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

Proposal from the Intergovernmental Organization for International Carriage by Rail for uniform Eurasian rail freight transport law

Submitted by the Intergovernmental Organization for International Carriage by Rail

I. General remarks

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.

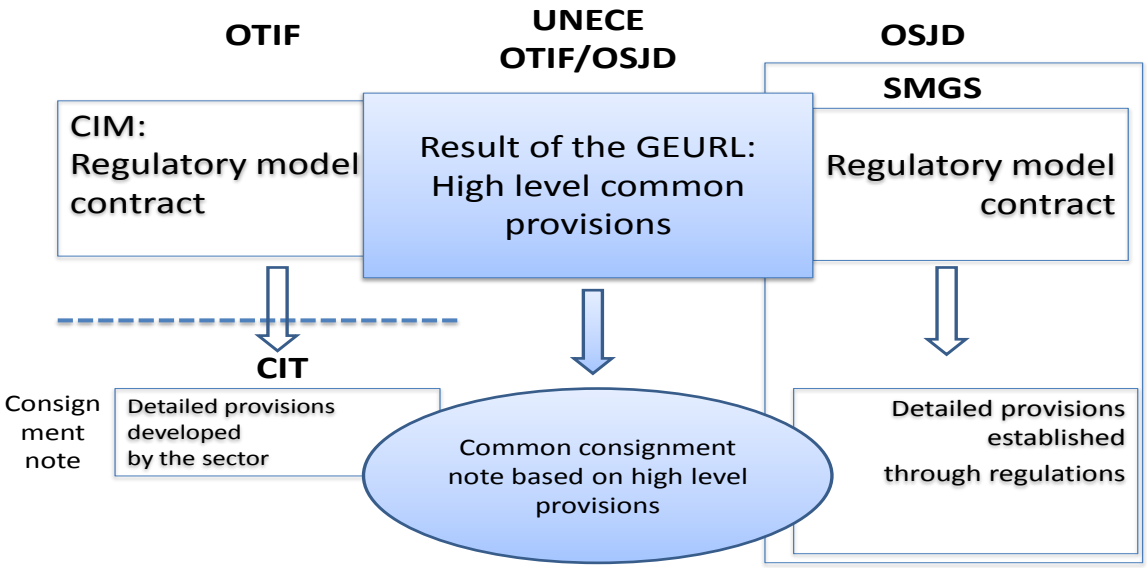
2. In order to facilitate the work in relation to the unification of Euro-Asian rail freight transport law, the Intergovernmental Organisation for International Carriage by Rail (OTIF) is submitting to the Group of Experts towards Unified Railway Law its analysis on the general framework to be put in place to develop unified Euro-Asian law for the transport of goods by rail; it is reproduced as submitted, without formal editing.

3. 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).

4. This proposal takes over the main elements of a study commissioned by the Intergovernmental Organization for International Carriage by Rail (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.

5. This proposal is limited to high-level provisions which should be used as the basis for a common contract, evidenced by a common consignment note. Indeed, the remarkable work already carried out by OSJD and CIT on the common consignment note, in which OTIF has played an active part, could serve as a basis for such a contract.

Figure 1
Nature of the work to be done



6. OTIF is in fact 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. In this framework, a common legal base, developed under the auspices of the UNECE and compatible with the two sets of legislation, will be such as to give a solid legal basis to a single contract.

7. For future discussions, the aim of the provisions presented here is to be integrated into column 4 of document ECE/TRANS/SC.2/GEURL/2013/9.

II. Detailed proposal

Title I General

Article 1 Scope

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

- 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.
- Alongside this possibility, OTIF believes that mandatory application for the transcontinental transport of goods on some high performance corridors could be developed, particularly on axes on which some of the transport is intermodal (maritime traffic on the Caspian Sea, for example). If the contracting parties conclude an appropriate agreement, the legal regime applies "as an act of law", in accordance with the model of the CIM lines.[1]

Figure 2
Agreed scope

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.

[1] The question of the possible inclusion of intermodal lines and corridors should be clarified.

§ 1

This legal regime shall apply to every contract for the carriage of goods by rail for reward between States Parties to this legal regime (hereinafter "States Parties") when *t*he parties to the contract of carriage agree to apply this legal regime.

It shall also apply when the corridors listed in annex 1 to this legal regime are used.

This legal regime shall apply in the same conditions when international transport which is the subject of a single contract includes, in addition to carriage by rail, maritime transport or cross-border transport by inland waterway.

§ 2

This legal regime cannot *be agreed on for the transport of goods to which* the CIM UR or the 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.

§ 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 extend its liability 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 Definitions

This Article includes, in an adapted form, the definitions in Article 3 of CIM and they should be made compatible with any corresponding future definitions in SMGS.

For the purposes of this legal regime:

(a) "carrier" means the contractual carrier with whom the consignor has concluded the contract of carriage, or a successive carrier who is liable on the basis of this contract;

(b) "substitute carrier" means a carrier, who has not concluded the contract of carriage with the consignor, but to whom the carrier referred to in letter (a) has entrusted, in whole or in part, the performance of the carriage by rail;

(c) "General Conditions of Carriage" means the conditions of the carrier in the form of general conditions or tariffs legally in force in each State Party and which have become, by the conclusion of the contract of carriage, an integral part of it;

(d) "intermodal transport unit" means a container, swap body, semi-trailer or other comparable loading unit used in intermodal transport;

(e) "keeper" means the person who, being the owner or having the right of disposal over it, exploits the railway vehicle economically in a permanent manner as a means of transport and who is registered in an official vehicle register, insofar as one exists.

Title II Conclusion and performance of the contract of carriage

Article 4 Contract of carriage

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.

§ 1

The contract of carriage shall be confirmed by the making out of a uniform consignment note. One consignment note shall be used for all goods that are to be carried on the basis of a contract of carriage, even if the consignment consists of several packages or is carried in several wagons or as a train-load consignment.

The absence, irregularity or loss of the consignment note shall not affect the existence of the contract of carriage which shall remain subject to the provisions of this legal regime.

§ 2

The international associations representing carriers shall determine the uniform model of the consignment note (and the – optional – languages to be used for printing and completing the model).[2]

§ 3

The consignment note shall be signed by the consignor and the carrier. The signature can be printed or replaced by a stamp, by an accounting machine entry or in any other appropriate manner.

The carrier must certify the taking over of the goods on the duplicate of the consignment note in an appropriate manner and return the duplicate to the consignor.

§ 4

The consignment note may be drawn up in the form of electronic data processing.[3]

Article 5 Wording of the consignment note

The provision would 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).

§ 1

The consignment note shall contain the following particulars:

(a) the date and the place at which it is made out;

(b) the name and address of the consignor;

(c) the name and address of the contractual carrier(s);

(d) the place and the date of taking over of the goods (and the name and address of the person to whom the goods are actually delivered if this is not the contractual carrier or one of the contractual carriers);

(e) the place designated for delivery;

(f) the name and address of the consignee;

(g) the description of the nature of the goods and the mode of packaging and, in the case of dangerous goods, the name prescribed in the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID – Appendix C to the Convention concerning International Carriage by Rail) and the Rules of carriage applicable to dangerous goods (Annex 2 to the Agreement on the international transport of goods by rail);

(h) quantity, marks and numbers of packages that make up the consignment;

[2] How this is arranged between the international associations representing carriers and the States parties/intergovernmental organisations should be the subject of a specific study.

[3] The process of revising CIM that is currently being prepared anticipates revised wording concerning the electronic consignment note.

(i) the gross mass or the quantity of the goods expressed in other ways;

(j) number of the wagon or wagons in which the goods are carried;

(k) the intermodal transport unit, its category, its number or other characteristics necessary for their identification;

(l) a detailed list of the documents which are required by customs or other administrative authorities and are attached to the consignment note or held at the disposal of the carrier at the offices of a duly designated authority or a body designated in the contract (a reference to data to which the parties have access is sufficient);

(m) the costs relating to carriage (the carriage charge, incidental costs, customs duties and other costs incurred from the conclusion of the contract until delivery) in so far as they must be paid by the consignee or any other statement as to which costs are payable by the consignee.

§ 2

Where applicable, the consignment note shall also contain the following particulars:

(a) the costs borne by the consignor;

(b) the agreed transit period;

(c) the agreed route;

(d) a list of other documents not mentioned in § 1, letter I) handed over to the carrier;

(e) the entries made by the consignor concerning the number and description of seals he has affixed to the wagon.

§ 3

The parties may agree to enter in the consignment note any other particulars which they may deem useful.

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.

The consignor shall be responsible for all costs, loss or damage sustained by the carrier by reason of:

(a) the entries made by the consignor in the consignment note being incomplete;

(b) the consignor omitting to make the entries prescribed for dangerous goods.

In the case of letter (b), the carrier may at any time unload or destroy the goods or render them innocuous, as the circumstances may require, without payment of compensation, save when the carrier was not aware of the dangerous nature on taking them over.

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. If this type of obligation were to be maintained, there should be a sentence along the lines of “without prejudice to any public order provisions to which the carrier is subject...”.

§ 1

Unless otherwise agreed between the consignor and the carrier, the costs incurred for transport shall be paid by the consignor.

§ 2

When by virtue of an agreement between the consignor and the carrier, the costs are payable by the consignee and the consignee has not taken possession of the consignment note nor asserted his rights in accordance with the contract of carriage in accordance with Article 13, nor modified the contract of carriage in accordance with Article 14, the consignor shall remain liable to pay the costs.

Article 8 Examination

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

§ 1

The carrier shall have the right to examine at any time whether the consignor has complied with the conditions of carriage and whether the consignment corresponds with the entries in the consignment note made by the consignor. If the examination concerns the contents of the consignment, this shall be carried out as far as possible in the presence of the person entitled; where this is not possible, the carrier shall require the presence of two independent witnesses, unless the laws and prescriptions of the State where the examination takes place provide otherwise.

The contents of the consignment may only be examined during transport if this is prescribed by customs or other conditions, if operational safety so requires or if this is necessary for the preservation of the goods during carriage.

§ 2

If the consignment does not correspond with the entries in the consignment note or if the provisions of public law have not been complied with, the result of the examination must be entered in the copy of the consignment note which accompanies the goods, and also in the duplicate of the consignment note, if possible. In this case the costs of the examination shall be charged against the goods, if they have not been paid immediately.

§ 3

When the consignor loads the goods, he shall be entitled to require the carrier to examine the condition of the goods and their packaging as well as the accuracy of statements on the consignment note as to the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed. The carrier shall be obliged to proceed with the examination only if he has appropriate means of carrying it out. The carrier may demand the payment of the costs of the examination. The result of the examination shall be entered on the consignment note.

Article 9 Evidential value of the consignment note

This Article follows Article 12 CIM and Article 9 CMR.

§ 1

The consignment note signed by both parties to the contract shall be prima facie evidence of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier.

§ 2

If the consignment note contains no specific reservations by the carrier, it shall be presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over.

§ 3

If the carrier has loaded the goods or examined them in accordance with Article 8, the consignment note shall be prima facie evidence, unless the contrary is proved, of the accuracy of the statements in the consignment note concerning the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed. The consignment note will not be prima facie evidence in a case where it bears reasoned reservations.

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).

§ 1

The consignor shall be liable to the carrier for any loss or damage and costs due to the absence of, or defects in, the packing of goods, unless the defectiveness was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it.

§ 2

The consignor shall be liable for all the consequences of defective loading carried out by him and must in particular compensate the carrier for the loss or damage sustained in consequence by him.

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).

§ 1

For the purposes of the customs or other formalities which have to be completed before delivery, the consignor shall attach the necessary documents to the consignment note or place them at the disposal of the carrier and shall furnish him with all the necessary information.

§ 2

The carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents and information. The consignor shall be liable to the carrier for any loss

or damage resulting from the absence or insufficiency of, or any irregularity in, such documents and information, save in the case of fault of the carrier.

§ 3

The carrier shall be liable for any consequences arising from the loss or misuse of the documents made available to him, unless the loss of the documents or the loss or misuse has been caused by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. Any compensation payable by the carrier shall not exceed that provided for in case of loss of the goods.

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.

§ 1

The consignor and the carrier shall agree the transit period. In the absence of an agreement, the transit period shall not exceed that determined in accordance with §§ 2 to 4.

§ 2

Subject to §§ 3 and 4, the maximum transit periods shall be 12 hours for registration and 24 hours in respect of each ... (e.g. 400) km. The distances shall relate to the agreed route or, in the absence of an agreement, to the shortest possible route.

§ 3

In his General Conditions of Carriage, the carrier may fix additional transit periods of specified duration for the case in which exceptional circumstances, which the carrier cannot avoid and the consequences of which he is unable to prevent, cause an exceptional increase in traffic or exceptional operating difficulties.

§ 4

The transit period shall start to run after the taking over of the goods; it shall be extended by the duration of a stay caused without any fault of the carrier.

Article 13 Delivery, right of lien

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

§ 1

The carrier must hand over the consignment note and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts still due according to the contract of carriage.

§ 2

After the arrival of the goods at the place of destination, the consignee may ask the carrier in accordance with § 1 to hand over the consignment note and deliver the goods to him. In the event of dispute on the obligations of the consignee, the carrier shall not be required to deliver the goods unless security has been furnished by the consignee.

§ 3

If the goods are damaged or are delivered late or have been lost, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.

§ 4

In other respects, delivery of the goods shall be carried out in accordance with the prescriptions in force at the place of destination.

§ 5

The carrier shall have right of lien over the goods and accompanying documents in respect of all payments arising from the contract of carriage. The right of lien shall exist as long as the goods are in the carrier's possession. The effect and exercise of the right of lien shall be governed by the law of the place in which the right of lien is asserted.

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.

§ 1

The consignor shall be entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders. He may in particular ask the carrier to stop the goods in transit, not to deliver them or to hand them back at the place at which they are taken over or to deliver the goods to a consignee or place other than the consignee or place indicated in the consignment note.

§ 2

The consignor's right of disposal is transferred to the consignee at the time specified by the consignor in the consignment note. Unless the consignor has specified otherwise, the right of disposal shall be transferred to the consignor as soon as the goods reach the country of destination. If the consignee has the right of disposal, the carrier shall comply with his orders.

§ 3

If in exercising his right of disposal the consignee has ordered the delivery of the goods to a third party, that third party shall not be entitled to name other consignees.

§ 4

The consignor's or the consignee's right of disposal is extinguished from the time when the consignee or an entitled third party has taken possession of the consignment note, accepted the goods or asserted his rights in accordance with Article 13 §§ 2 and 3.

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.

§ 1

The person who has the right of disposal over the goods shall enter the desired modifications to the contract of carriage (orders) in the duplicate of the consignment note and give this to the carrier. He shall compensate the carrier for the costs and the prejudice arising from the carrying out of the orders, unless the carrier is at fault.

§ 2

The carrier shall not be required to carry out the orders if this is impossible, unlawful or unreasonable, for example if they interfere with the normal working of the carrier's undertaking or prejudice the consignors or consignees of other consignments. An instruction shall not result in a division of the consignment.

§ 3

When, by reason of the conditions provided for in §§ 1 and 2, the carrier does not wish to carry out the orders, he shall immediately notify the person from whom the orders emanate.

§ 4

If the carrier culpably fails to carry out an order or if he carries it out negligently, he shall be liable for any loss or damage which may be caused thereby. If the carrier implements the consignor's orders without requiring the production of the duplicate of the consignment note, the carrier shall be liable to the consignee for any loss or damage sustained by him if the duplicate has been passed on to the consignee. Any compensation payable by the carrier in such cases shall not exceed that provided for in case of loss of the goods.

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.

§ 1

If, after the goods have been taken over, it becomes clear that carriage or delivery has not been carried out in accordance with the contract of carriage, the carrier shall ask the person who has the right of disposal over the goods for instructions, or where circumstances prevent delivery, he shall ask the consignee for instructions.

§ 2

If the consignee has given instructions to a third party to deliver the goods in accordance with Article 15 § 3, § 1 shall apply as if the consignee were the consignor and the third party were the consignee.

§ 3

When circumstances preventing the carriage of goods can be avoided by modifying the route, the carrier shall use his discretion to decide whether such a modification shall be made or whether it is in the interest of the person who has the right of disposal over the goods for the carrier to ask him for instructions.

§ 4

When the circumstances preventing delivery cease to exist before arrival of instructions from the consignor to the carrier, the goods shall be delivered to the consignee and the consignor shall be informed without delay.

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.

§ 1

The carrier shall be entitled to the reimbursement of expenses he incurs as a result of:

(a) his request for instructions;

(b) the carrying out of instructions received;

(c) the fact that instructions requested do not reach him or do not reach him in time;

(d) the fact that he has taken a decision in accordance with Article 16 § 3, without having asked for instructions, unless such costs were caused by his fault. The carrier may in particular recover the carriage charge applicable to the route followed and shall be allowed the transit periods applicable to such route.

§ 2

If the carrier is unable to obtain lawful and reasonable instructions within a reasonable time, he must take such steps as seem to him to be in the best interests of the person entitled to dispose of the goods. He may for example keep the goods for account of the person entitled to dispose of them, return them to the consignor or unload them and keep them for the person entitled, or entrust them for safekeeping to a third party. In the latter case, the carrier shall only be liable for the careful choice of such third party. Thereupon the carriage shall be deemed to be at an end. The charges still due under the contract of carriage and all other costs relating to the carriage shall remain chargeable against the goods.

§ 3

The carrier may proceed to the sale of the goods, without awaiting instructions from the person entitled, if this is justified by the perishable nature or the condition of the goods or if the costs of storage would be out of proportion to the value of the goods. He may also proceed to the sale of the goods in other cases if after the expiry of a reasonable period he has not received from the person entitled to dispose of the goods instructions to the contrary which he may reasonably be required to carry out; in such a case, the carrier may destroy unusable goods.

§ 4

If the goods have been sold, the proceeds of sale, after deduction of the costs chargeable against the goods, must be placed at the disposal of the person entitled. If the proceeds of sale are less than those costs, the carrier may claim the difference.

§ 5

The procedure in the case of sale shall be determined by the law or custom of the place where the goods are situated.

Title III Liability of the carrier (or of several carriers)

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.

§ 1

The carrier who has concluded the contract of carriage shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over for carriage and the time of delivery, as well as from exceeding the transit period. If several carriers have concluded the contract of carriage, they form a plurality of contractual carriers and are jointly and severally liable.

§ 2

If carriage governed by a single contract is performed by several successive carriers, each carrier that is not already a contractual carrier, by the very act of taking over the goods with the consignment note, shall become a party to the contract of carriage and shall assume the following obligations arising from the consignment note.

§ 3

If the carrier uses a substitute carrier, Articles 26 and 27 § 2 on the persons for whom the carrier is liable and the extent of liability of other persons apply.

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.

The carrier shall, however, be relieved of liability in accordance with Article 18 insofar as the loss or damage to the goods or the exceeding of the transit period was caused by the wrongful act or neglect of the person entitled, an order which is not attributable to the carrier or instructions which are not attributable to the person entitled, inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

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.

§ 1

The person entitled may, without being required to furnish further proof, consider the goods as lost when they have not been delivered to the consignee or placed at his disposal within thirty days/six weeks after the expiry of the transit periods.

§ 2

The person entitled may, on receipt of compensation for the missing goods, request in writing that he shall be notified immediately should the goods be recovered in the course of the year following the payment of compensation. He shall be given a written acknowledgement of such request.

§ 3

Within thirty days after receipt of such a notification, the person entitled may require the goods to be delivered to him against payment of the amounts still due according to the contract of carriage and against refund of the compensation received, less, where appropriate, costs which may have been included therein. He shall retain his rights to claim compensation for exceeding the transit period provided for in Article 24.

§ 4

In the absence of the request referred to in § 2 or of instructions given within the period specified in § 3, or if the goods are recovered more than one year after the payment of compensation, the carrier shall dispose of them in accordance with the laws and prescriptions in force at the place where the goods are situated.

Article 21 Compensation for loss

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

§ 1

In case of total or partial loss of the goods, the carrier shall compensate the value of the goods at the place and time at which they were accepted for carriage, as well as reasonable costs incurred by the person entitled for establishing the loss or damage. If part of the goods has been delivered, this shall be deducted from the amount of compensation remaining to the person entitled.

§ 2

The value of the goods shall be fixed according to the market price or, if there is no such price, by reference to the normal value of goods of the same kind and quality. If the goods have been sold immediately before being accepted for carriage, it shall be presumed that the purchase price recorded in the seller's invoice, less any transport costs included therein, constitutes the market price.

§ 3

The carrier must, in addition, refund the carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending those duties; paragraph 1, second sentence, applies by analogy.

§ 4

In case of loss of an intermodal transport unit or of its equipment, the compensation shall be limited to the usual value of the transport unit or of its equipment on the day and at the place of loss. If it is impossible to ascertain the day or the place of the loss, the compensation shall be limited to the usual value on the day and at the place where the vehicle has been taken over.

§ 5

The carrier shall not pay compensation for other loss or damage.

Article 22 Compensation for damage

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

§ 1

In case of damage to goods, the carrier shall compensate the loss in value and shall refund reasonable costs incurred by the person entitled for establishing the damage. The amount of compensation for the loss in value shall be calculated by applying to the value of the goods defined in accordance with Article 21 § 2 the percentage of loss in value noted at the place of destination. It shall be presumed that the costs of mitigating and repairing damage correspond to the loss in value.

§ 2

The carrier shall also refund the costs provided for in Article 21 § 3 with the percentage of the loss in value of the damaged goods noted at the place of destination.

§ 3

In no case shall the compensation exceed the amount:

(a) which would have been payable if the whole consignment which lost value through damage had been lost;

(b) which would have been payable if only that part of the consignment which has lost value through damage has been lost.

§ 4

In case of damage to an intermodal transport unit or its equipment, the compensation shall be limited to the cost of repair. § 3 shall apply mutatis mutandis.

§ 5

The carrier shall not pay compensation for other loss or damage.

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.

§ 1

The total compensation payable in accordance with Article 21 § 1 and Article 22 § 1 shall not exceed ... (e.g. 20) units of account per kilogram of gross weight:

(a) of the whole consignment if the whole consignment has been lost or has lost value;

(b) of the part of the consignment concerned if only part of the consignment has been lost or has lost value.

§ 2

The unit of account referred to in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amount referred to in § 1 is to be converted into the national currency of a State according to the value of such currency at the date of judgement or arbitral award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

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.

§ 1

If loss or damage to the goods results from the transit period being exceeded, the carrier must pay compensation not exceeding... (e.g. four times) the carriage charge.

§ 2

If the goods have been lost or have lost value as a result of partial loss, compensation for exceeding the transit period shall not be paid.

§ 3

If damage to the goods is not the result of the transit period being exceeded, the compensation provided for in § 1 shall be payable in addition to that provided for in Article 22.

§ 4

In no case shall the compensation for exceeding the transit period together with compensation for partial loss and damage exceed the compensation which would be payable in case of total loss of the goods.

§ 5

If the transit period has been established by agreement, other forms of compensation than those provided for in § 1 may be so agreed. If, in this case, not only the transit period agreed, but also the transit period provided for in Article 12 is exceeded, the person entitled

may claim either the compensation provided for in the agreement mentioned above or that provided for in this Article.

Article 25 Conversion and interest

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

§ 1

Where the calculation of compensation requires the conversion of sums expressed in foreign currency, conversion shall be at the exchange rate applicable on the day and at the place of payment of the compensation.

§ 2

The person entitled may claim interest on compensation, calculated at five per cent per annum, from the day of a claim in accordance with Article 33 § 2 or from the day on which legal proceedings were instituted.

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.

The carrier shall be liable for his servants and other persons whose services he makes use of for the performance of the carriage, when the servants and other persons are acting within the scope of their functions. The managers of the railway infrastructure on which the carriage is performed shall be considered as persons whose services the carrier makes use of for the performance of the carriage.

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.

§ 1

In all cases where this legal regime applies, any action in respect of liability, on whatever grounds, may be brought against the carrier only subject to the conditions and limitations laid down in this legal regime.

§ 2

The same shall apply to any action brought against the servants or other persons for whom the carrier is liable pursuant to Article 26.

Title IV Assertion of Rights

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.

§ 1

If partial loss or damage to the goods is apparent and if the consignee or consignor does not report this at the latest when the goods are delivered, it shall be presumed that the goods have been delivered in a condition in accordance with the contract. The notice of claim shall identify the damage with sufficient clarity.

§ 2

If partial loss or damage is not apparent, the presumption according to § 1 shall also apply when the damage is not reported within seven days of delivery.

§ 3

The right of legal action in the event of the transit period being exceeded shall be extinguished if the consignee fails to report that the transit period was exceeded within thirty days following delivery of the goods.

§ 4

The declaration of damage upon delivery may be filed against the person who has delivered the goods. The declaration after delivery must be made against the carrier. A claim after delivery shall be made against the carrier in text form. To comply with the notice period, timely dispatch of the claim is sufficient.

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.

§ 1

The consignor may bring an action provided he has the right of disposal in accordance with Article 14 or when there are circumstances preventing delivery. The consignee may bring an action from the time when he has the right of disposal in accordance with Article 14 or has acted in accordance with Article 14 § 4 without losing his right of disposal over the goods to a third party referred to there, who has himself obtained the right to bring an action.

§ 2

An action for the recovery of a sum paid pursuant to the contract of carriage may only be brought by the person who made the payment.

Article 30 Right of defence

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).

§ 1

Actions based on the contract of carriage may be brought against the or a contractual carrier, the carrier making the delivery or against the carrier on whose leg of the journey the event giving rise to the claim occurred.

§ 2

An action for the recovery of a sum collected pursuant to the contract of carriage may be brought against the carrier who has collected that sum or on whose behalf it was collected.

§ 3

An action may be brought against another carrier when instituted by way of counter-claim or by way of exception in proceedings relating to a principal claim based on the same contract of carriage.

§ 4

If the plaintiff has a choice between several carriers, his right to choose shall be extinguished as soon as he brings an action against any one of them.

Article 31 Forum

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

§ 1

All actions based on carriage subject to this legal regime may be brought before the courts or tribunals of States Parties designated by agreement between the parties or before the courts or tribunals of a State on whose territory:

(a) the defendant has his domicile or habitual residence, his principal place of business or the branch or agency which concluded the contract of carriage; or

(b) the place where the goods were taken over by the carrier or the place designated for delivery is situated.

Other courts or tribunals may not be seized.

§ 2

Where an action based on this legal regime is pending before a court or tribunal competent pursuant to § 1, or where in such litigation a judgement has been delivered by such a court or tribunal, no new action may be brought between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the State in which the new action is brought.

§ 3

Security for costs shall not be required in proceedings arising out of carriage under this legal regime from nationals of States Parties resident or having their place of business in one of those States.

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 operations for carriers.

§ 1

When a judgement entered by a court or tribunal of a State Party in any such action as is referred to in Article 31 has become enforceable in that State, it shall also become enforceable in each of the other States Parties, as soon as the formalities required in the State concerned have been complied with. The merits of the case shall not be subject to review. These provisions shall also apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.

§ 2

Debts arising from a transport operation subject to this legal regime, owed to one carrier by another carrier not under the jurisdiction of the same Contracting State, may only be attached under a judgement given by the judicial authority of the Contracting State which has jurisdiction over the carrier entitled to payment of the debt sought to be attached.

§ 3

Railway vehicles used to perform a transport operation subject to this legal regime may only be seized on a territory other than that of the Contracting State in which the keeper has its registered office, under a judgement given by the judicial authority of that State.

Article 33 Limitation of actions

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

§ 1

The period of limitation for an action arising out of carriage under this legal regime shall be ... (e.g. one) year(s).

The period of limitation shall begin to run:

(a) in the case of partial loss, damage or delay in delivery, on expiry of the date on which the goods were delivered;

(b) in the case of total loss, from the thirtieth day after the expiry of the time-limit;

(c) in all other cases, on expiry of the date when the right of action may first be exercised.

§ 2

The period of limitation shall be suspended by a claim submitted in writing to a carrier who, in accordance with Article 30, may have an action brought against him, until the day

that the carrier rejects the claim by notification in writing. If only part of the claim is accepted, the period of limitation shall start to run again in respect of the part of the claim still in dispute. The period of limitation shall not be suspended by further claims having the same object.

§ 3

The burden of proof of receipt of the claim or of the reply shall lie on the party who relies on those facts.

§ 4

A right of action which has become time-barred may not be exercised further, even by way of counter-claim or by way of exception.

§ 5

Otherwise, suspension and interruption of the limitation period shall be governed by national law.

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.

For disputes subject to this legal regime, the contract of carriage or a written agreement between the parties concerned may contain a clause conferring competence on an arbitration tribunal that must apply this legal regime. The arbitration proceedings shall, at the option of the claimant, take place within one of the forums referred to in Article 31. The parties may freely determine the composition of the arbitration tribunal and the arbitration proceedings or shall refer to a widely recognised set of arbitration rules.

Title V Relations between Carriers

Article 35 Settlement of accounts

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

(§ 1)

Any carrier who has collected or ought to have collected, either at departure or on arrival of the goods, charges or other costs arising out of the contract of carriage must pay to the carriers concerned their respective shares. The methods of payment shall be fixed by agreement between the carriers.

(§ 2

Article 9 shall also apply to the relations between successive carriers.)

Article 36 Right of recourse

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

§ 1

A carrier who has paid compensation pursuant to this legal regime shall have a right of recourse against the carriers who took part in the carriage in accordance with the following provisions:

(a) the carrier who has caused the loss or damage shall be solely liable for it;

(b) when the loss or damage has been caused by several carriers, each shall be liable for the loss or damage he has caused; if such distinction is impossible, the compensation shall be apportioned between them in accordance with letter (c);

(c) if it cannot be proved which carrier has caused the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge.

§ 2

In the case of insolvency of any one of the carriers concerned, the unpaid share due from him shall be apportioned among all the other carriers concerned, in proportion to their respective shares of the carriage charge.

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.

§ 1

The validity of the payment made by the carrier exercising a right of recourse pursuant to Article 36 may not be disputed by the carrier against whom the right of recourse is exercised, when compensation has been determined by a court or tribunal and when the latter carrier, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings. The court or tribunal seized of the principal action shall determine what time shall be allowed for such notification of the proceedings and for intervention in the proceedings.

§ 2

A carrier exercising his right of recourse must present his claim in one and the same proceedings against all the carriers with whom he has not reached a settlement, failing which he shall lose his right of recourse in the case of those against whom he has not taken proceedings.

§ 3

The court or tribunal must give its decision in one and the same judgement on all recourse claims brought before it.

§ 4

The carrier wishing to enforce his right of recourse may bring his action in the courts or tribunals of the State on the territory of which one of the carriers participating in the carriage has his principal place of business, or the branch or agency which concluded the contract of carriage.

§ 5

When the action must be brought against several carriers, the plaintiff carrier shall be entitled to choose the court or tribunal in which he will bring the proceedings from among those having competence pursuant to § 4.

§ 6

Recourse proceedings may not be joined with proceedings for compensation taken by the person entitled under the contract of carriage.

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 start considering the liability of different 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.

The carriers may conclude agreements which derogate from Articles 35, 36 and [38].