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Unification of international railway law with the objective of allowing rail carriage under a single legal regime

Analysis and proposal on the general framework of uniform Euro-Asian law for the transport of goods by rail

Submitted by the Intergovernmental Organization for International Carriage by Rail

1. In accordance a) with the Joint Declaration on the promotion of Euro-Asian rail transport and activities towards unified railway law, particularly sections a) and c) of paragraph 2 (ECE/TRANS/2013/2), signed in Geneva by 37 Member States of the UNECE at the Ministerial session of the seventy-fifth session of the Inland Transport Committee, and b) the mandate of the Group of Experts towards Unified Railway Law (ECE/TRANS/2013/9), adopted by the Inland Transport Committee at the same session (ECE/TRANS/236, paras. 14 and 29), it is desirable, on the one hand, to establish a unified set of transparent and predictable provisions and legal rules applicable to rail transport between Europe and Asia in all the countries concerned, which could facilitate border crossing procedures, particularly for transit transport and, on the other, to unify international railway law with the aim of setting up a single legal regime for rail transport from the Atlantic to the Pacific.

2. In order to facilitate the work in relation to the unification of Euro-Asian rail freight transport law, the Intergovernmental Organisation for International Carriage by Rail (OTIF) is submitting to the Group of Experts towards Unified Railway Law its analysis on the general framework to be put in place to develop unified Euro-Asian law for the transport of goods by rail.

I. A single legal regime

3. OTIF has carried out an in-depth analysis of the general framework to be put in place with a view to setting up a unified legal regime for the transport of goods from the Atlantic to the Pacific. This could take one of the following three forms:

- law overarching the two existing legal regimes, COTIF/CIM and SMGS;
- autonomous law to take the place of these two legal regimes;
- interface law, which would aim to make the tried and tested provisions of

COTIF/CIM and SMGS homogeneous.

4. The idea of creating law overarching the two legal regimes COTIF/CIM and SMGS might certainly appear to be very attractive. In OTIF's view however, this would be counter to the desired aim, in that it would in fact be tantamount to creating a supplementary legal regime, a sort of third law, with all the risks of clashing with the two existing legal regimes that this would involve.

5. A second approach might be to create autonomous law for the transport of goods by rail in Eurasia. However, in OTIF's view, this approach would constrain States not only to enter into a very lengthy cycle of negotiations, whose success would not be certain, but also to denounce the two legal regimes that have proved their worth, COTIF/CIM and SMGS.

6. If this approach were taken, the States Parties to the CIM Uniform Rules should first of all declare that they will not apply this Appendix to COTIF in its entirety.

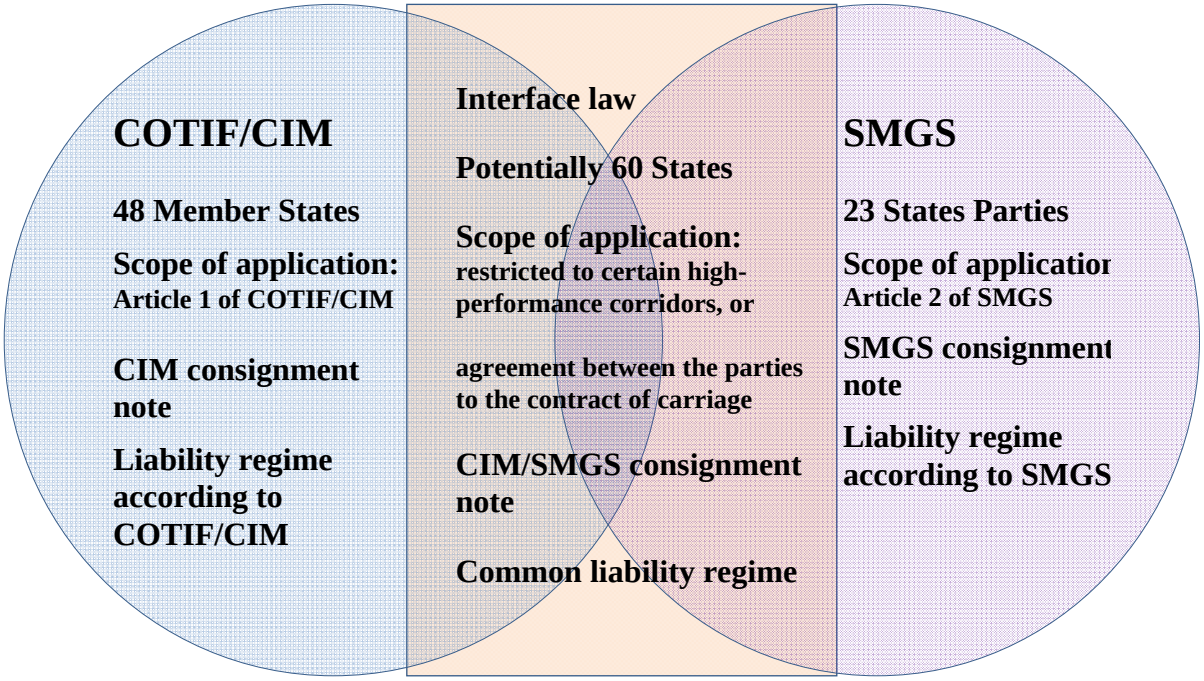
7. In a subsequent step, COTIF should be amended to enable denunciation of the CIM Uniform Rules, which is a long process requiring ratification by the States.

8. The third solution, which is OTIF's preferred approach, would be to put in place a legal system that would rapidly become operational by developing interface law between the two legal regimes which currently coexist, COTIF/CIM and SMGS.

9. In fact, thanks to the constant efforts of OSJD, CIT and OTIF, a lot of progress has been achieved in bringing together the legal provisions of COTIF/CIM and SMGS, such as the rapprochement of the provisions concerning the presumption of damage in case of reconsignment and the legal harmonisation of the carriage of goods by rail in Eurasia, particularly with the creation of the CIM/SMGS consignment note, the model wagon and container list form and the uniform CIM/SMGS report model.

10. The interface law could either be applied to certain high-performance corridors or, quite simply, if the parties to the contract of carriage so decide, when goods traffic passes from the area of application of COTIF/CIM and SMGS.

11. In other words, the validity of COTIF/CIM for transport that is governed strictly by COTIF/CIM, and the validity of SMGS for transport that is governed strictly by SMGS would not be called into question. The same would be the case for traffic performed under both CIM and SMGS when the parties have arranged for reconsignment at the frontier of the two legal regimes.



12. OTIF is convinced that only interface law could be put in place quickly in the area of application of COTIF/CIM and SMGS, which reaches from the Atlantic to the Pacific.

II. Managing the interface law

13. In its in-depth analysis of the general framework to be put in place with a view to setting up a unified legal regime for the carriage of goods by rail from the Atlantic to the Pacific, OTIF also examined questions relating to the definition of the new interface law, its adoption and modus operandi.

14. The new interface law between OTIF and OSJD could of course take the form of a new Convention.

15. This would assume putting into place a completely new structure and would undeniably raise the question of how it would be funded.

16. This is why OTIF would be more in favour of two scenarios:

- the parallel creation of two specific Appendices or Annexes to COTIF and SMGS, for which the means of coordinating adoption in the two Organisations would have to be found;
- setting up a joint body for both Organisations tasked with developing, adopting and revising the unified legal regime.

17. In order to gain a better idea of how the rules of unified law referred to in this document might look, the annex contains a draft whose aim is to serve as the basis for the initial discussions on this issue.

Annex

Proposal for a general framework to develop uniform Eurasian law for the carriage of goods by rail

I. General remarks

The draft proposes to establish a legal regime for the transcontinental transport of goods by rail (hereinafter legal regime) which should apply to certain high-performance corridors or, if the parties to the contract of carriage so decide, to the transcontinental carriage of goods by rail, in order to alleviate the problem of the coexistence of two different international legal systems (COTIF/CIM and SMGS).

This proposal takes over the main elements of a study commissioned by OTIF in 2011. In view of the need to make definite progress with this issue, the draft is based not only on COTIF/CIM and SMGS, but also on the CMR, which was developed 55 years ago on the basis of the CIM in force at that time and which is now applicable and recognised in both Europe and Asia.

This document is now being submitted so that it can be used as a basis for the initial discussions. It is only an outline showing the Articles concerning the scope of application, prescriptions of public law and derogations. However, for each Article OTIF is able to provide drafting suggestions which take into account the CIM and SMGS as well as solutions drawn from international conventions for the other modes of transport, particularly the Montreal Convention for international carriage by air.

OTIF is convinced that the broad promulgation of uniform legal rules for the carriage of goods by rail in Eurasia will only be possible if tried and tested provisions, such as SMGS and COTIF/CIM, are taken over.

II. Detailed plan of the text:

Title I
General provisions

Article 1 Scope

To determine the scope of the legal regime, two possibilities are proposed:

- **mandatory application** for transcontinental goods transport on certain **high-performance corridors**;
- **application agreed** between the parties to the contract of carriage for the transcontinental carriage of goods by rail, where the parties consider that the type of goods and the route are suitable for application of the legal regime.

If the contracting parties conclude an appropriate agreement, the legal regime applies "as an act of law", and not as General Terms and Conditions.

Art. 1 § 2 of the draft makes clear that the purpose of the legal regime is only to avoid the application of national law when through freight transport is to be performed across the CIM/SMGS border and CIM or SMGS cannot be applied over the entire journey. Applying

CIM to purely CIM traffic and applying SMGS to purely SMGS traffic is not being called into question. This is also the case when the parties are planning interrupted CIM/SMGS transport operations with reconsignment at the border between the two legal regimes.

If the contracting parties conclude a contract in accordance with Art. 1 § 2 CIM, they will then apply CIM to this entire transport operation. A contract in accordance with Art. 1 § 1 of this draft is then ruled out.

Proposed text:

§ 1

This legal regime shall apply to every contract for the carriage of goods by rail *(as a wagon load)* for reward between Contracting States to this legal regime when *the high-performance corridors referred to in Annex 1 to this legal regime are used/the parties to the contract of carriage agree to apply this legal regime.*

(This legal regime shall also apply when supplementary carriage of the goods by road in inland transport in a Member State is included in the contract of international carriage of goods by rail.)

§ 2

This legal regime shall not *apply to transport/shall not be agreed for transport* to which the CIM UR and/or SMGS apply.

Article 2 Prescriptions of public law and derogations

§ 1 essentially provides clarification; what it says applies even if not specifically mentioned.

The purpose of **§ 2** is to make it easier for States that are not signatories to this legal regime, and which are only transited, to "tolerate" the new Convention (e.g.: the courts of the transit country take the Convention into account if proceedings are pending).

If the contracting parties agree to apply the legal regime, then according to **§ 3**, it applies on a mandatory basis. In line with more recent conventions (cf. Art. 25 to 27 of the Montreal Convention), the current draft also provides that the carrier can extend his liability and obligations in favour of the customer. The third sentence of Article 5 CIM contains a similar provision, whereas Article 2 § 1 of SMGS assumes that the Agreement is absolutely binding.

Proposed text:

§ 1

Carriage to which this legal regime applies shall remain subject to the prescriptions of public law, in particular the prescriptions relating to the carriage of dangerous goods as well as the prescriptions of customs law.

§ 2

For carriage performed between two States Parties, passing through a State which is not a State Party, the States concerned may conclude and publish agreements which derogate from this legal regime.

§ 3

Insofar as this legal regime does not provide specifically for this, the parties may not agree derogations from this legal regime. A carrier may, however, extend its liability *(with respect to reason and amount)* and obligations in accordance with this legal regime.

§ 4

Insofar as this legal regime does not make provision for this, the law of the State in which the person entitled asserts his claim shall apply (national law).

Article 3 Definition

This Article should include, in an adapted form, the definitions in Article 3 of CIM and should make them compatible with any corresponding future definitions in SMGS.

Title II
Conclusion and performance of the contract of carriage

Article 4 Consignment note

In order to take account of the needs of rail transport, it is pointed out that a consignment note must be used for every consignment (cf. Art. 6 § 6 CIM, Art. 7 § 1 para.3 SMGS).

The "uniform CIM/SMGS consignment note" will serve as the model for creating the uniform consignment note for the legal regime.

The electronic consignment note should also be provided on the basis in particular of the Additional Protocol to the CMR on the electronic consignment note dated 20 February 2008.

Article 5 Wording of the consignment note

The provision will contain the usual division into:

- what the consignment note must always contain (§ 1),
- what the consignment note must contain in specific cases (§ 2) and
- voluntary optional content (§ 3).

Article 6 Responsibility for particulars entered on the consignment note

This provision follows Articles 7 and 22 CMR, Article 10 Montreal Convention, Articles 8 and 9 CIM and Article 12 § 1 SMGS.

Article 7 Payment of costs

In line with the concept of the legal regime, based on a contract under private law, public service obligations are ruled out for the carrier from the outset, particularly the obligation to carry and the tariff obligation.

Article 8 Examination

This provision mainly takes over Article 11 CIM and takes Article 12 § 2 SMGS into account.

Article 9 Evidential value of the consignment note

This Article follows Article 12 CIM and Article 9 CMR.

Article 10 Packing, loading

This Article takes over Article 10 CMR in a more streamlined form, as also incorporated into Article 14 CIM (see also second sentence of Art. 9 § 1 SMGS). The Article deals with the consignor's liability for defective loading (cf. Art. 13 § 2 CIM, Art. 9 § 4 para.4 SMGS).

Article 11 Completion of administrative formalities

In an editorially revised version, this Article corresponds to Article 11 CMR and Article 15 §§ 1 to 3 CIM; (see also Art. 11, § 1, para. 1 and § 2, paras. 1 and 2 and Art. 23 § 1, para. 2 and § 2 SMGS).

Article 12 Transit periods

Following the model of Article 19 CMR, on which Article 16 CIM is also based, the transit period is primarily decided by agreement between the parties. Following the example of Article 16 § 3 CIM and Article 14 §§ 3 to 5 SMGS, the possibility of additional transit periods is provided, although on a strictly limited basis.

Article 13 Delivery, right of lien

This Article is based on Article 13 CMR, Article 17 CIM and Articles 17 § 1 and 19 SMGS.

Article 14 Right to dispose of the goods

This provision takes over Article 12 paras.1 to 4 CMR, Article 18 CIM and Article 20 §§ 1 to 3 and 7 SMGS in a more streamlined form.

Article 15 Exercise of the right to dispose of the goods

This provision takes over Article 12 paras.5 to 7 CMR and Article 19 CIM in a more streamlined form; cf. also Art. 20 §§ 4, 5, 10, 11 SMGS.

Article 16 Circumstances preventing carriage and delivery

This provision has its origins in Articles 14, 15 CMR, Articles 20, 21 CIM and Article 21 SMGS. Like SMGS, the draft summarises circumstances preventing carriage and delivery in one Article.

Article 17 Consequences of circumstances preventing carriage and delivery

This Article is based on Article 16 CMR, Article 22 CIM and Article 21 §§ 3, 5 and 7 SMGS.

Article 18 Basis of liability

In view of the consistently accepted principle of the consensus-based contract of carriage and in view of the types of (scheduled) traffic envisaged, it is assumed that "contractual carrier" may also mean several carriers. The forms of "successive carrier" and "substitute carrier" could therefore be redefined in this context.

Article 19 Relief from liability

Article 18 only deals with the *basis of liability*, although it does so for different categories of carriers. Article 19 is a self-standing provision with *grounds for relief from liability* following the example of Article 17 para.2 CMR, Article 23 § 2 CIM and Article 23 § 3 Nos. 1 and 3 SMGS.

Title III
Liability of the carrier

Article 20 Presumption of loss of the goods

This Article would take over Article 20 CMR and Article 29 CIM. In contrast, Article 17 § 6 of SMGS assumes that the consignee must still accept the goods if they arrive not later than six months after the transit period has expired. According to SMGS, the consignee has no option: he has to accept the goods during a period of six months, and once this period has expired, the goods no longer need to be delivered to him. In contrast, according to CMR and CIM, if he has made an appropriate declaration, the person entitled (consignor or consignee) has the option for one year either to request that the goods still be delivered or to dispense with delivery and keep the compensation for loss.

Article 21 Compensation for loss

This Article is based on Article 23 paras.1, 2 and 4 CMR, Article 30 §§ 1, 3 (but only in relation to intermodal transport units) and 4 CIM and Art. 25 SMGS.

Article 22 Compensation for damage

This Article has its origins in Article 25 CMR, Article 32 CIM and Article 26 SMGS.

Article 23 Maximum amount of compensation

In contrast to CMR (Art. 29) and CIM (Art. 36), the Montreal Convention does not suspend statutory limits of liability in the event that the carrier has committed a serious fault (intent or recklessness of his organs, people or auxiliaries). Instead, it contains a higher maximum amount of compensation per kilogram (19 special drawing rights) than CMR and CIM.

The advisability of such a change could be discussed.

Article 24 Compensation for exceeding the transit period

This Article follows Article 33 CIM and Article 27 §§ 1 and 2 SMGS.

Article 23 § 5 CMR merely states that compensation not more than the carriage charges must be paid for exceeding the transit period.

Article 25 Conversion and interest

This Article is based on Article 27 CMR, Article 37 CIM and Article 28 § 2 and 3 SMGS.

Article 26 Persons for whom the carrier is liable

This Article corresponds to Article 3 CMR and Article 40 CIM. SMGS manages without an equivalent provision.

As in CIM, (legally independent) infrastructure managers are declared to be auxiliaries of the carriers, so that customers who have suffered loss or damage cannot be sent from a carrier to an infrastructure manager when there is a dispute between a carrier and an

infrastructure manager on who has caused the loss or damage. This provision also ensures that an infrastructure manager against whom a claim is raised directly can invoke the limits of liability of this legal regime.

Article 27 Other actions

This Article corresponds to Article 28 CMR and Article 41 CIM. SMGS manages without an equivalent rule.

The provision ensures that persons who have suffered loss or damage cannot "escape into another legal system" (primarily national law) in order to obtain more compensation than under the legal regime.

Article 28- Notice of claim

Following the example of CMR (Art. 30) and the Montreal Convention (Art. 31), Article 28 provides for a **notice of claim** by the consignor or consignee in order to safeguard their rights.

Article 29 Right to bring an action

This Article governs the **plaintiff's right of action** and is based on Article 44 §§ 1 to 3 CIM and Article 30 § 1 SMGS.

Title IV
Assertion of rights

Article 30 Persons against whom an action may be brought

This Article governs the **capacity to be subject to an action** and is based on Article 36 CMR, Article 36 § 3 of the Montreal Convention, Article 45 CIM and Article 30 § 2 SMGS.

The legal action may only be brought against one of the participating carriers, even if there are several contractual carriers. As in CIM, the consolidation of actions is not permitted. If several carriers are jointly and severally liable and if one of them is ordered to pay, the sum to be paid is apportioned between them in accordance with Article 37. A ruling in favour of a carrier dismissing the action also works in favour of the other participating carriers (compulsory joinder).

Article 31 Forum

This Article takes over Article 31 paras.1, 2 and 5 CMR, Article 46 CIM and Article 11 COTIF.

Article 32 Execution of judgement, attachment

Article 32 is based on Article 31 para.3 and 4 CMR and Article 12 COTIF. Like Article 31 § 3 of the draft, this is to simplify and safeguard cross-border railway operations.

Article 33 Limitation of actions

This Article has its origins in Article 32 CMR, Article 48 CIM and Article 31 SMGS.

Article 34 Arbitration procedure

Following the example of Article 33 CMR, Article 34 of the Montreal Convention and Article 28 § 2 COTIF, Article 34 of the draft allows the **parties to the contract of carriage** to confer competence on an arbitration tribunal. In so doing however, the validity of the legal regime, as in CMR and the Montreal Convention, may not be circumvented.

Article 35 Settlement of accounts

This Article follows Article 49 § 1 CIM and Article 32 SMGS.

Article 36 Right of recourse

This Article corresponds to Article 37, 38 CMR, Article 50 CIM and Article 33 § 1 SMGS.

Article 37 Procedure for recourse

The procedure for recourse is dealt with along the lines of Article 39 CMR, Article 51 CIM and Article 33 § 4 SMGS.

Article 38 Liability in case of loss or damage to wagons or intermodal transport units of other carriers

In the rail sector, the successive carriage of goods by several carriers is particularly widespread. As a result, freight wagons and intermodal transport units provided by another carrier are frequently used by other carriers. **Appendix D of COTIF (CUV UR)** and **SMGS Annex 10** contain **law on the use of wagons** which takes account of these relationships in connection with the use of **third-party wagons**. It would seem appropriate to deal in this draft, at least in a rudimentary form, with liability **between carriers** for **wagons that are used** and also for **intermodal transport units that are used**.

Article 39 Agreements concerning recourse

This Article corresponds to Article 40 CMR and Article 52 CIM.