errors which are made are reproduced systematically throughout all the documents produced from the master. Rather than increasing difficulties, a consistent error is easier to find and to correct than is a haphazard error.

10. A fourth development is the use of computers for the preparation of transport documents and telecommunications for their transmission. This development goes hand in hand with the trade facilitation movement since the full benefits of neither computers nor telecommunications can be realized without the standardization of the data required for different purposes and standardization

2/ Cited in E. du Pontavice, L'informatique et les documents du commerce extérieur, Revue de jurisprudence commerciale, special issue of November 1979, p. 435 et 445-46.

3/ See Facts about the Working Party on Facilitation of International Trade Procedures, TRADE/WP.4/INF.68, TD/B/FAL/INF.68.

4/ The United Nations Layout Key for Trade Documents with explanatory material is contained in document ECE/TRADE/137 (United Nations publication, Sales No. E.81.II.E.19).

of the format for entry of the data. This pressure for standardization is accentuated when the information is sent by telecommunications since, in an effort to reduce transmission costs, as much data as possible is sent by code. For example, it would be impractical to send in full by telecommunications the standard conditions of carriage now found on the back of most transport documents. It would be cheaper to refer to them by a single word or, better yet, a single letter or number in the appropriate location.

I. THE LEGAL REGIME

A. Existing Multilateral Conventions

11. There follows below a chart showing the major transportation conventions in force, awaiting ratification or in draft which govern the documentary requirements. Those protocols to the existing conventions which do not affect the documentary requirements are not listed.

<u>Mode of transport</u>	<u>Name of Convention</u>	<u>Date of adoption/ Date in force</u>	<u>Preparing Organization</u>	<u>Geographical Coverage</u>
Sea	International Conv. for the unification of certain rules of law relating to bills of lading (Hague Rules)	25 August 1924/ 2 June 1931	Comité Maritime International	World-wide
Sea	United Nations Convention on the carriage of goods by sea, 1978 (Hamburg Rules)	31 March 1978/ not yet in force	United Nations Commission on International Trade Law (UNCITRAL)	World-wide
Air	Convention for the unification of certain rules relating to international carriage by air (Warsaw Convention)	12 October 1929/ 13 February 1933	Comité international technique d'experts juridiques aériens, <u>absorbed by International Civil Aviation Organization</u>	World-wide
Air	Hague Protocol	28 September 1955/ 1 August 1963	ICAO	World-wide
Air	Montreal Protocol No. 4	25 September 1975/ not yet in force	ICAO	World-wide
Rail	International Convention concerning the carriage of goods by rail (CIM)	7 February 1970/ 1 January 1975	Central Office for International Railway Transport (Berne)	Europe, North Africa Western Asia
Rail	Convention concerning international transport by rail (COTIF), Appendix B (CIM)	9 May 1980/ not yet in force	Central Office for International Railway Transport (Berne)	Europe, North Africa Western Asia

<u>Mode of transport</u>	<u>Name of Convention</u>	<u>Date of adoption/ Date in force</u>	<u>Preparing Organization</u>	<u>Geographical Coverage</u>
Rail	Agreement concerning the international carriage of goods by rail (SMGS)	1 November 1951/ current revision in force since 1 July 1966	Organization for the Collaboration of Railways	Eastern Europe, East Asia
Road	Convention on the Contract for the international carriage of goods by road (CMR)	19 May 1956/ 2 July 1961	Economic Commission for Europe	Europe
Multimodal	United Nations Convention on international multimodal transport of goods (Multimodal)	24 May 1980/ not yet in force	United Nations Conference on Trade and Development (UNCTAD)	World-wide
Inland Waterways	Draft Convention on the contract for the carriage of goods by inland waterways (CMN)	Draft of 1973	International Institute for the Unification of Private Law, Economic Commission for Europe	Europe
Terminal operators	Preliminary draft Convention on the liability of international terminal operators (ITO)	Draft of October 1981	International Institute for the Unification of Private Law	World-wide

12. Sea. The Hamburg Rules are intended to replace the Hague Rules. Although the Hamburg Rules have more detailed provisions governing the bill of lading and accommodate the use of non-negotiable transport documents better than do the Hague Rules, they contain no fundamental changes in the law governing the documentary aspects of the carriage of goods by sea.

13. Air. The Hague Protocol of 1955 amended, *inter alia*, article 8 of the Warsaw Convention by reducing the number of items of required information on an air consignment note. Since several countries have not ratified the Hague Protocol, any uniform air consignment note must be based upon the requirements of the original Warsaw Convention as well as the less extensive requirements of the Protocol.

14. Article 8 of the Convention as amended by the Hague Protocol would in turn be amended, though in a minor way, by Montreal Protocol No. 4 of 1975. More importantly, article 5 of the Convention would be amended by this Protocol to permit the use of computer communication technology in place of a paper air consignment note.

15. Rail. The 1980 COTIF will replace the 1970 CIM concerning the carriage of goods by rail as well as the 1970 CIV concerning the carriage of passengers and luggage by rail. The 1970 CIM currently in force is the eighth version of the original CIM which came into force in 1893. Based upon past experience the 1980

version could be expected to come into force about 1985. In contrast to the earlier versions of CIM, which were separate conventions, the CIM provisions in the 1980 COTIF are contained in an annex to the main convention.

16. The original text of SMGS of 1951 was similar in structure and content to the CIM. However, the differences between the two texts have increased as each has been revised since that time.

17. Several countries in Eastern Europe are parties to both the CIM and SMGS. This has greatly facilitated through traffic between those States which are parties to only one or the other agreement. It has not, however, prevented divergence in the texts of the two conventions.

18. Multimodal. The documentary provisions of the Multimodal Convention are modeled on those of the Hamburg Rules. At its tenth session in June 1982, the UNCTAD Committee on Shipping, which sponsored the Multimodal Convention, requested the Secretary-General of UNCTAD to bring the Hamburg Rules to the attention of those member States that had not yet become Contracting Parties and to suggest the desirability of bringing it into force at an early date. 5/

19. The International Chamber of Commerce has published rules for a Combined Transport Document. 6/ Although these rules have no binding force, several organizations which have prepared model combined (multimodal) transport documents have secured the endorsement of the ICC that the form in question conformed to the ICC rules, thereby introducing a degree of uniformity into the nature of the document.

20. The acceptability of combined transport documents is also affected by their acceptability as a transport document for purposes of a letter of credit under the Uniform Customs and Practice for Documentary Credits (UCP). 7/

21. Inland waterways. UNIDROIT is considering a fully revised version of the draft of CMN. The Governing Council was informed at its 61st session in April 1982 that some progress had been made in resolving differences of opinion among the Rhine States regarding the exoneration of the carrier for fault in the navigation of the vessel, but it was not clear whether final agreement seemed likely. 8/

22. Terminal operators. A preliminary draft convention was approved by the UNIDROIT Study Group on the Warehousing Contract at its third session in October 1981. It was reported to the 61st session of the UNIDROIT Governing Council in April 1982 that some opposition to the draft had been voiced by certain terminal operators who saw it as an invasion of their contractual freedom. 9/

5/ The draft resolution as adopted by the Committee is found in TD/B.C.4/L.162.

6/ ICC Publication No. 298.

7/ The current (1974) version of the UCP is found in ICC Publication No. 290. For discussion of the progress made in revising the UCP, see A/CN.9/229, and of its effect on transport documents, paras. 71, 72 and 80 below.

8/ Report of the 61st session of the Governing Council (15 and 16 April 1982), UNIDROIT 1982 C.D. 61st session, Agenda item 5 (f).

9/ Ibid., agenda item 5 (h).

23. The Governing Council requested the Secretariat to give wide publicity to the draft rules so as to bring criticisms out into the open where any misconceptions could be dispelled and legitimate concerns taken into account. 10/

B. Documentary régime under the conventions

1. Requirement to issue a document

a. Paper document

24. All of the conventions under consideration require the issue of a transport document or provide that a transport document can be required by either the shipper or the carrier.

25. The conventions governing the two forms of land based transport, rail and road, require the issue of a consignment note and prescribe its contents in some detail. 11/ The Multimodal Convention requires the multimodal transport operator to issue a multimodal transport document, but the convention permits the document to be either negotiable or non-negotiable. 12/ Similarly, the draft CMN would require that either a bill of lading or a consignment note be issued for carriage on inland waterways. 13/ The bill of lading could be in nominative form, or to order or to bearer.

26. The Warsaw Convention gives both the air carrier and the consignor the right to require the issue of a consignment note, and assures that the air carrier will do so by withdrawing the benefits of provisions which exclude or limit its liability if a consignment note is not issued containing certain data. 14/ This rule is continued under the Hague Protocol of 1955.

27. Under Montreal Protocol No. 4 the issue of a transport document, now called an air waybill, would be required by the Convention. However, failure to do so would not affect the carrier's liability under the Convention. 15/

10/ The Council was informed by the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) of the interest of the Commission in the subject, which might perhaps at some time in the future be translated into positive action, given its close relationship with the international conventions relating to the carriage of goods and in particular the Hamburg Rules, as well as its relevance to the needs of a number of developing countries.

11/ CIM 1970, art. 8; CIM 1980, art. 11; SMGS, art. 6; CMR, art. 4. The CMR goes on to provide that "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."

12/ Art. 5 (1).

13/ Art. 3 (1). The draft CMN contains the same provision as does the CMR quoted in note 11 as to the absence, irregularity or loss of the transport document.

14/ Arts. 5 (1) and 9. The Warsaw Convention contains in art. 5 (2) the same provision as does the CMR quoted in note 11 as to the absence, loss or irregularity of the air consignment note.

15/ Arts. 5 (1) and 9 of the Convention as amended by Montreal Protocol No. 4.

28. Both the Hague Rules and the Hamburg Rules allow the shipper to require the carrier to issue a bill of lading once the carrier has received the goods into his charge. 16/ Furthermore, once the goods are loaded on board, the shipper has the right to have a "shipped" bill of lading, which may be in the form of a notation on the bill of lading already issued indicating the name or names of the ship or ships upon which the goods have been loaded and the date or dates of loading. 17/

29. Neither the Hague Rules nor the Hamburg Rules require that a bill of lading be issued if the shipper does not require one. However, the liability régime of the Hague Rules, including the exonerations from liability and the limits of liability, applies only if there has been a contract of carriage "covered by a bill of lading or any similar document of title". 18/ The Hamburg Rules on liability on the other hand apply to "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another". 19/ Therefore, while the right of the shipper to demand a bill of lading remains the same under the Hamburg Rules as it is under the Hague Rules, the Hamburg Rules are more open to the use of sea waybills and other forms of non-negotiable transport documents or to paper-less documentation techniques.

30. The draft ITO is the least demanding of all the texts under consideration in that it would require that a document be issued only if requested by the customer, and it is not anticipated that one would be issued in all cases. 20/

b. Issuance of paper document by automatic data processing

31. The Multimodal Convention permits the multimodal transport operator, if the consignor so agrees, to preserve a record of the data required under the convention by making use of any mechanical or other means, e.g. a computer. In such a case the consignor must be furnished a readable document, in non-negotiable form, which document is deemed to be the multimodal transport document. 21/

32. The draft ITO provides that nothing contained therein prevents the issuing of documents by any mechanical or electronic means, if not inconsistent with the law of the country where the document is issued. 22/

c. Issuance of transport document at destination

33. It has long been technically possible to issue the necessary transport documents at destination by wiring the relevant information to the carrier or its agent at the destination. 23/ With the standardization of the data entries on

16/ Hague Rules, art. 3 (3); Hamburg Rules, 14 (1).

17/ Hague Rules, art. 3 (7); Hamburg Rules, 15 (2).

18/ Art. 1 (b). See also art. 2. For the possibility of incorporating the liability regime of the Hague Rules into the contract of carriage by a clause on a sea waybill, see para. 70 below.

19/ Art. 1 (6). See also art. 2.

20/ UNIDROIT 1982, Study XLIV, Doc. 14, art. 4.

21/ Art. 5 (4).

22/ Art. 4 (4).

23/ At least as early as the 1958 edition of the Uniform Commercial Code of the United States of America, sec. 7-305 authorized the carrier at the request of the consignor to issue the transport document at destination.

transport documents and with the development of computer to computer telecommunication networks, direct production of the documents at destination is now feasible.

34. Issue of the transport document at destination is not permitted by the CIM and SMGS for rail, CMR for road or the Warsaw Convention for air, all of which require a copy of the consignment note to travel with the goods. 24/

35. Since neither the Hague Rules nor the Hamburg Rules require the issue of any transport document, there appears to be no obligation on the carrier as to the place of issue under these rules. If the carrier and shipper agreed, either a sea waybill or bill of lading could be issued by the carrier at the destination. The same result would appear to be possible under the Multimodal Convention and the draft CMN.

d. Substitution for paper document

36. Under Montreal Protocol No. 4 in place of the paper air waybill the carrier could substitute "any other means which would preserve a record of the carriage to be performed". 25/ In that case the shipper must be furnished a paper receipt for the goods.

37. Under the draft CMN electrical or automatic means of recording the transaction may be used. 26/ In contrast to Montreal Protocol No. 4, no paper receipt is required.

38. Since neither the Hague Rules nor the Hamburg Rules require the issue of a transport document unless the shipper requests a bill of lading, neither convention precludes the use of paper-less documentation techniques.

2. Control of the goods through the document

39. One of the traditional functions of an ocean bill of lading is to serve as a document of title whereby the possessor of the bill of lading has symbolic possession of the goods. This function is effectuated by the rule that the carrier can hand over the goods only against surrender of the bill of lading. This rule is assumed, but not stated, in the Hague Rules. It is specifically stated in the Hamburg Rules, the draft CMN and the Multimodal Convention. 27/

24/ CIM 1970, art. 16 (1); CIM 1980, art. 28; SMGS, art. 6 (1); CMR, art. 5 (2); Warsaw Convention, art. 6 (2). Under Montreal Protocol No. 4 the second original must be marked "for the consignee", but the Convention would no longer specifically require that it travel with the goods or be handed over to the consignee. Under resolution 600k of the International Air Transport Association when teletype or other electronic means are used to transmit an air waybill for international carriage, a paper waybill must first be made. Whenever a consignment is transferred to a subsequent carrier, the second original for the consignee and copies of the transmittable air waybill must be provided to the subsequent carrier.

25/ Art. 5 (2) of the Convention as modified by the Protocol.

26/ Art. 3 (5).

27/ Hamburg Rules, art. 1 (7); draft CMN, art. 4 (1); Multimodal, art. 6 (2).

40. The draft ITO would allow for the same result by providing that:

"The document issued by the ITO may, if the parties so agree, and the applicable law so permits, contain an undertaking by the ITO to deliver the goods against surrender of the document." 28/

41. The conventions which specifically mention a consignment note as the only transport document also provide a mechanism for the shipper to order the carrier not to hand over the goods to the consignee. Under the Warsaw Convention the consignment note must be made out in three originals. The third original is given to the shipper. 29/ Until the goods arrive at the place of destination, the shipper can exercise the right of disposition over the goods upon surrender to the carrier of the third original of the consignment note. 30/ The rule is essentially the same for goods carried by road under the CMR, except that the copy to be given to the shipper and which is to be surrendered to the carrier in case of any stoppage in transit is the first original. 31/ For rail carriage under either the CIM or the SMGS, any diversion of the goods by the shipper must be noted on the duplicate of the consignment note. 32/ Therefore, the consignor loses his right of disposition of the goods once he has given over his "original" or duplicate of the consignment note to the consignee or to a bank under a documentary credit.

42. The Multimodal Convention states that if the goods are carried under a non-negotiable multimodal transport document, the multimodal transport operator is discharged from his obligation to deliver the goods if he makes delivery to the consignee "or to such other person as he may be duly instructed, as a rule, in writing." 33/ Since the consignor's right to order the multimodal transport operator to deliver the goods to a person other than the consignee is not based upon possession of a copy of the non-negotiable document, the convention appears to offer no means of precluding the consignor from exercising a right of disposition over the goods until the goods have been delivered. The same conclusion would seem to apply to a shipment under a sea waybill since neither the Hague Rules nor the Hamburg Rules govern the documentary aspects of such a shipment.

43. The draft CMN provides that the carrier can deliver only to the person designated on the bill of lading if it is issued in nominative form. 34/ The draft provides no rule as to the right of the shipper to control the goods if the carriage is under a consignment note.

28/ Art. 4 (4).

29/ Art. 6.

30/ Arts. 12 and 13.

31/ Art. 12 (5).

32/ CIM 1970, art. 21 (2); CIM 1980, art. 30 (2); SMGS, art. 19 (5).

33/ Art. 7 (2).

34/ Art. 4 (1). The draft also gives specific rules for bills of lading in order or bearer form.

3. Data requirements

44. In order for the transport document to fulfil its various functions, it must contain a certain amount of data. Much of this data is the same no matter what the means of carriage. In fact, much of it is the same data as is needed on other documents concerned with the sale and shipment of the goods. However, each of the conventions prescribes a certain number of data elements which must appear on the particular transport document.

45. The minimum number of data elements required by any convention is three by the Hague Rules and by the Hague Protocol and Montreal Protocol No. 4 to the Warsaw Convention. 35/ The maximum number of required data elements is seventeen in the original Warsaw Convention followed by fifteen for the Hamburg Rules and the Multimodal Convention. 36/

46. There is no discernible trend towards either increasing or decreasing the number of required data elements. The 1955 Hague Protocol reduced the number of required data elements from the original seventeen of the Warsaw Convention to three. This decision was confirmed by the 1975 Montreal Protocol No. 4, although one of the required data elements is different from that in the Hague Protocol. On the other hand the Hamburg Rules in 1978 increased the required number of data elements from the three contained in the Hague Rules to fifteen. This was followed by the Multimodal Convention in 1980.

35/ Hague Rules, art. 3 (3); Hague Protocol and Montreal Protocol No. 4, art. 8 of the Warsaw Convention as modified. The data elements required by the two protocols are not completely identical.

36/ Warsaw Convention, art. 8; Hamburg Rules, art. 15; Multimodal Convention, art. 8.

4. Requirement of a signature

47. Most, but not all, of the conventions require that the transport document be signed by the shipper or the carrier, or both. All of the conventions which require a signature permit the signature to be applied in some mechanical way.

<u>Convention</u>	<u>Signature required</u>		<u>Permitted form</u>			<u>Law of place of issue relevant</u>	<u>Article of Convention</u>
	<u>Shipper</u>	<u>Carrier</u>	<u>Stamped</u>	<u>Printed</u>	<u>Other means</u>		
Hague Rules	No	No					
Hamburg Rules	No	Yes	Yes	Yes	Yes <u>a/</u>	Yes <u>a/</u>	14
Warsaw Conv.	Yes	Yes	Yes	Yes-shipper	No	No	6
Hague Protocol	Yes	Yes	Yes	Yes-shipper	No	No	6
Montreal Protocol No. 4	Yes	Yes	Yes	Yes	No	No	6
CIM-1970	Yes <u>b/</u>	Yes <u>c/</u>	Yes	Yes-shipper	No	Yes <u>b/</u>	6, 8
CIM-1980	Yes <u>b/</u>	Yes <u>c/</u>	Yes	Yes-shipper	No	Yes <u>b/</u>	13, 11
SMGS	Yes	Yes <u>c/</u>	Yes	Yes-shipper	No	No	6, 7
CMR	Yes	Yes	Yes <u>d/</u>	Yes <u>d/</u>	No	Yes <u>d/</u>	5
Multimodal	No	Yes	Yes	Yes	Yes <u>a/</u>	Yes <u>a/</u>	5
Draft CMN	Yes	Yes	Yes	Yes	Yes <u>e/</u>	Yes <u>e/</u>	6
Draft ITO	No	No					

a/ "The signature on the bill of lading / multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading / multimodal transport document is issued."

b/ "If the laws and regulations in force at the forwarding station so require, the sender shall add to his name and address, his written, printed or stamped signature."

c/ Neither the CIM nor the SMGS requires the carrier's "signature". However, both require the carrier to affix its stamp to the consignment note.

d/ "These signatures 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."

e/ The rule is similar to that in note d/ with the addition that any other mark of authenticity may also be used if permitted by the law of the country of issue.

48. The ECE/UNCTAD Working Party on Facilitation of International Trade Procedures has recommended

"to Governments and international organizations responsible for relevant intergovernmental agreements to study national and international texts which embody requirements for signature on documents needed in international trade and to give consideration to amending such provisions, where necessary, so that the information which the documents contain may be prepared and transmitted by electronic or other automatic means of data transfer, and the requirement of a signature may be met by authentication guaranteed by the means used in the transmission". 37/

C. Organizations which prepare transport document forms

49. Under some transport conventions it is considered important that all carriers use a transport document with a uniform format. In these cases one organization may be charged with designing the required document. Where such uniformity is not as highly regarded, the carriers may be free to design their own documents, so long as they contain the information required by the convention.

50. The rail consignment note for use under SMGS is prescribed by the States as an annex to the Convention. The form of the note has been recently revised and it is now aligned to the United Nations Layout Key.

51. Until the 1970 version of CIM came into force in 1975, the railway consignment note under that convention was also contained in an annex to the Convention. Under the 1970 version of CIM the railways have the authority to prescribe a model consignment note. 38/ The proposed model note must be communicated to the Central Office for International Railway Transport (Berne) which communicates it to the Contracting States. If no State has objected within one month, the proposal goes into effect. If there is an objection, the Central Office tries to resolve the differences. Under the 1980 CIM annexed to COTIF, expected to come into force about 1985, the railways will have full authority to establish a model consignment note without governmental approval. 39/ The reform of the railway consignment note under CIM has been undertaken by the International Rail Transport Committee (CIT). The railway consignment note for use under CIM has been aligned to the United Nations Layout Key since 1969.

52. None of the other conventions prescribe either the organization charged with designing the document or that the document in use must be uniform in format. Nevertheless, the desirability of using documents which are uniform in format has led to the design of model transport documents by different organizations.

53. The International Air Transport Association (IATA) has designed an air consignment note which is mandatory for use by IATA members and is widely used by non-members. A new Universal Air Waybill/Consignment Note which is closely

37/ Recommendation No. 14, TRADE/WP.4/INF.63, TD/B/FAL/INF.63.

38/ Art. 6 (1).

39/ Art. 12 (2). See also, E. Bertherin, La réforme de la lettre de voiture internationale, 88 Bulletin des transports internationaux par chemins de fer 47 (1980).

aligned to the United Nations Layout Key has been adopted for optional use as from 1 April 1982 and mandatory use as from 1 January 1984. 40/

54. A CMR consignment note which is aligned to the United Nations Layout Key has been designed by the International Road Transport Union (IRU) and is in general use. Other organizations, such as the Simplification of International Trade Procedures Board (SITPRO) in the United Kingdom, have also designed CMR consignment notes which are in use. The SITPRO CMR consignment note is also aligned to the United Nations Layout Key.

55. There is not the same degree of standardization of the transport documents for carriage of goods by sea that is found in other forms of transport. The tradition that each carrier had its own form of bills of lading, and often different forms for different commodities or routes, has persisted to this day. Similarly, as new transport documents have been developed in the nature of sea waybills, they have often been individually designed by each carrier.

56. Nevertheless, some degree of standardization has been achieved. The model bill of lading proposed by the International Chamber of Shipping, which is aligned to the United Nations Layout Key, is widely followed. Various trade associations and shipping conferences have proposed model shipping documents of various kinds. These models often follow the format proposed by the International Chamber of Shipping.

57. The least uniform of all transport documents is undoubtedly the combined transport or multimodal transport document. Because of the diversity of situations which fall under the rubric of combined or multimodal transport, it is likely that uniformity of the document will not be achieved for some time, if at all. Nevertheless, combined transport documents aligned to the United Nations Layout Key have been adopted by such organizations as the Baltic International Maritime Conference (BIMCO), International Chamber of Shipping (ICS) and International Federation of Freight Forwarders Associations (FIATA).

II. SOME CURRENT DEVELOPMENTS

A. Blank-back, short-form and shipper-supplied documents

58. Transport documents are often designed as multi-leaf forms with carbon inserts which permit the shipper to fill out all originals and copies by a single typing. The originals usually carry on the reverse side the general conditions of carriage of the carrier.

59. The development of series of forms for international trade transactions which are aligned to the United Nations Layout Key for Trade Documents has made possible the use of modern reprographic one-run methods of document preparation for all of the documents necessary for the sale and shipment of the goods. However, the document preparation equipment often does not accommodate multi-leaf forms and in some cases requires the use of continuous feed paper which must, therefore, have no printing on the reverse side.

60. Even where this is not the case it would be simpler for the shipper if he were permitted to use a standard form for any given mode of transport which could be used with any carrier.

40/ IATA Resolution 600j (111).

61. To accommodate such shipper-supplied forms or blank-back documents the ECE/UNCTAD Working Party on Facilitation of International Trade Procedures has recommended that the following clause should be used on the face of the document:

"The terms of the transport operator's/carrier's standard conditions of carriage (including those relating to pre-carriage and on-carriage) and tariff applicable on the date of taking charge of the goods for transportation are incorporated herein as well as any international convention or national law which is compulsorily applicable to the contract evidenced in this document.

A copy of the transport operator's/carrier's standard conditions of carriage applicable hereto may be inspected or will be supplied on request at the office of the transport operator/carrier or their principal agents." 41/

62. The extent to which the courts in various countries will accept such a general incorporation clause depends on the attitude of the legal system towards contracts of adhesion and the use of general conditions as well as the text of the individual carrier's standard conditions of carriage and the availability of that text to the shippers who are to be made subject to its terms. 42/

63. Blank-back or short-form transport documents are acceptable for documentary credits issued under the Uniform Customs and Practice for Documentary Credits. 43/

B. Universal or multipurpose transport documents

64. The alignment of the various transport documents to the United Nations Layout Key has demonstrated that the data requirements for the carriage of goods by different modes of transport are similar. The development of blank-back and short-form transport documents with a clause similar to that suggested by the ECE/UNCTAD Working Party on Facilitation of International Trade Practices has made it possible for the conditions of carriage of any carrier by any mode of transport to be incorporated into the transport document.

65. A Working Group of the Swedish Trade Procedures Council (SWEPRO) has combined these two features in a draft blank-back multipurpose transport document. 44/ The document has been designed to replace the

- Sea waybill, date freight receipt;
- Bill of lading, waterways bill of lading, through bill of lading;
- Combined transport document;
- Rail consignment note;
- Road consignment note;

41/ Recommendation No. 12, para. 16, TRADE/WP.4/INF.61, TD/B/FAL/INF.61.

42/ One observer has remarked that the case law on the validity of short-form and blank-back transport documents is confusing and difficult to interpret in a certain number of important maritime countries. E. du Pontavice, supra note 2 at p. 441.

43/ Art. 19 (b)(ii).

44/ SWEPRO, Multi-Purpose Transport Document (MPT), (Göteborg, 1981), reprinted in TRADE/WP.4/R. 165.

- Air waybill, house airbill;
- FCT (Forwarding agent's certificate of transport);
- FCR (Forwarding agent's certificate of receipt).

66. When the multipurpose transport document is to be used as a bill of lading, the two letters "BL" are to be typed in a specific box on the form. Although the report of the Working Group does not discuss the issue, it seems to be thought that this is a sufficient indication that "the carrier undertakes to deliver the goods against surrender of the document." ^{45/}

67. The draft multipurpose transport document has been used successfully in an experimental manner by several firms in Sweden. The report of the SWEPRO Working Group was issued in November 1981 in English and has been distributed widely so as to stimulate international understanding of the concept. As noted by SWEPRO "there is no point in starting local introduction in Sweden alone since this would become difficult without international understanding for this new idea." ^{46/} Moreover, there may be difficulties in using the document with those modes of international transport, such as rail and air, in which a prescribed form is required for use by all carriers. ^{47/}

C. Sea waybill in place of bill of lading

68. The only transport documents which must be sent by the shipper separately from the goods are the bill of lading and the negotiable multimodal transport document. The special handling these documents require increases costs for all parties. Moreover, the documents frequently arrive later than do the goods, causing port congestion with the associated costs.

69. In some trades it has been found that the majority of all shipments are made between customers of long standing or between different plants of a multinational group. In these cases a bill of lading serves no commercial function that would not be served as well by a non-negotiable transport document such as a sea waybill.

70. At the present time the major legal difficulty presented by the use of sea waybills in shipment between related parties lies with the liability regime of the Hague Rules which applies only if the carriage is covered by a bill of lading or similar document of title. Therefore, sea waybills frequently incorporate the Hague Rules into the contract of carriage. There is some doubt as to whether such an incorporation is effective. ^{48/} The Hamburg Rules obviate this legal question since they apply to "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another." ^{49/}

71. Although sea waybills are most frequently used when the goods are not to be sold afloat and no documentary credit is to be issued, the cost advantages arising out of the simplification of documentary procedures when no bill of lading has been issued has led the ECE/UNCTAD Working Party on Facilitation of International Trade Procedures to recommend that:

^{45/} Part of definition of a bill of lading in Hamburg Rules, art. 1 (7).

^{46/} SWEPRO News, No. 3, February 1982, p. 7.

^{47/} "The consignment note shall not be replaced by other documents or supplemented by documents other than those prescribed or allowed by this Convention or by the tariffs." CIM 1970, art. 6 (8). See also, CIM 1980, art. 13 (4).

^{48/} Supra, note 42.

^{49/} Art. 1 (6).

"Carriers should always offer a non-negotiable transport document, bearing in mind that these can be utilized under documentary credits if stipulated by the applicant for the credit." 50/

72. The current draft revision of the Uniform Customs and Practice for Documentary Credits accepts the use of non-negotiable sea waybills under documentary credits. Whereas the 1974 version of UCP referred extensively to marine bills of lading, the current draft refers to "transport documents". 51/ It is the responsibility of the applicant for the credit to specify any particular transport document he may wish to require. It is also the responsibility of the bank which issues the credit to decide whether the transport documents specified in the application for the credit are sufficient for its purposes.

73. The concern which has been expressed over the use of sea waybills under documentary credits lies in the fact that they do not assure the bank or the consignee that the goods will not be diverted by the consignor after he has received payment under the credit. An identical problem would arise where the transport documentation was in paper-less form.

74. Several studies have been undertaken to develop approaches to this problem which would give the same legal assurance to the consignee and to the bank as would possession of a bill of lading but which would be administratively more efficient. The project which is the most advanced was sponsored by the Swedish Council for Transport Research. It has been put into experimental use as the ACL Cargo Key Receipt System. 52/ The System is a merger of the sea waybill and automatic data processing. It relies upon an in-house computer system operating between the ports of shipping and destination. The carrier furnishes the shipper with a print-out of the shipping data which it authenticates as the first copy. This print-out contains, inter alia, the following elements:

- (a) The buyer's bank, which has opened the letter of credit, is named as the consignee;
- (b) The shipper's declaration that he has irrevocably abrogated his right of disposal to the goods during the transit in favour of the consignee;
- (c) The carrier's declaration that it holds the consignment specified on the receipt in security and as collateral for the bank named as consignee.

75. No other project appears to have reached the level of practical experimentation and use. However, one paper-less transport documentation proposal which has been put forward for use with public data communication systems is the use of a public key crypto system whereby the data content of a computer message would, by means of the cryptology involved, authenticate the source and the content of the message. 53/ This proposal would also rely on declarations similar to those contained in the ACL Cargo Key Receipt System.

50/ Recommendation No. 18, Facilitation Measure 7.2, ECE/TRADE/141.

51/ Infra., para. 80.

52/ K. Grönfors, Cargo Key Receipt and Transport Document Replacement (Göteborg, 1979); K. Grönfors, The Legal Aspects and Practical Implications of non-Documentary (Paperless) Cargo Movement, BIMCO Bulletin 1981, p. 6180.

53/ R. Henriksen, The Legal Aspects of Paper-less International Trade and Transport (Copenhagen 1982).

76. Yet another approach which has been suggested is to rely upon a registration system. Under one proposal, the carrier would register in its computers any sales or security interests given in the goods. ^{54/} Under another proposal which has been advanced for bulk cargoes, and especially for the tanker trade, the registry would be kept either in a central registry in a convenient location or by a bank. ^{55/}

D. Legal value of computer records

77. As paper records and documentation, including transport documents are increasingly replaced by records stored in computers, concern has been expressed as to the legal value of those records. In spite of the widespread use of computers in all fields of commercial activity, there remains a hesitancy in some countries to admit computer records as evidence before courts and arbitral tribunals. It is thought that the current state of techniques in the matter of recordings on computers does not give sufficient guarantees against falsification. In addition there are classical legal barriers concerning the use of such recordings as evidence, particularly in countries of common law tradition.

78. The report on electronic funds transfers submitted to the Commission at this session sets out a number of international actions which have been taken to facilitate the use of automatic data processing. ^{56/} Several of those actions in the field of transport documents have already been noted above. The report also sets out international actions which have been taken in respect of the evidential value of computer records.

79. The report concludes that:

"Harmonized rules as to the conditions under which computer records must be produced to be admissible as evidence and the evidential value of computer records are necessary to give legal security to international electronic funds transfers. The problem, however, goes beyond electronic funds transfers and concerns all aspects of international trade in which computers might be used. Since rules of evidence are part of the procedural law, and are linked to the rest of the legal structure in a State, uniformity of law would be difficult to attain at present. However, if guidelines are established as to the conditions under which computer records are admitted in evidence, it may influence the legal development in this field". ^{57/}

^{54/} K.H. Reinskou, Bills of Lading and ADP: Description of a Computerized System for Carriage of Goods by Sea, 2 Journal of Media Law and Practice, No. 2 (1981), reprinted in TRADE/WP.4/R.159.

^{55/} P. Gram, Chairman, INTERTANKO Documentary Committee, Delivery of Cargo without Presentation of Bills of Lading, report dated 16 November 1980. Compare the suggestion made at the eighth session of the Commission that "if it were considered desirable that any security interest for the financing of international trade should have as one element a system of registration, the possibility of a world-wide computer-assisted registration system should be explored." Report of the United Nations Commission on International Trade Law on the work of its eighth session, Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 60.

^{56/} A/CN.9/221, paras. 70 to 81.

^{57/} Ibid., para. 88.

E. Documentary letters of credit

80. One of the principal concerns of the International Chamber of Commerce in the current revision of the Uniform Customs and Practice for Documentary Credits is to adjust the rules to the changes in transport documentation which have occurred recently. ^{58/} Four points are of particular interest in the context of this report.

- The new draft version of the UCP uses the term "transport documents" and mentions a particular form of transport document only in those rare cases when the intended rule applies uniquely to that one document. This allows for a more uniform approach to documentary credits involving goods shipped by different modes of transport, by combined or multi-modal transport, or under different types of documentation using the same mode of transport.

- Unless otherwise stipulated in the credit, banks will accept as originals documents produced or appearing to have been produced by data processing or photographic systems if, after their production, such documents have been marked as originals and signed or otherwise authenticated by their issuers. This will allow for the production of documents based upon a standard layout key, such as the United Nations Layout Key, using photographic or automatic data processing techniques.

- Unless a credit specifically calls for an on-board transport document, banks will accept a transport document which indicates that the goods have been taken in charge or received for shipment. This has always been the rule in regard to all means of transport other than carriage of goods by sea. With the advent of containerization and multi-modal transport, it may not be feasible or necessary for an on-board document to be issued. However, the applicant for the credit/buyer of the goods will retain the right to require an on-board bill of lading under the credit and the shipper/seller of the goods retains the right to require such a document from the carrier under both the Hague Rules and the Hamburg Rules.

- The rules in respect of transshipment have been expanded to reflect the nature of combined and multi-modal transport.

CONCLUSION

81. The law and practices in regard to international transport documents are changing rapidly. The distinctions between the different modes of transport of goods and the needs of the shippers and banks, as well as the carriers, in respect of the documentation arising out of such transport are becoming less pronounced. As a result there may be a greater need in the future than there has been in the past for harmonization of the rules governing such transport documentation.

82. The Secretariat intends to remain informed of developments in this field. When the time seems mature, the Secretariat may suggest to the Commission a future course of action taking into account the views expressed by the Commission.

^{58/} The progress made by the International Chamber of Commerce in revising UCP is described in A/CN.9/229. The most recent draft of the revision at the time of writing is found in ICC document No. 470/394. The provisions on transport documents are found in articles 22 to 33.