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

Unified railway law to connect Europe, Asia and Africa

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2016

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This last Bulletin of 2016 again shows that OTIF's activities continue apace. In this period at the end of the year, I should like to use this editorial to offer all our readers and partners my best wishes for success and development. 2016 has enabled us to steer the Organisation's activities towards new horizons.

This is particularly the result of an internal dynamic, for example the two seminars that OTIF organised under the EuroMed programme in Egypt and in Israel. The Secretariat had indeed actively sought better collaboration with DG Neighbourhood and Enlargement Negotiations, which deals with the European Union's relations with its neighbouring regions. As the law that OTIF develops is an integral part of European railway law, it was logical to seek joint action.

It was also the productive nature of our solid partnerships, such as that which OTIF enjoys with the European Union Agency for Railways (ERA), which enabled OTIF to have useful discussions at InnoTrans with actors in the rail sector from Japan, the United States, Australia, the Gulf States and Brazil. Our participation in the Platform of Railway Agencies organised by ERA should help us to come up with more global solutions.

These partnerships together demonstrate the strength of OTIF. I should like this approach of openness and development to continue and accelerate in 2017.

François Davenne

PARTICIPATION IN THE FIRST PLATFORM OF RAILWAY AGENCIES

On 21 and 22 September, the European Union Agency for Railways (ERA) organised the first platform of railway agencies at InnoTrans 2016 in Berlin.

As an intergovernmental organisation whose activities include the development of technical interoperability, OTIF was invited to share its international point of view.

In all, around thirty participants from different continents were present: high-level representatives from the Japanese Ministry of Land, Infrastructure, Transport and Tourism, the Chief Executive of Australia's Office of the National Rail Safety Regulator, representatives of the United States' Federal Railroad Administration, representatives of the Gulf Cooperation Council (GCC), representatives of the Brazilian National Land Transport Agency and lastly, representatives of ERA and the European Commission's Directorate-General for Mobility and Transport.

On 21 September, safety was the focus of the discussions and, for example, the benefit of continuing harmonisation in terms of safety management systems, the potential role of big data in notification systems, which are often based on the goodwill of railway companies, and differences in safety cultures.

On 22 September, discussions turned to the future of command-control systems for the international railway networks of the future; this resulted in a very informative discussion on the ways and means to promote innovative systems.

The Secretary General of OTIF, Mr Davenne, welcomed this invitation, thanked the Director of ERA, Mr Doppelbauer, for the quality of the discussions that took place, and welcomed this initiative, expressing his support for future platforms.

OSJD-OTIF: THE ANNUAL MEETING

On 21 October 2016, the Secretary General of OTIF, Mr Davenne, the heads of the OTIF Secretariat's legal and dangerous goods departments, Mr Kuzmenko and Mr Conrad, and Mr Nešić, an expert in the technical interoperability department, attended the high-level annual meeting in Warsaw with the Organisation for Cooperation between Railways (OSJD).

The meeting was also attended by the Chairman of the OSJD Committee, Mr Szozda, the Vice-Chairmen of the Committee, Mr Zhukov and Mr Dong, the Executive Secretary of the Committee, Mr Kiss, the Chairman of the Transport Law Commission, Mr Nosenko, the Chairman of the Infrastructure Commission, Mr Vopalecky, and numerous specialists: Mr Sabik, Mr Kozmava, Mrs Antonevic, Mr Khudoyorov, Mr Lotfi, Mr Bakhshi and Mr Car.

A number of points were dealt with during the meeting, illustrating that cooperation between OSJD and OTIF is developing and becoming established.

The two organisations concluded the formation of conditions to support use of the CIM/SMGS consignment note and to strengthen work on developing the CIM/SMGS electronic consignment note.

OSJD and OTIF highlighted the attention they are both giving to the carriage of postal traffic by rail between China and Europe. They also agreed to continue their cooperation on the UNECE's unified railway law project.

Lastly, they welcomed the regular work on updating and harmonising SMGS Annex 2 and RID.

In the technical area, OSJD and OTIF will continue together on the path towards technical compatibility.

Finally, recognising the challenge posed by electronic data, big data and the recent work on telematics applications for freight in international rail transport, OSJD and OTIF have decided to continue their exchange of information and to strengthen their cooperation.

NEW HEAD OF THE LEGAL DEPARTMENT

Following the call for applications for the post of head of the legal department, the Secretariat of OTIF is pleased to announce that Mr Aleksandr Kuzmenko has been appointed to the post. One of his main tasks will be to develop uniform railway law between Europe and Asia.

Mr Kuzmenko has had responsibility for a number of roles and has occupied various posts within AB "Lietuvos geležinkeliai", Lithuanian Railways. Until recently, he was the head of Lithuanian Railways' international and EU law service within the legal and personnel department. Mr Kuzmenko has solid legal training and broad experience. He was welcomed to the OTIF Secretariat in October 2016.

INTERNSHIP: MILENA MILACIC

Being involved in OTIF's training programme was a great opportunity for me to gather thorough information from OTIF experts about the implementation of COTIF and its Appendices and to broaden my knowledge on topics concerning the application of technical rules in the railway system. Above all, I expect that the experience I have gained here will be highly beneficial for my further work.

I am employed as a railway adviser at the Ministry of Transport and Maritime Affairs (Directorate General for Railway Transport). One of my assignments is to participate in the creation of national rules for the safety and interoperability of the railway system, so one of the main reasons that motivated me to apply for this programme was the possibility of becoming more familiar with the work of OTIF, and with the assistance of experts at the Secretariat, to achieve a better understanding of the practical application of COTIF and identify more detailed aspects of its relevance for Montenegro.

Cooperation with OTIF is of great significance for Montenegro, considering its aspirations to reorganise the railway system, in terms of reaching compliance with international technical rules and a satisfactory level of safety and interoperability. Therefore, this programme was recognised by the Montenegrin Ministry as a good way to intensify cooperation with OTIF, especially if we take into account that it has not played an active role in OTIF's events lately. At the same time, it is seen as an opportunity that will contribute to the improvement of its administrative capacities in terms of staff training. Taking part in the activities of OTIF's technical department has also given me a slightly different insight into the organisation of railway systems worldwide from the legal and technical point of view, which was very important in terms of improving my experience in this field.

The overall experience of working with the team of people at the OTIF Secretariat was very positive, and I am grateful for everyone being at my disposal for any kind of questions and doubts. I also hope that we will have the opportunity to cooperate further in future. On the other hand, the experience of living in Switzerland was a bit challenging, but it turned out to be an amazing adventure. In any case, this two-month period in OTIF was very beneficial for me, for my current work at the Ministry and also a very good experience for possible further engagement abroad, at some of the European institutions or companies.

Milena Milacic

COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU): INTERPRETATION OF APPENDIX A TO COTIF

In a ruling of 21 May 2015, the Magistrate's Court in Ypres, Belgium, sought a ruling from the CJEU concerning Appendix A to COTIF. It asked the CJEU to clarify its interpretation of Article 6, paragraph 2, last sentence of this Appendix.

This request was made in the context of a dispute between the National Belgian Railways (SNCB) and Mr Demey concerning payment of a lump-sum amount claimed as the result of a series of offences.

The second chamber of the CJEU gave its ruling on 21 September 2016 (case C-261/15). An analysis and comments on this ruling can be read in the article by Mrs Hammerschmiedová on page 16.

THE OTIF-COTIF WORKSHOPS SOUTH OF THE MEDITERRANEAN

In connection with the Euromed Transport project supported by the European Commission's Directorate-General for Neighbourhood and Enlargement Negotiations, OTIF organised two workshops/information days entitled "OTIF-COTIF – Presentation of unified railway law" with the participation of the International Rail Transport Committee (CIT).

On 27 October 2016 in Cairo, the Ministry of Transport of the Arab Republic of Egypt welcomed speakers from OTIF and CIT for a day of presentations and questions. The Secretary General, Mr François Davenne, presented OTIF and the added value of the Convention concerning International Carriage by Rail (COTIF). The Secretary General of CIT, Mr Cesare Brand, presented the CIT documentation and the advantages thereof.

The Secretariat would like to thank the Ministry of Transport of the Arab Republic of Egypt and the National Egyptian Railway Company for their active participation at the workshop and the resources they deployed to organise the event together.

On 2 November 2016 in Jerusalem, the speakers from OTIF and CIT gave presentations to the State of Israel concerning the advantages to be gained from applying COTIF and its Appendices and acceding to OTIF and CIT.

The Secretariat would like to thank the Ministry of Transport of the State of Israel for its warm welcome and faultless joint organisation.

These two workshops provided an opportunity to promote OTIF as a vital framework for the development of unified railway law.

OTIF'S NEW WEBSITE

Since 1 December 2016, OTIF's new website has replaced the former website under www.otif.org. The site will be finalised and tested up to the end of January 2017.

With a modern, streamlined design and texts that have been reworked, the new website should be more enjoyable to consult and use. More documents are now on line, the way information is presented has been reviewed and there are more images (photos, diagrams).

The new website offers the possibility of registering for meetings directly on line, which is one example of the move towards developing interactive tools. This will continue throughout 2017 with the uploading of additional interactive tools for users.

The Secretary General therefore invites you to discover www.otif.org.

MONITORING SYSTEM FOR THE CONFORMITY ASSESSMENT BODIES

Monitoring the conformity assessment body is a key project for the EU. It is of relevance to OTIF because it also applies the principle of independent assessment bodies. In other words, according to the UTP GEN-E, these Assessing Entities, as they are referred to in OTIF's terminology, also have the task of assessing subsystems and interoperability constituents. The quality of assessments performed by EU Notified Bodies and OTIF Assessing Entities should be the same. Therefore, these entities should also provide the same level of knowledge for carrying out the assessments.

The original aim of this project was to define the same accreditation criteria for the Notified Bodies in the rail sector throughout the European Union and hence the same level of requirements.
The harmonised requirements relate to aspects such as

- structure, together with responsibilities and competences,
- qualifications,
- quality management,
- audits and inspection.

When the project was concluded in March this year, this so-called "accreditation scheme" was published on the website of the European Union Agency for Railways. It is also possible to use these requirements for the recognition of Notified Bodies in each State.
The OTIF Secretariat took part in the meetings of the Agency's working groups and monitors the impacts, particularly for the non-EU Member States of OTIF.

The original project has now developed further, in the direction of monitoring.

The aim of this further development is to put controls in place to monitor and ensure that the assessments performed by Notified Bodies meet sufficient levels of quality. Monitoring would be a task of the European Union Agency for Railways in cooperation with the national body for accrediting or recognising Notified Bodies.

The OTIF Secretariat's approach to this further developed project is that the non-EU Member States of OTIF and their Assessing Entities should get to grips with this scheme too.
Monitoring, i.e. checking and controlling the work of the Assessing Entity, is a task for the Competent Authority in each State. The aim is to ensure the same level of assessment quality between Assessing Entities in both EU and non-EU Member States of OTIF.
In the EU, a network has been established between Notified Bodies in coordination with the European Union Agency for Railways. The parties meet regularly to share experiences and discuss a common approach to assessments. It would certainly be worthwhile and advisable to establish a connection between this EU Notified Bodies network and the Assessing Entities of non-EU Member States, in order to build up a shared pool of experience.

At its WG TECH meetings, the OTIF Secretariat reports on developments and is available to respond to questions.

The following sets out the OTIF Secretariat's views on how the implementation procedure might look:

- Establish a link between NB-Rail and the non-EU assessing entities, with the assistance of the European Commission.

- Publish and promote the existing accreditation scheme for Notified

Bodies among non-EU Competent Authorities as an example of best practice, with the suggestion that they use the scheme mutatis mutandis to verify the competences of persons and organisations working in the field of UTP conformity assessment. The OTIF Secretariat could do this in coordination with the European Union Agency for Railways.

- Follow closely the development of the monitoring scheme for Notified Bodies and keep WG TECH updated on the results. The OTIF Secretariat could do this in coordination with the European Union Agency for Railways.

- Once the work is finished at EU level, make available to non-EU Competent Authorities information on the experience gained and best practices concerning the implementation of the monitoring scheme at EU level and promote using them as a basis for consistently monitoring the quality of conformity assessment at national level by non-EU OTIF Contracting States. The OTIF Secretariat could do this in coordination with the European Union Agency for Railways.

- Discuss whether and how the co-ordinated monitoring of assessing entities should be established within the framework of COTIF.

- Consider the need for changes to the UTP GEN-E on assessing entities, in relation to the EU changes within the 4th Railway Package. This task is part of a wider activity to consider the need for alignment between COTIF and the EU provisions as part of the 4th Railway Package.

Margarethe Koschmider

49TH SESSION OF THE UN SUB-COMMITTEE OF EXPERTS ON THE TRANSPORT OF DANGEROUS GOODS (GENEVA, 26 JUNE TO 6 JULY 2016)

The 49th session of the UN Sub-Committee of Experts on the Transport of Dangerous Goods was held from 26 June to 6 July 2016 under the chairmanship of Mr Duane Pfund (United States of America). As all the decisions of the UN Sub-Committee of Experts have repercussions for the dangerous goods provisions of the various modes, the Intergovernmental Organisation for International Carriage by Rail (OTIF) was represented as a modal organisation.

Classification issues

New classification provisions for Class 8

In recent years, there have been discussions in the UN Sub-Committee of Experts concerning a revision of the classification provisions for Class 8, in particular because the industry has repeatedly encountered difficulties in connection with assigning mixtures to packing groups.

The UN Sub-Committee of Experts agreed on a text which is also aligned as far as possible with the text of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS).

More specifically, the new classification provisions contain alternative methods for assigning mixtures to packing groups. To use these alternative methods, a step-by-step approach is provided, depending on the data available, according to which the most reliable method should always be considered first. This step-by-step procedure should also ensure an appropriate level of safety in situations where reliable data are simply not obtainable.

According to this procedure, the current criteria for assigning packing groups need only now be applied in those cases for which test data are available for the entire mixture. If the only data available concern similar mixtures and if these data are sufficient for assessing the hazards, the assignment can be made on the basis of certain transfer rules. In cases where there are not enough data on similar mixtures, the corrosive properties of the individual components

The following were represented at the session:

24 States entitled to vote,
3 observer States,
2 governmental organisations and
30 non-governmental organisations.

The UN Sub-Committee of Experts on the Transport of Dangerous Goods develops the so-called UN Model Regulations, which constitute the joint basis for all the mode-specific dangerous goods provisions. The aim of this is to simplify the multimodal carriage of dangerous goods.

of the mixture must be taken into account. Assignment to packing groups is then carried out on the basis of a calculation method.

Decisions on the various parts of the text will be taken at the next session of the UN Sub-Committee of Experts when the decisions on the GHS are also available.

Lithium batteries in cargo transport units

Portable containers equipped with lithium ion batteries or lithium metal batteries and the requisite battery management system are now used to store and supply energy (see also Bulletin 1/2016, p. 20). The batteries are mounted in racks, frames or similar fittings, which are in turn installed inside the container.

For such cargo transport units, the UN Sub-Committee of Experts decided to provide a new entry, to which a special provision is assigned which sets out the conditions for assignment to this UN number and the provisions to be complied with. Apart from the batteries and the dangerous goods contained in the fire suppression system or in the cooling system, no other dangerous goods may be carried in the cargo transport unit.

Packing

Packing instruction LP 902

In the past, packing instruction P 902, which applies to UN 3268 Safety devices, electrically initiated, was already amended by replacing the general statement that packagings have to meet the testing requirements for packing group III by a list of approved packagings. This has now been done for packing instruction LP 902, which applies to large packagings. On the one hand, this excludes the interpretation that flexible large packagings may also be used, and on the other, it aligns with the other packing instructions applicable to large packagings, in which the large packagings authorised are also listed.

Pressure drums with convex dished ends

At its last session, the UN Sub-Committee of Experts approved the reference to an ISO standard for pressure drums (ISO 21172-1:2015) (see also Bulletin 1/2016, p. 19). This standard prohibits the use of pressure drums with convex dished ends for corrosive substances. At the last session, it was pointed out that this type of pressure drum design has been used in North America since 1936, particularly for the carriage of chlorine and sulphur dioxide, without leading to any incidents. In North America, the convex dished ends of these pressure drums were considered to be a positive characteristic from the safety point of view, as they push out when over-pressurised, providing an immediate visual indication of over-pressurisation.

Example of a pressure drum with convex dished ends

The UN Sub-Committee of Experts looked at this issue again at this session, as the prohibition in the standard would lead to far-reaching negative consequences in many parts of the world where such pressure drums are still in use, even though experience in terms of safety in these countries was entirely positive. Those who were in favour of these drums emphasised the advantages of this type of construction. For example, it was not necessary to weld on protective collars for valves, as the convex end prevents the valve from jutting out.

In the end, the UN Sub-Committee of Experts decided to add a note concerning standard ISO 21172-1:2015 to override the prohibition in the standard against using pressure drums with convex dished ends for the carriage of corrosive substances.

Water temperature during internal pressure (hydraulic) test with plastics packagings and IBCs

Chapters 6.1 and 6.5 are silent in terms of the water temperature at which the internal pressure test has to be carried out on plastics packagings and IBCs. However, various tests have shown that the temperature has a major influence on the mechanical behaviour of plastics. In these tests, it has been demonstrated that a higher temperature causes the plastics packaging to fail sooner. In addition, design type tests with different water temperatures can lead to different test results (pass or fail).

In order to make the test results more comparable, it was proposed that for the internal pressure test of plastics packagings, composite packagings with plastic inner receptacles, plastics IBCs and composite IBCs with plastic inner receptacles, a minimum water temperature of 12°C should be prescribed.

As some delegations expressed reservations about specifying a minimum temperature, it was decided that the temperature of the water used in the internal pressure test would simply be indicated in the test report.

Documentation

Inscribing the proper shipping name

Table A contains entries which have several proper shipping names in column 2 (e.g. UN 1057 Lighters or Lighter refills). According to the introductory sentence to 3.1.2.2, it is not mandatory to include the entire content of column 2 in the transport document or on the package. In the subsequent examples, it is always only the most appropriate entry that is required.

This contradiction has now been removed by amending the introductory sentence. This means that in future, proper shipping names that do not relate to the goods being carried may no longer be inscribed in the transport document or on the package. If a package contains different goods with the same UN number, but with different proper shipping names, the different proper shipping names must be inscribed separately in the transport document or on the package, unless some other part of the regulations stipulates otherwise (e.g. special provision 367 for paint related material).

Carriage of lithium batteries

The UN Sub-Committee of Experts noted that for the carriage of lithium batteries, the ICAO Technical Instructions in certain cases prescribe danger label model No. 9A, whereas in the UN Model Regulations and RID/ADR/ADN, only the mark for lithium batteries in accordance with 5.2.1.9 is required. This leads to problems in transport before or after carriage by air.
The UN Sub-Committee of Experts decided to refer to this difference in marking for packages in air transport in a Note to special provision 188.

Terminology

"Hazard" and "risk"

Based on the English version of the UN Model Regulations, it was noted that the terms "hazard" and "risk" are used synonymously, without taking account of the differing definitions of these terms. A hazard is deemed to be the inherent properties of a substance or article that has the potential to do harm to persons, property or the environment. A risk is deemed to be the likelihood that the harm may occur.

The UN Sub-Committee of Experts decided to make the necessary corrections to the English version of the UN Model Regulations and to check whether this would have any repercussions for the other language versions.

Next session

The 50th session will be held from 28 November to 6 December 2016 in Geneva and will finish the work on the 20th revised edition of the UN Model Regulations.

Jochen Conrad

RID/ADR/ADN JOINT MEETING (GENEVA, 19 TO 23 SEPTEMBER 2016)

From 19 to 23 September 2016, the autumn session of the Joint Meeting of the RID Committee of Experts and the UNECE Working Party on the Transport of Dangerous Goods was held in Geneva under the chairmanship of Mr Claude Pfauvadel (France). 24 States, the European Union, the European Union Agency for Railways and 16 non-governmental organisations were represented at this meeting.

Tanks

Prevention of water ingress in safety valves

Safety valves may be of a design that collects water in the discharge opening. This particularly concerns specific types of safety valves used on tanks for the carriage of liquefied flammable gases, such as liquefied petroleum gas (LPG). If the water freezes, the safety valve may not operate properly. The working group on tanks supported the inclusion of a further construction requirement for gas tanks, with a transitional provision. In future, safety valves in which water may collect are to be fitted with a protective cap. The European Industrial Gases Association (EIGA) was asked to check by the time of the next Joint Meeting whether the protective caps required can interfere with the operation of the safety valves.

Tanks with a protective lining or coating

On 3 July 2013 in the Netherlands, the protective lining of a tank-vehicle carrying hydrofluoric acid leaked, which subsequently led to a hole forming in the shell. The shell was made of aluminium alloy and the leaking hydrofluoric acid spilling out from above the waistline of the tank dissolved approximately one quarter of the diameter of the shell material and part of a stiffener in a short period of time.

The black material shown is the protective lining, which had to be sealed with a makeshift plug. Over the protective lining is the aluminium alloy used for the shell and over that is the white peeling paint.

6.8.2.1.9 stipulates that materials for shells or protective linings in contact with the substances carried must not react dangerously, form dangerous compounds or substantially weaken the material. As only the protective lining comes into contact with the substances carried when a protective lining is used, this provision does not apply to the material of the shell in this case.

During the lifetime of a tank the lining may develop defects due, for example, to mechanical damage caused by cleaning apparatus. In tanks made of aluminium alloys carrying corrosive substances, as in this case, a defect in the protective lining can result immediately in a hole and loss of integrity of the tank.

An informal working group hosted by the Netherlands proposed various amendments to the provisions to help avoid incidents of this type in future. These proposed amendments focussed on prohibiting the use of shells made of aluminium alloys for the carriage of substances known to have a corrosive effect on aluminium alloys. For the future, an alternative approach will be considered using the classification criteria for corrosiveness.

In future, protective linings must be visually inspected for damage in the periodic inspection and the intermediate inspection. Further inspections need only be undertaken if irregularities are detected in the visual inspection. The aim of this is to reduce to a minimum any interventions that might risk damaging the protective lining.

Interpretation of RID/ADR/ADN

Entering the technical name in the transport document

RID 5.4.1.4.1 requires that the transport document be filled out in one or more languages, one of which must be English, French or German. In addition to English, French or German, ADR/ADN 5.4.1.4.1 requires that the transport document also be filled out in the language of the forwarding country.

The International Union of Railways (UIC) raised the question of whether the technical name, which is prescribed for certain collective entries and n.o.s. entries, would also have to be translated, and pointed out that there were some technical names that only existed in one language and for which no "official" translation was available.

The Joint Meeting established that the language rule also applies to the technical name, and in the case of Class 6.2, scientific names may be used for which there is no translation into each of the languages. However, it said no to UIC's further question as to whether the carrier must be in a position to judge whether a technical name has been correctly shown in the transport document (e.g. correct spelling, correct language (German, English or French)).

Transitional provisions in 1.6.2.13 and 1.6.2.15

The transitional provisions in 1.6.2.13 and 1.6.2.15 govern the continued use of bundles of cylinders, which are not provided with the marks valid from 2013/2015, until the next periodic test and inspection.

The European Industrial Gases Association (EIGA) was of the view that these transitional provisions are unclear, because nothing is said about the procedure for these bundles of cylinders at the next periodic inspection. In the past, this had led to differing interpretations by the operators of such bundles of cylinders and the inspection authorities. One interpretation of these transitional provisions had been that the bundles of cylinders had to be withdrawn from service at the next periodic inspection.

The Joint Meeting said that the wording corresponded to the usual formula and that an amendment would mean that a number of other transitional provisions would also have to be reworded at the same time. It decided that:

- the transitional provision covered the marking; the bundles of cylinders could be used with the old mark until the date of the next periodic inspection;
- at the next periodic inspection, the mark must be brought into compliance, after which the transitional provision would no longer be relevant for the bundles of cylinders in question, which could continue to be used with the new, compliant mark.

The second session of the 2016/2017 biennium dealt mainly with the amendments for the 2019 edition of RID/ADR/ADN. A working group on tanks was again set up to deal with documents relating to tanks. This group met in parallel to the plenary and was chaired by Mr Arne Bale (United Kingdom). The most important decision of the working group on tanks was to include new provisions for tanks with protective linings or coatings. In addition to various questions of interpretation and proposals for amendments, the plenary session also dealt with the results of the informal working group on the transport of waste electrical and electronic equipment containing lithium batteries. This led to a rewording of the current special provision for used lithium batteries and the inclusion of a new special provision for waste equipment. Some corrections necessary in the 2017 edition were also adopted at this session.

New proposals to amend RID/ADR/ADN

Danger label model No. 9A

When the new danger label 9A was introduced into RID/ADR/ADN 2017, it was apparently forgotten to mention this new danger label in addition to the existing danger label 9 in the table of

mixed loading prohibitions in 7.5.2.1. This omission would lead to an unintended mixed loading prohibition.

The Joint Meeting confirmed that including danger label model No. 9A in the 2017 amendments should also have resulted in a consequential amendment to 7.5.2.1, and decided to include this consequential amendment in a corrigendum.

Visual inspection of the load in sealed cargo transport units

According to 1.4.2.2.1 (c), the carrier has to carry out a visual inspection of the load. At the last Joint Meeting, Austria asked how this obligation was understood in other countries with regard to cargo transport units that are not officially sealed. Austria pointed out in particular that as the result of an amendment to the SOLAS Regulation VI/2, in force as from 1 July 2016, according to which the consignor has to determine the gross mass of the container and inform the shipping company in advance, containers will in future be sealed more often in order to ensure that the container has remained unopened and that the information is still correct in the port.

As the IMDG Code requires a container/vehicle packing certificate to be made out for cargo transport units subsequently carried by sea, which confirms that the loading provisions have been complied with, the Joint Meeting agreed that in this case, the carrier can rely on the information in the container/vehicle packing certificate and need not carry out a visual inspection of the load himself.

Dangerous goods safety adviser

At the last Joint Meeting, a proposal submitted by the European Association of Dangerous Goods Safety Advisers (EASA) was adopted to extend the obligation to appoint a dangerous goods safety adviser to dangerous goods consignors (see Bulletin 2/2016, p. 19-20). The Joint Meeting adopted the transitional provisions submitted by the representative of EASA, which also covered the dangerous goods safety adviser's training certificate.

The questions that remained unresolved from the last Joint Meeting concerning the extension of the obligation to appoint a dangerous goods safety adviser to operators of tank-wagons, tank-containers and portable tanks and to harmonise the safety advisers' annual report were also reluctantly noted at this meeting.

With regard to extending the obligation to appoint a dangerous goods safety adviser, some reservations were expressed, as operators are not necessarily the people who are directly involved with using the tank-container, portable tank or tank-wagon.

The proposal for guidelines on harmonising the safety adviser's annual reports were also noted with some reluctance, as some countries already had mandatory format requirements which partly adapted reports to the undertaking's operational activities and which the sector associations had already developed in line with the models adapted to the fields of activity.

The representative of EASA would submit a new proposal in light of the discussion, if need be.

Reports of informal working groups

Transport of waste electrical and electronic equipment containing lithium batteries

The Joint Meeting in September 2014 discussed for the first time the possible conditions of carriage and exemptions for dangerous goods contained in waste electrical and electronic equipment carried for the purpose of recycling or disposal. At that time, the Joint Meeting approved the setting up of an informal working group, saying that an inventory should first be made of studies and projects carried out in the EU Member States in the context of EU Directive 2012/19/EU on waste electrical and electronic equipment.

This working group met twice and then submitted its recommendations to the Joint Meeting:

- Special provision 636 should now only apply to lithium batteries and lithium cells and should only contain the unamended paragraph (b). The case of equipment containing lithium batteries and lithium cells should be dealt with in a separate special provision.
- Batteries and cells contained in equipment that are not used as the equipment's main source of energy should be completely exempt, as the amount of lithium contained in emergency batteries used to secure data in the event of a power failure is very small (< 1 g) and they are completely enclosed by the equipment.
- The conditions of carriage for waste electrical and electronic equipment that is not exempt should be further relaxed for carriage to the intermediate processing facility. In addition to the packagings which are already listed in packing instruction P 909 on the disposal of lithium batteries, specially designed collection receptacles should be approved. As for used lithium batteries, it must be ensured by means of a quality assurance system that the total quantity of lithium batteries and lithium cells does not exceed 333 kg per transport unit.

The Joint Meeting adopted all the amendments proposed by the working group. In order that the new provisions can be applied straight away, the representative of Germany said he would initiate a multilateral special agreement for those States that were interested.

Next session

The next RID/ADR/ADN Joint Meeting will be held in Berne from 13 to 17 March and will continue discussions on the amendments for 2019.

Jochen Conrad
Katarina Guricová

PRESUMPTION OF LOSS OR DAMAGE IN CASE OF RECONSIGNMENT APPLICATION OF ARTICLE 28 § 3 CIM TO CIM-SMGS TRAFFIC

In CIM-SMGS traffic, it is not always possible to prove whether damage during transport occurred when performing the CIM contract of carriage or the SMGS contract of carriage. This can be remedied by the presumption of loss or damage in case of reconsignment, according to which it is presumed that the loss or damage occurred during the latest contract of carriage, unless it can be proved otherwise. Article 40 of the revised SMGS, which has been in force since 1 July 2015, contains a presumption of law for cases in which the place the damage occurred is unknown; this is comparable to the presumption of law in Article 28 § 3 CIM. As a result, the condition of reciprocity required for the application of this provision of CIM is satisfied in full. In the period between July 2008 and June 2015, the presumption of law in CIM-SMGS traffic was only applied when consignments were handed over with the CIM/SMGS consignment note.

When developing SMGS[1], the Organization for Co-operation between Railways (OSJD) takes as a basis the provisions that have been drafted for an annex to a new convention[2] designed along the lines of COTIF. The corresponding amendments are adopted in a simplified procedure so that the text can be adapted on an on-going basis (every year). The version of SMGS that entered into force on 1 July 2015 included substantial new features in terms of structure and content, one of which was a new version of the provision concerning presumption in case of reconsignment (Article 40), which is relevant to the application of Article 28 § 3 CIM. In the version of SMGS in force since 1 July 2016, no further amendments concerning the subject of this Article have been made.

This provision, which has replaced the previously applicable Article 23 § 10 SMGS, is entitled “Presumption in the event of a change in the legal regime governing the contract of carriage”. It concerns all cases of consignments coming from a State that does not apply SMGS and which are reconsigned in accordance with SMGS. The refutable presumption that damage or partial loss occurred during the performance of the last contract of carriage, i.e. the SMGS contract of carriage, is linked to the condition that “the consignment was accepted by the carrier without remarks”.

This has a direct effect on the application of Article 28 § 3 CIM, which lays down a refutable presumption in the case where the contract of carriage prior to reconsignment was subject to “a convention concerning international through carriage of goods by rail comparable with the CIM UR”, i.e. SMGS, and where this convention contains the “same presumption of law” in favour of consignments consigned in accordance with the CIM UR. The condition for this is that “the consignment remained in the charge of the carrier and was reconsigned in the same condition as when it arrived at the place from which it was reconsigned”.

At present, it can be assumed that both legal regimes, CIM and SMGS, contain a comparable presumption of law for reconsigned consignments for which the place the damage or loss occurred is unknown.[3] In contrast to the former Article 23 § 10 SMGS, the parallelism of the rules concerning presumption of damage in both legal regimes is no longer limited to consignments with a CIM/SMGS consignment note.

Bibliography
Kommentar zum Abkommen über den internationalen Eisenbahn-Güterverkehr (SMGS) russisch

(Commentary on the Agreement concerning International Freight Traffic by Rail – SMGS – Russian)
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1 Convention on International Rail Freight Traffic, governing direct railway traffic for the carriage of freight between the railways of the following States: Afghanistan, Albania, Azerbaijan, Belarus, Bulgaria, China, Estonia, Georgia, Hungary, Iran, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, North Korea, Poland, Russia, Slovakia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

2 The English version of the draft convention is available on the OSJD website (along with the Russian and Chinese versions). http://en.osjd.org

3 This assessment was confirmed by a decision of the 12th General Assembly (section 10 of the final document). The explanations concerning Article 28 CIM were amended accordingly: “Article 40 of the SMGS edition in force since 1 July 2015 contains a similar presumption concerning the reconsignment of goods being carried from a country which is not a member of SMGS.”

History of origins

The origins of the presumption of law 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, Berne Convention) or where transport was performed on the basis of two consecutive contracts of carriage in accordance with the CIM. Case law to the detriment of railway users led to proposals aimed at resolving this problem being dealt with as early as the 4th 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 and 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.

At the 5th 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 law was made on condition that in the case of direct handing over from the original place of forwarding to the last destination station, CIM would have had to apply from the original place of forwarding. 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 1980. For an SMGS-CIM reconsignment, it no longer depended on whether the CIM UR would have been applicable from the original place of forwarding up to the final place of delivery. However, application of the presumption of law was linked to the condition of reciprocity. 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 applied 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. As long as this condition was not met, this provision of CIM was not applicable.

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 CIM.

Article 28 § 3 CIM and the version of Article 23 § 10 SMGS of 1 July 2008 – the same presumption of law for the benefit of consignments with a CIM/SMGS consignment note

In a provision included in SMGS that came into force on 1 July 2008 (new paragraph 10 of Article 23 SMGS), the requirement for reciprocity was partially met, namely in relation to consignments with a CIM/SMGS consignment note. The conditions for it to be applied can be summarised as follows:

- consignment with a CIM/SMGS consignment note
- claim as a result of partial loss or damage
- ascertained at the place of reconsignment
- after the date has been stamped in the CIM/SMGS consignment note
- the railway that applies SMGS or CIM has accepted the consignment without obvious irregularities.

The same conditions were specifically laid down for the CIM-SMGS direction of travel (paragraph 1) as for the SMGS-CIM direction of travel (paragraph 2). Paragraph 3 made clear that this presumption obtained irrespective of whether the goods had been reloaded into a wagon of another gauge.

The second paragraph, which lays down a presumption of law in favour of SMGS consignments in the CIM area, was certainly of a declarative nature. It covered part of what is dealt with in Article 28 § 3 CIM. This way, Article 23 § 10 SMGS made clear that with regard to consignments with a CIM/SMGS consignment note, the same presumption of law applied to both directions of travel; in one case in favour of consignments from the SMGS area, and in the other, in favour of consignments from the CIM area. Transport operations with two separate consignment notes were not covered by this provision.

Article 28 § 3 CIM and Article 40 SMGS – comparable conditions

At present, the conditions to be met are similar in both legal regimes, although not entirely identical.

Article 28 § 3 CIM	Article 40 SMGS
Reconsignment (after transport in accordance with a comparable convention)	Reissue of the consignment note owing to a change in the legal regime governing the contract of carriage, i.e. 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	accepted by the carrier “without remarks”
consignment remains in the charge of the carrier	
damage as a result of partial loss or damage	damage as a result of spoilage to or “shortage” of the goods
ascertained after reconsignment/after change in the legal regime	
same presumption of law in favour of consignments carried onwards from the area of application of CIM to the area of application of SMGS	

In the final analysis, cases of loss or damage of the same kind should be covered in both directions. In light of this comparison, the question might arise as to whether the presumption of law according to SMGS also comes into question if the goods do not remain in the charge of the carrier. This would be the case for instance if carriage in accordance with CIM were followed by intermediate storage or transhipment carried out on the basis of an independent contract by an undertaking independent of the carrier and acting on behalf of the consignor, i.e. not by the carrier himself or by an auxiliary of the carrier on the carrier’s behalf, before the consignment is reconsigned in accordance with SMGS. It cannot really be assumed automatically that in the practice of east-west-east traffic, transhipment (reloading onto wagons of a different gauge) can in all cases be associated with either the CIM or the SMGS contract of carriage or the last/first CIM/SMGS carrier. However, presumption only makes sense if, between the CIM carrier and the SMGS carrier, nobody else takes custody of the goods.

The second additional condition on the CIM side is explained by the history described above. When revising the SMGS, the legislator rightly assumed that reciprocity (for CIM-SMGS traffic) automatically exists.

Purpose of presumption of law: to facilitate the task of the consignee with regard to the provision of evidence

This presumption means a reversal of the burden of proof with regard to

one of the basic prerequisites for the liability of the carrier in both legal regimes, i.e. the occurrence of the damage in the period between the time the goods were taken over, which, in these cases, is at the time of reconsignment, and delivery of the goods. 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 consignee 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.

Eva Hammerschmiedová

PASSENGER ON THE TRAIN WITHOUT A TICKET: IS THERE A CONTRACTUAL RELATIONSHIP BETWEEN HIM AND THE CARRIER? CJEU JUDGMENT C-261/15 OF 21 SEPTEMBER 2016 IN THE PRELIMINARY RULING PROCEDURE

Based on a question from a Belgian court in the preliminary ruling procedure, the Court of Justice of the European Union (CJEU) dealt with the interpretation of **Article 6 § 2 CIV**, which is in Annex I to Regulation (EC) 1371/2007 (rail passengers' rights regulation): "The contract of carriage must be confirmed by one or more tickets issued to the passenger. However, subject to Article 9, **the absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract**, which shall remain subject to these Uniform Rules." In its judgment, the CJEU made clear that this provision does not preclude national Belgian law, which lays down the facts of a criminal offence committed by a passenger travelling without a ticket, who does not subsequently pay the fare within the period laid down by the law. The application of Article 6 § 2 CIV does not preclude the provisions of Belgian law either, according to which this offence excludes the existence of a contract of carriage.

Summary of the facts

Mr Demey was found on four occasions to be travelling as a train passenger in Belgium without a ticket. Mr Demey failed to pay the fare and the supplement requested by the inspector in the train or subsequently, despite letters requesting payment sent by the National Belgian Railway Company (SNCB). SNCB brought legal proceedings against Mr Demey before the Magistrates' Court, Ypres (Belgium) and requested payment of the fare plus "additional lump-sum compensation", instead of the administrative surchange originally claimed. It based its claim on Belgian law, under which Mr Demey had committed criminal offences; the offences committed justified the lump-sum compensation.

Mr Demey defended himself in partic-

ular against the lump-sum compensation. His defence was based on the following arguments: This claim was based on an unlawful SNCB clause and he was protected against these under consumer protection laws. His assumption was that for each of his train journeys, he automatically had a contractual relationship with the carrier on the basis of the second sentence of Article 6 § 2 of Annex I to Regulation (EC) 1371/2007 (rail passengers' rights regulation, PRR), irrespective of whether he obtained the appropriate ticket in advance or in the train and paid the fare for it.

As an integral part of the PRR, Article 6 CIV is also applicable to domestic transport in Belgium (Art. 2 PRR). According to Belgian law, the offence committed excludes a contractual relationship, and hence application of the provisions of consumer protection law.

In these circumstances, the Belgian court referred a question to the CJEU for a preliminary ruling in order to clarify whether the application of Article 6 § 2 CIV precluded this judgment.

Question for preliminary ruling:

"Does Article 6(2), [final sentence], of [Appendix A in] Annex I to [Regulation No 1371/2007] preclude the Belgian national penalty provisions (...), under which a train passenger without a ticket – and in the absence of regularisation within the periods laid down in the relevant regulations – commits a criminal offence, which excludes any contractual relationship between the transport company and the train passenger, with the consequence that [the benefit of] the legal protection provisions under European and Belgian national law which are based on that (exclusive) contractual relationship with that consumer, …, is also denied to the train passenger?"

This is a question on how Article 6 § 2 CIV is to be understood and interpreted. Can the question as to whether a contract of carriage between SNCB and this passenger exists be answered on the basis of Article 6 § 2 CIV?

The CJEU ruled as follows:

The final sentence of Article 6(2) of Appendix A to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of COTIF, in Annex I to Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, must be interpreted as not precluding national provisions which lay down that a person making a train journey while not in possession of a ticket for that purpose, who fails to regularise his situation within the periods laid down in those provisions, does not have a contractual relationship with the railway undertaking.

Justification

The CJEU summarises the nub of the dispute to the effect that the question at issue is whether, according to the provision cited, as soon as somebody travels by train, a contract of carriage is concluded, irrespective of whether or not he is in possession of an appropriate ticket. It comes to the conclusion that Article 6 § 2 CIV only governs the proof of a contract of carriage, without regulating in detail the conditions under which a contract of carriage comes about. These conditions are governed by national rules. Article 6 § 2 CIV assumes the existence of a previously concluded contract of carriage. According to further statements made by the court, the wording of Articles 7-9 CIV supports this conclusion.

Remark by the Secretariat

As Article 6 CIV does not contain a rule on concluding the contract of carriage, it cannot preclude the application of Belgian law in this respect (Art. 8 § 2 COTIF). The CJEU's clear response is to be welcomed.

In general terms, the following may also be added: in fact, in the CIV UR, the contract of carriage is designed as a consensual contract (as is also the CIM contract of carriage), where one or more tickets provide proof of the conclusion and content of the contract – until proved otherwise. This means that in order for the contract to come into existence, the concordant will of the parties is required. In the case of somebody who wishes to travel without paying the fare, there can be no question of the concordant will of the parties.

The court's conclusion, that Article 6 § 2 CIV only governs the proof of a contract of carriage, is very apt. The ticket is only documentary proof, a prima facie evidential document. If a contract of carriage has been concluded and the ticket cannot be produced (for instance because it has been lost or stolen), other means of evidence can be considered. The contract of carriage does not lapse if the ticket is lost. Loss of the ticket only makes it more difficult for the passenger to provide evidence.

From the provision according to which the absence or loss of the ticket does not affect the existence of the contract (Art. 6 § 2), it cannot be concluded that everybody who boards a train automatically becomes a contracting party to the contract of carriage.

Two issues must be clearly distinguished: the existence of a contract and the proof of this contract. The first requires the concordant will of the contracting parties. For the second, the ticket is the usual, but not the only possible proof of a contract of carriage.

Eva Hammerschmiedová

CALENDAR OF OTIF'S MEETINGS IN 2017

DATE	EVENT	LOCATION
27 January	Administrative Arrangements management meeting ERA/OTIF	Brussels - Belgium
8 - 9 February	RID-ATMF Working Group, 4th Session	Brussels - Belgium
21 - 22 February	WG TECH: standing working group technology, 31st session	Rome - Italy
13 - 17 March	RID/ADR/ADN Joint Meeting	Berne - Switzerland

EVENTS WITH OTIF PARTICIPATION IN 2017

DATE	EVENT	ORG	LOCATION
25 - 26 January	Railway Interoperability and Safety Committee (RISC)	European Commission	Brussels - Belgium
2 February	10th anniversary - Luxembourg Rail Protocl	UNIDROIT	Luxembourg
7 February	Working party LOC&PAS TSI	EU Agency for Railways (ERA)	Lille - France
14 - 17 February	WP 30. Working Party on Customs Questions affecting Transport	UNECE	Geneva - Switzerland
14 - 17 February	Temporary Working Group on Annex 2 to SMGS "Provisions for the Carriage of Dangerous Goods"	OSJD	Warsaw - Poland
19 - 21 February	33rd Storck Symposium 2017	Verlag ecomed Storck	Hamburg - Germany
21 - 24 February	Inland Transport Committee - 70th anniversary	UNECE	Geneva - Switzerland
28 February - 1 March	UIC Group of Experts on the Carriage of Dangerous Goods	UIC	Belgium
23 March	CIM Committee	CIT	Berne - Switzerland
24 March	Multimodality Working group	CIT	Berne - Switzerland

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