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Item 2 of the provisional agenda

Unification of international railway law with the objective of allowing rail carriage under a single legal regime

Draft of relevant legal provisions *

Note by the secretariat

Mandate

1. This document has been prepared in line with the output/activities of cluster 4: “Rail transport and Trans-European Railway (TER) Project” of the programme of work of the transport subprogramme for 2014–2015 (ECE/TRANS/2014/23) and the Terms of Reference of the UNECE Group of Experts towards Unified Railway Law (ECE/TRANS/2013/9) as adopted by the Inland Transport Committee on 28 February 2013 (ECE/TRANS/236, para. 72) and by the Executive Committee of ECE on 11 July 2013 (EXCOM/CONCLU/62 and ECE/EX/2013/L.7).

2. In order to arrive at a common understanding of the concept and explanatory legal provisions to be enshrined into a new international legal railway regime, the Group of Experts undertook during its sixth (December 2013) and seventh sessions (April 2014) a review of secretariat documents ECE/TRANS/SC.2/GEURL/2013/9 and ECE/TRANS/SC.2/GEURL/2014/5 respectively. Columns 3 and 4 of these documents contained an evaluation of relevant legal provisions of COTIF/CIM and SMGS as well as first elements and a possible wording of some specific legal provisions that could be included into a legal instrument for Euro-Asian rail freight transport.

3. Based on this review of the conceptual and legal basis of a new international railway regime, the secretariat was requested to prepare a document which includes comments

* The present document is being issued without formal editing.

received or discussed during the previous sessions on evaluation of relevant legal provisions of COTIF/CIM and SMGS as well as on first elements and a possible wording of specific legal provisions that could be included into a legal instrument for further review by the experts (ECE/TRANS/SC.2/GEURL/2014/8).

Scope of Application

Article 1 CIM / Article 1 SMGS, Article 2 of GP (new General Provisions)

CIM is applicable for carriage between Contracting Parties to CIM, even in case of transit through third countries. CIM is also applicable (similar to CMR) if only one State, either the place of taking over the goods or the place designated for delivery, is a Contracting Party to CIM (refer also to Art. 1, § 2 of MC).

SMGS (2012) is exclusively applicable for carriage on railway lines that are members to this Agreement (also for transit).

In case SMGS is not applicable in the country of origin or the country of destination and if at least two SMGS countries with their railways are involved in the carriage, the relevant transit tariff comes into force as long as no other agreement on direct international rail carriage (especially CIM) is applicable.

A new unified legal railway regime could become applicable if, for a single Euro-Asian contract of carriage of goods by rail (concluded, for example, between a freight forwarder or several railway companies and a shipper for the carriage of goods between Geneva and Irkutsk) neither CIM nor SMGS can be applied, but only national legislation.

A new unified legal railway regime would neither replace CIM nor SMGS as long as the parties to the contract of carriage of goods accept, as is the case today, a brake in delivery and re-consignment of the goods at the CIM/SMGS external boundaries/perimeters.

A new unified legal railway regime will not limit the application of Art. 1, para. 2 of CIM (or similar provisions that may be possibly be contained in future versions of SMGS) allowing parties to the contract of carriage of goods by rail to agree on the through application of CIM in case where at least either the place of departure or of delivery of the goods is in a Contracting Party to CIM.

The possibilities provided by Art. 1, para. 2 of CIM, applicable since 2006, had never been used. This may be due to the fact that the extension of legal provisions beyond the scope of the relevant public law framework does not rule possible collision with mandatory legislation outside of CIM and is not familiar to public and private stakeholders.

Article A Scope of Application

§ 1 Subject to § 4 this legal regime / **model law** shall apply to every single contract of carriage of goods by rail for reward, **when the place of taking over of the goods and the place designated for delivery are situated in two different States** which are Contracting Parties to this **legal regime**, if the parties to the contract agree that the contract is subject to this legal regime.

§ 2 When international carriage (with employment of an intermodal transport unit) being the subject of a single contract under this legal regime includes carriage by road or inland waterway in internal traffic of a Contracting State as a supplement to transfrontier carriage by rail, this legal regime shall apply.

§ 3 When international carriage being the subject of a single contract under this legal regime includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, this legal regime shall apply, if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article ... of this legal regime.

§ 4 This legal regime cannot be **agreed** for the carriage of goods by rail for which the provisions of CIM and/or SMGS or **bilateral agreements between Contracting Parties (= submitted by the Government of Finland)** are applicable.

A new unified legal railway regime, bringing together familiar administrative procedures and legal provisions of CIM and SMGS, may increase acceptance and facilitate implementation among all parties.

The need to insert relevant provisions governing road, inland water **and sea transport** as a supplement to the international carriage by rail, as provided in Article 1, para. 3 **and 4** of CIM, **has been** considered.

Article 5 CIM / Article 2 SMGS, Article 4 of GP

CIM, SMGS and other international conventions (eg. Art. 41 of CMR and Art. 49, 26, 47 of MC) establish law that is mandatory as long these conventions do not allow deviations/exceptions.

This holds also true if the application of the new legal railway regime is agreed upon by the parties to a contract of carriage. If the parties have agreed on the applicability of the legal regime, it is mandatory and applies as a whole.

Similarly to Art. 5.3 of CIM or Art. 25 to 27 of MC, a new unified legal railway regime could provide that the carrier may assume a liability greater and obligations more burdensome vis-à-vis his customers than those provided in the new regime.

Article 2 CIM / Article 4 SMGS

International transport conventions regulate the contractual relationship between carriers and customers. They contain provisions of private law. Public law remains untouched. CIM and SMGS address this in different ways.

A new unified legal railway regime could also address these issues and, if appropriate, also refer to the increasingly important administrative and safety – related regulations of railways that should remain untouched by the new regime (such as licencing and monitoring of railway undertakings, safety certification and infrastructure access rights).

A new unified legal railway regime assumes and might stipulate that carriage to which the legal regime applies shall remain subject to these **and other prescriptions of national and international law. In case of**

Article B

Mandatory Law

§ 1 Unless provided otherwise in this **legal regime**, any stipulation, agreed upon by the parties to the contract of carriage, which would derogate from this legal regime shall be null and void. **The nullity of such stipulation shall not involve the nullity of other provisions of the contract of carriage. (= OSJD)**

§ 2 Nevertheless, a carrier may assume a liability greater and obligations more burdensome than those provided for in this legal railway regime.

(Former § 2 deleted)

Article C

Prescriptions of public law

Carriage to which this legal railway regime applies shall remain subject to the prescriptions of public law, in particular the prescriptions relating to the carriage of dangerous goods as well as the prescriptions of customs law and those relating to the protection of animals.

infringements, sanctions apply – in line with applicable national public law.

The contract of carriage and performance of carriers

Article 6 CIM / Articles 7, 8 SMGS, Article 7, 8 (§§ 3, 4) of GP

In accordance with Art.6 of CIM (Art. 4 of CMR), the contract of carriage is concluded by agreement among the parties concerned. In accordance with Art. 7 of SMGS, the contract of carriage is concluded by making out of the consignment note and by taking over of the goods and the consignment note.

As the new unified legal railway regime shall only become applicable upon agreement among all parties, the conclusion of the contract of carriage would also require the agreement of all parties. This agreement could, in particular for large (volume) contracts, be reached before taking over of the goods and the consignment note.

In accordance with CIM and SMGS, a consignment note must be made out for each consignment. One consignment does no longer need to relate to only one wagon load.

Given the importance of the appropriate languages to be used, the relevant provisions of SMGS could be used in stipulating that the language versions need to be determined in advance for making out the consignment note.

The new common CIM/SMGS consignment note (refer to Art. 7 § 15 SMGS) **could** be referred to in a new unified legal railway regime.

According to CIM and SMGS (also CMR, Art. 5 CMR and Montreal Convention, Art. 7), the consignment note shall be signed or appropriately authorized by the parties concerned. If necessary, the

Article D

Contract of carriage. Consignment note

§ 1 Under the contract of carriage the carrier is obliged to carry the goods to the destination and there to deliver them to the consignee. (= OSJD, Article 7 of GP, § 1)

§ 2 The contract of carriage must be confirmed by a **uniform** consignment note.

For the totality of goods (consignment) that, on the basis of a contract of carriage, is to be carried, only one consignment note shall be made out, even if the totality of goods consists of several parts or is transported in several wagons or as a full train load.

The absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract of carriage which shall remain subject to this legal railway regime as long as, in case of doubt, the validity of application of this legal railway regime can be established.

(Former § 2 deleted)

§ 3 The consignment note shall be signed by the consignor and the carrier. The signature can be replaced by an imprint, by a stamp, by an accounting machine entry or in any other appropriate manner, **insofar as the laws and**

number of copies and their handing over to the different parties and stakeholders involved could also be addressed in the new unified legal railway regime, in line with the appropriate provisions in SMGS, CMR and the Montreal Convention.

In line with CIM and SMGS, an electronic consignment note should be permitted. Following consultations with experts, further details may need to be inserted into a new legal regime taking account of the CMR Protocol of 20.02.2008 and chapter 3 of the Rotterdam Rules that provide more details on electronic registration than CIM and SMGS.

prescriptions of the State in which the replacement is carried out permit such replacement.

The carrier must certify the taking over of the goods on the duplicate of the consignment note in an appropriate manner and return the duplicate to the consignor.

§ 4 The consignment note and its duplicate may be established in the form of electronic **communication. An electronic consignment note that complies with the provisions of this Paragraph shall be considered to be equivalent to the consignment note referred to in this legal regime and shall therefore have the same evidentiary value and produce the same effects as that consignment note.**

Authentication of the electronic consignment note

The electronic consignment note shall be authenticated by the parties to the contract of carriage by means of a reliable electronic signature that ensures its link with the electronic consignment note. The reliability of an electronic signature method is presumed, unless otherwise proved, if the electronic signature:

- (a) **is uniquely linked to the signatory;**
- (b) **is capable of identifying the signatory;**
- (c) **is created using means that the signatory can maintain under his sole control; and**
- (d) **is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.**

The electronic consignment note may also be authenticated by any other electronic authentication method permitted by the law of the State in which the electronic consignment note has been made out.

The particulars contained in the electronic consignment note shall be accessible to any party entitled thereto.

Conditions for the establishment of the electronic consignment note

The electronic consignment note shall contain the same particulars as the consignment note referred to in this legal regime.

The procedure used to issue the electronic consignment note shall ensure the integrity of the particulars contained therein from the time when it was first generated in its final form. There is integrity when the particulars

have remained complete and unaltered, apart from any addition or change which arises in the normal course of communication, storage and display.

The particulars contained in the electronic consignment note may be supplemented or amended in the cases authorized by this *legal regime*.

The procedure used for supplementing or amending the electronic consignment note shall make it possible to detect as such any supplement or amendment to the electronic consignment note and shall preserve the particulars originally contained therein.

Implementation of the electronic consignment note

The parties interested in the performance of the contract of carriage shall agree on the procedures and their implementation in order to comply with the requirements of this legal regime, in particular as regards:

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

These procedures must be referred to in the electronic consignment note and shall be readily ascertainable.

(= in accordance with Art. 2 to 5 of the Additional Protocol to the CMR concerning the Electronic Consignment Note, signed at Geneva, 20th February 2008, in force since 5th June 2011)

Article 7 CIM / Article 7 SMGS, Article 8 (§§ 1, 2) of GP

CMR (Art.6), CIM and, to some extent, SMGS and MC (Art.5 and 6) differentiate as to the content in the consignment note:

Article E Wording of the consignment note

§ 1 The consignment note must contain the following particulars:

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- (a) Always must contain;
- (b) Where applicable, must contain;
- (c) May contain.

The same distinction could be followed in the new legal railway regime.

Possible wording of a new legal regime for Euro-Asian rail freight transport

- (a) the date and the place at which it is made out;
 - (b) the name and address of the consignor;
 - (c) the name and address of the contractual carrier;
 - (d) the name and address of the person to whom the goods have effectively been handed over if he is not **the** contractual carrier;
 - (e) the place and the date of taking over of the goods;
 - (f) the place designated for delivery;
 - (g) the name and address of the consignee;
 - (h) the description of the nature of the goods and the method of packing, and, in case of dangerous goods, their generally recognized description;
 - (i) the number of packages and their special marks and numbers;
 - (j) the number of the wagon(s) in which the consignment is carried
 - (k) in case of using an intermodal transport unit, its category, number or other characteristics necessary for its identification;
 - (l) the gross mass or the quantity of the goods expressed in other ways;
 - (m) a detailed list of the documents which are required by customs or other administrative authorities and are attached the consignment note or held at the disposal of the carrier at the offices of a duly designated authority or a body designated in the contract;
 - (n) the costs relating to carriage (the carriage charge, incidental costs, customs duties and other costs incurred from the conclusion of the contract until delivery) in so far as they must be paid by the consignee, or any other statement that costs are payable by the consignee.
- § 2** Where applicable the consignment note must also contain the following particulars:
- (a) the costs which the consignor undertakes to pay;
 - (b) the agreed transit period;
 - (c) the agreed route;
 - (d) a list of the documents not mentioned in § 1, letter m, handed over to the carrier;
 - (e) the entries made by the consignor concerning the number and description of seals he has affixed to the wagon.

Article 8 CIM / Article 12 SMGS, Article 9 of GP

Art. 8 CIM, Art. 12 § 1 SMGS, Art. 7 CMR und Art. 10 of MC contain similar provisions on the responsibility of the consignor for particulars entered on the consignment note. Art. 9 CIM und Art 22 CMR also provide provisions on actions to be taken by the carrier in case he has not been informed of the dangerous nature of the goods he has taken over. On this basis, similar general provisions could be inserted into the new legal railway regime.

In line with general principles of law, the consignor shall be liable for such information that the carrier enters in the consignment note at the request of the consignor. Therefore, such principles do not need to be included into the new regime.

Article 10 CIM / Articles 15, 13, 12 § 3 SMGS, Articles 24, 23 of GP

Should the new legal railway regime only be applicable upon agreement of the parties to the contract of carriage, public service obligations for the carrier (especially transport and tariff obligations) are not relevant. Thus, relevant provisions on the payment of costs in line with CMR (Art. 6 Abs. 1 lit. i und Abs. 2 lit. b, Art. 13 Abs. 2) und CIM (Art. 7 § 1 lit. o und § 2 lit. b, Art. 10 und Art. 17 § 1)) could be included into the new legal regime.

In case costs are already described in the provisions relating to details of the consignment note, it might be sufficient to only refer to the “costs relating to carriage”.

§ 3 The parties may enter on the consignment note any other particulars they consider useful.

**Article F
Responsibility for particulars entered on the consignment note**

§ 1 The consignor shall be **liable** for all costs, loss or damage sustained by the carrier by reason of:

- (a) the entries made by the consignor in the consignment note being incorrect, or
- (b) the consignor omitting to make the entries prescribed in regard of dangerous goods.

§ 2 If the consignor has failed to make the entries in regard of dangerous goods, the carrier may at any time unload or destroy the goods or render them innocuous, as the circumstances may require, without payment of compensation, save when he was aware of their dangerous nature on taking them over.

**Article G
Payment of costs**

§ 1 Unless otherwise agreed between the consignor and the carrier, the costs relating to carriage (**the carriage charge, incidental costs, customs duties and other costs incurred from the conclusion of the contract until delivery**) shall be paid by the consignor.

§ 2 When by virtue of an agreement between the consignor and the carrier, the costs are payable by the consignee, the consignor shall remain liable to pay the costs, if the consignee has not taken possession of the consignment note nor asserted his rights in accordance with Article M §§ 2 and 3 nor modified the contract of carriage in accordance with Article N.

§ 3 **If the carriage charges, in accordance with the contract of carriage, are calculated separately by each participating carrier on his section of the route, these charges shall be calculated according to the tariffs applied by the respective carrier. (cf. OSJD, Article 23 of GP, §§ 1 and 2)**

Article 11 CIM / Article 12 § 2 SMGS, Article 16 of GP

Art. 11 of CIM and Art. 12 § 2 as well as Art. 9 § 7 of SMGS contain similar provisions on the examination of the goods. Thus, relevant provisions in the new legal railway regime could be based on the shorter provisions in CIM and, in the interest of rail customers, could also include relevant provisions of Art. 12 § 2 Section 3 of SMGS.

In accordance with Art. 8 of CMR, the carrier is obliged to make certain examinations relating to entries in the consignment note and the contents of the consignment, even if the consignor does not require such examinations.

The introduction of such a requirement does not seem to be appropriate for rail transport given its different operational requirements compared to road transport.

The provisions on to the evidential weight of the consignment note (Article I of the new convention) specify which examinations the carrier should carry out in his own interest to safeguard his rights.

Article 12 CIM / Articles 8, 23 § 6 SMGS, Article 7 of GP

Unlike the CMR, CIM distinguishes, with regard to the probative value of the consignment note, as to whether the carrier or the consignor has loaded the goods. This is due to the different operational procedures in road and rail transport.

**Article H
Examination**

§ 1 The carrier shall have the right to examine at any time whether the conditions of carriage have been complied with and whether the consignment corresponds with the entries in the consignment note made by the consignor. If the examination concerns the contents of the consignment, this shall be carried out as far as possible in the presence of the person entitled; where this is not possible, the carrier shall require the presence of two independent witnesses, unless the laws and prescriptions of the State where the examination takes place provide otherwise.

§ 2 If the consignment does not correspond with the entries in the consignment note or if the provisions of public law have not been complied with, the result of the examination must be entered in the copy of the consignment note which accompanies the goods, and also in the duplicate of the consignment note, if it is still held by the carrier. In this case the costs of the examination shall be charged against the goods, if they have not been paid immediately.

While en route, the cargo contents may only be inspected if customs or other rules so require, or in order to ensure the safety of train movements and protect the cargo while en route.

§ 3 When the consignor loads the goods, he shall be entitled to require the carrier to examine the condition of the goods and their packaging as well as the accuracy of statements on the consignment note as to the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed. The carrier shall be obliged to proceed with the examination only if he has appropriate means of carrying it out. The carrier may demand the payment of the costs of the examination. The result of the examination shall be entered on the consignment note.

**Article I
Evidential value of the consignment note**

§ 1 The consignment note, signed by the consignor and the carrier shall be prima facie evidence of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier.

SMGS addresses the probative value of the consignment note in different provisions, however in a more restricted manner compared to CMR and CIM.

The new unified legal railway regime could contain provisions that are based on CMR, but take account of the specific operational procedures of railways.

Article 14, 13 CIM / Article 9 SMGS, Articles 11, 12 of GP

CIM and SMGS address both packaging and loading of the goods, while CMR only regulates the packaging. If the new legal railway regime is to continue to regulate also the loading of the goods, then this should be done in a single rule, similar to SMGS.

Article 15 CIM / Article 11 SMGS, Article 15 of GP

The new legal railway regime could be based on Article 11 of CMR and should not take over the detailed provisions of Art. 15, § § 4–8 of CIM.

§ 2 If the consignment note contains no specific reservations by the carrier, it is assumed, failing proof to the contrary, that the goods and their packaging have apparently been in good condition at the moment they were taken over by the carrier.

§ 3 If the carrier has loaded the goods or has examined them according to Article H, the consignment note shall be prima facie evidence of the condition of the goods and their packaging indicated on the consignment note or, in the absence of such indications, of their apparently good condition at the moment they were taken over by the carrier and of the accuracy of the statements in the consignment note concerning the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed.

However, the consignment note will not be prima facie evidence in a case where it bears a reasoned reservation.

Article J Packing, Loading

§ 1 The consignor shall be liable to the carrier for any loss or damage and costs due to defective packing **or labelling** of the goods **or defective marking**, unless the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it.

§ 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. **Should the consignment note contain no information on the person who has loaded the goods, it shall be considered as loaded by the consignor. (cf. OSJD, Article 12 of GP, § 4)**

§ 3 **In the case of apparent or known defective packing, labelling or loading of the goods the carrier may accept the goods for carriage under specific contract conditions. (cf. OSJD, Article 11 of GP, § 3)**

Article K Completion of administrative formalities

§ 1 For the purposes of the customs or other formalities which have to be completed before delivery of the goods, the consignor shall attach the necessary

documents to the consignment note or make them available to the carrier and shall furnish him with all the information which he requires.

§ 2 The carrier shall not be obliged to check whether these documents and this information are correct and sufficient. The consignor shall be liable to the carrier for any damage caused by the absence or insufficiency of, or any irregularity in, such documents and information except in the case of fault of the carrier.

§ 3 The carrier shall be liable for any consequences arising from the loss or incorrect use of the documents which were made available to him unless the loss of the documents or the loss or damage caused by the incorrect use of the documents has been caused by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. The compensation payable by the carrier shall not exceed the compensation provided for in the event of loss of the goods.

Article 16 CIM / Article 14 SMGS, Art. 17 of GP

The transit period should be determined primarily by agreement of the parties, as provided in Art. 19 of CMR, Art. 16 CIM and in Art. 14, § 7 of SMGS.

The agreed transit period may be limited to full wagon loads (see proposed Art. A § 1).

Article L Transit periods

§ 1 **Unless agreed otherwise between the consignor and the carrier, the transit period shall be defined for the complete journey and shall not exceed the period resulting from the application of §§ 2 to 4. (cf. OSJD, Article 17 of GP, § 1)**

§ 2 Subject to §§ 3 and 4, the maximum transit period shall be ... hours for the period for consignment and 24 hours for each ... km (or fraction thereof) distance of carriage. The distances shall relate to the agreed route or, in the absence thereof, to the shortest possible route.

§ 3 The carrier may fix additional transit periods of specified duration **in the following cases:**

(a) **consignments to be carried**

- by lines of a different gauge,

- by sea or inland waterway,

- by road if there is no rail link; (CIM Article 16 § 3 / cf. OSJD

Article 17 of GP, § 3)

(b) exceptional circumstances causing an exceptional increase in traffic or exceptional operating difficulties.

Article 17 CIM / Article 17 SMGS, Article 19 of GP

The new legal railway regime could be based on Art. 13 of CMR, Art. 17 of CIM and Art. 17 § 1 of SMGS. It could also foresee the possibility of a lien (“Pfandrecht”) of the carrier in line with Art.19 of SMGS.

Article 18 CIM / Article 20 SMGS, Article 18 of GP

The new legal railway regime could be based on Art. 12, Sections 1–4 of CMR, Art. 18 of CIM and Art. 20 §§ 1- 3 and 7 of SMGS.

Provisions in line with Art. 20 § 7 of SMGS seem to be more appropriate than those in Art. 18 § 3 of CIM and could also be included.

The duration of the additional transit periods shall appear in the General Conditions of Carriage.

§ 4 The transit period shall start to run after the taking over of the goods; it shall be extended by the duration of a stay caused without any fault of the carrier. **(Last sentence deleted).**

**Article M
Delivery**

§ 1 At the place of delivery the carrier shall hand over the consignment note and deliver the goods to the consignee against a receipt and payment of the amounts due according to the contract of carriage. **Restrictions of the right of the consignee to refuse to accept the goods shall remain subject to the laws and prescriptions in force at the place of destination. (cf. OSJD, Article 19 of GP, § 2)**

§ 2 After the arrival of the goods at the place of delivery, the consignee shall be entitled to require the carrier to deliver to him, according to § 1, the consignment note and the goods. In the event of dispute on this matter the carrier shall not be required to deliver the goods unless security has been furnished by the consignee.

§ 3 If the loss of the goods is established or if the goods are damaged or delivered late, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.

§ 4 In other respects, delivery of the goods shall be carried out in accordance with the prescriptions in force at the place of destination.

§ 5 **This legal regime does not affect a right of the carrier that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due. (cf. Article 49 of the Rotterdam Rules and OSJD, Article 27 of GP: Right to hold goods by carrier))**

**Article N
Right to dispose of the goods**

§ 1 The consignor has the right to dispose of the goods and to modify the contract of carriage by giving subsequent orders, in particular by asking the carrier to stop the goods in transit or not to deliver them or to give them back at the place of taking over of the goods or to change the place of delivery or to deliver them to a consignee other than the consignee indicated in the consignment note. **Restrictions of the right to dispose of the goods shall remain subject to the laws and prescriptions applicable in the State where**

the goods are situated when the instruction is issued. (cf. OSJD, Article 18 of GP)

§ 2 The consignor's right of disposal is transferred to the consignee at the time specified by the consignor in the consignment note. Unless the consignor has specified otherwise, the right of disposal shall be transferred to the consignor when the goods have reached the country of destination. If the consignee has the right of disposal, the carrier shall obey only the orders of the consignee.

§ 3 If in exercising his right of disposal the consignee has ordered the delivery of the goods to another person, this other person shall not be entitled to name other consignees.

§ 4 Any right of disposal shall be extinguished when the consignee or another person entitled has taken possession of the consignment note or has accepted the goods or asserted his rights in accordance with Article M §§ 2 and 3.

Article 19 CIM / Article 20 SMGS

The new legal railway regime could be based on Art. 12, Sections 5–7 of CMR, Art. 19 of CIM and Art. 20 §§ 4–6, 10, 11 of SMGS.

In addition, provisions on the right and on procedures to dispose of goods could be brought together and included in the new legal railway regime, similar to Art. 12 of CMR and Art. 20 of SMGS.

Article O

Exercise of the right to dispose of the goods

§ 1 If the person who is entitled to dispose of the goods wishes to modify the contract of carriage he has to produce to the carrier the duplicate of the consignment note on which the new instructions have to be entered. He shall compensate the carrier for the costs and the prejudice arising from the carrying out of such instructions, unless the carrier is at fault.

§ 2 The carrier is not obliged to carry out instructions, unless they are possible, lawful and reasonable to require. Instructions must in particular neither interfere with the normal working of the carrier's undertaking nor prejudice the consignors or consignees of other consignments. Any instruction shall not have the effect of splitting the consignment.

§ 3 When, by reason of the provisions of §§ 1 and 2, the carrier will not carry out instructions which he receives, he shall immediately notify the person who gave him such instructions.

§ 4 A carrier who has not carried out properly the instructions given under the provisions of this article shall be liable to the person entitled to make a claim for any loss or damage caused thereby, if the carrier is at fault. If the carrier implements the consignor's instructions without requiring the duplicate of the consignment note to be produced, he shall be liable to the consignee for any loss or damage caused thereby, if the duplicate has been passed on to the consignee. Any compensation payable shall not exceed that payable in the event of loss of the goods.

Articles 20, 21 CIM / Article 21 §§ 1, 2, 4 SMGS, Article 21 of GP

CMR (Art. 14, 15) and CIM regulate circumstances preventing carriage and delivery in two articles, while the SMGS addresses both circumstances, including consequences within a single Article (Art. 21). CMR (Art. 16) and CIM address the consequences of non-delivery in a separate article.

In line with the SMGS, the new legal railway regime could bring together both circumstances preventing carriage and delivery in single provisions. Its consequences could then be addressed, for reasons of clarity, in a separate provision.

Article 22 CIM / Article 21 §§ 3, 5 – 8 SMGS

Article P

Circumstances preventing carriage and delivery

§ 1 If it becomes evident, after the goods have been taken over by the carrier, that carriage or delivery cannot be performed according to the contract, the carrier shall ask for instructions from the person entitled to dispose of the goods or, where circumstances prevent delivery, he shall ask the consignor for instructions.

§ 2 If the consignee, in accordance with Article O § 3, has given instruction to deliver the goods to another person, § 1 shall apply as if the consignee were the consignor and the other person were the consignee.

§ 3 If circumstances preventing carriage can be avoided by modifying the route, the carrier shall decide whether a modification shall be made or whether it is in the interest of the person entitled to ask him for instructions.

§ 4 If circumstances preventing delivery cease to exist before arrival of instructions from the consignor to the carrier, the goods shall be delivered to the consignee. The consignor shall be notified without delay.

Article Q

Consequences of circumstances preventing carriage and delivery

§ 1 The carrier is entitled to reimbursement for the costs occasioned by his request for instructions or the carrying out of instructions or the fact that he has taken a decision in accordance with Article P § 3, unless such costs were caused by his fault. The carrier may in particular recover the carriage charge applicable to the route followed and shall be allowed the transit period applicable to such route.

§ 2 If the carrier cannot, within a reasonable time, obtain lawful and reasonable instructions, he shall take such measures as seem to be in the best interest of the person entitled to dispose of the goods. He may, for example, return the goods to the consignor or unload them for account of the person entitled. Thereupon the carriage shall be deemed to be at an end. The carrier shall then hold the goods on behalf of the person entitled. He may, however, entrust them to a third party, and in that case he shall not be under any liability except for the exercise of reasonable care in the choice of such third party. The charges due under the contract of carriage and all other costs of the carriage shall remain chargeable against the goods.

§ 3 The carrier may sell the goods, without awaiting instructions from the person entitled, if this is justified by the perishable nature or the condition of the

Articles 23, 26, 27 CIM / Article 23 SMGS, Articles 30, 32 of GP

As in CMR (Art. 17), CIM and SMGS provide, irrespective of fault, a contractual liability of the carrier for loss or damage to goods or delay in delivery and allow for specific reasons for relieve of liability of the carrier.

The new legal railway regime could take over such provisions, but should not necessarily allow for privileged exemptions of liability (Art. 17, para. 4 and Art. 18, para. 2–5 of CMR; Art.23 § 3, Art. 25 § § 2–3 of CIM; Art. 23 § 9 of SMGS)

Further provisions on [absolute] relief of liability as contained in Art. 23 § § 4–5 of SMGS and in Art. 24 of CIM seem to be superfluous.

goods or if the costs of storage would be out of proportion to the value of the goods. He may also proceed to the sale of the goods in other cases if within a reasonable time he has not received from the person entitled instructions to the contrary which he may reasonably be required to carry out; in such a case the carrier may destroy unusable goods.

§ 4 If the goods have been sold, the proceeds of sale, after deduction of the costs chargeable against the goods, shall be placed at the disposal of the person entitled. If the proceeds of sale are less than those costs, the carrier shall be entitled to the difference.

§ 5 The procedure in the case of sale shall be determined by the law or custom of the place where the goods are situated.

§ 6 **Article C remains unaffected.**

Article R**Basis of liability**

§ 1 The carrier who has concluded the contract of carriage (contractual carrier) shall be liable for loss or damage resulting from the total or partial loss of or damage to the goods between the time of taking over of the goods and the time of delivery, as well as for exceeding the transit period. **(Former second sentence deleted)**

§ 2 If carriage governed by a single contract is performed by successive carriers, each carrier who is not a contractual carrier, by the very act of taking over of the goods with the consignment note, shall become a party to the contract of carriage and shall assume the obligations arising from the consignment note. **(In such case the liability of all carriers shall be joint and several).**

§ 3 Where the carrier has entrusted the performance of the carriage, in whole or in part, to a substitute carrier who does not take over the consignment note, Articles X and Y § 2 shall be applicable.

§ 4 The carrier shall be relieved of this liability to the extent that the loss or damage or the exceeding the transit period was caused by the fault of the person entitled or by an instruction given by the person entitled other than a result of the fault of the carrier or by an inherent defect of the goods or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

Burden of proof (Article 25 CIM / Article 23 § 8 SMGS, Article 34 of GP) This provision is not required for the new legal regime

Since the burden of proof that lies on the carrier is derived from general rules of evidence, the new legal railway regime may not need to include specific provisions in this regard – in contrast to CMR, CIM and SMGS.

Successive carriers (Article 26 CIM) / Joint liability of railways (Article 22 SMGS) See Article R § 2

In Euro-Asian rail transport operation covered by the new legal railway regime several contractual carriers (refer to Art. 3 a) of CIM) provide often carriage successively and operate on different parts of the journey. They then undertake a joint liability for the entire carriage.

However, carriage by successive carriers is also still possible (Art. 26 of CIM, Art. 22 § 3 of SMGS and Art. 34 ff of CMR).

The legally problematic entity of the "substitute carriers" (Art. 27 of CIM only, not in SMGS and CMR) could be dispensed with.

See Article R § 3

The legal entities of the "contractual carrier" and the "successive carrier" could be addressed in the basic rules of liability (i.e. in Article R of the proposed new text proposal).

Presumption of loss or damage in case of reconsignment (Article 28 CIM / Article 23 § 10 SMGS) This provision is not required for the new legal regime.

Such provisions do not seem to be required in the new legal railway regime.

Article 29 CIM / Article 17 §§ 5, 6 SMGS, Article 20 of GP

**Article S
Presumption of loss of the goods**

While CIM (Art. 29) and CMR (Art. 20) allow the consignee, in case of rediscovered goods, a choice for delivery or compensation, the SMGS (Art. 17 § 6) requires the consignee to accept the goods during a period of six months.

§ 1 The person entitled may, without being required to furnish further proof, consider the goods as lost when they have not been delivered to the consignee or placed at his disposal within **three month** after the expiry of the transit period.

The new legal railway regime might follow the example of CIM and CMR.

Article 30 CIM /Article 25 SMGS, Article 35 of GP

CMR, CIM and SMGS follow similar principles: Obligation to pay compensation is limited to the value of the lost goods and the paid carriage charges; according to CMR and CIM also in terms of fixed amounts. Compensation for collateral damages will not be refunded.

The new legal railway regime could also be based on these principles. Appropriate compensation limits will need to be determined.

§ 2 The person entitled may, on receipt of compensation for the missing goods, request in writing that he shall be notified immediately should the goods be recovered within one year after the payment of compensation. The carrier shall acknowledge such request in writing.

§ 3 Within thirty days after receipt of such notification, the person entitled may require the goods to be delivered to him against payment of the costs resulting from the contract of carriage and against refund of the compensation received less, where appropriate, costs which may have been included therein. He shall retain his rights to claim compensation for exceeding the transit period provided for in Article V.

§ 4 In the absence of the request referred to in § 2 or of instructions given within the period specified in § 3, or if the goods are recovered more than one year after the payment of compensation, the carrier shall be entitled to deal with them in accordance with the laws and prescriptions in force at the place where the goods are situated.

§ 5 Any obligation of the consignee to accept the recovered goods shall remain subject to the laws and prescriptions applicable in the State where the place designated for delivery is situated. (cf. OSJD, Art. 20 of GP, § 3)

Article T

Compensation for loss

§ 1 In case of total or partial loss of the goods, the carrier shall compensate the value of the goods on the day and at the place where they were taken over for carriage. If part of the goods has been delivered, its value which remains to the person entitled shall be deducted from the amount of compensation.

§ 2 The value of the goods shall be fixed according to the market price or, if there is no such price, according to the usual value of goods of the same kind and quality. If the goods have been sold just before being taken over for carriage the purchase price noted in the seller's invoice, minus carriage charges included therein, shall be considered prima facie to be the market price.

§ 3 The carrier shall, in addition, refund the carriage charge, customs duties already paid and other charges paid in respect of the carriage of the goods. If part of the goods has been delivered, § 1, second sentence, shall apply by analogy.

§ 4 In case of loss of an intermodal transport unit or its removable parts, the compensation shall be limited to the usual value of the unit or its removable parts on the day and at the place of loss. If it is impossible to ascertain the day or the place of loss, the compensation shall be limited to the usual value on the day and at the place where the unit has been taken over by the carrier.

Liability for wastage in transit / Limitation of liability in case of mass shortfall (Article 31 CIM / Article 24 SMGS, Article 36 of GP)

Given the type of goods carried in Euro-Asian rail transport, wastage in transit should not play a major role.

As is the case in CMR, the new legal railway regime should therefore not include specific liability provisions for wastage in transit.

Article 32 CIM / Article 26 SMGS, Art. 37 of GP

The new legal railway regime could be based on the structurally comparable provisions on compensation for damage contained in CIM, SMGS and CMR (Article 25).

§ 5 No further damages shall be payable.

This provision is not required for the new legal regime.

Alternative:

Article TA of this Legal Regime

§ 1 *In respect of goods which, by reason of their nature, are generally subject to wastage in transit by the sole fact of carriage, the carrier shall only be liable to the extent that the wastage exceeds the following allowances, whatever the length of the route:*

(a) *two per cent of the mass for liquid goods or goods consigned in a moist condition;*

(b) *one per cent of the mass or dry goods.*

§ 2 *The limitation of liability provided for in § 1 may not be invoked if, having regard to the circumstances of a particular case, it is proved that the loss was not due to causes which would justify the allowance.*

§ 3 *Where several packages are carried under a single consignment note, the wastage in transit shall be calculated separately for each package if its mass on consignment is shown separately on the consignment note or can be ascertained otherwise.*

§ 4 *In case of total loss of goods or in case of loss of a package no deduction for wastage in transit shall be made in calculating the compensation.*

§ 5 *This Article shall not derogate from Article R § 4.*

Article U

Compensation for damage

§ 1 In case of damage to goods, the carrier shall compensate the loss in value of the goods. The amount shall be calculated by applying to the value of the goods defined in accordance with Article T § 2 the percentage of loss in value noted at the place of destination. It is presumed that the costs of lowering and repairing the damage correspond to the loss in value.

§ 2 The carrier shall, in addition, refund the costs provided for in Article T § 3, in the proportion set out in § 1.

§ 3 The compensation shall not exceed:

Article 33 CIM / Article 27 SMGS, Article 38 of GP

While CIM und SMGS provide for structurally comparable provisions for compensation for exceeding the transit period, they differ however in the compensation limits.

This will need to be discussed.

Compensation in case of declaration of value of goods or in case of interest in delivery (Articles 34, 35 CIM / Article 10 § 2, Article 25 § 1 SMGS, Article 10 of GP)

As in CMR (Art. 23, para. 6 and Art. 24 and 26), CIM and SMGS allow for higher compensation if consignor and carrier agree on a higher value for the goods or a special interest in delivery.

If the new legal railway regime, in line with Art. 5.3 of CIM, provides generally that liability of the carrier could be increased by him on a voluntary basis, special arrangements in this respect do not seem to be necessary.

- (a) the amount payable in the case of total loss, if the whole consignment has lost value through damage;
- (b) the amount payable in the case of loss of the part affected, if only part of the consignment has lost value through damage.

§ 4 In case of damage to an intermodal transport unit or its removable parts, the compensation shall be limited to the cost of repair. § 3 shall apply by analogy.

§ 5 No further damages shall be payable.

**Article V
Compensation for exceeding the transit period**

§ 1 In the case of exceeding the transit period, if the claimant proves that damage, including damage to the goods, has resulted therefrom, the carrier shall pay compensation **not exceeding the carriage charges**.

§ 2 Insofar as the goods are lost or have lost value as a result of partial loss, compensation for delay shall not be paid.

§ 3 Insofar as damage to the goods is not the result of delay, the compensation provided for in § 1 shall be payable in addition to that provided for in Article M.

§ 4 In no case the compensation for delay together with that for partial loss of or damage to goods shall exceed the compensation which would be payable in case of total loss of the goods.

§ 5 If the transit period has been established by agreement, other forms of compensation than those provided for in § 1 may be so agreed. If, in this case, the transit periods provided for in Article L are exceeded, too, the person entitled may claim either the compensation provided for in the agreement or that provided for in this Article.

These provisions are not required for the new legal regime.

Especially if there is no limitation of the amount of compensation for loss or damage (cf. Articles T and U) no higher compensation is justified in the case of declaration of value.

Loss of right to invoke the limits of liability (Article 36 CIM)

As the CMR (Art. 29), the CIM also contains a provision on the loss of the right to invoke the limit of liability in the case of serious fault of the carrier (Article 36). The SMGS does not contain such a provision, as it generally does not lay down compensation limits in terms of amounts.

In view to recent developments to aim at insurmountable compensation limits (see Art. 22, para. 3, sentence 1 of MC and also of the Rotterdam Rules), the new legal railway regime could do without the provision of Art. 36 of CIM provided that compensation limits, in terms of amounts, are sufficiently high or are omitted entirely.

Article 37 CIM / Article 28 SMGS, Article 23 of GP)

CMR, CIM and SMGS contain similar provisions that could be included into the new legal railway regime.

Liability in respect of rail-sea traffic (Article 38 CIM)

The inclusion into the new legal railway regime of provisions on “liability in respect of rail-sea traffic”, only provided in CIM (Art. 38), needs to be **reflected in connection with the possible installation of official lines of rail-sea traffic (cf. Art. A § 3).**

SMGS addresses these issues only with regard to the utilization of the consignment note in case of carriage via certain rail ferry links (Annex 12.6, Sections 3.1 to 4.2).

This provision is not required for the new legal regime.

**Article W
Conversion and interest**

§ 1 Where the calculation of the compensation requires the conversion of sums expressed in foreign currency, conversion shall be at the exchange rate applicable on the day and at the place of payment of compensation.

§ 2 The person entitled may claim interest on compensation, calculated at five per cent per annum, from the day on which the claim was sent in writing to the carrier or, if no such claim has been made, from the day on which legal proceedings were instituted.

For the first step this provision is not required for the new legal regime.

Liability in case of nuclear incidents (Article 39 CIM)

A provisions on liability in case of nuclear incidents, only provided in CIM (Art. 39), does not seem to be of much relevance for the new legal railway regime.

Article 40 CIM / Article 31 of GP

As in CMR (Art. 3 and 29, para. 2) and other international agreements, CIM (Art. 40) **and the new SMGS (Art. 31 of GP)** also provides for the liability of the carrier for his agents and servants. Such provisions should also be included in the new legal railway regime.

It may also be necessary to clarify that the infrastructure manager, if not legally identical to the carrier, shall be treated as an agent or servant of the carrier.

Article 41 CIM / Article 26 § 5 SMGS, Article 26 of GP

CIM (Art. 41) and, in substance also SMGS (Art. 26 § 5), provide, similar to CMR (Art. 28), MC (Art. 29–30) and other international agreements, that, in case these conventions are applicable, claimants cannot obtain higher compensation under other legislation. For CIM and CMR, these provisions also apply to the staff and agents of the carriers.

Similar provisions should also be included in the new legal railway regime.

Settlement of claims**Article 42 CIM / Article 18 SMGS, Article 22 of GP**

CIM (Art. 42) and SMGS (Art. 18) provide, as two separate steps of the settlement of claims, the (compulsory) drawing up of a report by the carrier and a claim by the person entitled (claimant).

According to CIM, this claim is optional whereas it is mandatory under SMGS.

This provision is not required for the new legal regime.**Article X****Persons for whom the carrier is liable**

The carrier shall be liable for his servants and other persons whose services he makes use of for the performance of the carriage, when these servants and other persons are acting within the scope of their functions. The managers of the railway infrastructure on which the carriage is performed shall be considered as persons whose services the carrier makes use of for the performance of the carriage.

Article Y**Other actions**

§ 1 In all cases where this Convention shall apply, any action in respect of liability, on whatever grounds, may be brought against the carrier only subject to the conditions and limitations laid down in this legal regime.

§ 2 The same shall apply to any action brought against the servants or other persons for whom the carrier is liable pursuant to Article X.

Article Z**Notice of damage**

§ 1 Where partial loss of or damage to the goods is apparent and the consignee or the consignor fails to notify this on delivery of the goods at the latest, it is presumed that the goods have been delivered in a condition conforming with the contract. The notice must specify the damage sufficiently clearly.

§ 2 Where partial loss or damage was not apparent, the presumption referred to in § 1 shall also apply if the damage is not notified within seven days after

CMR (Art. 30) and MC (Art. 31) on the other hand require a **notice of damage** to be made by the consignee.

In CMR (Art. 32, para. 2) the optional claim only ensures the suspension of the period of limitation.

The new legal railway regime could be based on CMR and MC. But instead of the requirement for drawing up a report for the ascertainment of a loss, the new legal regime could foresee the recording of the damage together with an optional claim to ensure suspension of the period of limitation.

It also seems to be appropriate to reduce the extensive procedural and formal requirements under CIM and SMGS.

Art. 43 CIM / Art. 29 SMGS, Art. 39 of GP

If a provision relating to claims is needed it should be based on Art. 43 CIM (optional claim) with an opening to a mandatory solution as in the SMGS area

delivery.

§ 3 Claims for delay shall expire if the consignee does not notify the carrier of the delay in delivery within ... days after delivery of the goods.

§ 4 If loss, damage or delay is notified on delivery, it is sufficient to give notice to the person delivering the goods. After delivery any notice of damage shall be given to the carrier in text form (e.g. E-Mail). Dispatch within the applicable notification period is sufficient.

§ 5 **Any obligation of the carrier to draw up a formal report if he discovers or presumes loss of or damage to the goods or discrepancies between the condition of the goods and the entries in the consignment note shall remain subject to the laws and prescriptions applicable in the State where he is performing the carriage. (cf. OSJD, Art. 22 of GP)**

**Article ZA
Claims**

§ 1 Claims relating to the contract of carriage must be addressed in writing to the carrier against whom an action may be brought.

§ 2 A claim may be made by persons who have the right to bring an action against the carrier. The necessity to make a claim before bringing an action against the carrier shall remain subject to the laws and prescriptions applicable in the State where the action shall be brought.

§ 3 To make the claim the consignor must produce the duplicate of the consignment note. Failing this he must produce an authorisation from the consignee or furnish proof that the consignee has refused to accept the goods. If necessary, the consignor must prove the absence or loss of the consignment note.

§ 4 To make the claim the consignee must produce the consignment note if it has been handed over to him.

§ 5 The consignment note, the duplicate and any other documents which the person entitled thinks fit to submit with the claim must be produced either in the original or as copies, the copies, where appropriate, duly certified if the carrier so requests.

§ 6 On settlement of the claim the carrier may require the production, in the original form, of the consignment note or the duplicate so that they may be endorsed to the effect that settlement has been made.

Article 44 CIM / Article 30 SMGS, Article 40 of GP

CIM and SMGS regulate who, on the basis of the contract of carriage, could take action (ability to sue), against whom action may be levied (capacity to be sued) and where should be the venue of legal action (jurisdiction).

SMGS provides fewer details in this respect than CIM.

CMR (Art. 31) and MC (Art. 33) primarily regulate the issues of jurisdiction and capacity to be sued (Art. 36 of CMR; Art. 36 para.3 and Art. 45–46 of MC).

Euro-Asian rail transport is often carried out by several carriers. Therefore, it seems advisable to also address in the new legal railway regime the issues of jurisdiction and capacity to be sued. Furthermore, due to the often large distances between the country of departure and the country of destination it seems also appropriate to regulate the ability to sue, either the consignor or the consignee (see Art. 44, paras. 1-2 of CIM)

Article 45 CIM / Article 30 § 2 SMGS**Article AA****Right to bring an action against the carrier**

§ 1 The consignor may bring an action as long as he has the right to dispose of the goods in accordance with Article N or if there are circumstances preventing delivery.

§ 2 The consignee may bring an action during the time he has the right to dispose of the goods in accordance with Article N.

§ 3 An action for the recovery of a sum paid pursuant to the contract of carriage may only be brought by the person who made the payment.

Article BB**Carriers against whom an action might be brought**

§ 1 Actions based on the contract of carriage may be brought against the contractual carrier or against the carrier who has delivered the goods or against the carrier having performed the part of the carriage on which the event giving rise to the proceedings occurred.

§ 2 An action for the recovery of a sum paid pursuant to the contract of carriage may be brought against the carrier who has collected that sum or against the carrier on whose behalf it was collected.

§ 3 An action may be brought against another carrier when instituted by way of counter-claim or by way of exception in proceedings relating to a principal claim based on the same contract of carriage.

§ 4 If the plaintiff has a choice between several carriers, his right to choose shall be extinguished as soon as he brings an action against any one of them.

Article 46 CIM / Article 30 § 3 SMGS

**Article CC
Forum**

§ 1 In legal proceedings arising from carriage under this legal regime, the plaintiff may bring an action in the courts or tribunals of Contracting States designated by agreement between the parties or in the courts or tribunals of a State on whose territory:

- (a) the defendant has his domicile or habitual residence, his principal place of business or the branch or agency which concluded the contract of carriage, or
- (b) the place where the goods were taken over by the carrier or the place designated for delivery is situated.

Other courts or tribunals may not be seized.

§ 2 Where an action based on this legal regime is pending before a court or tribunal competent pursuant to § 1, or where in such litigation a judgement has been delivered by such a court or tribunal, no new action may be brought between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the State in which the new action is brought.

(§ 3 In proceedings arising from carriage under this Convention security for costs cannot be required from nationals of Contracting States resident or having their place of business in one of those states).

Article 11 of COTIF: Security for costs

In accordance with Article 31 § 5 of CMR it could be suitable to include a provision as contained in Article 11 of COTIF in the new legal railway regime if it becomes a **formal Convention**, in force after a sufficient number of **ratifications**.

Article 12 of COTIF

In accordance with Article 31 §§ 3, 4 of CMR, it could also be suitable to include provisions as contained in Article 12 §§ 1, 2 of COTIF in the new legal railway regime if it becomes a **formal convention** (see above).

**(Article DD
Execution of judgements. Attachment**

§ 1 *When a judgement entered by a court or tribunal of a Contracting State in any such action as is referred to in Article CC has become enforceable in that State, it shall also become enforceable in each of the other Contracting States, as soon as the formalities required in the State concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened. These provisions shall also apply to judgements after trial, judgement by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.*

A similar provision as in Article 12 § 3 of COTIF may be included in a new **formal Convention** which would not readily allow attaching or making a seizure for the debts of one carrier against another.

A similar provision as in Article 12 § 5 of COTIF may be included in a new **formal Convention (see above)**

Extinction of right of action, Article 47 of COTIF, Article 30 § 1 SMGS

CIM, SMGS and MC (Art. 31, para. 4) foresee the extinction of the right of action in certain cases. CMR, however, only allows a period of limitation (Art. 32).

It may be considered to follow the example of CMR and to allow in the new legal railway regime also only a period of limitation.

Article 48 CIM / Article 31 SMGS, Article 41 of GP

CIM, SMGS and CMR (Art. 32) contain similar provisions on which the new legal railway regime could be based. However, the periods of limitation are different and a suitable solution needs to be found.

§ 2 *Debts arising from a transport operation subject to this legal regime, owed to one carrier by another carrier who is not under the jurisdiction of the same Contracting State, may only be attached under a judgement given by the judicial authority of the Contracting State which has jurisdiction over the carrier entitled to payment of the debt sought to be attached.*

§ 3 *Railway vehicles used to perform a transport operation subject to this legal regime may be seized on a territory other than that of the Contracting State in which the keeper has its registered office, only under a judgement given by the judicial authority of that State. The term “keeper” means the person or entity who, being the owner or having the right to use it, exploits the vehicle economically in a permanent manner as a means of transport and is registered as such in an official vehicle register if it is installed.*

This provision is not required for the new legal regime.

**Article EE
Limitation of actions**

§ 1 The period of limitation for an action arising from carriage under this legal regime shall be **one year**. The period of limitation shall begin to run:

- (a) in the case of partial loss, damage or delay in delivery, on expiry of the date of delivery of the goods;
- (b) in the case of total loss, from the thirtieth day after expiry of the transit period;
- (c) in all other cases, on expiry of the date when the right of action may be exercised.

§ 2 A written claim **in accordance with Article ZA** shall suspend the period of limitation until the day the carrier rejects the claim by notification in writing. If part of the claim is admitted, the period of limitation shall start to run again in respect of the part of the claim still in dispute. The burden of proof of the receipt of the claim or of the reply shall rest with the party relying on these facts. The period of limitation shall not be suspended by further claims having the same object.

Art. 28 § 2 COTIF / Art. 33 § 6 SMGS

COTIF and SMGS contain different rules for out-of-court dispute resolution. According to COTIF/CIM, the parties to the contract of carriage or the carriers may agree among themselves to an arbitration procedure. According to SMGS, a dispute between carriers on the right of recourse could be unilaterally submitted to the OSJD Committee for final decision.

Similar to CMR (Art. 33) and MC (Art. 34), the new legal railway regime could stipulate that, in the contract of carriage or by written agreement among the parties to the contract, an arbitration procedure could be foreseen based on the provisions of the new legal regime.

Relationship of Carriers

Article 49 CIM / Art. 32 SMGS, Art. 28 of GP

CIM and SMGS, but also CMR (Art. 37–40) and MC (Art. 37 and 48) contain provisions governing the relationship among several carriers.

The new legal railway regime could include similar provisions, in particular those related to Articles 49–52 of CIM and Articles 32 and 33 of SMGS.

Article 50 CIM / Article 33 SMGS, Article 29 of GP

§ 3 A right of action which has become time-barred may not be exercised further, even by way of counter-claim or exception.

§ 4 Otherwise, the suspension and interruption of the period of limitation shall be governed by national law.

**Article FF
Arbitration**

§ 1 The contract of carriage or a written agreement between its parties may, with reference to disputes subject to this legal regime, contain a clause conferring competence on an arbitration tribunal, if the clause provides that the tribunal shall apply this Convention.

§ 2 The arbitration procedure shall, at the option of the claimant, take place within one of the forums referred to in Article CC. The parties shall freely determine the composition of the arbitration tribunal and the arbitration procedure.

**Article GG
Settlement of accounts**

Any carrier who has collected or ought to have collected, either at departure or on arrival, charges or other costs arising from the contract of carriage must pay to the carriers concerned their respective shares. The methods of payment shall be fixed by agreement between the carriers.

**Article HH
Right of recourse**

§ 1 A carrier who has paid compensation pursuant to this legal regime shall have a right of recourse against the carriers who have taken part in the carriage in accordance with the following provisions:

- (a) the carrier who has caused the loss or damage shall be solely liable for it;
 - (b) when the loss or damage has been caused by several carriers, each shall be liable for the loss or damage he has caused; if such distinction is impossible, the compensation shall be apportioned between them in accordance with
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Article 51 CIM

letter c);

(c) if it cannot be proved which of the carriers has caused the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge.

§ 2 In the case of insolvency of any one of these carriers, the unpaid share due from him shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge.

**Article II
Procedure of recourse**

§ 1 The validity of the payment made by the carrier exercising a right of recourse pursuant to Article HH may not be disputed by the carrier against whom the right of recourse is exercised when compensation has been determined by a court or tribunal and when the latter carrier, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings. The court or tribunal seized of the principal action shall determine what time shall be allowed for such notification of the proceedings and for intervention in the proceedings.

§ 2 A carrier exercising his right of recourse must make his claim in one and the same proceedings against all the carriers with whom he has not reached a settlement, failing which he shall lose his right of recourse in the case of those against whom he has not taken proceedings.

§ 3 The court or tribunal must give its decision in one and the same judgement on all recourse claims brought before it.

§ 4 The carrier wishing to enforce his right of recourse may bring his action in the courts or tribunals of the State on the territory of which one of the carriers participating in the carriage has his principal place of business or the branch or agency which concluded the contract of carriage.

§ 5 When the action must be brought against several carriers, the plaintiff carrier shall be entitled to choose the court or tribunal in which he will bring the proceedings from among those having competence pursuant to § 4.

§ 6 Recourse proceedings may not be joined with proceedings for compensation taken by the person entitled under the contract of carriage.

Article 4 of COTIF/CUV

Vehicles and intermodal transport units, used as a means of transport, often are provided by one carrier to another carrier who is involved in the same contract of carriage. It seems to be useful in the new legal regime to deal with the liability of the carrier using a vehicle or intermodal transport unit of another carrier.

Article 52 CIM

Article JJ

Liability in case of loss of or damage to a vehicle or an intermodal transport unit (belonging to another carrier)

§ 1 A carrier to whom another carrier (both involved in the same contract of carriage) has provided a vehicle for use as a means of transport to perform a carriage of goods under this legal regime shall be liable for the loss or damage resulting from loss of or damage to the vehicle or its accessories, unless he proves that the loss or damage was not caused by fault on his part. The carrier shall not be liable for loss or damage resulting from loss of accessories which are not mentioned on both sides of the vehicle or in the inventory which accompanies it.

§ 2 In case of loss of the vehicle or its accessories, the compensation shall be limited to the usual value of the vehicle or of its accessories at the place and time of loss. When it is impossible to ascertain the day or the place of loss, the compensation shall be limited to the usual value on the day and at the place where the vehicle has been provided for use.

§ 3 In case of damage to the vehicle or its accessories, the compensation shall be limited to the cost of repair. The compensation shall not exceed the amount due in case of loss.

§ 4 No further damages shall be payable.

§ 5 The carrier entitled may, without being required to furnish other proof, consider a vehicle as lost when he has asked the carrier to whom he provided the vehicle for use as a means of transport, to have a search for the vehicle carried out and if the vehicle has not been put at his disposal within three months following the day of receipt of his request or else when he has not received any indication of the place where the vehicle is situated.

§ 6 If a carrier, under the circumstances of § 1, has provided another carrier with an intermodal transport unit, §§ 1 to 5 shall apply by analogy.

Article KK

Agreements concerning recourse

The carriers may conclude agreements which derogate from Articles GG and HH.

Recourse of action (infrastructure, rolling stock, technical specifications, rail security/safety)**1. Infrastructure**

The relationship between carrier and consignor does not depend on whether the carrier is also infrastructure manager or not.

However, SMGS seems to indicate otherwise (Art. 2, para. 1).

CIM (Art. 23, para. 1) clarifies that the liability of the carrier is independent of the railway infrastructure used (own infrastructure or that of a third person). Furthermore, CIM stipulates (Art. 40, 2. sentence) that the infrastructure manager is to be considered as an agent of the carrier. Thus, the carrier is liable for the infrastructure manager. The legal and contractual relationship between carrier and infrastructure manager is not addressed by the rules of rail carriage, but, for example, in COTIF/CUI.

Article 1, para. 5 of CIM excludes the application of CIM for carriage between stations on the territory of neighbouring States when the infrastructure of these stations is managed by one or more infrastructure managers subject to only one of those States. This is due to the fact that these cases are frequently regulated through bilateral inter-governmental agreements.

2. Rolling stock

The relationship between carrier and consignor does not depend on whether the carrier uses for the carriage his own or third-party vehicles. In CMR this is explicitly stated (Art. 17, para. 3).

In case of carriage of railway vehicles running on their own wheels and consigned as goods (see Art. 5, para.1 of SMGS), specific liability rules could be established as is done in CIM (Art. 24, 30, para. 3 and Art.32, para. 3).

Should a carrier use, in through rail transport without transshipment of the goods, foreign vehicles (that may belong to other carriers or to leasing/rental companies) the relationship between the vehicle owner (keeper) and the carrier should be regulated in specific rules concerning contracts of use of rail vehicles (see COTIF/CUV and annex 10 to SMGS). These rules are not part of the rules of rail carriage applicable between consignor and carrier and would therefore not be part of the new legal railway regime.

Possibly, provisions addressing the liability of the carrier for loss or damage to rail vehicles of other carriers could be included in the new legal railway regime (Section: Relations between carriers).

See Article FF above

Technical specifications of rail vehicles should not be regulated in the new legal regime.

3. Intermodal transport units

Intermodal transport units (containers, swap-bodies and semi-trailers) or other comparable loading units used in intermodal transport, without transshipment of the goods (see Art. 3 d), Art. 30, para. 3 and Art. 32, para. 3 of CIM as well as Annexes 8 and 11 to SMGS) are to be treated as rail vehicles: Loading units are either part of the goods (packaging) if provided by the consignor or are means of transport if provided by the carrier.

See Article T § 4 and Article U § 4 above

In case loading units are part of the goods, the liability of the carrier should be addressed in the new legal railway regime, similar to Art. 30, para. 3 and Art. 32, para. 3 of CIM.

In case loading units are means of transport, the liability of a carrier for loading units of another carrier could also be included in Article **JJ** of the new legal railway regime.

See Article JJ § 6 above

Technical specifications of loading units should not be regulated in the new legal railway regime.

4. Rail security/safety

Refer to the proposed wording of the new legal railway regime “Scope of Application”, Article C: Prescription of public law.

Refer to the proposed wording of the new legal railway regime “Scope of Application”, Article B: Mandatory law.
