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Group of Experts towards Unified Railway Law

Eighth session
Geneva, 10–11 July 2014

Report of the Group of Experts towards Unified Railway Law on its eighth session

Contents

I. Attendance

1. The Group of Experts towards Unified Railway Law held its seventh session on 10 and 11 July 2014 in Geneva.

2. The session was attended by experts from the following countries: Azerbaijan, Belgium, Finland, Germany, Kazakhstan, Poland, Russian Federation, Switzerland and Turkey. Representatives of Islamic Republic of Iran also attended under Article 11 of the Terms of Reference of UNECE. An expert of the European Union (DG MOVE) also attended.

3. Experts from the following intergovernmental organizations participated: UNECE TER Project Central Office, Organization for Cooperation between Railways (OSJD), the Eurasian Economic Commission and the Intergovernmental Organisation for International Carriage by Rail (OTIF). Experts from the following non-governmental organization participated: International Rail Transport Committee (CIT).

4. At the invitation of the secretariat, experts from the following organizations and an industry group participated: CMS Cameron McKenna, Deutsche Bahn (DB), Lithuanian Railways.

II. Adoption of the agenda (agenda item 1)

Documentation: ECE/TRANS/SC.2/GEURL/2014/6

5. The Group of Experts adopted the provisional agenda prepared by the secretariat (ECE/TRANS/SC.2/GEURL/2014/6).

III. Unification of international railway law with the objective of allowing rail carriage under a single legal regime (agenda item 2)

Documentation: ECE/TRANS/SC.2/GEURL/2014/8, Informal documents SC.2/GEURL Nos. 4–8 (2014)

6. The Group of Experts recalled that in order to arrive at a common understanding on the concepts and explanatory legal provisions to be enshrined into a new international legal railway regime, undertook at its sixth and seventh sessions a first review of columns 3 and 4 of secretariat documents ECE/TRANS/SC.2/GEURL/2013/9 and ECE/TRANS/SC.2/GEURL/2014/5 containing an evaluation of relevant legal provisions of COTIF/CIM and SMGS as well as first elements and a possible wording of some specific legal provisions that could be included into a legal instrument for Euro-Asian rail freight transport. This exchange of views was performed article by article starting with newly proposed Article A (scope of application) and up to article KK (agreements concerning recourse) (ECE/TRANS/SC.2/GEURL/2013/8, paras. 17–39 and ECE/TRANS/SC.2/GEURL/2014/2, paras. 9–53).

7. Document ECE/TRANS/SC.2/GEURL/2014/8 provided, for articles A to KK, a brief evaluation of provisions in COTIF/CIM and in SMGS as well as of other international legal documents, such as CMR and the Montreal Convention (column 1). Furthermore, the document included elements and a possible wording of some specific legal provisions (column 2) that could be included into a legal instrument for Euro-Asian rail freight

transport. By preparing this document the secretariat took into consideration all comments received by experts in due time for United Nations translation services.

8. The Group of Experts undertook a second review of columns 1 and 2 of ECE/TRANS/SC.2/GEURL/2014/8 for all articles analysed, in order to achieve an agreement on the wording of the explanatory legal provisions to be enshrined in a new international legal railway regime. This exchange of views and proposals was performed article by article starting with proposed Article A and up to article KK.

9. Article A. Scope of Application

The secretariat made a review of the concept on which the proposed model law which is a first step towards the unification of the two existing international railway regimes regarding euro Asian rail freight transport, is based on. The secretariat pointed out that the scope of application and the rest of the provisions listed in document ECE/TRANS/SC.2/GEURL/2014/8 reflect this first step towards the unification of the two rail legal regimes. Therefore the listed provisions should be read and understood as provisions serving this first step – model law –.

The Chair noted that paragraph 1 is on contradiction with paragraph 4. The representative from Germany mentioned that we do have a broad scope of application and in paragraph 4 we have an option solution. The representative from Russian Federation mentioned that originally they did not agree with this scope of application. They added that if we should try to narrow the scope then we do not need this new legal regime. The representatives from Lithuanian Railways and Deutsche Bahn mentioned that we should not limit the scope of this new legal regime. OTIF recalled that this scope of application – ie an interface law between OSJD and OTIF regime – has been proposed by OTIF at the first meeting and is to its view the only way to achieve a workable legal regime for Eurasian freight transport. The chair pointed out that this regime would be in addition to existing CIM and SMGS regimes. The representative of Switzerland referring to paragraph 2 and 3 pointed out that we should integrate provisions on intermodal transport but we should address more efficiently the issues of "internal traffic". The representatives of Russian Federation, of European Commission and of CIT agreed with the comment made by the representative of Switzerland and the inclusion of provisions relevant to Intermodal transport. The representative of Germany pointed out that we should avoid conflict of conventions for instance with Rotterdam rules and for this reason we should not include provisions referring to intermodal transport. The Chair suggested that a more generic reference on intermodal transport should exist in the provisions instead of the current detailed one. The experts decided to revise the provision on scope of application and agreed on the following text:

§1 This legal regime/model law shall/may apply to every contract of carriage of goods by rail for reward, when

1. The place of taking over of the goods and the place designated for delivery are situated in two different States which are Contracting Parties to this legal regime and

2. The parties to the contract agree that the contract is subject to this legal regime.

§2 The Parties to the contract of carriage may also agree on the application of this legal regime to intermodal transport operations involving rail if they do not contradict the (international) acts governing other modes of transport.

§3 Each contracting State may at the time of signature or ratification declare that this legal regime shall not apply to contracts for the carriage of goods by rail for

which the provisions of CIM and/or SMGS or bilateral agreements between Contracting States are applicable.

The CIT representative approved the adopted provision since CIT's suggestion for the former § 2 was accepted and the present § 3 was amended (not deleted) in such a way that the CIM and the SMGS as well as bilateral contracts are reserved.

Nevertheless, CIT and OTIF pointed out that the new § 3 rely on a declaration of non-application by each contracting states. It would be preferable to use a positive wording making clearer that the new instrument doesn't apply on path where one of the two existing regime (CIM or OSJD) can be applied to the whole transport.

10. Article B. Mandatory Law

No comments received or discussed. The article was approved as is.

11. Article C. Prescriptions of public law

No comments received or discussed. The article was approved as is.

12. Article D. Contract of Carriage. Consignment note

§1 of this article was approved as it is, nevertheless following comments from CIT and OTIF a sentence should be added to make clear that the Consignor should pay. In §2 some comments made regarding the word "absence". The Chair mentioned that we cannot have transportation without a consignment note. The representative of Germany noted that the paragraph refers to the fact that if we need a good proof of the contract then we should issue a consignment note. But the contract is still valid even without a consignment note. The representative of CIT mentioned that a definition of payment should be included. The secretariat pointed out that article A refers to "every contract of carriage of goods by rail for reward". However, if needed, a sentence should be added possibly in paragraph 1 of the article which will make clear that the consignor should pay. The Chair concluded that in general §2 of the article is acceptable but the word "absence" should be revised and possible changed. The representative of Germany made a comment regarding the bold sentence included in §3. It should be changed and read as "insofar as the applicable law allows". The Chair commented that we should put the sentence in bold, in yellow, and consider two options with and without reference to applicable law. Regarding §4 all experts agreed that the regime should include provision on the electronic consignment note. However the level of details should be further discussed. The representative of Germany mentioned that the key elements are needed and what is being mentioned at the moment in the provision is very basic. She added that reference to applicable national law should be made. The representative of Russian Federation commented that all information referred to electronic consignment note should be deleted. The Chair suggested that reference to electronic consignment note should exist. He suggested to keep the first paragraph of §4 and the phrase which mentions that the electronic consignment note shall contain the same particulars as the consignment note referred to in this legal regimes. All other information included in §4 should be deleted. The representative of CIT suggested that legal powers have been created to use an electronic consignment note (§ 4). However, they have been modelled on the additional protocol to the CMR; that is not appropriate since the requirements of road transport cannot be equated with those of rail transport. None of the information which needs to be transferred between carriers and to the infrastructure manager is included. Moreover, functional rules do not belong in the statute but rather the industry must align the rules to its

requirements. The simplest and most logical way of doing that would seem to be by using CIT documentation as has always been the case in the past. Furthermore, this paragraph conflicts with Article E § 2. In addition, the electronic consignment note is given no precedence.

13. Article E. Wording of the consignment note

The three paragraphs of the article was accepted and approved by the experts except of bullets (m) and (n) of §1. The Chair commented that in SMGS all expenses are being charged to consignee and that these expenses should be mentioned in the provisions but not in details. Therefore the parenthesis in bullet (n) should be deleted. The representative of CIT mentioned that we should probably look in more details at the customs transit procedures of the different customs unions.

14. Article F. Responsibility for particulars entered on the consignment note

No comments received or discussed. The article was approved as is.

15. Article G. Payment of costs

The representative of OSJD mentioned that Article 24 of SMGS General Provisions under the title payment of carriage charges and penalties should be included (Informal document SC.2/GEURL No. 8 (2014), p. 11–12). The secretariat noted that article G should be read in combination with article M. This combination brings an efficient solution. The Chair pointed out that reference to article M should be made in article G. The representative of CIT stated that in §3 and before the word "tariffs" the words "prices and" should be added. He mentioned that the establishment of tariffs conflicts with competitive freedom and the basic principles of the CIM Uniform Rules. The representative of Russian Federation made a reservation to the article pending clarifications to be provided at a later stage.

16. Article H. Examination

The representative of OSJD mentioned that Article 16 of SMGS General Provisions under the title examination of the goods should be included (Informal document SC.2/GEURL No. 8 (2014), page12). The secretariat responded that possibly the addition of OSJD proposal is not needed since at the end of §1is being mentioned that 'unless the laws and prescriptions of the State where the examination takes place provide otherwise". The Chair pointed out that in Russian Federation law no witnesses participate in the examination. In addition the article does not provide information for any procedures. Therefore we should mention either everything in details or reference to the applicable national law should exist. The representative of Germany mentioned that the carrier would like to find out if the consignment note is correct or not. What would it mean then any reference to national law? The representative of CIT stressed that the second paragraph of § 2 does not fit in with the system and confuses public law with private law.

17. Article I. Evidential value of the consignment note

No comments received or discussed. The article was approved as is.

18. Article J. Packing, Loading

The representative of CIT criticised the fact that there is no provision for defining who must load the goods. His view was that this is increasingly not defined. It is specified, however (§ 2), that if nothing is stated in the consignment note, the goods are to be regarded as loaded by the consignor. This rule is taken from the SMGS, but says nothing about who should load and unload the goods but rather

only comments on liability when something occurs. Also § 3 seems to be redundant and conflicts with the obligation to carry under Article D § 1. No other comments received or discussed by the experts and the article was approved finally as is.

19. Article K. Completion of administrative formalities

No comments received or discussed. The article was approved as is.

20. Article L. Transit Periods

The Chair proposed that the transit periods should be included in the provisions but the actual hours and kilometres should be defined by the market meaning the relevant organizations such as CIT, OSJD and OTIF. The representative of OSJD pointed out that we should establish time frames that will increase railways competitiveness and he agreed with the comment made by the Chair. The representative of Germany and of CIT also agreed with the proposal made by the Chair. The representative of Switzerland noted that in principle he agrees with the content of the article but he was not sure if we should mention all details. He mentioned that he did check regarding transit times in Switzerland during weekends, holidays etc. and the delays especially when intermodal transport is taking place were significantly longer. Therefore he suggested that §4 should include reference to holidays. The Chair mentioned that possibly different transit times should be established when intermodal transport is taking place. The representative of Kazakhstan stated that we are coming back on the discussions for the scope of application on covering intermodality or not.

21. Article M. Delivery

The representative of Germany expressed concerns on the new sentence in bold introduced in §1. The consignee shall have the right to refuse to accept the goods and also reference to the applicable law should be made. She declared that this is an important issue that we should solve it in substance and not only to mention the national applicable law. In addition she mentioned that we should check the EU legislation on this issue. The representative of CIT noted that we do have one regime where clearly the consignee has the right to refuse to accept the goods and another regime where there is obligation to take the goods. A good formulation is needed as to cover both cases. The chair pointed out that the carrier should not be a hostage between the consignor and the consignee. He requested that a list should be included with the cases where in OSJD region the consignee could refuse to accept the goods as to solve the issue. The representative of OSJD mentioned that Article 19 of SMGS General Provisions under the title delivery of the goods should be included (Informal document SC.2/GEURL No. 8 (2014), pages16-17). The secretariat mentioned that these issues could be dealt together with liability issues. The Chair commented that the text proposed by OSJD is problematic and it should be revised accordingly.

22. Article N. Right to dispose of the goods

The representative of Germany made a comment on the newly introduced sentence in §1 on applicable national law. Her comment was referring to the applicability of such a provision for the right to dispose the goods. The representative of CIT agreed with the comment made by the representative of Germany and he added that the consignor should have legal security on what to do with his goods. However he pointed out that the inclusion of national law would make things difficult in practice because standardisation and harmonisation were not promoted. The Chair stated that OSJD is ready to agree on a compromised solution.

23. Article O. Exercise of the right to dispose of the goods

No comments received or discussed. The article was approved as is.

24. Article P. Circumstances preventing carriage and delivery

No comments received or discussed. The article was approved as is.

25. Article Q. Consequences of circumstances preventing carriage and delivery

The representative of OSJD made the following comment: in §3 the words “a reasonable time” should be replaced by “within the prescribed period”. The Chair mentioned that this change could be accepted.

26. Article R. Basis of Liability

No comments received or discussed. The article was approved as is.

27. Article S. Presumption of loss of the goods

The representative of CIT mentioned that the time within the goods will be considered as lost since they have not been delivered to the consignee or placed at his disposal will be evaluated by the relevant organizations such as CIT, OSJD and OTIF and will be provided to the secretariat in due time and well before the next meeting of the group.

28. Article T. Compensation for loss

The secretariat pointed out that we need a provision which will provide the mechanism for the calculation of the value of the goods. The chair mentioned that we must declare “where” such calculation will take place. The representative of OSJD stated that OSJD supports the alternative article provided, Article TA. The chair requested the secretariat to prepare a consolidated version of the two articles, article T and article TA.

29. Article U. Compensation for damage

The representative of OSJD mentioned that there is no information or reference on the involvement of experts on the evaluation of damage. The representative of CIT mentioned that we should decide to set the value of the goods which is appropriate for some goods. The risk involved in such cases will be with railways competitiveness. The Chair mentioned that actually we do have two options: either we set the full price or we set limited liability. The Chair asked CIT together with OSJD and OTIF to discuss this issue and provide their proposal at the next session of the group.

30. Article V. Compensation for exceeding the transit period

The chair noted that in §1 is being mentioned that the carrier shall pay compensation not exceeding the carriage charges. He mentioned that we should include it since it is the case also in CMR.

31. Article W. Conversion and Interest

The representative of OSJD mentioned that they would like to delete this article. The representative of CIT pointed out that when this provision is not included then we have the problem on how to calculate it. The Chair suggested to put in yellow this article and further discuss it at the next meeting.

32. Article X. Persons for whom the carrier is liable

No comments received or discussed. The article was approved as is.

33. Article Y. Other actions

The representative of CIT pointed out that this is a very significant article for legal certainty and we should keep it. The chair agreed with that statement.

34. Article Z and ZA. Notice of Damage/Claims

The secretariat mentioned that again in this article reference to the national law exists. The representative of OSJD mentioned that they will work more on this article and they will come back with a slightly different text. The representative of CIT mentioned that in practice the reference to the national law makes the situation very complex and cannot be implemented. The industry and therefore the CIT can no longer specify details of the formal report in a standardised way because the formal report will be subject to national law.

The Chair asked CIT together with OSJD and OTIF to discuss the issue of the number of days within claims for delays shall expire if the consignee does not notify the carrier of the delay in delivery and provide their proposal at the next session of the group. The representative of CIT considered this article very important because it assures the quality of service. In addition he mentioned that CIT does not really understand §5 since all should fill in the same notice and everything should be harmonised. The representative of OSJD mentioned that Article 22 of SMGS General Provisions under the title formal report should be included (Informal document SC.2/GEURL No. 8 (2014), p. 27–28). The Chair pointed out that he agrees with CIT that harmonization should exist. Also he mentioned that this is a very serious and difficult issue where compromise should be found. The representative of OSJD declared that they will provide a new proposal for this article.

35. Article AA. Right to bring an action against the carrier

No comments received or discussed. The article was approved as is.

36. Article BB. Carriers against whom an action might be brought

No comments received or discussed. The article was approved as is.

37. Article CC. Forum

The representative of OSJD suggested the deletion of this article. The Chair agreed with the suggestion from the representative of OSJD. The representative of Germany suggested that this article should be deleted because it is dealing with procedural and not transportation law. No other comments received.

38. Article DD. Execution of judgements. Attachment

The representative of OSJD suggested the deletion of this article. The representative of Germany suggested that this article should be deleted because it is dealing with procedural and not transportation law. The chair agreed with the deletion of paragraphs 1 and 2 but he suggested keeping paragraph 3 in yellow and spending some more time to reconsider it.

39. Article EE. Limitation of actions

The chair suggested that we should delete this article. The experts agreed on this decision.

40. Article FF. Arbitration

No comments received or discussed. The article was approved as is.

41. Article GG. Settlement of Accounts

The Chair suggested that we should put this article in yellow with the remark "how the system between carriers will be addressed?" The representative of CIT replied that it depends on what we are going to include in the scope of application. The representative of OSJD stressed that he agrees with the chairman and he mentioned that there are many other issues on the relationship between carriers that they have not been addressed and we should do so.

42. Article HH. Right of Recourse

No comments received or discussed. The article was approved as is.

43. Article II. Procedure of recourse

No comments received or discussed. The article was approved as is.

44. Article JJ. Liability in case of loss of or damage to a vehicle or an intermodal transport unit (belonging to another carrier)

The representative of OSJD mentioned that this provision is not required for the new legal regime. No other comments received. No decision taken.

45. Article KK. Agreements concerning recourse

No comments received and no decision taken.

46. Following this second review of the conceptual and legal basis of articles A to KK of a new international railway regime, the Group of Experts agreed that the topics and issues that need further consideration and review are many and important and time will not permit discussion and finalization at the October 2014 session. Therefore the Group of Experts decided that a meeting of "friends of the chair" should be organized prior to the October session. During this meeting the experts will further review and discuss the articles for which a harmonized solution has not been found yet. This "friends of chair" meeting could take place on Monday the 29 of September 2014 in the Palais de Nations in Geneva. For this meeting the secretariat was requested to prepare a revised version of document ECE/TRANS/SC.2/GEURL/2014/8 based on the discussions and comments received during this session for articles A to KK.

IV. Identification of an appropriate management system for unified railway law based on the experience of international organizations in the field of the railway transport (agenda item 3)

Documentation: ECE/TRANS/SC.2/GEURL/2013/12, Informal documents SC.2/GEURL Nos. 2, 3 and 9 (2014)

47. The Group of Experts recalled that at its previous session, the secretariat presented an overview of a management system in order to facilitate discussions on identifying an appropriate management system for the new legal railway regime. This overview outlined the different actors and functions that exist and that could be used. Three main functions that would lead to an efficient management system were presented and analysed: (a) a depositary function, (b) an administrative function and (c) a secretariat support function.

48. The secretariat informed the Group that OTIF had provided a proposal on the appropriate management system for unified railway law that was available on the Group's web site as Informal document SC.2/GEURL No. 9 (2014). The representative of OTIF

mentioned that its proposal is the new legal instrument to become annex of the two existing railway regimes.

49. The Chair pointed out that the proposal of OTIF is an option, however, it would not constitute a first step towards the unification of the two existing international railway regimes. He also stressed that probably it is not the time yet to discuss this issue but we can see the difficulties that exist. There are many options and we must choose the best one.

50. The representative of Switzerland agreed with the Chair that we cannot take a decision at this point, however, he pointed out that in order to manage such an instrument we need an organization with rail experience and the resources to manage such a convention. It appears that a country cannot be a depository.

51. The representative of Germany stressed that we should discuss the management system when the text of the legal instrument is ready. He pointed out that we need an organization to be the secretariat and depository of the new instrument and UNECE can play this role. He added that on administrative issues, UNECE has the experience and the instruments developed to perform so.

52. The representative of European Commission mentioned that a new organization should not be established and that she considers the case of CMR as the best example. She also mentioned that she fully agreed with the representative of Germany.

V. Other Business (agenda item 4)

53. The representative of OSJD commented on paragraph 14 of the report of the seventh session of the Group. The representative of OSJD would like paragraph 14 of the report of the seventh session to be replaced by the following paragraph: “This concept is the first step towards the unified railway law and it allows the preparation of an optional agreement which does not affect the existing two legal regimes (COTIF/CIM and SMGS) and it allows the use of one contract on carriage, one consignment note, a uniform system of liability for rail transportation along Europe and Asia, allowing interested parties on a voluntary basis, to implement the principles of this unified law”.

VI. Date of next session (agenda item 5)

54. The next session of the Group of Experts is scheduled to be held at the Palais des Nations in Geneva on 30 and 31 October 2014.

VII. Summary of decisions (agenda item 6)

55. The Group of Experts agreed that the secretariat would prepare a short report on the outcome of the session.