

OTIF



**ORGANISATION INTERGOUVERNEMENTALE POUR
LES TRANSPORTS INTERNATIONAUX FERROVIAIRES**

**ZWISCHENSTAATLICHE ORGANISATION FÜR DEN
INTERNATIONALEN EISENBAHNVERKEHR**

**INTERGOVERNMENTAL ORGANISATION FOR INTER-
NATIONAL CARRIAGE BY RAIL**

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Partial revision of Appendix B (CIM UR)

Suggestions from the International Association of Tariff Specialists (IVT)

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**Suggestions from the International Association of Tariff Specialists (IVT)
concerning the CIM Uniform Rules (CIM UR)**

Based on the second sentence of Article 11 § 1 of the Revision Committee's Rules of Procedure, IVT has the honour of submitting the following suggestions on agenda item 5 (Partial revision of Appendix B – CIM UR)

1. Article 7 (Wording of the consignment note)
(a) § 1 f)

Discussion

The “place of delivery” to be entered in the consignment note is not defined, but it is assumed that this is the place at which the goods are delivered to the consignee, and according to Article 1, it determines the scope of the CIM UR for each consignment.

By entering a place at which the goods are not delivered as a “place of delivery”, the application of the CIM UR can be arbitrarily curtailed and the uniform application of the law to the entire transport operation which the CIM UR aim to provide, and hence legal certainty, will be circumvented. As this is contrary to the letter and spirit of the CIM UR, this form of entry should not be permitted and, as for the CMR in road transport, application of the international uniform rules should be ensured from platform to platform.

Suggestion

Add the following sentence to Article 7 § 1 f):

“It shall not be permitted to enter as the place of delivery a place where wagons are handed over, but where the goods are not delivered.”

- (b) § 2 a)

Discussion

The “carrier who must deliver the goods”, who must be shown in the consignment note, is not defined. This leads to interpretations according to which two carriers would have to be entered in the consignment note, and hence to legal uncertainty.

Suggestion

Add an appropriate definition to Article 7 § 2 a).

2. Article 12 (Evidential value of the consignment note) § 3**Discussion**

According to this provision, if the consignor carries out the loading, the consignment note only has the same evidential value (prima facie evidence of the accuracy of the statements) as when the carrier has carried out the loading if the carrier has examined the statements and recorded on the consignment note a result of his examination which tallies. According to Article 11 (Examination) § 3, the carrier is obliged to proceed with the examination (with payment of costs) only “if he has appropriate means of carrying it out”, although no further specific details are required, merely, according to § 4, a reservation. For the consignor, this frequently makes the situation in terms of evidence unreasonably difficult.

Suggestion

Cases should be defined in which, if the consignor has carried out the loading himself, the consignment note also has evidential value if the carrier has not examined the statements.

3. Article 16 (Transit periods)**Discussion**

Although in accordance with § 1, transit periods are primarily to be agreed between consignors and carriers, carriers frequently do not accept such agreements, which is why, in practice, it is primarily the maximum transit periods according to § 2 that are applied and which are very generous.

Suggestion

The carriers' acceptance of transit period agreements should be promoted. As an accompanying measure, it is suggested that the 24 hour transit period for wagon-load consignments in accordance with the 2nd indent of § 2 a) should at least be increased from 400 km to 500 km or fraction thereof.

4. Article 19 (Exercise of the right to dispose of the goods) § 2**Discussion**

According to this provision, the person entitled must compensate the carrier for the costs and the prejudice arising from the carrying out of subsequent modifications. The fact that there is no rule on how to ascertain the costs concerned can lead to unnecessary differences between the contracting parties with regard to the amount of the costs to be invoiced.

Suggestion

Add the following sentence to Article 19 § 2:

“Costs that have arisen shall be considered as the proven additional costs of the carriage actually performed as opposed to the notional costs of the carriage originally intended.”

5. Article 23 (Basis of liability) § 3

a) With regard to a)

Discussion

According to this provision, the carrier is relieved of liability to the extent that the loss or damage arises from the special risks inherent in carriage in open wagons. This is sometimes mistakenly interpreted to mean that the carrier is not generally liable for carriage in open wagons.

The “special risks” of carriage in open wagons are not defined in more detail, but it is obvious that these risks arise mainly from the poorer protection of the load against unlawful access and against environmental influences, and relief from liability depends on the extent to which this special risk causes the loss or damage. However, the extent of this special risk can also be increased or decreased by actions or omissions on the part of the carrier or his agents. Factors which might have an impact are, for example, unusually long waiting periods for the wagons, unsuitable locations for stops or failure to take possible and reasonable measures to protect the goods. These factors can therefore lessen the carrier’s relief from liability.

Suggestion

Clarification in OTIF’s Explanatory Report on this provision.

b) With regard to c)

Discussion

According to this provision, the carrier is relieved of liability to the extent that the loss or damage was caused by the special risks inherent in loading of the goods by the consignor or unloading by the consignee. This is sometimes mistakenly interpreted to mean that the carrier is not generally liable for carriage where the goods have been loaded by the consignor or unloaded by the consignee.

The “special risks” inherent in loading by the consignor or unloading by the consignee are not defined in more detail, but it is obvious that the risks involved might result from typical mistakes in loading activities, e.g. defective securing of the load, damage caused by fork-lift trucks or faulty handling of fittings, and that relief from liability depends on the extent to which this special risk causes the loss or damage.

Suggestion

Clarification in OTIF’s Explanatory Report on this provision.

6. Article 30 (Compensation for loss) § 2**Discussion**

In this provision, in case of total or partial loss of the goods, the maximum amount of compensation the carrier must pay does not exceed 17 units of account (IMF Special Drawing Right, see Article 9 COTIF) per missing/damaged kilogramme of gross mass. This maximum amount has not been changed since 1985, even though the value of the SDR has decreased not insignificantly since then. In air transport, a value of 19 SDR has been applied since 2009.

Suggestion

Increase the maximum amount to 19 units of account.

As the loss in value of the SDR has also led to the reduction of other amounts specified in the Appendices to COTIF, it is suggested that a general mechanism for adapting the amount should be examined, following the example of air transport (see Article 24 of the Montreal Convention).

7. Article 36 (Loss of right to invoke the limits of liability)**Discussion**

According to this provision, the limits of liability laid down in various Articles in favour of the carrier do not apply if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

The aim of the wording “recklessly and with knowledge that such loss or damage would probably result”, introduced by the 1990 Protocol for the Modification of COTIF 1980, was to remove the term “gross negligence”, which has been established since 1892¹. The model for the amendment to the text of the then Article 44 of COTIF 1980 was the analogous wording in the worldwide applicable air and maritime transport law.

It must be assumed that the expectations linked to this new wording have not been met: it was expected that in the OTIF Member States, using this wording instead of “gross negligence” would better promote uniform court procedures which would be equally fair to the railways and to their customers. This should not come as a surprise, given that the terms “knowledge” and “probably” are subjective and are not precise enough to achieve the desired objective.

Suggestion

Amend Article 36 to read as follows:

¹ See Art. 41 of the 1890 International Convention concerning the Carriage of Goods by Rail

“The limits of liability provided for in Article 15 § 3, Article 19 §§ 6 and 7, Article 30 and Articles 32 to 35 shall not apply if it is proved that the loss or damage results from wilful misconduct or gross negligence, which the carrier has committed.”

If need be, the Article could also be worded along the lines of Article 29 of CMR, as follows:

“The limits of liability provided for in Article 15 § 3, Article 19 §§ 6 and 7, Article 30 and Articles 32 to 35 shall not apply if it is proved that the damage was caused by the carrier’s wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct.”

8. Article 42 (Ascertainment of partial loss or damage) § 3

Discussion

This provision prescribes that the condition of the goods, their mass and the cause and extent of the loss or damage may be ascertained by an expert appointed either by the parties to the contract of carriage or by a court or tribunal. The procedure to be followed must be governed by the laws and prescriptions of the State in which such ascertainment takes place.

Suggestion

In the interest of consistency, a detailed rule on the experts’ relevant reports should be added.

9. Article 43 (Claims)

Discussion

This provision does not prescribe a deadline for dealing with claims, to the detriment of the claimant. According to Article 48 § 3, the period of limitation is suspended by the claim, but if dealing with the claim is delayed to an unreasonable extent, it can be considerably more difficult to produce evidence in the context of bringing an action before the court.

Suggestion

Add a § 7, as follows:

“The claim shall be replied to in writing, and if the claim is rejected in part or in whole, it shall be replied to no later than one year after its submission.”

10. Article 48 (Limitation of actions) § 1

Discussion

This provision prescribes a general period of limitation of one year for an action arising from the contract of carriage, with a longer, two year period of limitation for certain actions. In view of the considerable amount of time that is often needed for the initial clarification of the facts and circumstances, a general period of limitation of two years would seem suitable in the interest of the person concerned.

Suggestion

Amend § 1 to read as follows:

“The period of limitation for an action arising from the contract of carriage shall be two years.”