



ORGANISATION INTERGOUVERNEMENTALE POUR LES TRANSPORTS INTERNATIONAUX FERROVIAIRES
ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBAHNVERKEHR
INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

CIM UR Working Group

2nd Session

Minutes

Berne, 18 March 2015

Agenda

1. Opening of the session
2. Election of Chairman
3. Partial revision of the CIM UR

Discussions

1. Opening of the session

Mr Davenne, the Secretary General, opened the session and welcomed the delegations of the Member States and international organisations and associations present at the 2nd session of the CIM UR working group, which the Revision Committee (25th session, Berne, 25 and 26 June 2014) had mandated to prepare a revision of the CIM UR, with particular attention to reasonable provisions to be put in place concerning the electronic consignment note. He particularly drew delegates' attention to the fairly tight deadlines. Using the written procedure, the Revision Committee would first have to approve the proposals to revise the CIM UR endorsed by the working group. This procedure would have to start on 30 March 2015 and finish on 20 April 2015. The proposals would then have to be submitted to the General Assembly so that it could deal with them. However, in accordance with the request made by the European Commission at the 25th session of the Revision Committee, these proposals would have to be sent out by no later than 15 May 2015.

2. Election of Chairman

The **working group** elected Belgium, in the shape of Mrs Clio Liégeois (Belgium) to chair this session.

Mrs Liégeois took the chair.

3. Partial revision of the CIM UR

- Doc. CIM 2/1 – Views of the Member States and the international organisations and associations concerned, and a new proposal by the OTIF Secretariat on the wording of Article 6a of the CIM UR and the amendment of Article 6 § 9 of the CIM UR
- Doc. CIM 2 – Position of the German delegation on the OTIF Secretary General's amended proposal of 10 February 2015 (document CIM 2/1)
- Doc. CIM 2 – Opinion of Mr Freise (consultant) on the OTIF Secretariat's proposal of 10 February 2015 to amend the CIM provision concerning the electronic consignment note
- Doc. CIM 2 – Belgium's position for the meeting of the CIM UR working group on 18 March 2015 concerning Article 6(a) § 1.

In reply to a question from the **chair** on the status of the consultant, Mr Freise, **DE** explained that this consultant had submitted his opinion on the new proposals to amend the CIM at the SG's request. This was his position as an independent consultant; it had not been coordinated with DE. However, in order that Mr Freise could take part in this session of the CIM working group, DE had agreed that he could be a member of its delegation.

a) Article 6a – Form of the consignment note

Before starting the discussion on the substance, the **European Commission** wished to express two general concerns. At the 25th session of the Revision Committee, the EU had been of the view that it was perhaps premature to give priority to the electronic consignment note, as the EU's current legislation did not provide any legal basis to make documents that have to accompany sanitary or phytosanitary goods available electronically. There had been no further developments in EU law on these points. The European Commission could not therefore rule out the EU's position being the same if proposals along these lines were submitted to the General Assembly. In addition, although it was

planned to mention it in the Explanatory Report, DG SANCO wanted it explained in the text of § 1 itself that the electronic consignment note and the accompanying documents are drawn up electronically, provided that the provisions of public law do not prescribe written procedures, which is particularly the case for accompanying documents, such as sanitary and phytosanitary certificates.

With regard to the European Commission's second concern, **DE** thought the addition requested by DG SANCO was superfluous, as Article 2 of the CIM UR stipulated explicitly that the prescriptions of public law, in particular the prescriptions relating to customs law and those relating to the protection of animals, take precedence. With regard to the rest, DE was still very reticent about the proposed amendments and the priority to be given to the electronic consignment note. When documents were drawn up in paper form, the parties did not have to agree a procedure to define what was meant by "paper" (components, grammage, etc.). The same was not true of electronic documents, which are not defined. The international legislator can leave it up to the parties to define them, provided they are told how they can do so, as functional equivalence has to be ensured. The legislator can also define them himself. Here, there is a genuine need for regulation. If the international legislator chooses the first solution, he must also ask himself what the consequences will be if the parties do not agree a technical procedure for the registration and treatment of data, which is operable for all parties interested in the performance of the contract of carriage (§ 1 of the proposal) and if they do not agree to establish the consignment note and the accompanying documents in paper form (§ 2 of the proposal). If they cannot agree on either of these, they will not be entitled to request that a consignment note be drawn up. However, according to the law as it stands (Article 6 § 2 of the CIM UR), the consignor, or the carrier, as the case may be, has this right, which is in the interest of the parties so that they can prove the content of the contract of carriage.

RS also had some concerns in terms of the proposals submitted, in that they would lead to increased legal uncertainty, as the consignment note is an element of proof of the contract of carriage. In addition, RS did not entirely understand why these proposals contained a rule and an exception. The draft law currently being scrutinised in Serbia included the possibility of establishing either a paper or an electronic consignment note.

The **SG** shared DE's view. Procedures would in fact have to be put in place. However, this was not obvious for the paper or for the electronic consignment note. It was up to the sector to put them in place. The existing provisions for the other transport modes, such as the e-CMR, were provisions of an extremely high level. Article 5 of the e-CMR could therefore be taken as a basis for specifying the essential elements necessary for the procedures for recording electronic data (see p. 3 of doc. CIM 2/1). This being the case, one question remained open, i.e. whether it was the right time to have a provision such as the proposed Article 6a.

FR was in favour of the new wording proposed for Article 6a, which made it possible to anticipate the future. In this respect, the question of the priority electronic documents should be given was unavoidable. In addition, the proposal did not entirely upset the relationships between the parties to the contract of carriage, as it would still be possible to use the paper consignment note.

BE shared FR's view. The big railway undertakings operating in Belgium were in favour of reversing the principle and the exception relating to the electronic consignment note. The text being discussed at this meeting must help the contracting parties to reach agreement, with the aim of serving their interests. In Belgium, the sector made extensive use of the electronic consignment note. The "Raildata" data exchange system developed by UIC was already used by 18 members; it had been developed under pressure from the EU, through the "e-RailFreight" project. A strong legal basis for the electronic consignment note was therefore necessary. Article 6a was a preliminary solution to give the electronic consignment note more legal certainty. The SG's proposal to have a § 1b) based on Article 5 of the e-CMR could form a line of approach to deal with DE's concern. The question raised by DG SANCO could be resolved by a reference to Article 2 of the CIM UR in the actual text of § 2 of the proposals. This § 2 could also set out the three hypotheses in which a paper consignment note

would have to be drawn up, i.e. when the parties do not agree on an electronic version, when they decide mutually to use the paper version and when the provisions of public law take precedence.

DE again underlined that from the point of view of the CIM UR, the consignment note fulfilled several functions (evidence, receipt and blocking). Electronic consignment notes were certainly already in use, but only railway undertakings are members of the "Raildata" system. Consignors and consignees are not part of this system and DE would not accept forcing the parties to the contract of carriage to join it and to use an electronic consignment note, especially as the sector is able to use electronic consignment notes on the basis of the existing CIM UR provisions.

The **delegations** agreed to say that the issue of the electronic consignment note is unavoidable, but that there are still a number of questions. More time would be needed to examine these questions, but the current very tight deadlines did not allow this. In the meantime, CIT was invited to consult its members so that they could examine and define the various elements that were necessary. Nevertheless, the chair's proposal to set out the three hypotheses in which a paper consignment note would have to be drawn up and to include Article 5 of the e-CMR in the text were considered relevant ways of improving the text.

CIT explained that the major railway undertakings were going to set up electronic platforms to enable them to act together with their customers. It would consult its members and continue to examine the situation, starting with the functional requirements. CIT thought it would be in a position to report in 2016 on what could be done within the sector in 2016, and on what the electronic consignment note should contain, based on lessons learnt from operations.

The **SG** understood from these discussions that the working group thought it was premature to agree to proposed amendments concerning the electronic consignment note. He proposed only to maintain the editorial amendment made necessary to Article 6 § 7 of the CIM UR, to replace "**European Community**" by "**European Union**", to take account of the new title of the European Community since the entry into force of the Treaty of Lisbon. This editorial amendment would be submitted to the Revision Committee using the written procedure. He also suggested continuing to discuss the proposed amendments. These could be used as a basis for future discussions. The SG would also submit a report to the General Assembly on the conclusions this working group had reached and on the need for a working group set up by the Secretary General to continue discussions on the electronic consignment note, once the sector had re-examined in particular the functional requirements of the electronic consignment note.

Following these discussions, the **working group** endorsed the editorial amendment to Article 6 § 7 of the CIM UR, which would be submitted to the Revision Committee for adoption using the written procedure.

Following the chair's constructive proposal, it also endorsed the following text, which still has to be examined in depth, but which could be used as a basis for future consideration in a working group set up by the Secretary General, which would probably meet in 2016:

- "§ 1 The consignment note and accompanying documents shall be established in the form of electronic data registration. To this end, the parties to the contract of carriage are required to define a technical procedure for the recording and processing of data that is operable for all parties interested in the performance of the contract of carriage.
- § 2 Without prejudice to § 1, the parties to the contract of carriage may agree to establish the consignment note and the accompanying documents in paper form, if no agreement can be found according to § 1, if the parties to the contract of carriage agree to do so, or if they are obliged to do so in accordance with Article 2.
- § 2b The procedure used for recording and processing data shall contain, in particular:

- (a) The method for establishing and handing over the electronic consignment note to the party entitled;
- (b) The manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement;
- (c) The way in which confirmation is given that delivery to the consignee has been effected;
- (d) The procedures for supplementing or amending the electronic consignment note;
- (e) The procedures for the possible replacement of the electronic consignment note by a consignment note issued by different means.

§ 3 The procedure used for the registration and treatment of data must be equivalent from the functional point of view to the paper form, particularly so far as concerns the evidential value of the consignment note represented by those data.

§ 4 The procedure for establishing the electronic consignment note and the accompanying electronic documents shall ensure the integrity and reliability of the information they contain from the time they are established.

§ 5 The procedure agreed between the parties to the contract of carriage for filling out or amending the electronic consignment note shall enable identification of the amendments made. It shall also enable the original information contained in the electronic consignment note to be kept.

§ 6 The electronic consignment note shall be authenticated by the parties to the contract of carriage.

Authentication shall be carried out by means of an electronic signature or another appropriate method that ensures its link with the electronic consignment note."

It also emerged from the discussions that in future considerations, the provisions of the e-CMR should be used as a basis and it would also have to be checked whether text should be added to Article 6 § 8 of the CIM UR to say that the international associations of carriers must agree on the electronic data registration procedures.

It would be up to the international organisations of carriers, in this case the CIT, to specify what would be useful and necessary in practice to enable the parties to agree on the procedures used for recording and processing electronic data operable for all parties interested in the performance of the contract of carriage.

b) Article 42 – Ascertainment of partial loss or damage

The **working group** agreed to say that the considerations taken into account for the electronic consignment note must also be used as a basis for future discussions on the priority to be given to the electronic form of the ascertainment of partial loss or damage (report).

c) Article 18 – Right to dispose of the goods

DE explained its concerns with regard to the proposed amendment to Article 18 § 3. Neither the consignor nor the consignee are in a position to determine the precise time at which a consignment enters the territory of the country of destination. Only the carrier has this information. In other words, the actor who might be liable, i.e. the carrier, could exempt himself by means of information which he

alone possesses. Discussions within the UNECE on a new unified legal instrument for the carriage of goods by rail in Eurasia had certainly shown that the current CIM provision is perhaps a little inapt, but that it did not cause any harm and that time should be taken to think about it before changing it.

CIT confirmed that the discussions within the UNECE showed this issue in a new light. **CIT** would discuss this in a working group and suggested not to amend Article 18 § 3 of the CIM UR for the time being.

The **working group** agreed to say that the amendment to Article 18 § 3 of the CIM UR is postponed until the discussions initiated by the UNECE shed more light on the issue and until the sector examines the matter further.

d) Proposed addition to the Explanatory Report concerning Article 13 of the CIM UR

BE was opposed to this amendment, which ran the risk of burdening the carrier with more liability.

DE and **RS** supported the **BE** position and **FR** entered a scrutiny reservation on this addition.

The **working group** agreed to say that the proposed addition was not endorsed.

The **SG** emphasised that the Committee of Technical Experts (CTE) had also studied this issue. It would certainly come up again at CTE, as it concerned a genuine question in terms of legal certainty for railway undertakings.

DE (consultant) commented that it was not just a technical issue and that the legal experts should be consulted before any final decision. Anything to do with liability was in fact something which required a legal opinion in private law.

DE added that it assumed that CTE would not discuss the CIM UR and would not deal with the law on contracts of carriage, but with questions that come under the provisions of public law.

The **SG** confirmed that the legal experts would be consulted and that CTE would not discuss the CIM UR. This issue was nevertheless on the boundary between the two regulations; it would certainly be necessary to work on a proper interdisciplinary basis.

Annex: List of participants



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ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBahnVERKEHR
INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

2^{ème} session Groupe d'experts RU CIM
2. Sitzung der Arbeitsgruppe ER CIM
2nd session of the Working group CIM UR
(Berne, Bern, 18.03.2015)


Liste des participants
Teilnehmerliste
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INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

**Groupe de travail « RU CIM »
Arbeitsgruppe „ER CIM“
Working group “CIM UR”**

**CIM 2/1
10.02.2015**

Original : FR

2nd Session

Views of the Member States and the international organisations and associations concerned, and a new proposal by the OTIF Secretariat on the wording of Article 6a of the CIM UR and the amendment of Article 6 § 9 of the CIM UR.

1. Electronic consignment note (Article 6a):

1. At its 25th session (Berne, 25 and 26 June 2014), the Revision Committee decided in accordance with Article 22 of its Rules of Procedure to set up a working group to prepare a revision of the CIM UR, with particular attention to provisions to be put in place concerning the electronic consignment note.

At the 1st session of the CIM UR working group held in Berne on 9 December 2014, in order to analyse the revision of the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM - Appendix B to the Convention) in line with the wishes of the 25th session of the Revision Committee, several suggestions were made to amend the proposed wording of Article 6a.

Within the deadlines prescribed by the Revision Committee's Rules of Procedure, the Secretariat agreed to send the OTIF Member States, the regional organisations that have acceded to COTIF and the international associations concerned new wording for Article 6a to enable the Member States and stakeholders to give their opinions at another meeting of the working group, which will be held in Berne on 18 March 2015.

2. The Secretariat received formal comments from France, the European Commission (DG TAXUD and DG SANCO) and from the International Association of Tariff Specialists. These comments are attached in the annex. In general, they are in line with the Secretariat's proposal, but with some questions on some of the wording.

In particular, with regard to the first paragraph, the Commission has asked whether the expression "operable for all parties interested in the performance of the contract of carriage" is relevant. Certainly some actors in the contract of carriage might not be able to use all or part of the electronic procedure and might have particular requirements (particularly in terms of the implementation deadline), without this calling into question the general agreement.

The Secretariat is of the view that the text in square brackets should be retained for discussion at the working group, particularly in light of the sector's view.

In addition to a few editorial amendments, the Commission also wondered about the principle of functional equivalence. As there had been a consensus on this in the working group, the Secretariat proposes that it be maintained.

3. Following these exchanges, the Secretariat considers that the following principles for amending Article 6a are valid:

- a) The principle of functional equivalence of electronic data registration with the paper form should be established by adapting the sentence in the current Article 6 § 9 CIM, which would be added to § 3 of Article 6a of the draft CIM. Those who took part in the 1st session of the working group adopted this principle by consensus.
- b) The sentence in Article 6a § 5 of the draft CIM stipulating that the parties may agree to establish the consignment note and the accompanying documents in paper form should be integrated into a specific paragraph 2. Indeed, if the parties do not agree to establish a consignment note in an electronic format, or if there are any provisions of public law preventing them from doing so (customs or phytosanitary provisions), it should be possible to establish the consignment note in a paper format. This point must be made clear in the

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

- c) The Secretariat is of the view that a model procedure for establishing the electronic consignment note could be defined in accordance with Article 6 § 8 of the CIM. As this paragraph says, "the international associations of carriers shall establish uniform model consignment notes in agreement with the customers' international associations and the bodies having competence for customs matters in the Member States as well as any intergovernmental regional economic integration organisation having competence to adopt its own customs legislation". The parties to the contract of carriage could therefore agree to use such a model.
- d) In light of the above, it might however be timely to determine whether it is necessary to specify the essential elements that are necessary for the electronic data registration procedure. In this case, the Secretariat considers that Article 5 of the e-CMR could be taken as a basis. In order to give the international associations a common framework, consideration could be given to examining whether it is necessary to add the following paragraph 1b to Article 6a:

§ 1b *The procedure used for recording and processing data shall include, in particular:*

- a. the method for establishing and handing over the electronic consignment note to the party entitled;*
- b. the manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement;*
- c. the manner in which confirmation is given that delivery to the consignor has taken place;*
- d. the procedures enabling the electronic consignment note to be supplemented or amended; and*
- e. the procedures for the potential replacement of the electronic consignment note by a consignment note established by other means.*

4. The Secretariat therefore proposes the following text for discussion. The text takes account in square brackets of the various options and contains provisions based on e-CMR:

Article 6a CIM – Form of the consignment note

§ 1 The consignment note and accompanying documents shall be established in the form of electronic data registration [, provided that a technical procedure for the registration and treatment of data, which is operable for all parties interested in the performance of the contract of carriage, is agreed between the parties].

§ 2 The parties to the contract of carriage may agree to establish the consignment note and the accompanying documents in paper form.

§ 3 The procedure used for the registration and treatment of data must be equivalent from the functional point of view to the paper form, particularly so far as concerns the evidential value of the consignment note represented by those data.

§ 4 The procedure for establishing the electronic consignment note and the accompanying electronic documents shall ensure the integrity and reliability of the information they contain from the time they are established [*alternative*: the information contained therein from the time it was first generated in its final form].

§ 5 The procedure agreed between the parties to the contract of carriage for filling out or amending the electronic consignment note shall enable identification of the amendments made.

It shall also enable the original information contained in the electronic consignment note to be kept.

§ 6 The electronic consignment note shall be authenticated [by the parties to the contract of carriage].

Authentication may [*alternative*: shall] be carried out by means of an electronic signature or another appropriate method [that ensures its link with the electronic consignment note].

2. Article 42 Ascertainment of partial loss or damage

5. If the question of amending Article 6a is resolved, it would also be appropriate for the report on partial loss or damage to be established primarily in the form of electronic data registration.

For this reason, the Secretariat of OTIF again submits the following proposal to amend Article 42:

[...]

§ 2 ~~A copy of the report must be supplied free of charge to the person entitled.~~

§ 2 **The report must be drawn up in the form of electronic data registration and must be transmitted free of charge to the person entitled.**

The carrier and the person entitled may agree to draw up the report in paper form. A copy of the report must be supplied free of charge to the person entitled.

6. It would therefore be wise to add a new paragraph 3 to the Explanatory Report on Article 42, 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).".

3. Withdrawal of the proposals to amend Articles 18, 19 and 22 of the CIM UR.

7. At the 1st session of the working group, there was no unanimity or consensus among the participants in terms of amending Articles 18, 19 and 22 of the CIM UR.

It is therefore proposed not to follow up these proposals.

However, it would also be appropriate to take into account the latest discussions of the UNECE Group of Experts working on the unification of international railway law, with the objective of allowing rail carriage under a single legal regime. The Group of Experts is working on ideas similar to the amendment to Article 18 § 3 proposed by OTIF concerning the consignee's right to modify the contract of carriage.

The Secretariat of OTIF believes it is necessary to reword this proposal to amend Article 18, paragraph 3 of the CIM UR.

Article 18: Right to dispose of the goods

[...]

§ 3 The consignee shall have the right to modify the contract of carriage from the time when ~~the consignment note is drawn up~~ **the consignment enters the territory of the country of destination**, unless the consignor indicates to the contrary on the consignment note.

[...]

8. The Secretariat supports this proposed amendment. According to the current Article 18 § 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. This solution, which was adopted during the last revision to the CIM UR, is based on CMR, even though CMR only foresees this solution if the consignor explicitly allows it to be used in the consignment note.

However, according to transport operators, this transfer of the right to modify the contract of carriage takes place much too early. Unless the consignment note contains an explicit entry on the place or time at which the consignee is authorised to modify the contract (see Art. 12 § 3 CMR), or unless there is an entry saying that the consignee is not authorised to give subsequent orders, the right time for this transfer is when the goods arrive in the country of destination.

Moreover, the provision remains suppletory and when the contract is established, the parties may make other arrangements.

4. Proposed addition to the Explanatory Report concerning Article 13 of the CIM UR.

9. As it proved impossible to reach a consensus on this amendment, the Secretariat proposes that it be discussed again at the 2nd session of the group.

In fact, the proposed amendment was to add a new paragraph 6 to the Explanatory Report and Article 13, 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."

The Secretariat had introduced this proposal at the Revision Committee and the first session of the CIM working group, pointing out that it was a consequence of the issues dealt with at the meetings of the CUV working group in 2014. The question that **CER** had raised was what the consignor's responsibility is in terms of loading and what the transport undertaking's responsibility is in terms of checking the load, in order to determine responsibility for ensuring that the wagon is properly loaded.

10. 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 third and final meeting of the working group on the CUV UR held in Bern on 9 April 2014, 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.

At the CUV working group, there was a consensus on this proposal and it is therefore proposed that it be discussed at OTIF's next General Assembly.

ANNEXES:

Comments:

France

The European Commission (DG TAXUD and DG SANCO)

The International Association of Tariff Specialists

From: THIAM Mafal - DGITM/DST/SRF3 [mailto:mafal.thiam@developpement-durable.gouv.fr] Sent: Tuesday, 10 February 2015 14:49
To: Jäggi Françoise
cc: "CHEVALIER Benoit (Chargé de la sous-direction) - DGITM/DST/SRF"; helene.barthelemy@developpement-durable.gouv.fr; BRUN Jimmy (Chef de bureau) - DGITM/DST/SRF3
Ref: Position of France on the proposal to amend Article 6 § 9 of the CIM

Dear Madam,

At the first session of the "CIM UR" working group held in Berne on 9 December 2014, the Revision Committee adopted a proposal aimed at amending Article 6 of CIM (Appendix B) concerning the consignment note.

The Secretariat sent the Member States of OTIF and the regional organisations that have acceded to COTIF a new wording for this Article. In this case, it is a matter of replacing the current Article 6 § 9 by an Article 6a.

In view of the content of the amendments made, France has no comments on them and would like to inform you that it agrees with the proposed wording of Article 6a.

Mafal THIAM
Head of international conventions, Ministry of Ecology, Sustainable Development and Maritime Affairs, Transport Services Division, Office of Rail Regulation, Tel. 00 33 1 40 81 78 75

Article 6a CIM - Form of the consignment note

§ 1 The consignment note and accompanying documents shall be established in the form of electronic data registration [, provided that a technical procedure for the registration and treatment of data, which is operable for all parties interested in the performance of the contract of carriage is agreed between the parties].

The text in brackets is not necessary as it poses a question on the agreement between the parties and on the interested parties. Some party might be interested but is not able to join the agreement yet. Other party might decide to join later and would like to change something in the technical procedure.

Alternatively I propose to delete the text ', which is operable for all parties interested in the performance of the contract of carriage'. The common technical procedure should be agreed between all parties so that they all can implement the procedure, even though in different time frame.

The parties to the contract of carriage may agree to establish the consignment note and the accompanying documents in paper form.

This sentence should be a separate paragraph. It would serve as an easier reference.

§2 The procedure used for the registration and treatment of data must be equivalent from the functional point of view to the paper form, particularly so far as concerns the evidential value of the consignment note represented by those data.

It is not very clear what is meant by the *functional point of view*. The procedure is not the same for paper and electronic environment. Functional specification is usually needed for the electronic environment. However, it must be ensured that data are the same and have the same value. I don't think it is necessary to specify this fact.

§ 3 The procedure for establishing the electronic consignment note and the accompanying electronic documents shall ensure the integrity and reliability of the information they contain from the time they are established [*alternative* : the information contained therein from the time it was first generated in its final form].

The initial text seems preferable to the alternative proposal in brackets.

§ 4 The procedure agreed between the parties to the contract of carriage for filling out or amending the electronic consignment note shall enable identification of the amendments made.

It shall also enable the original information contained in the electronic consignment note to be kept.

§ 5 The electronic consignment note shall be authenticated [by the parties to the contract of carriage.]

Authentication may [*alternative*., shall] be carried out by means of an electronic signature or another appropriate method [that ensure its link with the electronic consignment note].

Dear Laszlo,

Thank you for bringing this to our attention.

I think the German proposal is better than the original proposal, however, we need to include a reference to “where appropriate” to cover the cases in which there is no legal basis for electronic certification. In the German proposal I like the details for the agreement, as I think it would be useful to lay down such details.

In any case, for the SPS certificates, the choice between electronic and paper form is not up to the contracting parties but depends on the provisions of the SPS regulations. Therefore, some wording should refer to the existence of such legislation. We know that it was planned to add something about it in the Explanatory Report, but we are wondering if it would not be clearer to include it in Article 6a(§1).

For instance:

"The consignment note and accompanying documents shall be established in electronic or paper form, provided that it is in line with the provisions of the relevant laws. This is particularly the case for accompanying documents, such as sanitary and phytosanitary certificates".

Kind regards –

Patricia

From: Logotrans [mailto: logotrans@aon.at]

Sent: Monday, 19 January 2015 10:46

To: info@otif.org

Ref: Art. 6a CIM

Dear Sir/Madam

The International Association of Tariff Specialist (IVT) submits the following suggestions:

The International Association of Tariff Specialists (IVT) thanks the Secretariat of OTIF for circular GZ A-72-00/501.2014 dated 12.1.2015 and for the opportunity to make comments on the Secretariat's amended text proposal for Article 6a of CIM contained in the circular.

IVT would like to submit the following suggestions on the individual paragraphs of the amended text:

On § 1

In principle, IVT supports the content of both the proposed addition in square brackets and the proposed addition marked "§ 1b" concerning the procedure for the registration and processing of data.

IVT suggests that these texts be amalgamated, consolidated and editorially adapted in a revised § 1, as follows:

"§ 1 The consignment note and accompanying documents shall be established in the form of electronic data registration.

The parties to the contract of carriage shall agree a technical procedure for the registration and treatment of data, which shall contain the following elements in particular

- a) The method for the issuance and the handover of the electronic consignment note to the entitled party;
- b) The manner in which the party entitled to the rights arising out of the electronic consignment note is able to demonstrate that entitlement;
- c) The way in which confirmation is given that delivery to the consignee has been effected;
- d) The procedures for supplementing or amending the electronic consignment note; and
- e) The procedures for the possible replacement of the electronic consignment note by a consignment note issued by different means.

The parties to the contract of carriage may agree to establish the consignment note and the accompanying documents in paper form if the technical procedure for the registration and treatment of data is not operable for certain parties interested in the performance of the contract of carriage."

On § 2

It is questionable whether additional value as a legal standard can be attributed to this text. Would it not be better to place it in the Explanatory Report as an explanation on what Article 6a aims to achieve?

On § 3

The alternative in square brackets is preferable, as establishing the consignment note is a process in which amendments can still be made.

The following only concerns the German text:

It should be pointed out that the German terms “verlässlich und vertrauenswürdig” (integrity and reliability) originate from a national translation (of the additional protocol to CMR), and do not correspond to the original French “intégrité”. Consequently, the words originally proposed in German, “vollständig und unversehrt” (complete and intact), should be maintained.

On § 4

No comments.

On § 5

The text in square brackets is preferable in both cases.

From: "G. Beate Czerwenka" <czerwenka-be@bmjv.bund.de>

Date: Thursday 19 February 2015 13:19

To: François Davenne <francois.davenne@otif.org>

Cc: B <ref-la11@bmvi.bund.de>, Thomas von Gäßler <thomas.gaessler@bmvi.bund.de>, László Polgár <Laszlo.POLGAR@ec.europa.eu>, Anja Reifenrath <reifenrath-an@bmjv.bund.de>, David Ashman <David.Ashman@otif.org>, Rainer Freise <rhfreise@t-online.de>, Carlos del Olmo <Carlos.DelOlmo@otif.org>

Ref: Electronic consignment note (Article 6a CIM)

Dear Mr Davenne,

In order to facilitate the discussions at the meeting of the CIM working group in March, please find attached a position on your new proposals in document CIM 2/1. I should be grateful if you would translate and distribute the position.

With kind regards

Dr. Czerwenka

Dr. G. Beate Czerwenka, LL.M. (Duke Univ.)
Ministerialrätin

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Position of the German delegation
on the OTIF Secretary General's amended proposal of 10 February 2015
(document CIM 2/1)

1. The German delegation maintains that there is no need for the proposed amendment to the rule concerning the consignment note. The possibility of using an electronic consignment note already exists. If a rule is nevertheless made, the German delegation is of the view that it is in any case necessary to maintain the existing principle that unless agreed otherwise, the consignment note must be drawn up in paper form.

The proposed Article 6a § 1 of CIM communicates the existing relationship between the rule and the exception. This is because it prescribes the use of an electronic consignment note; in § 2, the parties to the contract of carriage are only allowed to agree that the consignment note and accompanying documents will be drawn up in paper form. It is true that § 1 does still contain the addition in square brackets "[provided that a technical procedure for the registration and treatment of data, which is operable for all parties interested in the performance of the contract of carriage, is agreed between the parties]". But even if this addition in square brackets is retained, there is no fall-back provision to say that if such a procedure is not agreed, a paper-based consignment note has to be issued. If the parties have not agreed a certain procedure and do not agree to draw up the agreement in paper form, it is no longer possible to comply with the first sentence of Article 6 § 2 of CIM, according to which the contract of carriage must be confirmed with a consignment note. The proposed Article 6a § 1 and 2 of CIM would therefore complicate the processing of cross-border rail transport operations. Consequently, changing the relationship between the rule and the exception, as proposed by the Secretary General of OTIF, is a cause for concern.

2. It does not seem necessary to clarify in the Explanatory Report that Article 6a of CIM in no case takes precedence over the provisions of public law that prescribe the paper form. This is already dealt with explicitly in Article 2 of CIM.
3. There are some concerns about the proposal on Article 18 § 3 of CIM. As the discussions at the UNECE Group of Experts mentioned by the Secretary General have shown – and these discussions have certainly not been concluded – a rule saying that the right of disposal is transferred to the consignee when the consignment enters the territory of the country of destination causes problems: neither the consignor nor the consignee are in a position to determine the precise time at which the consignment enters the territory of the country of destination. This is because these persons do not accompany the consignment and they have to rely on the carrier's information. In consequence, without this information, they do not know who has the right of disposal either. There is concern about making the exercise of the right of

disposal dependent upon information from the person to whom the order is addressed and who might be liable for the consequences of failure to carry out an order or failure to carry it out properly (Article 19 § 6). Added to this is the fact that the consignee will often not be in a position to provide the duplicate of the consignment note. However, according to Article 19 § 1 of CIM, this is necessary in order to exercise the right of disposal. Therefore, the consequence of the rule being proposed is that at the time the consignment enters the territory of the country of destination, neither the consignor nor the consignee can exercise a right of disposal. This does not seem justifiable.

The Secretary General's remark that "the provision remains suppletory and ... the parties may make other arrangements" does not resolve the concerns expressed above. It should first be pointed out that this remark is probably not covered by the CIM, because according to Article 5 of CIM, any stipulation which, directly or indirectly, would derogate from CIM, is null and void; other arrangements would only apply if the CIM explicitly allow them. However, Article 18 of CIM does not permit any contractual derogations. If Article 18 of CIM is to be formulated as a dispositive rule, Article 18 § 3 of CIM could be amended as follows:

- § 3 The consignee shall have the right to modify the contract of carriage at an earlier time than that specified in § 2 a) to c), provided this is indicated on the consignment note.

**Opinion on the OTIF Secretariat's proposal
of 10 February 2015
to amend the CIM provision concerning the electronic consignment note**

1. The proposal to replace the current Article 6 § 9 CIM by a new Article 6a CIM must be seen in connection with the UNECE's creation of a new uniform legal instrument for Euro-Asian rail freight transport. This is because the aim of this legal instrument is to build a bridge between CIM and SMGS. It would therefore appear not to make much sense for the two sets of regulations to develop along different lines. On the contrary, coordinated, parallel development is preferable.
2. For the new uniform legal instrument, it is currently anticipated that the traditional paper consignment note *may* be replaced by an electronic consignment note. This corresponds to the current rule in Article 6 § 9 CIM and in other international conventions. These regulations prescribe that the paper consignment note is the general rule, but that the parties can agree to use an electronic consignment note. This approach ensures that the paper consignment note, which can satisfy the legal requirements for a transport document more easily and more reliably than electronic data registration has so far been able to do (particularly with regard to evidential value), continues to form the basis for processing international freight transport. The parties will make use of an electronic version when they can be sure that it is functionally equivalent to the physical consignment note or if they do not think the evidential value is important.
3. The conclusion for the time being is that the new uniform legal instrument being developed by the UNECE and the existing international conventions provide a simple solution (the paper consignment note) as a basic solution and they leave it up to the parties whether they wish to choose a more complex electronic procedure, which is ultimately at their own risk. This relationship between the rule and the exception should be maintained.
4. The OTIF Secretariat's latest draft of Article 6a CIM shows all too clearly the difficulties and uncertainties that can arise as a result of replacing the paper consignment note by an electronic consignment note if the parties have perhaps not complied with the complex requirements relating to the electronic consignment note:

According to § 1, the consignment note *shall be established* in the form of electronic data registration – but only if the parties have agreed a technical procedure which is operable for all parties interested in the performance of the contract of carriage. But what happens if the parties are unable to agree such a procedure? Does the obligation to use an electronic consignment note then lapse, or are sanctions imposed on them so that they make efforts to meet the requirements after all? And if the obligation to use the electronic consignment note does lapse, what then applies? Must the parties then agree to use a paper consignment note or is this automatically a fallback solution, even though this is not specified in the draft?

Constructing the law in this manner goes against the principles and logic of legislation: a legally prescribed "shall" cannot be made dependent upon the person subject to the law choosing whether he satisfies certain requirements. In contrast, a legal "may" can certainly be made dependent upon the participants who wish to make use of this "may" first checking whether they can or whether they wish to satisfy certain requirements.

This observation also supports maintaining the current relationship between the rule and the exception in terms of the paper and electronic consignment note.

5. §§ 3 to 6 of the proposed Article 6a CIM contain further "shall" provisions which are difficult to implement in practice and which, in many cases, the parties are perhaps unable to comply with, or at least not reliably. In these circumstances, it must be anticipated that if the new Article 6a CIM enters into force, the parties will, as a precaution, make regular use of the means of escape offered by § 2 of this Article and agree to use a paper consignment note. The desired aim of the proposed change to the law, which is to promote use of the electronic consignment note, will certainly not be achieved in this manner.

6. Conclusion

It is recommended that the paper consignment note be maintained as the norm and that the parties be given the possibility of using an electronic consignment note.

It is also recommended that the legal text should only set out the basic requirements that an electronic consignment note must meet, and that the detailed features should be left up to the contracting parties, with support from their associations.

Lastly, it is recommended that for the time being at least, the requirements for the functional equivalence of the electronic and paper consignment notes should not be dealt with in the CIM, as some of the issues here are still not clear and are controversial. The UNECE instrument takes this into account and its Article 4, paragraph 2 is worded more flexibly: *If* electronic data registration performs the same functions as a (paper) consignment note, it is *then* equivalent to the paper consignment note. It is up to the courts to decide whether this is the case.

Overall, it is advised to synchronise the revision of Article 6 § 9 CIM with developments in the corresponding provisions in the UNECE's legal instrument.

From: Clio Liegeois [<mailto:Clio.Liegeois@mobilite.fgov.be>]

Sent: Monday, 16 March 2015 09:04

To: info

cc: Jäggi Françoise

Ref.: TO THE MEMBER STATES OF OTIF AND TO REGIONAL ORGANISATIONS WHICH HAVE ACCEDED TO COTIF – A 72-00/506.2015 – CIM Working Group – Minutes of the 1st session (Berne, 9 December 2014)

Good morning

With regard to the meeting of the working group on CIM UR, please find attached Belgium's written position on the revision of Article 6a of CIM.

May I ask you to transmit this to the participants as a meeting room document in order to simplify the discussion?

Thank you.

Yours etc.

Clio Liégeois



Clio LIEGEOIS

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Belgium's position concerning Article 6(a) § 1 for the meeting of the CIM UR working group on 18 March 2015

Belgium supports the proposed addition to § 1 of the new Article 6a of CIM.

However, following consultation with the rail sector, Belgium would like to make the following comment:

Paragraph 1 mentions the obligation for the parties to the contract of carriage who wish to use an electronic consignment note to agree "a technical procedure for the registration and treatment of data, which is operable for all parties interested in the performance of the contract of carriage." This implies that the specifications for the electronic exchange of data between the carriers concerned have to be included in a contract of cooperation between them. In this regard, this new possibility in the scope of application of COTIF must not be allowed to lead to the proliferation of data exchange systems. Such proliferation would have a negative impact on the competitive strength of international rail freight transport. In principle therefore, priority should be given to electronic data exchange through a unique system under COTIF.

"Raildata" is a data exchange system developed by UIC and used by 18 members. This data exchange system was developed under pressure from the EU in the framework of the eRailFreight project and the sector does not wish to discuss a new standard again, now that this is an issue that has been dealt with and which functions.

Consequently, Belgium would like the comment relating to this new Article to say that the proliferation of data exchange systems must be avoided by requiring the parties to agree on this matter.

Proposed amendments to the Explanatory Report

With regard to Article 6 § 1 CIM

"The requirement for the parties to agree a technical procedure for the registration and treatment of data, which is operable for all parties interested in the performance of the contract of carriage, implies that it is up to these parties to lay down in a contract the specifications for the electronic exchange of data between them. In this regard, it is important to avoid the inclusion of this new possibility in the scope of application of COTIF being allowed to lead to the proliferation of data exchange systems. The parties should therefore be encouraged to agree a unique system for the exchange of data in an electronic format."

