



Economic and Social Council

Distr.: General
25 February 2011

Original: English

Economic Commission for Europe

Inland Transport Committee

Working Party on Rail Transport

Group of Experts towards Unified Railway Law

First session

Geneva, 6 May 2011

Item 3

Mandate: UNECE Position Paper towards unified railway law for Euro-Asian land transport

Item 6 of the provisional agenda

Memorandum of Understanding (MoU) or similar instrument (soft law)

Negotiation of an Inter-Governmental Document (IGD EurAsia) as a policy framework for General Terms and Conditions for Euro-Asian rail transport contracts (GTC EurAsia)

Note by the secretariat

I. Introduction

1. The position paper adopted by the UNECE Working Party on Rail Transport (SC.2) at its 64th session (18–19 November 2010, Vienna), provided a vision and a strategy towards unified railway law in the pan-European region and on Euro-Asian transport corridors (ECE/TRANS/2011/3). The position paper is expected to be approved by the UNECE Inland Transport Committee on 3 March 2011.

2. The UNECE position paper acknowledged that the common consignment note, prepared by the Committee of the Organization for Cooperation between railways (OSJD) and the International Rail Transport Committee (CIT), was a first step towards unified railway law as it provided a contractual link between two existing law regimes provided by COTIF/CIM¹ and SMGS.² However, while such private-law arrangements did facilitate international rail freight transport in the region, major rail freight customers, railway

¹ Convention concerning International Carriage by Rail (COTIF) and Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) – Appendix B to the COTIF Convention.

² Agreement on International Goods Transport by Rail (SMGS).

undertakings and Governments along Euro-Asian transport corridors requested further steps to ensure efficient negotiation and conclusion of rail transport contracts along these corridors (ECE/TRANS/2011/3, para. 28).

II. Mandate

3. The UNECE Position Paper recommended, as a short-term solution, to prepare a model of General Terms and Conditions for Euro-Asian rail transport contracts (GTC EurAsia). Further to the common CIM/SMGS consignment note, GTC EurAsia would include all non-commercial elements of rail freight contracts between shippers and railway undertakings as well as among railway undertakings and would be based on and in line with relevant provisions of COTIF/CIM and SMGS.

4. To ensure acceptance and uniform use of such a private-law model contract, the UNECE Position Paper recommended negotiating a Memorandum of Understanding/Resolution/Declaration or similar instrument. Such a Euro-Asian Inter-Governmental Document (IGD EurAsia)³ would constitute the policy framework for the correct and transparent use of international rail transport contracts on the basis of GTC EurAsia over a certain period.

5. GTC EurAsia should be prepared by the industry under the auspices of OSJD and CIT. IGD EurAsia is to be negotiated under the auspices of UNECE (ECE/TRANS/2011/3, paras. 28–38).

III. Objectives

6. Already today, Euro-Asian rail transport can make use of a well developed railway network with several alternative corridors. The construction of new railway links between China, Kazakhstan and Mongolia and the completion by Turkey of the Marmaray tunnel under the Istanbul Strait will further improve network.

7. However, Euro-Asian rail transport operations will only become a commercial reality, if regular and reliable services can be established and maintained along the whole corridor. This will only be possible, if Governments and railway companies work together and commit themselves to a set of common objectives and legal principles.

8. Such cooperation and commitment is essential for Euro-Asian rail transport as, contrary to air and sea transport, rail transport cannot yet rely on a common global legal framework and involves operations through many countries with differing economic and legal systems governing railway transport.

9. The proposed Euro-Asian Inter-Governmental Document (IGD EurAsia) could become the instrument of such commitment and the mechanism for inter-governmental and public-private cooperation in this field.

10. As indicated in the UNECE Position Paper, IGD EurAsia would not constitute mandatory law, but would be a soft law instrument establishing a public-private partnership resolving practical problems arising from different legal railway regimes along Euro-Asian transport corridors. Its aim is to provide a policy framework for GTC EurAsia and to demonstrate Governmental support for the development of Euro-Asian rail services.

³ The term « IGD EurAsia » is used in this document as a place-holder for the name (Memorandum of Understanding, Resolution, Declaration or similar) of the proposed inter-Governmental document until a decision is taken (also refer to chapter V).

11. Good inter-governmental cooperation and coordination is indispensable for efficient Euro-Asian rail transport as in many COTIF and SMGS member States railways operate as public or State supervised undertakings. Thus contractual provisions are often part of public and/or administrative law requiring approval by Governments.

12. Similarly, the establishment of commercially successful very long-distance rail transport services require for good communication and coordination between Governments and the private sector to create an environment of understanding and trust. This is essential to harness and synchronize the required investments in railway infrastructure, rolling stock, logistic centers and rail freight operations along Euro-Asian transport corridors.

13. The proposed IGD Euro-Asia takes account of these requirements. Its joint preparation by Government and industry stakeholders should also ensure that it addresses all relevant legal and operational requirements. It could thus become an authoritative and indispensable basis for the conclusion of Euro-Asian rail transport contracts.

14. This new and innovative approach could pave the way for Euro-Asian railway transport on the basis of a single transport contract, a single consignment note and a single liability system in line with the provisions of both COTIF/CIM and SMGS.

15. The Group of Expert may review the above considerations and may wish to modify and/or complement them to achieve a common understanding on the objectives of IGD EurAsia as a solid policy framework for GTC EurAsia.

IV. Proposed elements of IGD EurAsia as a policy framework for GTC EurAsia

16. The Group of Experts may wish to consider the main elements and provisions to be included into IGD EurAsia serving as the policy framework for GTC EurAsia.

17. The provisions of IGD EurAsia should be to the point and as concise as possible. It should focus on the concerns and responsibilities of Governments and public authorities responsible for legislation and facilitation of international railway transport between Europe and Asia. It should also take account of the needs of the economy, railway operators and shippers and provide for transparency, consistency and reliability in the conclusion and application of international rail transport contracts.

18. IGD EurAsia could have the following structure:

- Preamble
- Body of the document (substantive provisions)
- Final provisions
- Annex (GTC EurAsia)
- Acknowledgment and signatures

A. Preamble

19. The preamble or introductory paragraphs of an inter-governmental agreement or document states the reasons for this undertaking and the objectives to be attained. The substantive provisions are put in context assisting in understanding and, if necessary, in the interpretation of individual elements of the text of the agreement or document.

20. The preamble of IGD EurAsia could reflect the main elements of the mandate and objectives as mentioned above (paras. 3-15) stressing the inter-governmental character and public-private partnership enshrined in this approach. In particular, the preamble could underline the commitment and cooperative approach shown by Governments and railway

companies agreeing on common objectives and legal principles for transparent and efficient rail transport operations between Europe and Asia, with the countries in the Caucasus and Central Asian region and between Europe, Turkey, the Middle East and South-East Asia.

21. The preamble may refer to IGD EurAsia as a first step towards unification of railway law in the pan-European region and along Euro-Asian rail transport corridors, thus integrating the objectives and the strategy adopted in the UNECE Position Paper (ECE/TRANS/2011/3).

22. Once the Group of Experts has agreed on the above elements for inclusion into the preamble, the specific wording would need to be prepared.

B. Body of the document (substantive provisions)

23. The body of IGD EurAsia will contain the substantive provisions of the document and would need to be attuned to the scope and structure of COTIF/CIM and SMGS as well as to the underlying provisions of GTC EurAsia, yet to be prepared.

24. As a first basis for discussion, the Group of Experts may wish to consider the following elements for inclusion into the body of the document. In addition to a limited number general policy statements, additional elements could be included, as appropriate, based on the structure and the provisions of Appendix B CIM of COTIF, the provisions of the SMGS Agreement and the final text of GTC EurAsia.

1. Policy statements

25. The following policy statements could be included into IGD EurAsia:

(a) Unified railway law: Governments stress the importance of making progress towards unified railway law in the pan-European region, on Euro-Asian transport corridors and/or at global level with a view to establishing a level playing field with other modes of transport;

(b) Significance of GTC EurAsia: Governments welcome GTC EurAsia as a model to establish contractual relations among railways, between railways and shippers to facilitate international railway transport in the pan-European region and along Euro-Asian transport corridors;

(c) Declaration of commitment: Governments and public authorities responsible for rail transport endeavour to promote use of GTC EurAsia in their countries and declare readiness to assist in its application, as appropriate;

(d) Conformity: Governments declare that GTC EurAsia is in conformity with existing national rules and regulations and with relevant provisions of COTIF/CIM and SMGS;

(e) Geographical coverage: Governments affirm that GTC EurAsia is applicable on the whole/parts (which corridors?) of the railway network (open to international traffic) on the territory of their country;

(f) Substantive scope: Governments confirm application of GTC EurAsia for all all/parts (container, block trains, full wagon loads, etc.) and types of cargo (dangerous and perishable goods, live animals, etc.) shipped by rail along Euro-Asian transport corridors;

(g) Electronic data processing: Governments support the introduction of electronic data processing and use of electronic transport documentation, such as the electronic CIM/SMGS consignment note, for Euro-Asia rail transport operations.

2. Legal elements

26. More detailed provisions and issues as regulated in COTIF/CIM and SMGS could also be included into IGD EurAsia as follows:

- (a) General provisions:
 - Mandatory prescriptions of public law affecting international rail transport (dangerous goods, Customs procedures, transport of animals and perishable foodstuff, etc.)
 - Definition of terms used
 - Other derogations from GTC EurAsia
 - Applicable mandatory law
- (b) Conclusion and performance of the contract of carriage:
 - Contract of carriage
 - Consignment note
 - Payment of costs
 - Examination
 - Loading and unloading of the goods
 - Completion of administrative formalities
 - Delivery
 - Right to dispose of the goods
 - Carriage and delivery
- (c) Liability issues:
 - Basis for liability
 - Burden of proof
 - Loss, damage and wastage
 - Delay in delivery
 - Compensation
- (d) Assertion of rights:
 - Claims
 - Forum (competent courts or tribunals)
- (e) Relations between railway carriers

3. Economic and operational elements

27. Additionally, consideration may also be given to include economic and commercial aspects that are fundamental for the sustained efficiency and competitiveness of Euro-Asian rail transport. These include, among others, transparent and stable commercial framework conditions and the provision of adequate rail transport and traction capacity essential to attract investments in rolling stock and in new services. Also the provision of efficient and internationally harmonized border crossing procedures could be addressed.

28. Once the Group of Experts has agreed in principle on the above substantive provisions, they would need to be further developed and specific wording would need to be prepared.

C. Final provisions

29. The final or administrative provisions of IGD EurAsia could contain the following elements:

- (a) Open for signature: United Nations Member States / Contracting Parties to COTIF/CIM and SMGS);
- (b) Period for signature: One time event / time period;
- (c) Duration and termination: Unlimited / Until entry into force of model regulation for international rail transport (see UNECE Position Paper – ECE/TRANS/2011/3, paras. 39-43);
- (d) Entry into force: Should there be a quorum for its application (5 States or more?);
- (e) Monitoring: How to monitor application? Who should coordinate these activities?
- (f) Review: Should review and revision procedures be addressed?

30. The UNECE Position Paper recommends that IGD Eurasia should be monitored by the UNECE Working Party on Rail Transport, together with OTIF, OSJD, CIT and concerned railway companies. The UNECE Working Party should also regularly review its provisions in light of operational experiences and prepare and adopt, if necessary, amendments and/or comments thereto (ECE/TRANS/2011/3).

31. Once the Group of Experts has agreed in principle on the elements for inclusion into the final provisions, they would need to be further developed and specific wording would need to be prepared.

D. Annex (GTC EurAsia)

32. The Group of Experts may wish to consider how to refer to GTC EurAsia and to ensure that the contractual model provisions for Euro-Asian rail transport, agreed upon by the industry, are approved or endorsed by Governments and public authorities responsible for international rail transport (public-private partnership).

33. One possibility could be to refer to and endorse GTC EurAsia as a separate document prepared under the auspices of OSJD and CIT. Alternatively, GTC EurAsia could become an annex to IGD EurAsia on the understanding that Governments would be responsible for provisions contained in IGD EurAsia whereas railway companies would be in charge of the annexed provisions of GTC EurAsia. In terms of substance, there seems to be no difference between the two options and a final decision could await the results achieved in the UNECE Group of Experts and in the railway legal group under the auspices of OSJD and CIT.

E. Acknowledgment and signatures

34. The Group of Experts may wish to consider how, following preparation by the Group of Experts and approval by the UNECE Working Party on Rail Transport (SC.2), possibly in November 2011, the IGD EurAsia should be formalized and possibly signed.

35. The UNECE Position Paper recommended that the inter-governmental document could be acknowledged, signed and formalized by concerned Governments and railway undertakings at a special occasion, possibly during the annual session of the UNECE Inland Transport Committee (ITC) in March 2012 (ECE/TRANS/2011/3).

36. The Group of Experts may wish to provide guidance on possible procedures and opportunities in this respect.

37. The Group of Experts may also consider providing for acknowledgement and possible signature of IGD EurAsia by other important stakeholders, such as the European Union and concerned international organizations, such as OSJD, OTIF, Economic Cooperation Organization (ECO) and other inter-governmental organizations. GTC EurAsia could in turn also be acknowledged and signed by interested railway companies and non-governmental organizations involved in this work, such as OSJD, CIT and the International Union of Railways (UIC).

V. Designation of the instrument

38. The Group of Experts may wish to consider the formal name for the place holder “IGD EurAsia” that has been used throughout this document (see para. 4 above).

39. The UNECE Position Paper has recommended negotiating a Memorandum of Understanding/Resolution/Declaration or similar instrument (ECE/TRANS/2011/3, para. 34).

40. In the framework of the United Nations, such inter-governmental instruments or documents are often referred to as “soft law”. This includes resolutions, recommendations and declarations prepared, agreed upon and sometimes signed, for example, by the General Assembly or by United Nations Regional Commissions, such as UNECE. Similar terms used for such “soft law” instruments are: Statements, principles, codes of conduct, codes of practice, action plans and Memorandum of Understanding (MoU).

41. These instruments or documents refer to quasi-legal instruments which do not have any legally binding force or whose binding force is somewhat “weaker” than that of traditional law, often being referred to as “hard law”.

42. The Group of Experts may wish to provide guidance on the term to be used to formally designate this inter-governmental document following its completion by the Group of Experts. In doing so the Group of Experts may take into account the objective and strategy pursued in the UNECE Position Paper towards unified railway law, the intention and the content of this inter-governmental document and its potential signatories.

VI. Follow-up

43. Following agreement on the principle elements of the IDG EurAsia, the Group of Experts may wish to designate experts to prepare a draft inter-governmental document for consideration at the next session of the Group of Experts to be held at Geneva on 16 September 2011. Deadline for completion of this draft for timely transmission to UNOG Conference Services for translation is 1 July 2011.
