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Towards unified railway law

Draft Position Paper on the Unification of Railway Law

Prepared by the UNECE Group of Experts

I. Mandate and background

1. In 2005, the UNECE Working Party on Intermodal Transport and Logistics (WP.24), in line with an action plan adopted by the (then) ECMT Council of Ministers in Moscow, agreed on three strategic elements that should be the cornerstones of international activities to overcome the main weaknesses of rail transport between Europe and Asia (TRANS/WP.24/109, paras 13–20):

- Establishment of a common pan-European rail customs transit system;
- Harmonization of frontier controls for rail transport;
- Negotiation of a unified railway law.

2. Progress has been made on strategic element (1) with the adoption, on 9 February 2006, of a new Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes. Similarly, element (2) has been dealt with successfully and a new annex on rail transport to the International Convention on the Harmonization of Frontier Controls of Goods (1982) has been approved by UNECE in early 2010. The third element, however, i.e. negotiation of a unified railway law to allow direct carriage by rail under a single legal regime from the Atlantic to the Pacific, still remains to be tackled.

3. The common CIM/SMGS consignment note, prepared under a joint CIT/OSJD project to bridge practical differences between CIM and SMGS, was a very useful first step. However, contractual arrangements do not eliminate the underlying mandatory legal provisions and requirements under CIM and SMGS and national law. In the “Appeal from Bern”, issued in 2009, the CIT stressed that railway undertakings require standardised law of carriage with common legal terminology. Existing legal railway regimes that overlay each other must not compete with or block each other, but should be coordinated so that they complement rather than contradict each other and create a level playing field with other modes of transport, particularly road (CMR).

4. In November 2009, the UNECE Working Party on Rail Transport (SC.2), at its sixty-third session, expressed its full support for all initiatives that aim to unify railway law in the pan-European region. It decided to set up an informal Group of Experts to prepare a position paper on this issue for consideration at its sixty-fourth session in 2010. The Working Party asked the UNECE secretariat to send a letter to representatives of UNECE member States, OTIF, OSJD, European Community and international railway industry organizations, inviting them to participate in this work (ECE/TRANS/SC.2/212, para. 13).
5. Following the first session of the Group of Experts on 26 March 2010 in Geneva that adopted a programme of work, the Bureau of the Inland Transport Committee, at its session on 7 June 2010, took note of a first progress report on the activities of the group. The Bureau underlined that the mandate of the informal Group of Experts was to prepare a position paper on ways and means to achieve unified railway law in the pan-European region, with a particular focus on Euro-Asian rail transport linkages. The Bureau felt that a very cautious approach should be taken whenever EU law is involved and encouraged the UNECE secretariat to further consult with the European Commission with a view to clarifying these matters (TRANS/BUR.2010/5, paras 23–24).
6. The Group of Experts held a second session on 8 July 2010 at St. Petersburg and agreed to not further consider issues of organizational and operational interoperability in international rail transport as these issues were addressed and applicable only at European Union (EU) level and could be pursued by other competent bodies.
7. At its third session (Geneva, 16 September 2010), the Group of Experts reviewed the report of its second session as well as a first draft of a position paper prepared by the UNECE secretariat based on earlier considerations and views expressed. While agreeing in principle with the proposed strategy and approach towards unification of railway law as presented in the draft position paper, the Group of Experts requested the secretariat to circulate the reviewed draft position paper once more among participating experts (in English and Russian) soliciting further comments, if any. The completed position paper would then be submitted to the UNECE Working Party on Rail Transport (Vienna, 18-19 November 2010) for consideration and adoption.
8. All documents, reports and presentations made at the sessions of the Group of Experts are available at: http://www.unece.org/trans/main/sc2/sc2_igeurl2.html.

II. Justification for the unification of railway law¹

8 (1) Development of an adequate transport system is a prerequisite for a country's economic progress. Transport is particularly essential for the development of international trade. In order to provide for efficient and seamless international transport, common conditions governing international transport have been developed during the last 50 years and are now applicable at regional and global levels for all modes of transport, *except* for rail transport.

8 (2) Over the past decades, international trade, particularly between Europe and Asia, has exploded. So has containerized maritime transport reaching over 10 Mio TEU annually. This trend is predicted to continue, while seaports on both continents are already close to saturation. The same holds true for port hinterland transport in Europe and Asia.

¹ As agreed at the 3. session of the Expert Group, the secretariat has drafted this additional section for consideration by the Working Party

8 (3) At the same time, important infrastructure projects along Euro-Asian transport corridors have already been completed or are close to completion, such as new railway lines and border crossings between China, Kazakhstan and Mongolia, the Marmaray tunnel under the Bosphorus in Turkey and the rail link between Iran (Islamic Republic of) and Pakistan connecting the Indian sub-continent with Europe.

8 (4) Building adequate infrastructure is, however, not sufficient to exploit the potential of long-distance rail freight transport along the Euro-Asian land bridge as well as between adjacent countries. Required is a level playing field among competing modes. Required are also transparent and harmonized provisions of transport law applicable in the same way in all countries along Euro-Asian rail transport corridors that do also away with complicated border crossing procedures.

8 (5) Only then will railways be able to create a solid market niche for time-sensitive cargoes between the markets for air (1 day) and maritime transport (30 days). Numerous test runs have been organized already that show that rail could indeed provide a possible option for Euro-Asian freight transport, being twice as fast as maritime transport and considerably cheaper than air freight.

8 (6) It is against this background that UNECE Governments are now developing a strategy or road (rather) rail map to do away with the disadvantages railways are suffering from the lack of a unique railway law for the international transport of goods. Globalization, privatization and deregulation provide the railways with new options of action. Railway markets reach now out to transcontinental and global traffic flows. Governments should take up this challenge and act swiftly at the international level to turn rail market opportunities along Euro-Asian transport corridors into rail business.

III. Lessons learned and best practice

(a) International transport law

9. Globally standardized procedures and mechanisms for air transport have been established by means of the Chicago Convention and other treaties (Warsaw, Montreal Conventions). These global conventions prepared and administered under the auspices of the United Nations, provide a transparent and consistent legal and administrative framework guiding the development of air transport and establish procedural rules for their implementation at national level by Governments and the airline industry.

10. Similarly, in the field of maritime transport global rules exist for many years already in the framework of the Hague-Visby and Hamburg Rules. Recent efforts to harmonize and update these maritime laws at the global level have led to the adoption in 2009 of the so-called Rotterdam Rules by the General Assembly of the United Nations (not yet in force).

11. Also, the United Nations Convention on the Contract for the International Carriage of Goods by Road (CMR) of 1956 as well as the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) of 2001 provide for efficient and seamless international road and inland water transport by standardizing the conditions governing the contract for the international carriage of goods as well as the minimum level of carrier's liability.

12. These international treaties contain well established principles and procedures governing air, maritime, road and inland water transport at the global as well as at pan-European and Euro-Asian levels. However, no such provisions exist in the field of rail transport.

13. Within the UNECE region, extensive sub-regional legislation and regulations exist within the EU in the areas of railway policy and rail interoperability that is applicable in the 27 EU member States.

(b) International “model law”

14. In addition to the above mentioned treaties governing international transport law, there exist several, so-called “soft law” arrangements, such as United Nations resolutions or Model Regulations, that, while not legally binding, constitute an internationally agreed set of provisions that are implemented and applied through national legislation or regional or international treaties.

15. Examples of such soft-law are the European Code for Inland Waterways (CEVNI) that provides the framework for inland navigation in Europe and is in line with mandatory rules applicable for navigation within the EU and on the rivers Rhine, Moselle, Danube and Sava. Similarly, the UN Model Regulations on the Transport of Dangerous Goods provide a comprehensive and consistent set of global rules for all modes of transport (air, maritime, road, rail and inland waterways). These regulations are transposed into legally binding rules via modal international conventions, such as ADR for road, RID (Annex C to COTIF), SMGS (Annex 2) for rail transport and ADN for inland waterways.

16. These soft law arrangements provide an internationally agreed common base for the harmonization and gradual standardization of national or regional legislation governing transport without creating a new layer of international law and without interfering with existing mandatory regulations at national or regional level.

17. These international arrangements could thus serve as an example on how to harmonize international railway law based on and within the framework of the two existing international railway regimes (COTIF/CIM and SMGS) and the “acquis communautaire” for rail transport applicable in the EU.

(c) International private (contractual) law

18. Furthermore, private (contractual) law arrangements exist, such as the common CIM/SMGS consignment note, that is the “sum” of the CIM and SMGS consignment notes and provides a contractual link between shippers and railway companies. Such private (contractual) law arrangements do not modify the underlying legal provisions of national or international public law, such as COTIF or SMGS, and their effectiveness depends on the good application and harmonized interpretation of the respective mandatory law.

IV. Towards unification of railway law for Euro-Asian transport

19. Given the substantive, legal and institutional complexities and disparities of existing railway law at national, regional and international level in the pan-European region and along Euro-Asian rail transport corridors, it seems to be wise to move towards harmonization or unification of railway law gradually, using a step-by-step approach.

20. Following a careful review of the above-mentioned legal arrangements applicable in international rail transport and with a view of doing away with the legal shortcomings of international rail transport and establishing a level playing field with other transport modes, the Group of Experts proposes the following three step approach towards unification of international railway law.

(a) **Short-term: Memorandum of Understanding/Resolution/Declaration on general terms and conditions for Euro-Asian rail transport contracts**

21. Without modification of the institutional and legal framework provided by COTIF/CIM and SMGS, the common CIM/SMGS consignment note was a first step towards unification of railway law in the pan-European region and along Euro-Asian rail transport corridors. However, it is recognized that, while such private-law contractual arrangements facilitate international rail freight transport in the region, major rail freight customers, railway undertakings and Governments along Euro-Asian transport corridors require further steps to ensure efficient negotiation and conclusion of rail transport contracts along these corridors.

22. A possible short-term solution could consist in the preparation of **general terms and conditions for Euro-Asian rail transport contracts** that would address all non-commercial elements of rail transport of goods contracts between shippers and railway undertakings and are based on and in line with relevant provisions of COTIF/CIM and SMGS. The principles of consistency and most possible contractual freedom should be respected.

23. Such general terms and conditions could include and address contractual elements, such as:

- Liability rules (level, conditions, limitations, relief)
- Documentation (paper, electronic or both)
- Formal reports
- Handling of claims
- Limits of action
- Compensation between carriers

Further elements may need to be developed, as required.

24. General terms and conditions for rail transport contracts would enhance transparency in Euro-Asian rail freight operations, increase certainty of applicable legal rules for long distances rail services, particularly predictability of liability of parties to the transport contracts. They would establish internationally agreed recommendations for rail transport contracts on Euro-Asian rail transport corridors, while allowing for commercial freedom of the industry. The requirements of electronic data processing and use of electronic transport documentation, such as an electronic consignment note, should be included.

25. The development of such general terms and conditions for rail transport contracts should be undertaken with the support and under the auspices of an inter-governmental organization, such as UNECE. Inter-governmental cooperation and coordination is required as in many COTIF and SMGS member States, railways operate as public or State supervised undertakings and contractual provisions are part of public and/or administrative law requiring approval by Governments. In addition, UNECE, together with the other Regional Commissions of the United Nations has the mandate and geographical scope covering all countries along Euro-Asian rail transport corridors, including China., India and Pakistan.

26. Given the complexity of international rail transport contracts, the legal expertise and mandates of OTIF, OSJD and CIT as well as other inter-governmental and non-governmental rail and freight forwarding organizations is indispensable. The already existing and well-functioning working mechanisms of CIT and OSJD in the project

“Transport interoperability CIM/SMGS” should be fully utilized for this endeavour. Also the legal know-how and the operational experience of major European and Asian railway operators and freight forwarders would need to be harnessed and their support ensured. All expert group meetings should be open to interested Governments, railway undertakings and rail freight interests.

27. To ensure acceptance and uniform use of the general terms and conditions for Euro-Asian rail transport contracts, a **Memorandum of Understanding/Resolution/Declaration or similar instrument (MoU/R/D)** should be negotiated and adopted under the auspices of UNECE. Such a MoU/R/D would not constitute mandatory law, but would underline the political support of concerned Governments for the validity and acceptance of such general terms and conditions along important Euro-Asian rail transport corridors. It would thus constitute the policy framework for the correct and transparent use of international rail transport contracts over a certain period. In addition, the MoU/R/D could also determine the scope of application of the general terms and conditions, relating, for example, to specific Euro-Asian rail corridors only (for example, those specified in the Joint UNECE/UNESCAP Study on Developing Euro-Asian Transport Linkages)² or to specific cargoes and/or transport operations (i.e. container transport).

28. The MoU/R/D could be prepared and negotiated by a Group of Experts, operating at least in English and Russian, under the auspices of the UNECE Working Party on Rail Transport (SC.2). This Group of Experts should be open to all concerned countries, including Asian countries, such as China. The Group of Expert should also review the work undertaken by OSJD and CIT on the general terms and conditions for Euro-Asian rail transport contracts (see para. 27) and provide direction, as appropriate.

29. The MoU/R/D and its general terms and conditions for Euro-Asian rail transport contracts should be adopted by the UNECE Working Party on Rail Transport (SC.2). Thereafter it could be acknowledged, signed and formalized by concerned Governments and railway undertakings at a special occasion, possibly during the annual session of the UNECE Inland Transport Committee (ITC).

30. During the preparation of the MoU/R/D, the UNECE secretariat should ensure close cooperation with the European Commission, OTIF, OSJD and CIT as well as with the other concerned Regional Commissions of the United Nations., particularly with the Economic and Social Commission for Asia and the Pacific (ESCAP).

31. SC.2 should monitor, together with OTIF, OSJD, CIT and concerned railway companies, the application of the MoU/R/D and its general terms and conditions for Euro-Asian rail transport contracts. It should also regularly review its provisions in the light of operational experiences and prepare and adopt, if necessary, amendments and/or comments thereto, as appropriate.

Possible time frame:

Preparation of general terms and conditions (OTIF, OSJD and CIT)	March-October 2011
Preparation of MoU/R/D (UNECE)	June-October 2011
Adoption of MoU/R/D and general terms and conditions	November 2011
Signature of MoU/R/D and general terms and conditions	March 2012

² See: <http://www.unece.org/trans/main/eatl/in_house_study.pdf>.

(b) Medium-term: Model Regulations for international rail transport

32. Following adoption of the MoU and its general terms and conditions for Euro-Asian rail transport contracts, the preparation of global **Model Regulations and Implementation Mechanisms**, similar to those established for European inland navigation or the international transport of dangerous goods could be considered and taken up.

33. Such Model Regulations, of a non-mandatory nature, could be prepared and maintained by designated legal and technical experts of United Nations Governments, inter-governmental and non-governmental organizations as well as concerned industry groups. Rapid implementation of these Model Regulations would be ensured through existing national, regional and international rail legislation and conventions.

34. New international institutions would not need to be established for this purpose. Mechanisms and procedures should, however, be devised that ensure effective coordination and cooperation among existing international institutions in the field of rail transport and provide efficient bottom-up and top-down mechanisms that ensure effective transposition and application of the Model Regulations as well as harmony with national and sub-regional rail transport policies and operational requirements.

35. Model Regulations for international rail transport could consist of 3 layers:

- Layer 1: **Core provisions**, generally applicable for international rail transport operations, including those addressed by COTIF/CIM and SMGS and in the above general terms and conditions for Euro-Asian rail transport contracts;
- Layer 2: **Complementary provisions**, addressing, tariffs and other regulatory provisions, such as access and rail competition;
- Layer 3: **Regional provisions**, applicable for specific international rail transport lines and/or specific regions and geographical areas.

36. The Model Regulations do not constitute mandatory law, but a consensus at the international/global level that such regulations should be introduced, step-by-step, into the existing rail conventions, i.e COTIF and SMGS. Contracting States would not be recommended to transpose all Model Regulations into COTIF **and** SMGS, but only its core provisions. This would lead, over time, to further harmonized provisions in COTIF and SMGS. Complementary and regional Model Regulations would not need to be transposed into both conventions, but could be introduced into only one convention, i.e. either COTIF or SMGS and could thus be applicable only at sub-regional level, as appropriate and in line with national or regional rail policies and the respective legal, administrative and technical circumstances. However, with a view to ensuring efficiency and transparency in international and inter-regional rail transport operations, such differences would need to be reported and reviewed regularly. Such reporting would also facilitate further work towards harmonization of international railway law as it would clearly identify areas and needs for action.

Possible time frame:

Preparation of Model Regulations and mechanisms	June 2012 - October 2013
Adoption of Model Regulations and mechanisms	March 2014
Reporting and review procedures	as of 2015

(c) **Long-term: Convention on International Rail Transport**

37. Following a careful review of the application and experiences made with the above instruments and procedures, negotiation of a single international railway law could be envisaged with the objective to prepare a **Convention on International Rail Transport** similar to those existing for air, maritime, road and inland waterways at global and pan-European levels.

38. Such negotiations require considerable resources and should only be undertaken if the costs and benefits of such an approach have been clearly established and the necessary political support ensured. In preparation of such a treaty, the existing regulatory and institutional landscape in international rail transport must be taken into account as well as the diverse roles and interests of public and private entities responsible for rail infrastructure and operation in different United Nations member countries.

Possible time frame:

Negotiation of a convention on international rail transport: _____ as of 2015

V. Conclusions and follow-up

39. The Group of Experts wishes to put on record its appreciation for the constructive and fruitful work undertaken by all participating experts from UNECE Governments, inter-governmental and non-governmental organizations as well as railway undertakings.

40. In line with its mandate, the Group of Experts submits herewith its mandated position paper to the UNECE Working Party on Rail Transport (SC.2) for consideration and decision for possible follow-up action.
