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Item 4 of the provisional agenda

Monitoring results of pilot tests

Results of URL draft legal provisions' Pilot Tests (Germany-Poland-Belarus-Russian Federation)

Submitted by Deutsche Bahn AG

**Workshop on the implementation of a virtual pilot transport
based on
the new UNECE legal instrument “United Railway Law” (URL)
from 15 – 17 May 2017 in Berlin**

Teilnehmer:

Rail companies: Rzd, PKP Cargo, DB AG

Shipping companies: Transcontainer Europe, TransEurasiaLogistics, DB Cargo Logistics

Experts: Prof. Dr. Rainer Freise

REPORT

Representatives of the participating rail companies analysed a virtual railway transport Germany – Poland – Belarus – Russia based on the URL. Various transport connections may be used as actual routes. For example Bremen – Malaszewicze/Brest – Moscow or Wolfsburg – Malaszewicze/Brest – Kaluga.

The following subject areas were discussed and the following conclusions drawn:

1. Conclusion of contract

The URL applies when all parties to a contract of carriage, i.e. the shipper and all the rail companies involved in implementing the contract, agree that the URL is to apply to the unified contract of carriage (Art. 1 (1) No. 2 URL). The shipper may be the consignor of the goods or a freight forwarder. The URL only takes effect when the parties have reached agreement. The parties will of course only execute this agreement when all the preparations for implementing the transport from departure point to destination have been completed. The details of the preparations to be made are not contained in the URL because these preparations may differ depending on the nature of the goods being conveyed and the direction of transport. The important thing is that agreement on the application of the URL is voluntary; there is no obligation to agree the URL (no obligation to effect transport).

2. Responsibility for Costs

As required by law, the Parties must agree on how the costs are to be distributed between the shipper and recipient, when the contract is concluded. The URL provides for scope for discretion in this regard (Art. 8 URL).

3. Delivery time

The URL does not contain any concrete delivery times but presumes an agreement between the parties; otherwise a reasonable delivery time applies (Art. 13 URL). It is therefore advisable for the

contracting parties to determine the delivery time on conclusion of the contract and base this on the timetable data. This generally corresponds to the wishes of the customer.

4. Divergent agreements on liability

The URL permits contractual extensions of the liability of the carrier (Art. 3 § 2 URL). The parties must therefore agree, on conclusion of the contract, if the carrier's liability is to be extended. The participants agreed that the rail companies should adhere to the current practice and refrain from increasing their liability.

5. Customs procedure, Art. 4 No. 2 URL

Customs requirements do not change when the URL is agreed. Customs authorities should be requested to recognise the URL consignment note in the same way as the CIM/SMGS consignment note.

6. Shipping documents

(a) Consignment note, Art. 5 §§ 2-4 URL

A consignment must be issued even where the URL applies. The freight contract does not exist in isolation from the consignment note and it has no content other than that which arises from the consignment note.

Since no carrier commences the carriage of goods without a consignment note being issued (see Art. 5 § 3 (2) URL), in practice it is never the case that a consignment is missing from the outset, but only that the consignment is lost on route. The first case of a "missing consignment note" mentioned in Article 5 § 2 (3) does not therefore have any practical significance in itself and, in the view of the rail company representatives, can be deemed as equivalent to "loss". Considering this, we suggest that the expert group for the URL should examine the possibility of reformulating Art. 5 § 2 (3) and to place the words "the lack" in third place after "loss" or to leave them out completely.

If the loss of the consignment note is discovered on route, a replacement document must be issued, like the current standard shipping document for CIM and SMGS transports.

The current specimen consignment note, particularly the CIM/SMGS consignment note, can be adapted to the requirements of a European-Asian contract of carriage without any difficulty. The languages to be used must be indicated in this case; where appropriate translations must be provided.

Where a consignment note relates to several wagons or containers, the current CIM/SMGS wagon list or container list can still be used.

When finalising the specimen consignment note (based on the CIM/SMGS consignment note), ensure that all the entries required for executing carriage can be made:

- any extensions of liability,
- the whole delivery period and partial delivery periods of the individual carriers (insofar as partial delivery periods are not defined separately as between the rail companies),
- point at which the right of use passes from the shipper to the recipient,
- shipper's or recipient's authorised representative (in particular, freight forwarders) for subsequent decisions and for issuing instructions in the event of obstructions.

(b) Accompanying documents

Other accompanying documents must be provided, as before, by the shipper and entered on the consignment note. The commercial invoice will generally still be required for customs clearance of the goods.

7. Allocation of responsibilities

The rules on packaging, labelling, loading and unloading of the goods correspond to established principles. Unless otherwise agreed by the parties, Article 11 of the URL provides that the shipper must pack, label and load the goods, and that it is liable for errors.

8. Right of use, Art. 15

It is important that the shipper specifies in the consignment note, taking account of the requirements of the actual transport, the point at which the right of use passes to the recipient, otherwise the right of use will not pass until the goods arrive at the destination. Where appropriate, the shipper may specify, in the consignment note, other times, places and/or an authorised representative, for exercising the right of use.

9. Obstructions to carriage and delivery and issuing instructions

Article 17 § 3 URL means that the carrier must obtain instructions from the holder of the right of use (see Art. 2 No. 8) when this would be in the latter's interest. This applies, for example, where a change in route means that it is necessary to travel through other countries and that different border crossings must be used.

10. Delivery, Art. 14 URL

The carrier is obliged to effect delivery of the goods only in return for payment of outstanding amounts.

Under the URL, the recipient is not obliged to accept the goods or the consignment note. Such an obligation may arise under Article 14 § 3 from the law applicable in the country of destination.

Otherwise, the recipient may be contractually obliged with respect to the shipper (particularly under a contract of sale), to accept the goods.

11. Liability

(a) Ascertainment of damage

Under the URL, the rail company does not have to prepare a formal report, instead it is the task of the aggrieved party to report damage, Art. 28 URL.

The rail companies, however, still have an interest in ascertaining where the damage occurred so as to determine which rail company is liable (Art. 33 URL). It may therefore be assumed that the rail companies will, in future, continue to keep a record where damage is discovered on route and will also, for example, deploy experts in this regard. This also provides an opportunity to remedy the damage on route.

It is therefore recommended that, on transfer of the goods from the previous rail company, every rail company prepares a formal report if they discover any damage because, on the basis of such a report, it is possible to impute the damage to a specific rail company and make it solely liable as between the rail companies. It seems appropriate for the rail companies to jointly determine a standard specimen document for this, similar to the common "Formal CIM/SMGS Report".

Where damage is reported first by the recipient and no formal report by a carrier is available, and in addition the damage cannot be imputed to a carrier, the participating rail companies are jointly liable according to Art. 33 § 1 c URL). In the case of obvious damage, the recipient must report the damage on delivery. In the case of damage which is not obvious, the recipient must submit the report within seven days of delivery (Art. 28 URL). Place and time of delivery are often agreed between the delivering rail company and the recipient, particularly where a factory railway is used.

Where the recipient uses a factory railway, to which the wagons are transferred by the last carrier, then the recipient must report damage to the last carrier because the contract of carriage ends when the wagons are placed at the disposal of the factory railway. Where damage is reported by email, it is recommended that this email be sent to all participating rail companies.

(b) Rules on liability and compensation

The rules on liability under the URL were analysed on the basis of claims arising in practice:

Firstly, it is apparent that the regulation of claims is currently very complicated because there is a difference between the CIM sector and the SMGS sector and regulatory practice differs greatly. Many cases are settled by the aggrieved party with their transport insurers who in turn seek redress against the individual carriers or their insurers. Out-of-court settlements are common.

Under the URL, in the case of loss or damage (Art. 21, 24 URL), **the following applies** :

Where the goods being carried have a value not exceeding 17 SDR per kg, the aggrieved party will be compensated in full (the final amount of compensation per kg is still to be determined). Where, on the other hand, the goods have a higher value per kg (e.g. televisions or computers), then the

excess amount of loss will not be compensated under the URL. This affects particularly high-value goods which are low in weight.

The unit of account applicable to the URL, the Special Drawing Right of the International Monetary Fund, is defined in Art. 22 URL. This Special Drawing Right has to be converted into the currency of a country according to the value of this currency on the relevant day. Art. 22 § 2 URL applies to the respective conversion. Where the amount of compensation has to be indicated in a third currency (e.g. USD) this requires an additional conversion procedure.

In the case of **failure to meet the delivery time** only actual damage will be compensated, and compensation will be limited to half of the freight charge, Art. 25 URL.

(c) Exclusion of liability:

There are fewer exclusions of liability in the URL than under CIM and SMGS.

The remaining four material grounds for exclusion are specified in Art. 19 § 3 URL. Where a carrier pleads grounds for exclusion, it must prove that the requirements for the grounds for exclusion are met.

The URL contains no rules on the distribution of the burden of proof. Where the URL is used, the general legal principle applies that the party seeking to rely on a provision which is to its own advantage, must prove that the conditions for this provision are met. The generally applicable rule is: the question of whether the URL can be applied depends on how its application is enabled as between the participating countries.

(d) Assertion of rights to compensation:

By contrast with SMGS, under the URL (Art. 30) **either** the shipper **or** the recipient asserts a claim, depending on who has the right of use. This has the result that a shipper which still has the right of use asserts claims against the first rail company, whereas a recipient – if it has assumed the right of use - addresses claims to the delivering rail company.

12. Jurisdiction.

The representatives of the rail companies find that the URL does not contain any provisions on jurisdiction whereas the SMGS contains a general provision under Art. 47 § 4 which states that a claim must be brought in the competent court under national law. The CIM contains a more detailed provision in Art. 46 CIM.

13. Limitation and expiry of claims

The URL does not contain any provisions on limitation either, but leaves the matter to the applicable national law in each case.

Art. 28 § 3 URL states that claims for failure to meet the delivery time, expire when the recipient fails to notify the carrier of such failure within 60 days of delivery. The terms in Art. 25 and 28

URL are found not to have been translated in an identical manner and we would like the group of experts to look into this.

14. Summary of the results

- (a) The representatives of the rail companies are aware that formal entry into force of the URL has not yet taken place. Clarification is still required as to how the URL can be applied, in the preliminary phase, to actual, commissioned transports before formal entry into force of the URL.
 - (b) In many cases, the URL allows the contracting parties scope for discretion when drafting contracts. The parties (shipper and participating rail companies) must therefore agree how they are going to use this (e.g. when setting delivery times) when they conclude the contract.
 - (c) Since the URL does not regulate the procedures to be complied with by the participating carriers when implementing transportation, there is a need for the rail companies to conclude agreements on this (e.g. regarding formal reports).
 - (d) The current CIM/SMGS consignment note, can be adapted to the requirements of a European-Asian contract of carriage without any difficulty. Additional agreements between the parties can also be entered on this consignment note (see e.g. Field 7 of the CIM/SGMS consignment note).
 - (e) The URL does not impose any new requirements regarding the accompanying documents. The documents currently required can therefore continue to be used (e.g. wagon lists, container lists or the agreed continued use of the "Common Formal CIM/SMGS Report").
 - (f) Overall, the representatives of the rail companies conclude that based on its content, the URL can be applied to the envisaged virtual pilot transports. Individual procedures and documents must be adapted accordingly.
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