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Partial revision of Appendix B (CIM UR)

Explanatory document and suggestions for additions to the Explanatory Report

Uniform Rules concerning the Contract of International Carriage of Goods by Rail.

(CIM - Appendix B to the Convention)

Introduction

1. The aim of this document is to provide explanations on the proposals to amend the CIM UR submitted to the working group on the revision of the CIM UR, which was mandated by the 25th session of the Revision Committee (Berne, 25 and 26 June 2014) to prepare a revision of the CIM UR, with particular attention to reasonable provisions to be put in place concerning the electronic consignment note.

At the 25th session of the Revision Committee, the European Commission presented the decision of the Council of the European Union, according to which the amendments to Articles 6 and 6a of the CIM UR concerned EU legislation, as the consignment note and the accompanying documents were used for customs, sanitary and phytosanitary procedures.

While supporting the intention of giving the electronic form of consignment notes priority, the EU was of the view that the adoption of these amendments could have undesirable consequences. Current EU legislation offers no legal basis for using an electronic form of the customs documents that have to accompany sanitary or phytosanitary goods.

As a result, at the 25th session of the Revision Committee, no decisions were taken on the amendments to the CIM UR in order to have a well-prepared solution for Articles 6 and 6a, which, ideally, would be synchronised with developments in EU customs law, which will be staggered between now and 2020.

In order to prepare the 1st session of the working group on the revision of the CIM UR, OTIF organised a coordination meeting with the European Commission, CIT and CER. This meeting took place in Brussels on 19 September 2014.

It was clarified at the meeting that it will of course still be possible to use the paper consignment note, particularly if the customs regulations require it. This possibility is also important for sanitary and phytosanitary (SPS)¹ regulations. It is therefore important to clarify the pre-eminence of customs and SPS regulations in the Explanatory Report on CIM.

The aim of this new provision is to enable electronic documents gradually to become standard. It will of course still be possible to use the paper consignment note, particularly if the public order regulations, such as customs regulations, require it.

The wording of Article 6a is still supplementary law, i.e. the consignment note and the documents may be drawn up in paper form, which the parties to the contract of carriage will be obliged to do for customs documents in particular. The wording

¹ SPS: Sanitary and Phytosanitary Measures Agreement

chosen will make it possible gradually to take into account future developments in terms of moving towards paperless procedures, such as those of the Customs Code.

§ 5 of the proposed new Article 6a in fact stipulates explicitly that "The parties to the contract of carriage may agree to establish the consignment note and the accompanying documents in paper form".

At the meeting, it also emerged that the question arose as to the possible coexistence of paper documents for accompanying documents and for the consignment note itself. It was therefore decided to add a sentence explaining this in the Explanatory Report as well.

2. In terms of procedures, this working group will have its proposals validated by the Revision Committee using the written procedure so that this issue can be dealt with at the next General Assembly, which will be held in Berne at the end of September 2015.

This document also sets out the modifications to the Explanatory Report that should be made as a result of the amendments to these provisions in particular.

In accordance with Article 33 § 4 (c) of COTIF, The Revision Committee has the competence to amend the CIM Uniform Rules, except Articles 1, 5, 6 §§ 1 and 2, Articles 8, 12, 13 § 2, Articles 14, 15 §§ 2 and 3, Article 19 §§ 6 and 7 and Articles 23 to 27, 30 to 33, 36 to 41 and 44 to 48. The General Assembly has the competence to amend these Articles.

Justification for the amendments Article by Article

Article 6 Contract of carriage

Reasons for the proposed amendment

An editorial amendment is required in paragraph 7 of Article 6, as the European Community is now called the **European Union**. This would take account of the entry into force of the Lisbon Treaty.

Article 6a (new)
Form of the consignment note

Reasons for the proposed amendment

When the 1999 revision was carried out, and bearing in mind the experience gained in the UIC working group on the DOCIMEL project (electronic CIM document), which was carried out in collaboration with CIT, it was decided to replace Article 8 § 4 g)² of the 1980 CIM UR.

The text adopted by the Revision Committee, i.e. the current § 9 of Article 6 of the 1999 CIM UR, is based on the concept of functional equivalence. It reads as follows:

"§ 9 The consignment note and its duplicate may be established in the form of electronic data registration which can be transformed into legible written symbols. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by those data."

In other words, the principle of the same legal effects applies to all the functions of the consignment note, although the problem of evidential value is highlighted as an example, given that this is the area where the biggest difficulties occur in national legislations. Therefore, insofar as it is proved that the procedures used for electronic data registration and processing are designed in such a way as to ensure functional equivalence, electronic data registration will have the same evidential value as the corresponding data of a paper consignment note.

However, work on the e-RailFreight project demonstrated that the requirements adopted to transpose the principle of functional equivalence make the eRailFreight system complex and onerous, particularly as a result of the problems caused by depending on national law, which makes it unnecessarily complicated to use the consignment note at an operational level.

In view of this situation, CIT, together with OTIF, sought an alternative solution to the principle of functional equivalence by seeking a uniform solution, at least for the main function of the consignment note, i.e. that of proof of the conclusion and content on the contract of carriage and the taking over of the goods. With regard to the other functions that the consignment note may have (customs document, tax document etc.), it was clear from the beginning of the work that the requirements of national law, which are of a public nature, had to be taken into account.

Specifically, CIT and OTIF considered the development of succinct provisions of substance on the electronic consignment note and, if possible, on the electronic accompanying documents. To this end, the two organisations looked at the existing modern legal instruments for other modes of transport, such as the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (which entered into force on 4 November 2003), the

² Article 8 § 4 g) of the 1980 CIM UR: "Two or more States, by special agreement, or two or more railways by supplementary provisions or by tariff clauses, may agree on terms derogating from the Uniform Rules for the following types of consignments:

[...]

g) consignments sent under cover of an instrument suitable for automatic data transmission."

Rotterdam Rules (United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) and the Additional Protocol to the CMR (e-CMR) on the electronic consignment note (which entered into force in 2008 – currently 9 contracting parties).

The experts of OTIF and CIT noted that the system of the Additional Protocol to CMR differs from that of the Montreal Convention and the Rotterdam Rules. In the CMR Additional Protocol, the provisions come under transport law and IT law.

The group of experts was therefore of the view that the approach used in the e-CMR could not be taken over wholesale into the system of the CIM UR, but that the experts could derive some ideas from the e-CMR and take national law into consideration as appropriate.

The electronic consignment note and the electronic accompanying documents also had to be given priority, even though CIT and OTIF were fully aware of the fact that it would still take the railway undertakings a number of years to adapt their organisation and IT systems to the systematic use of electronic support to carry out the international carriage of goods.

During the discussions, the experts of CIT and OTIF reached the conclusion that the legal system of COTIF and its Appendices, particularly the CIM UR, did not really allow room for another annex concerning the "electronic consignment note" along the lines of the e-CMR Protocol.

As a result, they drafted a new provision (Article 6a), which entails the deletion of Article 6 § 9 of the CIM UR, and takes account of the following requirements.

- Priority of the electronic consignment note and documents over paper documents (§ 1).
- Authentication of the electronic consignment note (§ 4).

According to the e-CMR, the electronic consignment note is authenticated by means of an electronic signature (Article 3 § 1 e-CMR); it can also be authenticated by any other electronic process [...].

As the electronic signature has a considerable influence on the electronic consignment note and as national laws obviously contain different requirements in this respect at present, the experts of OTIF and CIT chose a simple form of words, according to which the electronic consignment note could be authenticated "by means of an electronic signature or another appropriate method".

In this respect, the experts of OTIF and CIT also took as a basis Article 6 § 3 of the CIM UR, where the signature can be "replaced by a stamp, by an accounting machine entry or in any other appropriate manner".

- Integrity and reliability of the data in the consignment note (§ 2 and 3).

These paragraphs take over Article 4 of the e-CMR in a simplified form.

The procedures used to draw up a consignment note must ensure the reliability and integrity of the information contained in the consignment note.

The integrity of the information is ensured when it remains complete and has not been altered by any amendment in the normal course of electronic communication. In addition, any addition or modification to the electronic consignment note must be detectable.

- Use of the paper consignment note if there is a particular need to do so (§ 5).

With regard to the other functions that the consignment note may have (customs document, tax document etc.), it was clear from the beginning of the work that the requirements of national law, which are of a public nature, had to be taken into account.

After finalising the draft of the new Article 6a of the CIM UR, the experts of CIT and OTIF examined one by one all the provisions of the CIM UR that make reference to the consignment note, e.g. Article 7, "Wording of the consignment note", Article 8, "Responsibility for particulars entered on the consignment note", etc.

They concluded that these provisions should not be amended, as messages exchanged within the electronic system are equivalent to operations relating to the paper consignment note. However, they thought it useful and necessary to clarify this issue in the parts of the Explanatory Report dealing with Articles 6, § 2, 21, 43 and 44 of the CIM UR.

Proposed amendments to the Explanatory Report

With regard to Article 6 § 2 CIM

Add a paragraph as follows:

"The consignment note may be drawn up in electronic or paper form (see Art. 6a CIM). Messages exchanged in the framework of the electronic system are equivalent to operations relating to the paper consignment note (handing over of the consignment note and attached accompanying documents, handing over of the duplicate of the consignment note, withdrawal of the consignment note, etc.)."

With regard to Article 6a § 5

"In no case does Article 6a take precedence over the provisions of public law which impose paper procedures. This is particularly the case for accompanying documents, such as customs documents and sanitary and phytosanitary (SPS) certificates. In addition, not all the documents accompanying an electronic consignment note are necessarily paperless."

With regard to Articles 21, 43 and 44 CIM

Add a paragraph as follows:

"The main aim of presenting the original or the duplicate consignment note is to protect the consignor's interests (for example, to prevent an unauthorised person from giving orders or submitting a claim in place of the consignor) and the consignee's interests (for example, if the consignee has asked the consignor to provide the duplicate consignment note to prevent any subsequent modification of the contract of carriage, particularly when a consignment is subject to a documentary letter of credit. If an electronic consignment note is used, a printout corresponding to the original or to the duplicate of the consignment note must be presented in

place of these sheets from the consignment note. The consignment note guides issued by CIT clarify this situation."

Article 16 Transit periods

Sundays and statutory holidays are not necessarily non-working days in all the Member States. Moreover, statutory holidays vary considerably from one Member State to another. The Secretariat of OTIF was therefore of the view that this issue would be better dealt with under the general conditions of carriage, rather than in the CIM UR themselves. It therefore proposed to delete Article 6 § 4, second sentence, of the CIM UR, which reads as follows: "The transit period shall be suspended on Sundays and statutory holidays."

However, CIT's view, which the Secretary General shares, supports maintaining Article 16 § 4, second sentence of the CIM UR.

In a letter dated 26 September 2014, CIT raised the following arguments:

"If, for example, as a result of national law, the customs office at the border crossing is closed or there are traffic restrictions on Sundays or public holidays, but the transit period has not been suspended, it would be impossible for the carrier to deliver the consignment and he would therefore, in all probability, fail to keep to the agreed transit period. In addition to that, due to the operational procedures of the railways, it is not possible to reschedule the timetables on departure or in transit and this should also be taken into particular account.

Carriers are unable to make changes to their operations in order to compensate for this de facto dependence on the opening times of the marshalling yards or the relevant customs offices or accept any further reduction of the transit periods than those laid down in the CIM Uniform Rules, since the entire operational chain of the railways is based and predetermined on the *a priori* fixed timetables in the framework of the Forum Train Europe (FTE). This is the reason why carriers are tied to the current application of Article 16 § 4, sentence 2 of CIM."

This is why the Secretariat of OTIF proposes at this stage to withdraw the proposal to delete this provision, which it submitted to the 25th session of the Revision Committee (document CR 25/5).

Article 18 Right to dispose of the goods

Reasons for the proposed amendment

The proposed amendment to this provision has two elements:

- Firstly, to amend the title of Article 18.

It would seem appropriate to replace the expression "right to dispose of the goods" by "right to amend the contract of carriage", as the right to dispose of the goods is a term which is more generally used in a sales contract.

- Secondly, to amend § 3 of Article 18.

According to the current § 3, the right to modify the contract of carriage is transferred from the consignor to the consignee from the time when the consignment note is drawn up, unless the consignor indicates to the contrary on the consignment note. The solution adopted in the latest revision of the CIM UR is based on the CMR. However, it should be noted that the CMR only offers this solution if the consignor indicates this in the consignment note.

However, practice shows that this transfer of the right to modify the contract of carriage takes place much too early. It is therefore appropriate to propose that the consignor's right be transferred to the consignee later: unless the consignor indicates the place or time of the transfer in the consignment note (see Art. 12 § 3 CMR) or unless it is stated that the consignee is not authorised to give subsequent orders, this transfer should take place when the goods arrive in the country of destination (cf. Art. 31 CIM 1980).

Proposed amendment to the Explanatory Report

Add the following sentence to paragraph 2:

"The original title of Article 18 (Right to dispose of the goods) has been replaced by "right to amend the contract of carriage", as the right to dispose of the goods is a term which is more generally used in a sales contract.

"Since the entry into force of the 1999 CIM UR, practice has also shown that the solution adopted in the 1980 CIM UR for deciding the time at which the consignor could modify the contract of carriage, i.e. "when the consignment entered the territory of the country of destination", was easier to manage, both for the consignor and for the carrier, than the time at which the consignment note was drawn up. This is why adopted this amendment to § 3 of Article 18, returning to the wording of Article 31 of the 1980 CIM UR."

Article 19

Exercise of the right to dispose of the goods

Reasons for the proposed amendment

Only the title of the Article changes, with "Exercise of the right to dispose of the goods" being replaced by "Execution of subsequent orders", in order to take account of the amendment to the title proposed for Article 18.

Proposed amendment to the Explanatory Report

"The original title of Article 19, "Exercise of the right to dispose of the goods" has been replaced by "Execution of subsequent orders". This amendment takes account of the amendment to the title of Article 18."

Article 22

Consequences of circumstances preventing carriage and delivery

Reasons for the proposed amendment

The aim of this proposed amendment is to replace the term "consignor" with the term "person entitled" in Article 22, paragraph 6 of the CIM UR, which deals with the consequences of circumstances preventing carriage and delivery.

This provision is intended to protect the carrier in relation to problem goods (hazardous waste, etc.). It applies only if the circumstances cannot be avoided in accordance with §§ 2 and 3.

It must also apply when the consignee has modified the contract of carriage, and in this case the goods must be returned to the person from whom instructions have been requested, i.e. to the consignee who has modified the contract of carriage. In the latter case, a second contract of carriage, in the framework of which the consignee of the first contract would appear as the consignor, is not concluded; the original contract of carriage is simply modified.

Proposed amendment to the Explanatory Report

Add the following text to paragraph 3:

"..... .. decided to replace the term "consignor" by "**person entitled**". In practice, even though this provision only applies if the circumstances cannot not be avoided in accordance with §§ 2 and 3, the terms had to be harmonised in order to designate the carrier's final contact point and to speak in this sense of the person entitled (§§ 2 and 3) and not the consignor. This provision must also apply when the consignee has modified the contract of carriage, and in this case the goods must be returned to the person from whom instructions have been requested, i.e. to the consignee who has modified the contract of carriage. In the latter case, a second contract of carriage, in the framework of which the consignee of the first contract would appear as the consignor, is not concluded; the original contract of carriage is simply modified."

Article 42

Ascertainment of partial loss or damage

Reasons for the proposed amendment

The amendment to this provision follows the same approach as that adopted for the electronic consignment note, i.e. to give priority to drawing up a report in the form of electronic data registration (§ 2, paragraph 1). However, as for the electronic consignment note, the carrier and the person entitled may agree to draw up the report in paper format in those cases where they are obliged to do so (§ 2, paragraph 2). Therefore, the wording of § 2 of Article 42 is also still supplementary law.

Proposed amendment to the Explanatory Report

Add a new paragraph 3 as follows:

"....., decided to follow the same approach as that adopted for the electronic consignment note, i.e. to give priority to drawing up a report in the form of electronic data registration (§ 2, paragraph 1). However, as for the electronic consignment note, the carrier

and the person entitled may agree to draw up the report in paper format in those cases where they are obliged to do so (§ 2, paragraph 2).".

Article 13 Loading and unloading of the goods

Proposed amendment to the Explanatory Report

With regard to Article 13 CIM

Add a new paragraph 6 as follows:

"6. In § 2, the consignor's responsibility in terms of loading is to ensure that his activities do not compromise rail safety in normal conditions of transport. When complying with its safety obligations in accordance with Articles 6 § 2 and 15 § 3 of the current version of ATMF or the safety management system in EU law, the railway undertaking must ensure that it is able to detect any obvious loading anomalies."

Reasons for the proposed addition

A new paragraph 6 should be added to the comments on Article 13 of the CIM UR in the Explanatory Report.

During the discussions on the revised version of the UTP WAG at the 6th session of the Committee of Technical Experts (Geneva, 12 June 2013), a question was raised on Appendix I, 6th bullet point, which says that "The rail transport undertaking operating the train must make sure that freight vehicles are safely and securely loaded and remain so throughout the journey."

The need to ensure conformity with Article 13 of CIM was acknowledged. This Article reads as follows:

"§ 1 The consignor and the carrier shall agree who is responsible for the loading and unloading of the goods. In the absence of such an agreement, for packages the loading and unloading shall be the responsibility of the carrier whereas for full wagon loads loading shall be the responsibility of the consignor and unloading, after delivery, the responsibility of the consignee.

§ 2 The consignor shall be liable for all the consequences of defective loading carried out by him and must in particular compensate the carrier for the loss or damage sustained in consequence by him. The burden of proof of defective loading shall lie on the carrier."

These provisions provide a clear framework of responsibility between the consignor and the loader, which enables the consignor to be made responsible for the consequences of defective loading on his part. Nevertheless, the extent of this responsibility and how it is reconcilable with the railway undertaking's obligation to ensure the safe operation of the train is not made explicit.

To make it clear, at the 3rd and final meeting of the working group on the CUV UR held in Bern on 9 April 2013, in paragraph 8 of document CUV 3/3 dated 10 March 2014, the

Secretariat of OTIF proposed this addition and proposed to include this obligation in the part of the Explanatory Report which refers to Article 13 of the CIM UR.

After a presentation of this issue by OTIF and after a discussion, the delegates at that meeting agreed that it was appropriate to include this paragraph 6 in the comments in the Explanatory Report on Article 13 of the CIM UR.