

**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.