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Contribution to the 19th session of the UN ECE Group of Experts towards Unified Railway Law, meeting on 2-4 April 2019: Options available for converting URL into a legally binding instrument – URL as contract of carriage's convention

1. INTRODUCTION

The subject matter concerns rail contractual law for international traffic in Eurasia that is currently managed through two distinct legal regimes:

1. The COTIF Convention administered by the Intergovernmental Organisation for International Carriage by Rail (OTIF), which involves 50 States, including 26 EU Member States (the European Union is also a Contracting Party since 2011);
2. The Agreement on International Traffic by Rail (SMGS) administered by the Organisation for Co-operation between Railways (OSJD), which involves 29 States, including 9 EU Member States from eastern/south-eastern Europe.

In the pan-European region, these uniform rules have been developed and applied for more than 100 years within OTIF, and cover all different types of contracts dealing with international railway traffic, in particular for the carriage of goods, carriage of passengers, carriage of dangerous goods, use of infrastructure, use of vehicles. The EU and 26 EU Member States are members of OTIF, which allows OTIF rules to (1) develop consistently and coherently with the EU rail acquis, and (2) support the promotion and extension of EU rail interoperability standards and safety management systems, to the benefit of EU rail operators and rail industries. On the other hand, the Russian Federation and most of the central Asian countries are members of OSJD, created in 1956, and all contracts for international carriage of goods by rail through one of these countries must apply OSJD rules. As a result, shippers and operators involved in Eurasian rail (freight) transport have to establish two distinct contracts, under two different legal and liability regimes. This is considered an impediment to the growing traffic of rail freight between Europe and Asia, and to the competitiveness of rail transport for this type of service.

2. UNIFIED RAILWAY LAW INITIATIVE

The Unified Railway Law initiative aims at solving this issue. It started in 2011 at the United Nations Economic Commission for Europe (UNECE) in a form of a Group of Experts towards Unified Railway Law (GEURL), reporting to the Working Party on Rail Transport, under the Inland Transport Committee.

In February 2013, the project received political support as 37 member countries of UNECE (including 20 EU Member States) signed the Joint Declaration on the promotion of Euro-Asian rail transport and activities towards unified railway law (https://www.unece.org/trans/main/sc2/sc2_geurl_itc_declaration.html).

During the following years (2013-2018), the group of experts managed to develop draft Legal Provisions on Unified Railway Law (URL) for contract of carriage of goods, which could provide the legal basis for a single contract of carriage and a single liability regime (also using a single consignment note). This was specifically designed for Euro-Asia rail freight services only, i.e. when neither the provisions of OTIF nor OSJD alone apply on the entire journey (interface law, i.e. not applicable within the OTIF or the OSJD region). The URL would be an opting-in solution and alternative to the current situation requiring the performance of a double contract.

In February 2018, the UNECE Inland Transport Committee (ITC) approved the extension of the mandate of the Group of Experts for two more years under new Terms of Reference, which provide that the group should:

- 1) Organize and monitor a series of real pilot tests on designated rail freight corridors to validate the draft Legal Provisions;
- 2) Prepare a formal document or system of documents that could be proposed for adoption by UNECE as a legally binding instrument (possibly an international convention);
- 3) Discuss other relevant issues related to international rail freight transport for possible inclusion in the scope of the initiative (dangerous goods; use of freight wagons; rail infrastructure; rolling stock).

The GEURL has met twice in 2018 (July, October), and should meet three times in 2019 (April, July, October), before concluding its activities with the transmission of a report to the Working Party on Rail Transport at its 73rd session (November 2019).

3. PURPOSE OF THE CONTRIBUTION TO THE 19TH SESSION OF THE GEURL

The main potential benefit of URL is to provide for a single contractual regime for rail freight transport service across Eurasia, which should ease rail transport operation and procedures, in particular with China. The URL initiative meets the interest of the Union, as quoted and underlined in the recent Communication “Connecting Europe and Asia - Building blocks for an EU Strategy” of 19 September 2018 (JOIN(2018) 31 final).

The new terms of reference also mandates the group of expert to: (a) prepare the necessary provisions and document to formalize the draft Legal Provisions into a legally-binding document; (b) consider extending the scope of URL to cover additional relevant areas, pertaining to dangerous goods; use of freight wagons; rail infrastructure; rolling stock. The combination of these objectives, if not properly controlled, could result in an additional legal regime which could conflict or overlap with the scope of OTIF and certain parts of the EU rail acquis, with a risk of further fragmentation of rail contract law and technical requirements. This should be clearly avoided.

After eight years of activity, the progress made by the GEURL is sufficiently advanced and stable to look forward to completing its mandate without further delay. The purpose of the enclosed draft submission (Annex) is to push the group to effectively execute its current mandate without requesting yet another extension for two more years.

The main result expected from the GEURL by the end of its current mandate is a report outlining an advanced proposal for a legally-binding document or system of document(s) on URL, taking into account the draft Legal Provisions already developed for the contract of carriage of goods. The approach suggested in the enclosed draft submission meets this objective. The suggestion to propose a draft Convention on the Contract for the international carriage of goods by rail would meet the actual expectations of the industry. Such instrument, similar to the CMR Convention for road transport, would not require the setting up of yet another bureaucratic structure; the Convention could be effectively administered within the current structure of UNECE, with the technical support of OTIF and OSJD, and relevant industry associations. This general approach reflects the views of several EU Member States involved in the activities of the GEURL. The draft version of the enclosed submission was consulted with the Member States experts that have been involved during the past sessions.



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Execution of the Mandate of the Group

Options available for converting URL into a legally binding instrument – URL as contract of carriage's convention

Submitted by the European Commission*

I. Mandate

The present document is submitted in conformity with cluster 4, Rail transport, and the TransEuropean Railway (TER) project, paragraph 4.2. Draft programme of work of the transport subprogramme for 2018–2019 (ECE/TRANS/2018/21/Add.1), adopted by the Inland Transport Committee on 23 February 2018 (ECE/TRANS/274, para. 123) and, under the terms of reference of the ECE Group of Experts towards Unified Railway Law (ECE/TRANS/2018/13/Rev.1), adopted by the Inland Transport Committee on 23 February 2018 (ECE/TRANS/274, para. 69) and the Executive Committee of ECE. This document is submitted in accordance with point (g) of the report of the Group of Experts towards Unified railway Law on its eighteenth session (ECE/TRANS/SC.2/GEURL/2018/5).

II. Contextual background

A. Summary of the problem definition

Rail companies operating between Europe and Asia are not covered by one uniform legal regime concerning the carriage of goods. Rail transport law for international traffic in Eurasia is currently managed through two main distinct regimes: the Convention concerning International Carriage by

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Rail (COTIF) and its Uniform Rules concerning the contract of international carriage of goods by rail (CIM), and the Agreement on International Railway Freight Transport (SMGS).

While some harmonization has been achieved at operational level between the two set of rules (e.g. CIM/SMGS consignment note), it is a fact that rail freight traffic between Europe and Asia remains subject to two distinct contractual arrangements, under two different legal regimes. This is considered an impediment to the growing traffic of Euro-Asia rail freight transport, for several main reasons:

- Freight forwarders and railway undertakings have to conclude two contracts, under two different legal regimes that contain different prescriptive rules and conditions; this creates unnecessary burden and constraints on business operation;
- On the practical level, re-consignment of the goods is necessary at the handover point between the CIM and SMGS freight law regimes; this usually requires transfer of the consignment note from one legal regime to the other, resulting in additional costs and delays;
- The application of two different legal regimes for one transportation of goods by rail implies that customers face serious hurdles identifying and enforcing claims in the event of cargo loss or damage.

This also differs from the other modes of transport, which benefit for long of a harmonized legal framework for the international carriage of goods: road transport subject to the Convention on the Contract for the International Carriage of Good by Road (CMR), maritime transport covered by the Hague-Visby Rules and air traffic covered by the Montreal Convention. This situation puts rail transport at a competitive disadvantage vis-à-vis the other modes. Over the past few years, rail freight traffic between Asia and Europe has significantly increased and it is generally recognized that the potential of growth is considerable, in regards to both existing and new international transport corridors. It is therefore necessary and urgent to find a suitable solution that can be implemented in a reasonable time frame.

B. State-of-play of the activities of the Group of Experts towards Unified Railway Law

In 2010, under the auspices of the Inland Transport Committee (ITC) and its Working Party on Rail Transport, a Group of Experts towards Unified Railway Law (GEURL) was established and tasked to prepare a prospective position paper, which was submitted at the 73rd session of the ITC (ECE/TRANS/2011/3). Following that, a joint declaration on the promotion of Euro-Asian rail transport and activities towards unified railway law was signed in February 2013 at the ECE Ministerial Meeting, which provided the necessary political support and guidance for further activities.

During the following years until the end of 2017, the GEURL managed to develop a consistent set of draft legal provisions for unified railway law based upon the provisions of COTIF/CIM 1999 and SMGS 2015 (cf. Informal document SC.2/GEURL No.6 (2017)).

In February 2018, the ITC approved another extension of the mandate of the GEURL under new terms of reference (ECE/TRANS/2018/13/Rev.1), including the following core tasks:

- a) Monitor the finalization of necessary documents in order to perform international rail transport under the unified railway law including a standard model for the consignment note for the new provisions and its manual;
- b) Monitor the performance of a substantial number of real pilot tests to be carried out by the railway companies involved in the Group along the corridors agreed and along other corridors if proposed by governments in order to ensure the operational validity and effectiveness of the legal provisions prepared;
- c) Draft a document (or systems of documents) on Unified Railway Law which could be adopted as a legally binding instrument; the document (or systems of documents) shall: (i) take into account the draft legal provisions on the contract of carriage already prepared; (ii) include the necessary

formal provisions such as depository, management, secretariat, administrative committee, amending procedures, voting rights, etc.; (iii) be structured in a way which allows to easily supplement it with provisions on other issues related to international rail freight transport where the Group considers it appropriate to do so;

- d) Discuss other relevant issues related to international rail freight transport with a view to adding, where appropriate, provisions to the document referred to at (c); these issues may include: (i) Common Provisions on dangerous goods; (ii) Common provisions on the use of freight wagons; (iii) Common provisions on rail infrastructure; (iv) Common provisions on rolling stock.

The GEURL has met twice in 2018, and should meet three times in 2019, before concluding its activities with the transmission of a report to the Working Party on Rail Transport at its 73rd session (Nov. 2019).

In 2018, the GEURL made significant progress on tasks a), b), and d): a draft ad hoc URL consignment note was finalized; targeted communication and promotion of URL was undertaken to speed up the organization of pilot tests; a substantial scoping discussion took place as regards other relevant issues related to international rail freight transport. More details can be found in the Report of the GEURL on its 18th session (ECE/TRANS/SC.2/GEURL/2018/5).

As regards task c), the GEURL reviewed, with the assistance of the Secretariat, various possible options derived from existing legal instruments currently in force at international level in the transport sector. More details can be found in the supporting document issued by the Secretariat (ECE/TRANS/SC.2/GEURL/2018/6/Rev.1). Being at midpoint of its mandate, the GEURL should soon make an informed decision on a realistic approach to decide on a document (or systems of documents) on Unified Railway Law which could be adopted as a legally binding instrument.

III. URL as contract of carriage's convention

A. Objective and selected approach

The stated objective is to improve the efficiency of rail freight transport operations across the Eurasian continent. One important issue concerns the simplification of the contractual and liability conditions, and of their respective administrative elements. A legally binding document on URL is necessary to achieve legal certainty and security for rail transport industries and for enforcement authorities alike. It may therefore take the general form of an ECE Convention (multilateral treaty).

At the same time it is necessary to avoid the creation of an additional legal regime that could conflict or overlap with CIM and SMGS, with a risk of further fragmentation of rail transport law. The general and long-term objective of harmonization of rail transport law should not be undermined.

Therefore, at this point in time, the logical approach on URL should be to focus on the contractual aspects of the carriage of goods by rail and to propose an opt-in solution that could be applied upon agreement by the parties involved, as an alternative to the juxtaposition of CIM and SMGS rules.

Furthermore, the new instrument should not interfere with existing rules applicable for international rail freight traffic carried out within the OTIF or OSJD regions respectively; URL should be an interface law applicable if neither CIM nor SMGS or bilateral/multilateral agreement between the States concerned apply to the contract covering the entire journey.

While the potential impact of URL as contract of carriage's convention is analyzed in section IV, the selected approach may also be assessed on its own merits, including: (1) Creating an instrument of a manageable length (not hundreds of pages) – important for practitioners; (2) Focusing on the contract of carriage allows to establish a very streamlined management system; (3) Remedying the problems that exist today rather fast – the text of the draft convention could be finalized in a foreseeable timeframe.

B. Other relevant issues related to international rail freight transport

The terms of reference of the GEURL foresee a discussion on other relevant issues related to international rail freight transport, which may be included in the scope of a legally binding document on URL, namely: provisions on dangerous goods; on the use of freight wagons; on rail infrastructure; and on rolling stock.

Following the discussion that took place at the 18th session of the GEURL in October 2018, , at this juncture, none of these issues can realistically be considered for inclusion in the legally binding instrument on URL, for the following reasons:

- Provisions on the carriage of dangerous goods are subject to a multimodal harmonization process at global level; the ECE administers the agreements for effective implementation of these mechanisms for road, rail and inland waterways transport of dangerous goods, notably through the Joint Meeting of the RID Committee of Experts and the Working Party on the Transport of Dangerous Goods; at this point in time, there is no evidence that there is an acute regulatory problem with the transport of dangerous goods by rail between Europe and Asia, and there is no need to create another framework, where the necessary instruments and administrative structures are already in place;
- Regarding railway infrastructure, freight wagons and rolling-stocks, the issue of technical harmonization is of a totally different order of magnitude; such undertaking would be very time-consuming and require a considerable amount of human and financial resources; this does not seem commensurate with the limited resources and current objectives assigned to the GEURL; it should only be envisaged if the costs and benefits of such approach have been clearly established and the necessary political support ensured;
- Finally, most of these other issues relevant to international rail freight transport relate to safety and interoperability standards of railway systems, which are regulated at the level of the European Union and subject to an on-going internal process of harmonization and simplification; it is the interest of the European Union, and eventually of its international partners, that this process is conducted and completed in order to facilitate the smooth transport of goods by rail within the European Union and the effective connectivity with the international transport corridors. Therefore, it appears premature to consider including these issues in a legally binding instrument on URL at this point in time.

C. Main provisions of a draft Convention on the Contract for the international carriage of goods by rail

The selected approach described in section III.A above is effectively reflected in Article 1 ‘Scope of application’ of the draft Legal Regime for URL that has been developed by the GEURL (Informal document SC.2/GEURL No.6 (2017)). Chapter 1 of the draft Legal Regime for URL also contains relevant definitions (Article 2), and provisions on mandatory law (Article 3) and public law (Article 4).

The main substantive provisions on URL should concern: (1) the conclusion and performance of the contract of carriage, (2) the liability regime, (3) the settlement of claims, and (4) the relations between carriers. These elements are effectively covered by the draft Legal Regime for URL that has been developed by the GEURL.

It is suggested to follow the model of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which proved to be a simple, effective and robust instrument, since its entry into force in July 1961. Indeed, the CMR Convention’s objectives are very similar to the objective of URL that is the standardization of the conditions governing contract of the international carriage of goods, including with respect to the documents used for such carriage and to the carrier’s liability.

The final provisions may address *inter alia* the following issues: participation/accession, signature, ratification, depositary, entry into force, denunciation, settlement of disputes relating to the interpretation or application of the Convention, declaration/reservation, review, amendment, notifications.

D. Management and administration of the draft Convention

The subject-matter of the draft Convention is legal and contractual; it does not involve any operational tasks, which would otherwise require the provision of a management structure with relevant resources, as is the case for example with the TIR Convention (e.g. regular edition and publication of TIR carnets).

Secondly, taking into account the experience and practice gained with the CMR Convention over more than 50 years, it is anticipated that the draft Convention on the Contract for the international carriage of goods by rail would necessitate minimal resources for its administration.

The ECE Inland Transport Committee and its Working Party on Rail Transport (SC.2) would ensure the good administration of the Convention, encourage new accessions, and may discuss its provisions in the context of the work aimed at facilitation and development of international rail traffic through harmonization and simplification of rules and requirements relating to Euro-Asia rail transport. If/when deemed necessary, an ad hoc group of experts with a specific mandate could be formed for a limited period of time, for example to draft proposals for amendments to the Convention or to prepare recommendations on the application or interpretation of certain particular provisions.

The main relevant organizations and industry associations (OTIF, OSJD, CIT, UIP, ITF...) are already present and active in this framework and would be invited to continue providing the necessary expertise and assistance to facilitate the implementation of the Convention, e.g. for the issuance of a standard model contract or for the review/update of the URL consignment note and other relevant transport documents.

IV. Expected impact

A. On the rail operators and their customers

Rail operators and their customers would be the direct beneficiaries of the present proposal for URL as a contract of carriage's convention. It would indeed provide them the possibility to conclude a single contract of carriage for specific international transport of goods by rail between Europe and Asia, accompanied by a single consignment note that is subject to a single international legal regime.

A Convention on the Contract for the international carriage of goods by rail would establish a uniform international legal framework for rail freight transport between participating states, otherwise subject to the OTIF/CIM or OSJD/SMGS regimes.

The URL provisions take priority over national laws and apply to each international contract of carriage between those states if the parties to the contract of carriage opt to apply URL to their contract.

The URL regime covers the entire route from the premises of the consignor to those of the consignee; it is thus not necessary to take into account multiple freight transportation regulations; the URL rules for the conclusion of the contract also enhance freedom of the parties to decide on relevant details that best suit their individual needs.

The single URL consignment note does not need to comply with two regulatory frameworks as is currently the case for the CIM/SMGS consignment note; this would therefore eliminate the delay and administrative burden to re-consign the goods at the border between the CIM and SMGS regions.

Overall, the draft Convention on the Contract for the international carriage of goods by rail would give rail operators and their customers the ability to move freight across the Eurasian continent in a quick, cost-effective manner, based on a uniform legal regime with minimal administrative burden.

B. On the participating States (contracting or signatory to the draft Convention)

Following the initial effort to negotiate and agree on a final text for the Convention, there would be no particular (negative) impact for the participating States. From the legal perspective, the proposed instrument is clear, simple, and similar to what already exists in the road sector (CMR Convention). It would simply require the one-off tasks for signature and ratification of the text of the Convention.

As indicated before, the implementation of the Convention as such would have very little impact on the financial and administrative resources of the participating States. The existing structures at ECE level are sufficient to allow the necessary monitoring and administration.

C. On the relevant organizations, intergovernmental organizations and industry associations

Being a proposal for an interface law, the draft Convention on the Contract for the international carriage of goods by rail does not conflict with the existing CIM and SMGS rules, which apply for international rail traffic within the boundaries of their respective geographical areas. On the other hand, both OTIF and OSJD should have an interest to ensure the smooth application of URL as contract of carriage's convention, for the benefit of their member countries and the rail transport community as a whole. In the broader perspective, URL could create new opportunities for cooperation between the two organizations and stimulate bottom-up harmonization of technical standards.

V. Compliance with the terms of reference of the GEURL

After eight years of activity, the progress made by the GEURL is sufficiently advanced and stable to look forward to completing its mandate without further delay. In accordance with its current mandate and terms of reference, the GEURL is expected to conclude its activities after its 22nd session planned in October 2019, with a transmission of a report to the Working Party on Rail Transport in November 2019.

Based on the four groups of tasks described in the terms of reference, it is expected that the report should contain *inter alia* an advanced proposal for a legally-binding document or system of document(s) on URL, taking into account the draft Legal Provisions already developed for the contract of carriage of goods. The proposal outlined in this document meets this objective. More importantly, the proposal for a draft Convention on the Contract for the international carriage of goods by rail would meet the actual expectations of the industry and market players, in a timely and cost-effective manner.

If this proposal is supported by the GEURL at its 19th session, it should be possible to finalize an advanced draft during the next two sessions of the group and present it for consideration at the 73rd session of the Working Party on Rail Transport in November 2019.