



Intergovernmental Organisation  
for International Carriage  
by Rail

---

Bulletin  
of International  
Carriage  
by Rail

---

**1/2008**

116<sup>th</sup> Year • January - March

## Summary

### Official Communications from the Secretariat of OTIF

**Lists of lines 1999**  
**CIV list of maritime and inland waterway services,**  
p. 1

### Legal Matters concerning COTIF

**Presumption of loss or damage in case of recon-**  
**signment,** p. 1

**Publications and interesting links,** p. 5

### Transport of Dangerous Goods

**RID/ADR/ADN Joint Meeting**  
Berne, 25-28.3.2008, p. 6

### Co-operation with International Organisations and Associations

**United Nations Economic Commission for Europe**  
**(UN/ECE)**  
Inland Transport Committee (ITC) – Geneva, 19-21.2.2008, p. 7

**United Nations Commission on International**  
**Trade Law (UNCITRAL)**  
Working Group III (Transport law) – 21<sup>st</sup> Session – Vienna, 14-  
25.1.2008 – p. 8

**International Union of Railways (UIC)**  
Legal Group – Paris, 19.2.2008 – p. 9

### Case Law

Hof van Cassatie van België – Ruling of 18.5.2007 – Absence of  
consignment note – Right to bring an action (CIM) – p. 10

### Book Reviews

**Andresen, Bernd/Valder, Hubert,** Speditions-, Fracht- und  
Lagerrecht (The Law on Forwarding, Freight and Storage),  
transport law handbook with commentaries, supplement 1/08, as  
at January 2008, p. 12

### Last but not least

**The magic of technical literature,** p. 13

**Annual subscription to the Bulletin : SFr. 48,-**  
**Orders are to be sent to :**

Intergovernmental Organisation  
for International Carriage by Rail (OTIF)  
Gryphenhübelweg 30, CH - 3006 Berne  
Phone : + 41 31 359 10 10  
Fax : + 41 31 359 10 11  
E-mail : [info@otif.org](mailto:info@otif.org)  
Internet : [www.otif.org](http://www.otif.org)

# 1/2008

116<sup>th</sup> year – January - March

## **Bulletin of International Carriage by Rail**

Quarterly publication of the OTIF

In case of reproduction of essays and texts translated by the Secretariat of OTIF, full acknowledgment of author, publisher and source must be given. The opinions expressed in essays are those of the authors.

### **Official Communications from the Secretariat of OTIF**

#### **Lists of lines 1999**

#### **CIV list of maritime and inland waterway services**

(published on 1 July 2006)

#### **Secretary General circular no 9, 3 January 2008**

##### *Chapter “Germany”*

Inclusion of the following shipping lines:

- *Dagebüll – Amrum (15.03-26.10)*, operated by the “Wyker Dampfschiffahrts-Reederei Föhr-Amrum GmbH” (DE–25938 Nordseebad Wyk auf Föhr);
- *Hamburg – Helgoland (20.03-26.10)*, operated by the “FRS Helgoline GmbH & Co. KG” (Postfach 26 26, DE–24916 Flensburg);
- *Konstanz – Ermadingen – Reichenau*, co-operated by the “Schweizerische Bodensee-Schiffahrtsgesellschaft AG (SBS)” (Friedrichshafenerstrasse 55a, Postfach 77, CH-8590 Romanshorn) and the “Bodensee Schiffahrts-

betriebe GmbH (BSB)” (Hafenstraße 6, DE–78462 Konstanz).

Following the inclusion of these shipping lines and the modifications made in the Germany chapter, the chapter has been re-issued.

See COTIF 1999, Article 24 §§ 1, 3-5.

### **Legal Matters concerning COTIF**

#### **Presumption of loss or damage in case of reconsignment**

Application of Article 28 § 3 of CIM to traffic using the CIM/SMGS consignment note – a new SMGS provision enters into force

Some new SMGS provisions will enter into force on 1 July 2008 (see decisions of the CIM/SMGS Steering Group, Bulletin 3/2007, p. 42/43 and 4/2007, p. 61). Implementation of the solutions achieved – with OTIF’s input - in the context of the CIT-OSJD project to make transport law interoperable forms part of these additions to SMGS: design for a common CIM/SMGS formal report, wagon and container list (one document for groups of wagons and containers), procedure for approving traffic axes on which the CIM/SMGS consignment note can be used and presumption when the place the loss or damage occurred in traffic with the

CIM/SMGS consignment note is unknown. These rules and model documents mitigate the disadvantages that arise for rail transport customers as a result of the co-existence of two transport law regimes, CIM and SMGS. They offer considerable advantages to those who make use of the CIM/SMGS consignment note as opposed to those who, for whatever reasons, perform transport with the customary reconsignment, using a separate consignment note for each contract of carriage.

One of these new rules is Article 23 § 10 of SMGS. The proposals for this provision were drafted in the CIM/SMGS Legal Group, submitted to the meeting of experts of the OSJD's "Transport Law" Commission in July 2007 and adopted in October 2007 at the annual meeting of this Commission. Article 23 § 10 introduces presumption in case of reconsignment into SMGS. This has a direct effect on the application of Article 28 § 3 of CIM. As both these provisions contain legal presumption for reconsigned consignments concerning which the place the loss or damage occurred is unknown, it may be claimed that the rules are parallel, even if this is only partially the case, as explained below. In the context of the parallelism this creates, the application of Article 28 § 3 of CIM will be possible from 1 July 2008.

### History of origins

The origins of legal presumption in case of reconsignment have a long history. The problem of the claimant's not being able to assert his claim for compensation for loss or damage occurring in transport if he was not in a position to provide proof of which of two immediately consecutive contracts of carriage was being carried out at the time the loss or damage occurred, has existed since the beginning of the last century. In those days, these were cases where domestic transport was carried out prior to transport in accordance with the then International Convention on international rail freight transport (CIM/IÜG, Berne Convention) or where transport was performed on the basis of two consecutive contracts of carriage in accordance with the CIM/IÜG. Case law to the detriment of railway users led to proposals aimed at resolving this problem being dealt with as early as the 4<sup>th</sup> Revision Conference (1932). A provision was adopted at that Revision Conference according to which it was to be presumed that any loss or damage had occurred during performance of the latest contract of carriage. However, this was very restrictive: It only covered a small number of cases where it was not possible to ascertain during which of consecutive contracts of carriage the loss or damage occurred. Thus presumption only applied if both the previous and subsequent transport operations were subject to the CIM/IÜG.

At the 5<sup>th</sup> Revision Conference (1952), this provision was extended to cover cases where consecutive transport operations were subject to different freight transport laws; however, the presumption of loss or damage was made on condition that in the case of through consignment from the original forwarding station to the final destination, CIM would have had to apply. In the case of an SMGS-CIM reconsignment, presumption was only considered if the SMGS transport was performed in States that were also Contracting Parties to CIM at the same time.

When COTIF was partially revised in 1989, the provision was extended further. A special rule concerning SMGS-CIM reconsignment was included in Article 38 § 2, para. 2 of CIM. In the fundamental revision of COTIF, which was concluded with the adoption of the Vilnius Protocol in 1999, this provision was carried over into Article 28 § 3 of CIM. For an SMGS-CIM reconsignment now, it no longer depends on whether the CIM UR would have been applicable from the original place of forwarding up to the final place of delivery in the case of through consignment. In the case of reconsignment of consignments that have come from the SMGS area and have been reconsigned in accordance with CIM, the presumption of loss or damage only applies on condition that the same presumption of law is provided for the benefit of consignments coming from the CIM area and reconsigned in the direction of SMGS (reciprocity). Owing to this as yet unfulfilled condition, neither Article 38 § 2, para. 2 of CIM 1980 nor Article 28 § 3 of CIM 1999 were ever applied.

### Article 28 of CIM and Article 23 § 10 of SMGS – object of the rule

Both Articles provide for refutable presumption, which applies in case of reconsignment. It is presumed that the loss or damage (partial loss of or damage to goods) occurred during the latest contract of carriage, in so far as the consignment remained in the charge of the carrier and was reconsigned unaltered in the condition in which it arrived at the place of reconsignment. This is a reversal of the burden of proof in relation to one of the basic conditions for the carrier's liability, i.e. the origination of the loss or damage in the period between when the goods are taken over, which in these cases is at the time of reconsignment, and delivery of the goods.

According to Article 28 § 3 of CIM, this presumption also applies if the contract of carriage prior to the reconsignment was subject to "a convention concerning international through carriage of goods by rail comparable with the CIM UR", i.e. SMGS, and if this convention contains "the same presumption of law" in

favour of consignments consigned in accordance with the CIM UR.

This requirement for reciprocity will be met from 1 July 2008 with the entry into force of the new paragraph 10 of SMGS Article 23 in relation to consignments with a CIM/SMGS consignment note. The new Article 23 § 10 of SMGS reads as follows:

*“If, when carrying goods with the CIM/SMGS consignment note from countries that are not party to this convention, damage to or partial loss of the goods is ascertained after the date has been stamped in the CIM/SMGS consignment note at the place of reconsignment, and the railway that applies SMGS has accepted the consignment without obvious irregularities, until proof is provided otherwise, it is presumed that the damage or partial loss occurred during performance of the contract of carriage in the SMGS area.*

*If, when carrying goods with the CIM/SMGS consignment note from countries that are party to this convention, damage to or partial loss of the goods is ascertained after the date has been stamped in the CIM/SMGS consignment note at the place of reconsignment, and the CIM carrier has accepted the consignment without obvious irregularities, until proof is provided otherwise, it is presumed that the damage or partial loss occurred during performance of the contract of carriage in the CIM UR area.*

*This presumption shall be applicable irrespective of whether the goods were reloaded into a wagon with a different gauge.”*

In this provision of SMGS, the idea of reciprocity is given expression by the fact that both directions of travel are referred to. The second paragraph, which lays down a presumption of law in favour of SMGS consignments in the CIM area and which is certainly of a declarative nature, covers part of what is dealt with in Article 28 § 3 of CIM. It is clear from the wording of both the first and second paragraphs that only goods carried with the CIM/SMGS consignment note can benefit from this presumption of law. In contrast, transport using two separate consignment notes is not included; the condition of a same presumption of law for such consignments is still not met.<sup>1</sup>

<sup>1</sup> When SMGS is revised, consideration should be given to extending the presumption of law to consignments with two separate consignment notes.

### **Requirements for presumption of law**

The requirements for presumption of law include the following elements:

- reconsignment
- of the same consignment (same object of carriage)
- at the same place (the place of delivery of the first contract of carriage is also the place of reconsignment)
- in an unaltered condition
- remains in the charge of the carrier
- claim as a result of partial loss or damage
- ascertained after reconsignment and
- with regard to CIM/SMGS reconsignment, reciprocity (same presumption of law in favour of consignments carried onwards from the area of application of CIM to the area of application of SMGS).

### **Same presumption of law**

In comparing Article 28 of CIM and Article 23 § 10 of SMGS, it becomes apparent that the element of “remaining in the charge of the carrier” is not explicitly mentioned in the SMGS provision. The SMGS experts’ justification for this was that the effect of the CIM/SMGS Consignment Note Manual (GLV CIM/SMGS), which also forms part of SMGS (Annex 22), was that the consignment in any case remains in the charge of the carrier or railway. The CIM/SMGS Consignment Note Manual also provides that the place of delivery according to the first contract of carriage is also the place of reconsignment of the same consignment on the basis of the second contract of carriage. Nevertheless, problems cannot be completely ruled out in those cases where, despite using the CIM/SMGS consignment note, the modalities of reconsignment provided for in the manual have not been observed, so that the consignment is temporarily out of the charge of the carrier. However, for transport from the area of application of SMGS to the area of application of CIM, uninterrupted charge of the carrier remains one of the conditions for presumption to have effect.

“Same presumption of law” means the same legal effect in parallel cases. As long as the scope of the cases covered in SMGS is narrower, i.e. as long as they are restricted to transport operations with the CIM/SMGS consignment note, while the parallel provision in CIM relates to any SMGS-CIM transport operation, this means that there is parity, at least with regard to transport with the CIM/SMGS consignment note. This difference is no obstacle to applying the presumption of law in the CIM area. In the event that a court of a COTIF Member State were not to consider the presumption newly included in SMGS as equivalent presumption of law, because it does not cover all cases of CIM/SMGS reconsignment, it should be noted that the rule concerning such a presumption of law on the part of the CIM carrier may in any case be agreed in a contract. Such presumption of law, which facilitates the other contracting party’s situation with regard to furnishing evidence, in fact means an extension of the carrier’s liability, and according to Article 5 of CIM, this can be agreed in a contract.

### **The purpose of the presumption of law**

The purpose of this presumption of law is to facilitate the task of the final consignee (the injured party) with regard to the provision of evidence, by saving him from having to prove that the damage or loss occurred during the period between accepting the goods for transport (at the place of reconsignment) and delivery at the final destination – this evidence is required under both freight laws, but it is sometimes difficult to provide it after reconsignment. At the same time, the carrier is free to prove that the loss or damage did not occur during the latest contract of carriage.

### **The effects of the presumption of law**

The presumption that the loss or damage occurred during the latest contract of carriage, which applies until proved otherwise, has a bearing on all questions that are of relevance to the assertion of compensation claims: right of action to make a claim, capability of being sued, amount of compensation, extinction and limitation of actions.

- The consignor of the latest contract of carriage is entitled to make a claim;
- Claims may be asserted against the carrier(s) of the latest contract of carriage;
- The amount of compensation is based on the latest contract of carriage (value of the goods on the day and at the place of reconsignment,

declaration of value or interest in delivery according to the latest contract of carriage);

- Extinction and limitation of claims is based on the latest contract of carriage.

If one of the conditions is absent, presumption does not apply. The compensation claim is nevertheless assessed on the basis of the latest contract of carriage if loss or damage is ascertained and a complaint is made at the destination point. However, the injured party would have to prove that the loss or damage occurred during the latest contract of carriage.

### **Applying the presumption of law and its significance in practice in West-East and East-West traffic**

With regard to reconsignment and because of the reloading required as a result of different gauges – in so far as wagons are not automatically changed over to another gauge – different situations can arise in West-East and East-West traffic. Depending on whether reloading takes place at the same place as reconsignment or whether the goods are reloaded into wagons of the other gauge before or after reconsignment, ascertaining any loss or damage that has occurred during transport and attaching the loss or damage to the liability regime of CIM or SMGS can be more or less difficult.

If reloading and reconsignment take place at the same place, this provides an opportunity, when opening the wagon, to ascertain whether loss or damage has occurred during the first contract of carriage. For loss or damage ascertained at a later stage, it should in most cases be possible to attach the loss or damage to the second contract of carriage even without recourse to the presumption of law.

If reloading takes place before reconsignment, this will likewise provide an opportunity to ascertain with certainty any loss or damage that has occurred up to that point during the first contract of carriage. However, in the case of loss or damage ascertained at a later stage, there might be cases where the presumption of law may be considered. Difficulties in attaching loss or damage to one or the other contract of carriage are most likely to arise when reloading only takes place after reconsignment. In these cases particularly, presumption of law could be helpful. With regard to loss or damage discovered at the place of reloading after reconsignment, it might be difficult to ascertain the leg of the journey during which this loss or damage occurred. Even if the leg of the journey between the place of reconsignment and reloading were to be a short border section, not only would there be risks inherent in the necessary

manipulation of the wagons before customs clearance and before reloading, but additional risks would also be involved as a result of wagons having to stop for long periods of time on these border sections.

In practice, cases cannot be ruled out in which the loss or damage is not ascertained in time before the destination is reached, including cases where it might have been possible for the loss or damage to occur even before reconsignment, but the loss or damage was not ascertained either at the time of reconsignment or of reloading. Thus no formal report would be prepared before the destination was reached and there would be no other evidence (for instance a report on the opening of a wagon for the purpose of border or customs controls) and when the goods are unloaded at the destination, it is nevertheless clear that the loss or damage ascertained at that point is loss or damage that has occurred during transport. In such cases – even though they may perhaps be few in practice – the presumption of law is useful for the rail transport undertakings' customers in the freight transport sector. (Translation)

### Publications and interesting links

*Bulletin des transports et de la logistique*, Paris, n° 3209/2008, p. 68/69 – Dommages aux marchandises. « Dommage » ou perte ? (M. Tilche)

*Idem*, n° 3211/2008, p. 108/109 – Préjudice commercial. Comment indemniser ? (M. Tilche)

*Idem*, n° 3212/2008, p. 121/122 – Valeur de la marchandise. Sur quoi se fonder ?; p. 125-127 – Arrimage. Prévenir les litiges (M. Tilche)

*Idem*, n° 3213/2008, p. 142/143 – Conventions internationales. Un carcan ? (M. Tilche)

*Idem*, n° 3216/2008, p. 195 – Cela n'arrive pas qu'aux autres ... (M. Tilche), Observations sur l'arrêt de la Cour d'Appel de Caen du 6 mars 2008 (Novatrans contre S.A. JHM Transports et a.) – Transport ferroviaire. Retard. Délais garantis. Obligation essentielle. Manquement. Réparation intégrale du dommage (v. p. 204/205) ; p. 197/198 - Voyageurs. Spécificité française ; p. 199/200 – Traçabilité. Obligation cardinale (M. Tilche) ; p. 200-202 – CNUDCI. Qu'en attendre ? Points névralgiques du projet de la Convention sur le transport de marchandises effectué [entièrement ou partiellement] [par mer] exposés par P. Delebecque

*Idem*, n° 3214/2008, p. 155-159 – CMNI. Fluvial : dimension internationale (Ch. Hübner, M. Tilche) ; p. 160 – Emballage. En cas d'accident ... (M. Tilche, J.-M. Fabre) ; p. 163-164 – Retard. Dans l'œil du cyclone (M. Tilche)

*CITINFO (Comité international des transports ferroviaires, CIT)* <http://www.cit-rail.org>, Publications, éditions 1/2008 et 2/2008; Veröffentlichungen, Ausgaben 1/2008 und 2/2008; Publications, Editions 1/2008 and 2/2008

*DVZ - Deutsche Verkehrszeitung*, Hamburg, Nr. 30/2008, S. 2 – BGH hilft Transporteuren. Neue Rechtsprechung hebt Messlatte für unbegrenzte CMR-Haftung an (J. Kohagen, B. Hector)

*Idem*, Nr. 34/2008, S. 7 – Spezial: DVZ-Rechtskonferenz. Kleine Änderung – große Wirkung. Haftungsfälle lassen sich durch Angebotsgestaltung verhindern oder begrenzen (J. Kohagen)

*European Transport Law / Droit européen des transports / Europäisches Transportrecht*, Antwerpen, No. 1-2008, p. 3-15 – International Carriage of Goods: Ocean Carrier liability and the European Union (M. Katsivela)

*Idem*, No. 2-2008, p. 123-168 – Electronic documents and shipping practice not yet a married couple (R. Brunner)

*Transportrecht*, Hamburg, Nr. 2/2008, S. 67-78 – Der europäische Erfüllungsortsgerichtsstand des Art. 5 Nr. 1 lit. b EuGVVO und Transportverträge (P. Mankowski); S. 78-84 – Die Schadensberechnung bei grobem Verschulden: Wertersatz – Schadenersatz? (K.-H. Thume)

*Idem*, Nr. 3/2008, S. 89-102 – Montrealer Übereinkommen vs. Warschauer System. „Will the Montreal Convention be able to replace the Warsaw System and what will the changes be?“ (E. Ruhwedel); S. 107-112 – Weitere Rechtsfragen zur CMNI – Bedienstete, Beauftragte, ausführender Beförderer (K. Ramming)

\* \* \*

**Hon. Prof. Dr. Kurt Spera**, *Leitfaden für die Internationale Eisenbahnbeförderung*, Das „Übereinkommen über den internationalen Eisenbahnverkehr (COTIF)“ in der Fassung des Protokolls von Vilnius 1999; verfügbar als Online-Version (PDF) unter:

<http://www.bmvit.gv.at/service/publikationen/verkehr/externe/leitfaden.html>

## Transport of Dangerous Goods

### RID/ADR/ADN Joint Meeting

*Berne, 25-28 March 2008*

Experts from 26 Governments (including the USA) and 16 international governmental organisations (including the European Commission and OSJD) and non-governmental organisations (including UIC, UIP, CEN and IRU) took part in the work of this session chaired by Mr C. Pfauvadel (France). Almost 80 delegates attended the meeting.

As at each first session of a biennium, the Joint Meeting dealt with questions of interpretation concerning the new provisions that have entered into force and last-minute amendments to the new version of RID/ADR, particularly with regard to standards currently being published. The Joint Meeting also continued its examination of pending items and dealt with new proposals for amendments. It also noted the work underway in various working groups meeting outside the plenary session. The main topics dealt with were as follows:

#### **Joint Meeting Rules of Procedure**

After the RID Committee of Experts some years ago and WP.15 (ADR) recently, it was proposed that the Joint Meeting should also adopt Rules of Procedure based on those of WP.15, which are broadly harmonised with those of the RID Committee of Experts. In view of the fact that German is also a working language and that the sessions are held at different venues to WP.15, it was decided to draft Rules of Procedure specifically for the Joint Meeting which would also take account of the specific features of ADN. The secretariats were asked to prepare a draft adapted accordingly. However, some reservations were voiced concerning the voting procedure reluctantly adopted by WP.15 (see Bulletin 3/2006, p. 39) based on that of the RID Committee of Experts (quorum of one third of the Contracting Parties/Member States and number of affirmative votes equal to at least one-third of the full participants represented during the vote), as this voting procedure could lead to a deadlock in votes on regulations which affected only a few countries and in which abstention levels would accordingly be high. It should be recalled that this procedure differs from the simple majority procedure set out in the UN/ECE Rules of Procedure, which allows a proposal to be adopted for example by

4 votes to 3, which does not constitute a convincing decision.

#### **Rules of procedure for informal documents**

The preference expressed by IRU to refrain from voting on documents that had not been received by the secretariats of the Joint Meeting within a time limit of 12 weeks prior to the session and to limit the number of official and informal documents to be dealt with at each session was not considered acceptable by the Joint Meeting. In the Joint Meeting's view, it was up to the Chair and the secretariats themselves, when preparing and adopting the agenda, to determine whether or not to consider certain informal documents which were not urgent or which took up new topics. However, IRU's preference is justified, because it is not uncommon for late proposals to be adopted on the basis of informal documents without associations such as IRU having had time to consult their members.

#### **Definition of "liquid"**

A lengthy discussion ensued on this issue, during which it was pointed out that the definitions in RID/ADR/ADN of both "liquid" and "solid" differed from those in other regulations, including the Model Regulations. This discrepancy, although minor, gave rise to different interpretations and uses, and even to contradictions. The Joint Meeting was of the view that the definitions must be standardised, including with the UN Sub-Committee of Experts on the Globally Harmonized System of Classification and Labelling of Chemicals, since they had repercussions for the entire transport chain (including transport in tanks). The definition of the term "viscous" should also be standardised. Pending a proposal from the representative of the United States of America to the UN Sub-Committee of Experts, the Joint Meeting agreed on the following:

- If the criterion of melting-point was applicable, the substance should be classified as a liquid;
- If the criterion of melting-point was not applicable, the substance could be classified as a solid, provided one of the two tests employed (ASTM or penetrometer) gave that result.

#### **Establishment of a register of safety advisers**

Views were divided on the need for such a register, but most of the representatives who took the floor did not support the obligation to communicate the identity of the safety adviser and to keep a register.



### Definition of the safety obligations of participants (unloaders)

Views were divided on the need for a definition of “unloaders” and specifications on their obligations. Some representatives supported the proposal, pointing out that the obligations arising during unloading operations were currently not clearly defined. Others were of the view that the problem could be resolved by more clearly specifying the obligations of consignees when they were acting as unloaders. Others felt that the task of unloader could be taken on by a range of participants and that unloading could involve several participants at the same time, participants whose respective responsibilities were often stipulated in domestic regulations and whose obligations could stem from other regulations, such as those on safety at the workplace; accordingly, they were not in favour of introducing provisions which could cause more complications, such as inconsistencies between different legal instruments (see also Bulletins 4/2005, p. 53 and 1/2006, p. 4).

Following a lengthy discussion, the representative of Spain proposed that an informal working group should be set up on the issue, on the proviso that the Joint Meeting supported in principle the introduction of effective provisions on the matter. The Joint Meeting voted in favour of the principle and accordingly accepted the offer from the Government of Spain. The informal working group’s terms of reference would be as follows:

- (a) To identify possible obligations of undertakings responsible for unloading and to clarify the respective roles of the different participants;
- (b) To explore, as an alternative solution, the possibility of clarifying the role of the consignee and the procedure which the consignee should follow in using the services of subcontractors;
- (c) To consider the secondary problems created by each of the proposals put forward, such as the imposition on the participants of new obligations which they were unable to meet;
- (d) To consider the idea that the unloaders’ obligations could be shared by a number of participants;
- (e) To consider the issue in the specific context of each mode of transport (rail, road, inland navigation);

- (f) To submit a report and recommendations to the Joint Meeting.

### Standards

After learning from the representative of CEN that new editions of standards EN 14025 and EN 13094 were likely to appear, the Joint Meeting expressed support for the following procedure for the insertion of references in the 2009 edition:

- Standard EN 14025:2008, to be issued in May, would be referenced in the notification texts for 1 January 2009 following approval by WP.15 and the RID Committee of Experts;
- Standard EN 13094:2008, only to be issued after the May meetings of WP.15 and the RID Committee of Experts, would be referenced in an amendment of 1 July 2009 following approval by the Joint Meeting in September and by WP.15 and the RID Committee of Experts at their autumn sessions.

The Joint Meeting was of the view that the general transitional measure of six months for the application of RID/ADR did not apply to the mandatory standards. The dates for the application of the standards listed must be respected. That was a question of interpretation based on the content of the general transitional measure, “unless otherwise prescribed ...”.

(Translation)

## Co-operation with International Organisations and Associations

### United Nations Economic Commission for Europe (UN/ECE)

#### Inland Transport Committee (ITC)

70<sup>th</sup> Session

*Geneva, 19-21 February 2008*

As usual, OTIF took part, at least for part of the time, in the annual session of the UN/ECE Inland Transport Committee held from 19 to 21 February 2008.

It should be noted that following the secretariat’s proposal, the Committee’s Bureau adopted a new structure for the Committee’s sessions. Sessions would be divided

into three parts: (policy-oriented) fundamental issues, technical and reporting.

The 70<sup>th</sup> session of the Committee was organised along these lines.

The first day of the session was therefore devoted to a discussion by Ministers of Transport of countries in the Euro-Asian region on the future development of Euro-Asian transport links. The Secretary General represented OTIF in this discussion.

Following the discussion, the Ministers or high level officials from 18 countries<sup>1</sup> signed a joint statement on future development of Euro-Asian transport links<sup>2</sup> in which

- they confirmed their support for the joint UNECE-ESCAP project and for its continuation,
- they endorsed the Euro-Asian routes identified and their priority development,
- they supported the creation of a mechanism that would ensure efficient coordination and monitoring of project-related activities in the future, and
- they invited Governments, international organizations and potential donors to consider providing the financial assistance required to ensure the uninterrupted continuation of a new phase II of the project (2008-2011).

With regard to questions relating to the work of the Committee in general, various items of interest to OTIF were included on the agenda: transport and security, the electronic consignment note and facilitation of border crossing in international rail transport.

The Committee approved the final report of the Multidisciplinary Expert Group on **Inland Transport Security**. It requested its subsidiary bodies to act expeditiously upon the recommendations contained in the report. The Committee also invited the Chairman and members of the Multidisciplinary Expert Group to find appropriate ways to continue their work until its next meeting, which is expected to take place two

months prior to the 2009 session of the Committee. The Committee also welcomed Russia's intention to hold an international conference to address issues related to inland transport security. Lastly, it welcomed the fact that the International Transport Forum would be organising a round table on security, risk perception and cost-benefit analysis to be held on 27 and 28 November 2008.

On 20 February 2008, the Committee approved the final text of the Additional Protocol to the **CMR** concerning the **electronic consignment note**<sup>3</sup>. The Protocol will be open for signature in Geneva from 27 to 30 May 2008 and after that date, it will be open for signature at United Nations headquarters until 30 June 2009. 12 States have already declared that they intend to sign this Protocol<sup>4</sup>.

With regard to the **facilitation of border crossing in international rail transport**, the Committee was informed about the work on the draft Annex 9 (border crossing by rail) to the 1982 Convention on the harmonization of controls of goods. The Committee expressed its wish that the outstanding issues between the European Community, OSJD and OTIF be resolved before the next session (beginning of June 2008) of the Working Party on Customs Questions affecting Transport (WP.30), so that WP.30 could resume its discussions. With regard to the draft new Convention to facilitate the crossing of frontiers in international railway passenger transport, the Committee noted the difficulties in relation to the revision of the existing Convention of 1952 and invited WP.30 and the Working Party on Rail Transport (SC.2) to work together to find an appropriate solution.

(Translation)

## United Nations Commission on International Trade Law (UNCITRAL)

### Working Group III (Transport law)

21<sup>st</sup> Session

*Vienna, 14-25 January 2008*

In the second week of this session of the Working Group, OTIF was represented by the deputy Secretary General as an observer.

1 Afghanistan, Armenia, Azerbaijan (with reservations), Belarus, Bulgaria, China, Georgia, Greece, Iran, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Romania, Russia, Turkey, Ukraine and Uzbekistan.

2 [http://www.unece.org/trans/MinisterialITC70/min\\_jointstatement.htm](http://www.unece.org/trans/MinisterialITC70/min_jointstatement.htm)

3 <http://www.unece.org/trans/doc/2008/sc1/ECE-TRANS-2008-CRP-01a1e.pdf>

4 Albania, Armenia, Belgium, Latvia, Lithuania, Montenegro, Netherlands, Norway, Russia, Slovakia, Sweden and Switzerland.

The basis for discussions was the draft Convention on the carriage of goods [wholly or partly] [by sea]<sup>1</sup>. This was given a last reading, with the aim of sorting out all the unresolved problems (texts in square brackets).

The title, which has been made clearer, will be: “Convention on Contracts for the International Carriage of Goods wholly or partly by Sea”.

One particular definition that was deleted was that of the “consignor”, the meaning of which does not correspond to the definitions in other conventions (e.g. CIM, where the meaning is more that of the “shipper”). All other references to the consignor were deleted from the rest of the text as well. In addition, the definitions of “transport document”, “electronic transport record” and “holder” were improved.

The discussion on the maximum liability limits when the carrier is in breach of his obligations, which, as expected, was again very long-winded and controversial, ended in the limits being set at 875 SDR per package and 3 SDR per kilogramme and – in the case of loss or damage caused by delay – two and one half times the freight payable on the goods delayed. These provisions, for which there will not now be a simplified amendment procedure, apply to the entire (door-to-door) transport operation.

The calculation rule for packages/load units consolidated in containers, on pallets, etc. (liability for packages only if they are enumerated in the contract of carriage) was extended to cover the same for packages/load units contained in road vehicles and rail freight wagons.

The special rules for volume contracts were kept, but were reworded in order to avoid, as far as possible, the improper conclusion of such contracts for the purpose of circumventing the rules governing liability.

Fortunately, the new version of the Article on International Conventions governing the carriage of goods by other modes of transport drafted by the Secretariat was adopted without any amendments. This new version now takes precise account of the possible conflict in connection with the broader application of COTIF-CIM to carriage by sea (CIM Art. 1 § 4, COTIF Art. 24 § 1) by excluding carriage by sea as a supplement to carriage by rail.

In addition, contracts of carriage for passengers and their luggage were exempted from the Convention entirely.

Lastly, it was agreed that the Convention should enter into force one year after the date on which the 20<sup>th</sup> State had deposited its instrument.

The Working Group has thus completed its work. The draft Convention contained in the Annex to its report will now be sent to the Governments for their comments and submitted to the Commission (UNCITRAL) for possible approval at its 41<sup>st</sup> annual session (New York, 16 June to 3 July).

(Translation)

## International Union of Railways (UIC)

### Legal Group

#### Information session on international interests in railway rolling stock

*Paris, 19 February 2008*

On behalf of OTIF, the deputy Secretary General took part in the information session held at UIC's headquarters, which was attended by the UIC Chief Executive, Mr Aliadière, and chaired by Mrs Henuset (SNCB). The session was dedicated entirely to the issue of the importance for the railways of the Cape Town Convention and the Luxembourg Protocol.

In his presentation, the deputy Secretary General emphasised among other things that the term “railway rolling stock” in the Luxembourg Protocol is defined very broadly, so that new technical features are also taken into account and objects for urban (trams) and suburban (light railways) transport are included. Furthermore, he went into the reasons which, following the aviation sector, also support the creation of such an international registry for interests in the rail sector, and looked at the specific advantages this will bring. He provided more details on what can be registered and by whom, what the legal effects of registrations are, and what will be required of the registrar as a result of these functions, as well as the configuration and efficiency of the registry. He closed his presentation with an account of the status quo and a look at the further course of action until the Protocol enters into force, which will include the appointment of the registrar, the structure of

<sup>1</sup> UNCITRAL doc. A/CN.9/WG.III/WP.101, available on the UNCITRAL website, [www.uncitral.org](http://www.uncitral.org), along with the other meeting documents WP.102-WP.103 and the report (A/CN.9/645).

the registry, setting up the Supervisory Authority and preparations for OTIF's function as the secretariat.

Other speakers included Professor Kronke, Secretary General of UNIDROIT, Mrs Dreyfus-Cloarec, Chairman of the Board of EUROFIMA, Mr Poulain from the legal firm Armfelt & Associates and Mr Rosen, Chairman of the Rail Working Group, whose presentations also addressed the positive aspects of the uniform international legal situation created by both the conventions and the advantages they bring in connection with the financing of railway rolling stock.

(Translation)

## Case Law

### Hof van Cassatie van België

#### Ruling of 18 May 2007<sup>1</sup>

**A claim for damages may be brought against the rail carrier in the absence of a consignment note provided the contractual link between the person entitled and the carrier is established.<sup>2</sup>**

Cf. Article 54 of CIM 1980<sup>3</sup>

(The ruling was published in Dutch in the European Transport Law journal No. 5-2007, p. 656-660).

#### Summary of the facts and procedure

- An accident occurs at a road-rail combined transport terminal. The terminal was operated by the railway. While being handled during the loading operation, a trailer falls from a mobile crane onto another trailer which has already been loaded onto a wagon. No consignment note had been drawn up.

- The road haulier, who is a loyal customer of the piggyback transport company that organised the combined transport, refuses to pay the invoices prepared for other consignments. Being of the view that the damage takes too long to process, he deals with the matter in his way (compensation for the amount of damage suffered).
- After some years, the railway finally declined liability for the accident that occurred at its terminal, as the crane operator had followed the instructions given by the road haulier, who was himself a customer of the piggyback transport company.
- At the court of first instance, the piggyback transport company protests against the compensation taken by its customer and at the same time, brings an action against the railway for (financial) warranty.
- The court of first instance rules on the limitation of the invoices (compensated). As these invoices have nothing to do with the accident and as they come under the limitation of one year (CIM), the proceedings against the railway are invalid.
- Faced with this ruling, the piggyback transport company yields with regard to the limitation of the invoices in question; in contrast, it appeals on the "railway" point, thus initiating a legal action against the latter.
- The appeal judge – afterwards confirmed by the Court of Cassation (the highest jurisdiction) – agreed with the piggyback transport company.

The absence of the piggyback transport company's right to bring an action was one of the points of the discussions. The railway's argument was that because the piggyback transport company was not the person entitled (no consignment note), it could not bring an action against the railway (Art. 54 §§ 3 and 4 of CIM 1980). There was no contract of carriage. The Court of Appeal nevertheless notes that Article 54 § 4 of CIM 1980 does indeed stipulate that the consignor .... in order to bring an action, the consignee shall produce the consignment note if it has been handed over to him. According to the Court however, there is no obligation to produce the consignment note when the rail carrier has not accepted the transport and has consequently not provided the consignment note. According to the Court, the reason why no consignment note had

1 No. C.06.0435.N

2 The head note has been taken from European Transport Law with editorial amendments. It would be valid for a contractual relationship under CIM 1999 as it stands. For a contractual relationship in accordance with CIM 1980, this seems problematical in so far as the consignment note was to be considered as a constituent element for concluding the contract of carriage (see Art. 11 § 1 of CIM 1980).

3 Cf. Article 44 of CIM 1999

been made out is explained by the fact that the load to be consigned, to be carried, had been damaged during the loading operation and that it had been returned to the factory by lorry.

Furthermore, according to the Court, making out a consignment note constitutes proof of the existence of a contract of carriage and of its content. But the contract of carriage is in principle a consensual contract.<sup>4</sup> Moreover, CIM does not prescribe any penalty in the absence of a consignment note.

Thus there is no obligation for the plaintiff to produce a consignment note when the rail carrier has not accepted the consignment for transport and logically, has not provided a consignment note.

(Direct communication)

### Extracts from the ruling:

SNCB Holding, a company set up under public law with legal personality, ... the plaintiff,

versus

Belgian “société anonyme” (kind of joint stock company) providing transport using the combined rail-road system ...

### I. Proceedings before the Court

The appeal to the Court of Cassation is made against the ruling of 6 March 2006 by the Cour d'Appel de Bruxelles (Brussels Court of Appeal).

4 The fact that the Court based its reasoning on the idea that CIM 1980 did not prescribe a real and formal contract of carriage, but a consensual contract enabled it to assign the damage to the performance of the CIM contract of carriage. Cf. however R. Rodière, B. Mercadal, *Droit des transports terrestres et aériens*” (Land and Air Transport Law), 4<sup>th</sup> ed., Dalloz, Paris, 1984, No. 135, p. 179 (“... The contract seems at the same time to be a formal and real contract.”). See also comments by G. Mutz concerning the CIM contract of carriage as a real and formal contract in *Münchener Kommentar* (Munich Commentary), Verlag C.H. Beck, *Handels-gesetzbuch* (German Commercial Code), volume 7, *Transportrecht* (Transport Law), p. 1557. With this concept – applied to this case – the question that should instead be asked is: was the loading of the trailer onto the wagon in this case carried out in the context of a contract annexed to the contract of carriage? If this were the case, liability would be in accordance with this contract, concluded in accordance with national law, and not liability under a CIM contract of carriage.

### II. Grounds for the appeal

In its request, the plaintiff puts forward two grounds.

#### First ground

....

#### Second ground

#### Breach of legal provisions

...

- Article 54, § 3 and 4, of the Uniform Rules concerning the Contract of International Carriage of Goods by Rail<sup>5</sup>.

#### Decisions contested

The appeal judges declare the defendant’s appeal before a higher jurisdiction admissible and justified and order the plaintiff to pay 10,426.18 € plus costs, based on the following consideration:

“The plaintiff wrongly tries to maintain by reason of the absence of a consignment note that there would be no contract of carriage by rail, so that the defendant could not demonstrate that it possesses the capacity to institute contractual action.

The absence of a consignment note has its origin in the fact that the load to be carried had been damaged at the time of the loading operation and had not subsequently been carried by the railway, but had been sent back to the manufacturer by lorry.

Issuing a consignment note proves that there was a contract of carriage, but it is not an essential condition to provide proof of a contract of carriage, which in principle constitutes a consensual contract (J. Van Ryn and J. Heenen, op. cit.<sup>6</sup>, No. 758).

Moreover, CIM does not sanction the absence of a consignment note.”

5 “Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)” – Appendix B to the Convention concerning International Carriage by Rail of 9 May 1980. The Convention was ratified by an Act dated 25 April 1983 (Moniteur Belge, 7.9.1983).

6 *Principes de droit commercial* (Principles of Commercial Law), 2<sup>nd</sup> edition, volume 4, Etablissement Emile Bruylant, Brussels, 1988.

## Grounds for complaint

...

Article 54, § 3 and 4 of CIM require that to bring an admissible action against the plaintiff on the grounds of the contract of carriage, the plaintiff must be shown on the consignment note as the consignor or – in certain cases – as the consignee.

In other words, the appeal judge(s) consider that the defendant has the capacity to bring an admissible legal action against SNCB-Holding on the grounds of the contract of carriage and CIM, but without noting that the defendant is shown on the consignment note as the consignor or consignee within the meaning of Article 54 § 3 and 4 of CIM, their decision is not justified in law and they are in breach of the above-mentioned provision of CIM (breach concerning the contract of international carriage of goods by rail, ...).

### III. The Court's decision

#### Reasons

##### *First ground*

...

##### *Second ground*

...

4. Article 11 § 1 of CIM requires that the contract of carriage shall come into existence as soon as the forwarding railway has accepted the goods for carriage together with the consignment note. Acceptance is established by the application to the consignment note and, where appropriate, to each additional sheet, of the stamp of the forwarding station or accounting machine entry, showing the date of acceptance. According to paragraph 3 of this Article, when the stamp has been affixed or the accounting machine entry has been made, the consignment note is evidence of the making of the contract of carriage.

Article 54 § 4 of CIM requires that the consignor who brings an action against the carrier must produce the duplicate of the consignment note and the consignee the consignment note if it has been handed over to him.

The plaintiff's obligation to produce the consignment note becomes null and void when the rail

carrier has not accepted the transport and consequently, no consignment note has been issued.

5. The appeal judges note that the fact that "a consignment note was not issued has its origin in the fact that the load to be carried had been damaged at the time of the loading operation and had not subsequently been carried by the railway, but had been sent back to the manufacturer by lorry."
6. In considering that the defendant concerning whom the appeal judges ruled that the contractual link with the plaintiff had been established is entitled to institute a compensation claim against the plaintiff, even if no consignment note has been produced, the appeal judges justify their legal decision.

For this reason, the ground cannot be accepted.

#### Dictum

The Court,

Rejects the appeal.

Orders the plaintiff to pay the costs.

.....

(Translation)

## Book Reviews

**Andresen, Bernd/Valder, Hubert, *Speditionen-, Fracht- und Lagerrecht*** (The Law on Forwarding, Freight and Storage), transport law handbook with commentaries, ISBN 3 503 05904 0, supplement 1/08, as at January 2008, Erich Schmidt Verlag, Berlin.

This loose-leaf volume, which was first published in 2000 (see Bulletin 4/2004, p. 111), contains the texts of regulations (acts, general conditions) concerning the law on forwarding, freight and storage and a commentary on the main provisions of the German Commercial Code (HGB).

The authors, who are practising lawyers, have made use of their experience in applying the provisions of transport law, thus producing this practice-based guide for lawyers working in this area. The supplements ensure that the volume is always kept up to date.

Supplement 1/08 brings the commentaries on some of the provisions of the German Commercial Code right up to date (possessory lien of the carrier, removal contract, carrier's obligations), particularly with the inclusion of new references to the literature and case law. The compilation of provisions reproduced has been updated and extended. The updated version of the HGB contains amendments from July 2007. New texts brought in include the CIM Uniform Rules and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI). However, no commentaries on these legal texts have been included.

The handbook is aimed at all practitioners and lawyers dealing with transport law as an aid to their work, whether it be in undertakings, insurance companies, courts or associations.

(Translation)

material being refused for transport or delayed and that IMO is in the process of establishing a procedure to determine the causes of such refusal or delay and to put them right. Why simplify the requirements when you can complicate them?

Was it not the prophet Jeremiah who, 650 years B.C., said: "beware those who abuse their authority to enact laws that cause anguish unto others"!?

(Translation)

## Last but not least

### The magic of technical literature

Both the UN Sub-Committee of Experts, IMO, ICAO and the European land transport modes have recently adopted the following IAEA text, a marvel of technical literature:

"The criticality safety index (CSI) for packages containing fissile material shall be obtained by dividing the number 50 by the smaller of the two values of N derived in 6.4.11.11 and 6.4.11.12 (i.e.  $CSI = 50/N$ ). The value of the criticality safety index may be zero, provided that an unlimited number of packages is subcritical (i.e. N is effectively equal to infinity in both cases)."

Understand it if you can, and this is not the only example of the kind by far. However, in order to make things clearer and to help you out, we can tell you that the text deals with the construction of packages for radioactive material, that the references to 6.4.11.11 and 6.4.11.12 concern the normal and unusual conditions of transport, that the abbreviation "CSI" stands for Criticality Safety Index and that "N" does not stand for "Newton", but for "number".

Users of the regulations and carriers will no doubt manage ..., while some competent authorities are sometimes not in a position to reply to the questions they are asked. So it comes as no surprise that IAEA and IMO complain about consignments of radioactive