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Group of Experts towards Unified Railway Law

Seventh session

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

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I. Attendance

1. The Group of Experts towards Unified Railway Law held its seventh session on 3 and 4 April 2014 in Geneva.
2. The session was attended by experts from the following countries: Azerbaijan, Belgium, Finland, France, Germany, Netherlands, Russian Federation, Switzerland and Turkey. 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) and 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/2014/1

5. The Group of Experts adopted the provisional agenda prepared by the secretariat (ECE/TRANS/SC.2/GEURL/2014/1).

III. Analysis of existing international modal transport conventions (rail, road, air, inland water and maritime transport) and related agreements (agenda item 2)

Documentation: ECE/TRANS/SC.2/GEURL/2013/4

6. The Group of Experts recalled that, at its fifth and sixth sessions, it reviewed existing international arrangements and legal instruments covering all modes of transport on the basis of an outline provided by the secretariat with a view to identifying elements and mechanisms as well as best practices that could be of relevance for the establishment of a unified railway regime (ECE/TRANS/SC.2/GEURL/2013/4).
7. The Group of Experts agreed that since no comments were received from the experts, the document ECE/TRANS/SC.2/GEURL/2013/4 should be considered accurate and complete and, therefore, final.
8. The experts thanked the secretariat for its excellent work by preparing such a demanding and complex document which helped the experts to deliver their second concrete output based on the objectives set in the Joint Declaration. The experts agreed that this document from now on should be considered as reference document for their work towards the unification of international railway law.

IV. Unification of international railway law with the objective to allowing rail carriage under a single legal regime (agenda item 3)

Documentation: ECE/TRANS/SC.2/GEURL/2014/3, ECE/TRANS/SC.2/GEURL/2014/4, ECE/TRANS/SC.2/GEURL/2014/5

9. The Group of Experts recalled a first review of columns 3 and 4 of document ECE/TRANS/SC.2/GEURL/2013/9 undertaken at its previous session. This document provided 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 in 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 I (Evidential value of the consignment note) (ECE/TRANS/SC.2/GEURL/2013/8, paras. 17–39).

10. Based on this first review of the conceptual and legal basis of a new international railway regime, the secretariat prepared document ECE/TRANS/SC.2/GEURL/2014/5 which outlined further possible wording of specific legal provisions from article J (Packing and loading) up to article KK (agreements concerning recourse), for consideration and review by the experts.

11. Document ECE/TRANS/SC.2/GEURL/2014/5 provided, for articles J to KK, a comparison of provisions in COTIF/CIM (column 1) and in SMGS (column 2). These legal provisions are briefly evaluated in the context of other international legal documents, such as CMR and the Montreal Convention (column 3). Finally first elements and a possible wording of some specific legal provisions (column 4) that could be included into a legal instrument for Euro-Asian rail freight transport were provided.

12. The experts agreed that a better understanding of the concept of the international legal railway regime should be first reached starting reviewing the provisions of this new legal instrument.

13. Figure 1 below outlines the main concept of the new international legal railway regime, model law, as it was presented by the secretariat and it constitutes the first step towards the unification of railway regimes.

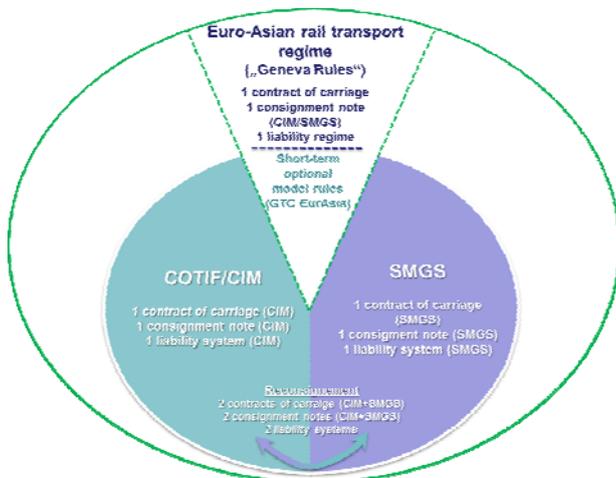
14. Under this concept, the new international legal railway regime, while leaving the present two regimes untouched, would fill the gap left by COTIF/CIM and SMGS for use of a single rail transport contract, a single consignment note and a single liability system for Euro-Asian rail transport. This regime would allow rail transport from the Atlantic to the Pacific on the same legal basis as is today only possible for road and air transport.

15. The proposed concept adopts a step by step approach towards the unification of international railway law. It should be adopted on the basis of the following arguments or justification:

(a) the establishment of an overall (third) layer of international railway law, in contradiction to COTIF/CIM and SMGS, should be avoided, not least to avoid conflict of conventions;

(b) the creation of a new international railway regime replacing COTIF/CIM and SMGS in their entirety would be complex and would require considerable time due to long transition periods for entry into force and for denunciation of COTIF/CIM and SMGS.

Figure 1
First step towards the unified railway law: the main concept



Source: UNECE

16. This concept for a new legal railway regime, model law, would be based on the following main features:

(a) The new legal railway regime would be applicable –this first step – only for international rail transport of goods that extend beyond the scope of application of the present COTIF/CIM or SMGS regime;

(b) The application of the new legal railway regime by the rail industry would be voluntary. The new legal railway regime would only apply if the parties to the rail transport contract, i.e. the consignor and the railway enterprise as carrier concluding the contract of carriage so decide and agree that the new legal railway regime should apply (opting-in). Therefore, the market will decide about the efficiency and success of this new legal tool. However, once the parties to the transport contract agree to apply the new railway regime and mark this in the transport contract, its provisions become mandatory;

(c) At this first step the focus will be on the contract of carriage and, in particular, on rights and obligations of the parties to the contract of carriage, documentation, liability, assertion of claims and relationship among carriers. Other equally important issues, such as technical specifications, rail infrastructure, rolling stock as well as security and safety would be addressed at a second step and only if the new legal instrument will be used with success by the majority of interested countries.

(d) Primarily, the geographical scope of unified rail transport rules should encompass the ECE region as well as interested countries, such as China and Mongolia. However the main objective is to create an international railway regime which all interested countries could apply.

17. Such a new international railway regime would be based on relevant provisions of COTIF/CIM and on the latest draft of the new SMGS. Such an approach, using familiar and well-proven legal provisions, standards and procedures, should ensure smooth and effective implementation of the new legal railway regime in acceding countries.

18. There seems to be consensus among experts that such step by step approach, where at this stage focus should be given on the contract of carriage and on filling the gap left by COTIF/CIM and SMGS while leaving the present two regimes untouched, should be adopted.

19. The Chair following the consensus on the main concept – model law – suggested four stages for the accomplishment of this work:

(a) Step 1: Forming the basis of a future Convention in the area of transport of goods. Development of unified approaches for the prospective operational and managerial mechanisms of a unified transport law.

(b) Step 2: Technical and experimental testing – pilot phase – of the norms of the Model Rules.

(c) Step 3: The expansion of transported volumes under the new Model Law. Using the Model Law for transportation, during which transition takes place from the legal CIM regime to the SMGS and vice versa to reach evaluation in practice.

(d) Step 4: Full introduction of the norms of a unified transport law.

20. The representative of OTIF pointed out that the provisions proposed by the secretariat of UNECE in its document ECE/TRANS/SC.2/GEURL/2014/5 were largely identical, with some editorial differences, to the provisions provided by OTIF on 20 January 2014. The provisions of OTIF of 2014 took over the main elements of a study commissioned by OTIF in 2011. Moreover, the concept proposed for the implementation of the interface law for transport of goods crossing the “border” between the area of application of CIM and SMGS regimes were also similar.

21. The representatives from OTIF and OSJD stated that they are ready to establish a joint informal group with the main objective to further facilitate the work done by the Group of Experts towards Unified Railway Law. The Group of Experts agreed that every help is most welcomed. However it was clearly stated that every input from this informal group should be delivered within the deadlines set by the secretariat and it should be drafted based on the rules and regulations set by UNECE for its formal Group of Experts.

22. Taking due account of consensus reached on the main concept of the first step of the new legal instrument – model law – the Group of Experts undertook a first review of columns 3 and 4 of ECE/TRANS/SC.2/GEURL/2014/5 for the rest of the articles that were not reviewed at the previous session in order to reach a common understanding of the explanatory legal provisions to be enshrined in a new international legal railway regime. This exchange of views was performed article by article starting with newly proposed Article J and up to article KK.

23. Packing, Loading

The secretariat mentioned that both CIM and SMGS address packaging and loading of the goods. The possible wording provided for a new legal regime regulates loading and packaging of the goods in a single rule similar to SMGS. There was agreement among the experts regarding the wording of this provision.

24. Completion of administrative formalities

The wording of the new proposed provision on completion of administrative formalities is mainly based on article 11 of CMR. There were no comments received by the experts on this provision.

25. Transit periods

The Chair pointed out that in SMGS today the transit period is fixed. In cases where the transit period is needed to be shorten then fees apply. The representative from Germany stressed out that in CIM there is also a ceiling on transit periods. The secretariat mentioned that fees apply also in CIM upon requests for shortening the transit periods. The Chair and the experts agreed that if they would like to increase railways competitiveness then twenty four hours / seven days per week operations

should be foreseen and transit periods should not be suspended on Sundays and statutory holidays.

26. Delivery

The Chair pointed out that in SMGS the consignee may decline to receive the cargo only if damage, deterioration or other factors have changed their condition to such an extent that no possibility exists to use them, wholly or in part, for the purpose originally intended. Such a provision does not exist in CIM. The secretariat mentioned that there are significant differences between SMGS and CIM on this provision. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

27. Right to dispose of the goods

The Chair pointed out that the SMGS agreement includes an exhaustive list under which any modifications of the contract of carriage could take place. The existence of such a list prevents any illegal actions. The representative of Germany stressed out that probably such a list could be avoided and a more practical approach could be adopted if article M was considered in combination with article O, exercise of the right to dispose of the goods. The Chair mentioned that we should then amend this provision with reference to the National legislation. The representative of OSJD stressed that the carrier should hold the goods at its disposal. The representative from Russia Federation asked if any provision where the carrier could modify the contract of carriage would exist. The secretariat replied that such a provision exist in article O paragraph two. The experts agreed that this provision should be reviewed in combination with provision O and comments should be provided to the secretariat.

28. Exercise of the right to dispose of the goods

The experts agreed that this provision should be reviewed in combination with provision M, Right to dispose of the goods, and comments should be provided to the secretariat.

29. Circumstances preventing carriage and delivery

The secretariat mentioned that this provision actually protects railways from the transportation of dangerous goods. In line with the SMGS the wording for the new legal regime brings together both circumstances preventing carriage and delivery in single provisions. There were no comments received by the experts on the wording of this provision.

30. Consequences of circumstances preventing carriage and delivery

The Chair pointed out that this provision should be in general supported. However elements related to customs issues should be carefully addressed as to avoid conflicts with customs legislation and/or national law. The secretariat stressed that article C addresses issues regarding customs legislation but reference will be included in article Q as well.

31. Liability

The Chair pointed out that the structure of paragraph 1 of this provision was not clear. He emphasized on the last sentence of the paragraph which refers to liability issues when several carriers have concluded the contract of carriage. After fruitful discussion the experts decided to delete the last sentence of paragraph 1. Furthermore the experts decided to delete the text in the parenthesis in paragraph two since it provided a not needed explanation. The secretariat mentioned that in

general article R (liability) should be read in connection with articles BB (carriers against whom an action might be brought) and HH (right of recourse). These three articles constitute a broad liability scheme under the restrictions that articles BB and HH set. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

32. Burden of Proof

The secretariat suggested that the burden of proof should not be included in the provisions of the new legal instrument since it lies on the carrier and it is derived from general rules of evidence. The Chair pointed out that the experts should further review and analyse this issue. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

33. Substitute carrier

The secretariat suggested that the term “substitute carrier” should be avoided in the provision of the new legal regime as it is the case in SMGS agreement. The experts agreed with this approach.

34. Presumption of loss of the goods

The secretariat mentioned that while CIM and CMR allow the consignee in case of rediscovered goods, a choice of delivery or compensation, the SMGS requires the consignee to accept the goods during the period of six months. The Chair pointed out that the number of days within the goods should be considered as lost when they have not been delivered to the consignee differs between SMGS and CIM. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

35. Compensation for loss

The secretariat noticed that CMR, CIM and SMGS follow similar principles on this issue. The obligation to pay compensation is limited to the value of the lost goods and the paid carriage charges. The wording for the new legal regime is also based on these principles. However, the current proposal has no limits. The Chair mentioned that the compensation should be considered as proportion of the value of the goods. The representative of CIT mentioned that it is important to set a limit for commercial and competition reasons. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

36. Liability for wastage in transit

The secretariat mentioned that no wording was prepared for this provision given the type of goods carried in Euro-Asian rail transport. The Chair pointed out the importance of such provision and he emphasized on the relevant list that is being outlined in SMGS agreement for this issue. The representative of European Commission stressed that at least so far perishable foods are not being transported by railways in EU countries. The representatives from OSJD and Russia Federation pointed out that experts should not limit themselves while drafting this provision with what is being transported today along Europe and Asia. They added that a list should be provided but probably not in so much detail as it is outlined today in the SMGS agreement. The experts agreed that wording should be provided for this provision and proposals and comments should be sent to the secretariat in due time.

37. Compensation for damage

The secretariat mentioned that the new legal railway regime could be based on the structurally comparable provisions on compensation for damage contained in

CIM, SMGS and CMR. The Chair noted that probably the translation of word “damage” in Russian language should change since it has different meaning.

38. Compensation for exceeding the transit period

The secretariat noted that while the CIM and SMGS provide for structurally comparable provisions for compensation for exceeding the transit period, they differ in the compensation limits. These compensation limits should be negotiated. The Chair pointed out that SMGS and CIM have adopted different approaches. CIM refers to loss because of delay. SMGS refers to a delay. Therefore it should be clarified whenever we refer to compensation for a loss because of delay or compensation for a delay. He also expressed his belief that such compensation should not exceed carrier’s charges. The representative of OSJD mentioned that article 27 of SMGS refers to compensation because of delay only. The compensation because of loss is being discussed in other articles of SMGS. He also pointed out that if there will be an increase of the compensation above the 30 per cent that applies today in SMGS then it will not be accepted by OSJD members. The secretariat mentioned that CIM is based on financial loss. Compensation is being provided only when a loss exist because of delay. The Chair stressed that this provision should include both the compensation for delay and compensation for loss because of delay. The representative of OTIF mentioned that in any case article M (transit period) should be first decided and then article V (compensation for exceeding the transit period). The experts agreed that wording should be provided for this provision and proposals and comments should be sent to the secretariat in due time.

39. Compensation in case of declaration of value

The secretariat mentioned that wording was not prepared for this provision since the concept agreed promotes an opting in solution for the transportation of special cargo. The Chair pointed out that the experts should further discuss this provision and especially the declaration of the value. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

40. Conversion and interest

The secretariat mentioned that CMR, CIM and SMGS contain similar provisions that could be included into the new legal railway regime. The experts did not provide any comment on this provision.

41. Liability in respect of rail-sea traffic

The secretariat noted that wording for such provision was not prepared for the new legal railway regime. This provision on liability in respect of rail-sea traffic is only provided by CIM. The Chair noted that we should address this provision in the future since it would be very important for intermodal transport. Russia Federation mentioned that it would be necessary to have such a provision in the future. Turkey mentioned that such provision is needed since there are existing corridors along the Euro Asia such as the Almaty – Istanbul one that cross the Van-Tatvan lake in Turkey. The representative from CIT pointed out that such provision would be necessary since corridors are crossing Caspian Sea. The experts agreed that this provision should be included in the draft and comments or proposal should be sent to the secretariat in due time.

42. Person for whom the carrier is liable

The representative of OSJD mentioned that the new revised SMGS includes such a provision. The experts agreed with the wording of this provision.

43. Other actions

The secretariat mentioned that CIM and in substance also SMGS provide that in case these conventions are applicable, claimants cannot obtain higher compensation under other legislation. Similar provisions should also be included in the new legal railway regime. The experts agreed with the wording of this provision.

44. Notice of damage

The secretariat mentioned that CIM and SMGS provide as two separate steps of the settlement of claims, the (compulsory) drawing up of a report by the carrier and a claim by the person entitled (claimant). According to CIM this claim is optional whereas it is mandatory under SMGS. The new railway regime could be based on CMR. Instead of the requirement for drawing up a report for the ascertainment of a loss, the new legal regime could foresee the recording of the damage together with an optional claim to ensure suspension of the period of limitation. Also in paragraph 3 the days within the claims for delay will expire, should be set. The Chair pointed out that the commercial act is the basic document that creates a proof for claims. It is very important to specify for instance the number of copies needed etc. The commercial act should be described here or at the article that refers to the rights of carriers. The experts agreed that this provision should be reviewed and comments should be sent to the secretariat in due time.

45. Claims

The secretariat mentioned that the new legal regime deals with actions and leaves the parties of the contract to deal with the claims. The Chair pointed out that in Russian legislation it is an imperative procedure; the claims must be made first to the carriers and then to proceed with any trial. The representative of Germany mentioned that the main objective is to create something for the future which is based on lean text. The representative of CIT mentioned that they also consider this provision important for railways operation and it should be included. The experts agreed that this provision should be reviewed and comments should be sent to the secretariat in due time.

46. Right to bring an action against the carrier

The secretariat mentioned that CIM and SMGS regulate who on the basis of the contract of carriage, could take action (ability to sue), against whom action may be levied (capacity to be sued) and where should be the venue of legal action (jurisdiction). The article AA of the new legal railway regime is rather a short version of the above mentioned articles. The experts agreed with the wording of this provision.

47. Carriers against whom an action might be brought

The Chair mentioned that this article was discussed with article R basis of liability. He mentioned that in paragraph 1 sentence three the words "or against one of several contractual carriers" should be deleted. The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

48. Forum

The experts agreed that this provision should be further reviewed and comments should be sent to the secretariat in due time.

49. Execution of judgements. Attachment

The Chair mentioned that this provision maybe is not a subject of a railway convention. If there are practical implications the experts should further discuss it otherwise this provision should be deleted. The experts agreed to further review this provision and provide comments to the secretariat in due time.

50. Extinction of right of action

The secretariat mentioned that CIM, SMGS and Montreal convention foresee the extinction of the right of action in certain cases; CMR however only allows a period of limitation. The Chair pointed out that it would be sufficient to foresee a period of limitation. The experts agreed to further review this provision and provide comments to the secretariat in due time.

51. Limitation of action

The chair suggested as a period of limitation for an action arising from carriage under this legal regime to be the one year. Also he commented on paragraph two that reference to written claim depends if we will agree to have a provision for claims or not. The experts agreed to further review this provision in combination with the provision for the claims and provide comments to the secretariat in due time.

52. Arbitration

The experts agreed with the wording provided for this provision.

53. Articles under the relationship of carriers

The experts agreed that for the articles included under the relationship of carriers section (from article GG up to article KK) will be further reviewed by the experts and comments will be provided to the secretariat in due time.

54. Following this first review of the conceptual and legal basis of articles J to KK of a new international railway regime, the Group of Experts decided that for its next session document ECE/TRANS/SC.2/GEURL/2014/5 should be revised based on the discussions of this session for articles J to KK and of the previous session for articles A to I.

V. 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 4)

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

55. The Group of Experts recalled that, at its previous session, the secretariat introduced ECE/TRANS/SC.2/GEURL/2013/12 which provided detailed information transmitted by OSJD and OTIF from Informal documents SC.2/GEURL Nos. 2 and 3 (2013) and contained a preliminary analysis of pertinent management issues enshrined in other transport conventions/agreements. Due to a lack of time, the Group of Experts did not consider this document.

56. The secretariat informed the group that OSJD provided a detailed analysis of the system of management of SMGS and CIM in English and Russian languages and it was uploaded onto the group's web site as Informal document SC.2/GEURL No. 2 (2014).

57. To facilitate discussions on the management system of the new legal railway regime, the secretariat presented an overview of such a management system (Informal document SC.2/GEURL No. 3 (2014)). This overview did not formulate any kind of proposal but simply outlined the different actors and functions that exist and that could be used. There are three main functions that would lead to an efficient management system: (a) a depository function, (b) an administrative function and (c) a secretariat support function. Each function could include several types of actors. For the depository function, the United Nations has an important role to play as the depository of the international railway regime. For the administrative function, existing good practices within the United Nations could be followed. An administrative committee, where all stakeholders and contracting parties participate and which reports to the Working Party on Rail Transport, could be an efficient solution. Concerning the secretariat support function, the OTIF, OSJD and UNECE secretariats all have a crucial role to play.

58. Experts agreed that the most appropriate or even the best management system – mechanism should be identified and adopted for this new legal regime. It was recalled that based on the joint declaration signed by the ministers an appropriate management system for unified railway law using the experience of international organizations in the field of railway transport (OSJD, OTIF and others) as well as of international organizations of other modes of transport should be identified and discussed on the basis of a material consensus on unified railway law.

59. The experts thanked the secretariat for its initiative to provide an overview of the management system of the legal railway regime. This item should be further discussed at the next session of the Group.

VI. Other Business (agenda item 5)

60. There were no proposals under this agenda item.

VII. Date of next session (agenda item 6)

61. The next session of the Group of Experts is scheduled to be held at the Palais des Nations in Geneva on 10 and 11 July 2014.

VIII. Summary of decisions (agenda item 7)

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