



Organisation intergouvernementale pour les transports internationaux ferroviaires
Zwischenstaatliche Organisation für den internationalen Eisenbahnverkehr
Intergovernmental Organisation for International Carriage by Rail

**Commission de révision
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Information from the Secretary General on the Secretariat's other activities

Working Group of Legal Experts

INTRODUCTION

The Convention concerning International Carriage by Rail (COTIF) is an important international instrument providing uniform international railway law for about fifty states in Europe, Asia and Africa. OTIF Member States represent different legal traditions and railway market organisation structures, both economically and technically.

One of the aims of OTIF is to promote, improve and facilitate, in all respects, international traffic by rail, in particular by establishing systems of uniform law, as well as keeping a watch on the application of all the rules and recommendations established within the Organisation (Article 2 COTIF). The COTIF *corpus juris* ensures legal certainty and reduces the costs that arise as a result of having to use different legal systems and from evolving commercial and economic needs. In order to reap the full benefits of COTIF, uniformity in the interpretation, application and adaptability of COTIF have to be safeguarded.

In its recent study entitled “International regulatory co-operation: the role of international organisations”¹, the Organisation for Economic Co-operation and Development (OECD) rightly observed that only a limited number of IOs [International Organisations] systematically track the implementation of their hard and soft instruments. This is a critical point, since tracking implementation provides the evidence needed on the use of instruments to support the evaluation of the influence of the IO [International Organisation] (and ultimately its impacts), as well as the relevance of the instrument and any need to update it.

COTIF explicitly sets out a principle of interpretation which is generally recognised in jurisprudence and doctrine that “when interpreting and applying the Convention, its character of international law and the necessity to promote uniformity shall be taken into account” (COTIF Article 8 § 1). Like most other classical international intergovernmental organisations, OTIF does not have police or an organ to enforce COTIF law. Furthermore, there is no international court to interpret and apply COTIF in order to ensure and safeguard uniformity and coherence. For the time being, the only existing tool contributing to uniform application is the Explanatory Report. However, an appropriate institutional structure and monitoring scheme should be put in operation in order to achieve the Organisation’s aims.

In addition to the clear need to monitor, support and promote application of the applicable regulations, both internally within the Organisation and externally by the stakeholders, the adaptability of COTIF is equally important. As a result of the development of the railway market, the process of further development of “hard” and “soft” railway law has to be streamlined. The development of “hard” railway law implies amendments and supplements to COTIF, as well as the adoption of new binding international treaties in the framework of COTIF (Article 2). On the other hand, “soft” railway law implies the adoption of legally non-binding recommendations, declarations, codes of conduct etc.

Last but not least, international railway law does not exist in a regulatory vacuum and it interfaces with other areas of law. This requires a comprehensive interdisciplinary approach to development, both in law and in practice.

Therefore, the establishment of an advisory/preparatory working group in the legal field is proposed and is described in detail below.

RELEVANT PRACTICE OF OTHER INTERGOVERNMENTAL ORGANISATIONS

A few examples of specialised legal bodies within other international intergovernmental organisations:

¹ OECD (2016), International Regulatory Co-operation: The Role of International Organisations in Fostering Better Rules of Globalisation, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264244047-en>

Council of Europe (CoE). Committee of Legal Advisers on Public International Law (CAHDI) is an intergovernmental committee which brings together the legal advisers of the Ministries of foreign affairs of the Member States of the Council of Europe as well as of a significant number of observer states and organisations. It has a mandate to examine questions related to public international law, conduct exchanges and co-ordinate views of Member States and provide opinions at the request of the Committee of Ministers or at the request of other Steering Committees or ad hoc committees etc.

International Civil Aviation Organization (ICAO). The Legal Committee was established by the ICAO Assembly in May 1947 as a permanent successor to the *Comité international technique d'experts juridiques aériens (CITEJA)*, a group of independent legal experts. It has the task of advising the Council and the Assembly on legal questions and the important function of preparing drafts for international conventions or protocols and studying and making recommendations in the field of aviation law.

International Maritime Organization (IMO). The Legal Committee was established in 1967 as a subsidiary body to deal with legal questions which arose in the aftermath of the Torrey Canyon disaster. It is empowered to deal with any legal matters within the scope of the Organisation. The Committee is also empowered to perform any duties within its scope which may be assigned by or under any other international instrument and accepted by the Organisation.

It can therefore be concluded, even without a detailed assessment of the legal bodies of CoE, ICAO and IMO, that there is a common need for such organs in order to assess, advise on and draft hard or soft law instruments in the legal field. It goes without saying that OTIF's requirements are no different from those of the above-mentioned organisations.

OTIF'S INSTITUTIONAL FRAMEWORK AND PRACTICE

The core institutional system of COTIF is established in Article 13 § 1 and consists of the following decision-making and administrative organs: the General Assembly, the Administrative Committee, the Revision Committee, the RID Expert Committee, the Rail Facilitation Committee, the Committee of Technical Experts and the Secretary General. Furthermore, the General Assembly may decide temporarily to establish other committees for specific tasks.

In addition, Article 16 § 9 COTIF explicitly gives "other Committees" the right to appoint working groups to deal with specific questions:

- The first Committee of Technical Experts (CTE) in 2006 set up a working group on "Technical Aspects" (WG TECH) in order to prepare the next session of CTE. This working group has functioned successfully for more than 10 years and meets three times a year.
- The second CTE in 2007 set up the ad hoc WG LEGAL, which dealt with legal questions. It met five times in 2007 and 2008.
- The 51st RID Committee of Experts in 2012 set up a standing working group. This working group meets once/twice per year in order to prepare amendments to RID to be adopted by the RID Committee of Experts.

Other organs enjoy the implicit right derived from the Convention to set up working groups. This right has already been exercised by the General Assembly, Administrative Committee and Secretary General:

- The sixth General Assembly in 2000 set up a working group to examine proposals from the Member States and suggestions from the Central Office on amending the General Assembly's Rules of Procedure on the basis of the 1999 Protocol version of COTIF in sufficient time for new Rules of Procedure to be submitted to the seventh General Assembly for adoption. The proposed amendments to the Rules of Procedure gave no cause for discussion and were tacitly

adopted by the Assembly. It was acknowledged that this was only possible because of the good work that had been done in preparing them.

- In 1997 the 88th Administrative Committee set up a working group to prepare a proposal regarding a new system of financing OTIF's expenses.
- In 2013 the Secretary General set up a working group on the revision of the CUV UR made up of experts from the states, national safety authorities and stakeholders, which met three times. Based on the proposals from the working group, the CUV UR were amended by the 25th Revision Committee and 12th General Assembly.
- In 2014 the Secretary General (supported by the Revision Committee) set up a working group to prepare the revision of the CUI UR, which met four times. Based on the proposals prepared by the working group, the 26th Revision Committee and 13th General Assembly will consider the amendment of the CUI UR.
- In 2017 the Secretary General set up a working group to amend the procedure for revising COTIF. Based on the results of this working group and subsequent additional information received from the Member States, the OTIF Secretariat has prepared proposals for the 26th Revision Committee and 13th General Assembly.

The practice of holding advisory/preparatory working groups has proved to be useful in ensuring consistent and coherent regulation, as well as the development thereof. Moreover, the experience of the CTE illustrates that other organs may also need legal advice.

The current practice of setting up ad hoc legal groups has also improved the quality and maturity of proposals submitted to the Revision Committee and General Assembly. However, such practice does not ensure a consistent and coherent approach in the development of the overall legal framework and does not allow new challenges to be identified on time. Moreover, legal assistance is needed not only for the development of "hard" railway law, but also to develop "soft" railway law and to ensure that the Organisation functions efficiently.

OTIF WORKING GROUP OF LEGAL EXPERTS: FUNCTIONS AND WORKING ARRANGEMENTS

The Secretary General intends to establish a working group of legal experts. The working group's functions will be of a preparatory and advisory nature in the legal field. The task of the working group will be to assist and facilitate the functioning of the existing organs defined in Article 13 § 1 in the legal field and to ensure the effective management of the Convention. The working group's activities will be limited to the legal field and will cover international public and transport law, in particular all general legal areas in so far as they are relevant to international rail traffic. However, its activities will not cover the specialised "technical" areas of the transport of dangerous goods, interoperability and safety, which are dealt by the respective committees and their working groups.

The working group will not have any special authority under COTIF to interpret the provisions of the Convention or other legal acts and will not have any authority to take any binding decisions. Nevertheless, the organs of the Organisation may follow the interpretations given or adopt any measures proposed. Therefore, any binding decisions will have to be taken by the existing competent organs. For instance, proposals concerning modification of the base Convention will have to be considered by the Revision Committee and adopted by the General Assembly. With regard to legal advice, it will only assist the competent organs and the latter will remain free to follow or reject the advice.

In order to optimise the functioning of the Organisation, the Secretary General proposes that all the OTIF organs may request the working group of legal experts to examine and propose actions or give its opinion on any legal issues concerning the application of existing legal instruments or the development of new ones.

Functions:

- preparation of draft amendments or supplements to the Convention;
- provision of legal advice and assistance;
- promotion and facilitation of the functioning and implementation of COTIF;
- monitoring and assessing the application and implementation of COTIF;
- acting as a forum and think-tank for OTIF's members to raise and discuss relevant legal questions.

Working arrangements:

- open to all members of the Organisation;
- decisions by simple majority;
- stakeholders may participate in an advisory capacity in accordance with conditions defined by the working group;
- periodically report to organs defined in Article 13 § 1 on relevant activities;
- detailed rules of procedure to be adopted by the working group itself.

OTIF WORKING GROUP OF LEGAL EXPERTS: WORK PROGRAMME

The work programme for 2018-2021 should include the following priority subjects:

- Develop a scheme to monitor and assess the application and implementation of COTIF

Different solutions are adopted at international level ranging from individual state reports to specific data bases of relevant administrative and judicial practice. The appropriate monitoring scheme has to be agreed and proposed by the working group.

- Assess the interfaces between customs and transport regulations in order to ensure efficient international railway traffic. This issue is of particular importance in the area of freight transport

Article 6 § 7 of the CIM UR stipulates that in the case of carriage which takes place on the customs territory of the EU or the territory on which the common transit procedure is applied, each consignment must be accompanied by a consignment note satisfying the requirements of Article 7 of the CIM UR.

The Union Customs Code (UCC), which entered into force on 30 October 2013, has been applicable since 1 May 2016. It is part of the modernisation of customs. Its essential objective in particular is to make all customs formalities paperless by 31 December 2020. The link between the CIM contract of carriage and the simplified transit procedure will disappear. The working group should assess this issue and make proposals with regard to customs matters relating to the carriage of goods by rail.

- Assess the digitalisation of international transport, particularly transport documents

The European Commission has decided to define a digital strategy for the transport and logistics sector in Europe in the framework of the "digital transport and logistics forum" project, which is looking in particular at using and recognising electronic transport documents.

This work could also have implications for the provisions of the CIM UR, particularly Article 6 § 9 of the CIM UR, which says that the consignment note may be established in the form of electronic data registration. The working group may develop a strategy on this subject.

- Uniform contract for international train paths

Increasing the modal share of freight is inconceivable unless there is real fluidity in international traffic and, in particular, a simple mechanism for allocating train paths. Based on existing international rules, namely CUI UR, and following the model of the GCU contract based on CUV, a coordinated and uniform legal framework for using international train paths should be established by the sector, with the support of the OTIF.

- Other issues

The OTIF organs and members of the working group may propose other relevant items, for instance market access conditions or revision of a particular appendix.

It is proposed to hold two sessions of the working group in 2018:

- First session, one day in May or June 2018: the adoption of working arrangements and the adoption of a detailed implementation plan for the work programme based on a proposal from the Secretariat.
- Second session, one day in last quarter of 2018: discussion of substance concerning particular work programme items agreed at the first session. In particular, this meeting may be the occasion to have an open discussion - including presentations from the sector - on the way forward for designing a uniform contract for international train paths.

Proposal for decision:

1. The Revision Committee notes the intention of the Secretary General to establish a working group of legal experts and thanks the Secretary General.
2. The Revision Committee supports setting up a working group of legal experts with the following functions:
 - preparation of draft amendments or supplements to the Convention;
 - provision of legal advice and assistance;
 - promotion and facilitation of the functioning and implementation of COTIF;
 - monitoring and assessing the application and implementation of COTIF;
 - acting as a forum and think-tank for OTIF's members to raise and discuss relevant legal questions.
3. The Revision Committee requests that periodical reports of the working group's activities be submitted.