



## Presumption of loss or damage in case of reconsignment

Application of Article 28 § 3 of CIM to traffic using the CIM/SMGS consignment note –  
a new SMGS provision enters into force<sup>1</sup>

Some new SMGS<sup>2</sup> provisions will enter into force on 1 July 2008 (see decisions of the CIM/SMGS Steering Group, Bulletin of International Carriage by Rail 3/2007, p. 42/43 and 4/2007, p. 61). Implementation of the solutions achieved – with OTIF's input - in the context of the CIT-OSJD project to make transport law interoperable forms part of these additions to SMGS: design for a common CIM/SMGS formal report, wagon and container list (one document for groups of wagons and containers), procedure for approving traffic axes on which the CIM/SMGS consignment note can be used and presumption when the place the loss or damage occurred in traffic with the CIM/SMGS consignment note is unknown. These rules and model documents mitigate the disadvantages that arise for rail transport customers as a result of the co-existence of two transport law regimes, CIM and SMGS. They offer considerable advantages to those who make use of the CIM/SMGS consignment note<sup>3</sup> as opposed to those who, for whatever reasons, perform transport with the customary reconsignment, using a separate consignment note for each contract of carriage.

One of these new rules is Article 23 § 10 of SMGS. The proposals for this provision were drafted in the CIM/SMGS Legal Group, submitted to the meeting of experts of the OSJD's "Transport Law" Commission in July 2007 and adopted in October 2007 at the annual meeting of this Commission. Article 23 § 10 introduces presumption in case of reconsignment into SMGS. This has a direct effect on the application of Article 28 § 3 of CIM. As both these provisions contain legal presumption for reconsigned consignments concerning which the place the loss or damage occurred is unknown, it may be claimed that the rules are parallel,

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<sup>1</sup> Published in the Bulletin of International Carriage by Rail 1/2008, p. 1 et seq.

<sup>2</sup> Agreement on International Goods Transport by Rail, concluded in the framework of the Organisation for Railways Cooperation (OSJD), whose aim is direct rail traffic for the carriage of goods between the railways of the following States: Albania, Azerbaijan, Belarus, Bulgaria, China, Estonia, Georgia, Hungary, Iran, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, North Korea, Poland, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam

<sup>3</sup> The CIM/SMGS consignment note has been available since 1 September 2006; the CIM/SMGS consignment note manual, which sets out the transport operations for which this consignment note may be used, is published on the website of CIT ([www.cit-rail.org](http://www.cit-rail.org), Products, Freight traffic CIM)

even if this is only partially the case, as explained below. In the context of the parallelism this creates, the application of Article 28 § 3 of CIM will be possible from 1 July 2008.

### **History of origins**

The origins of legal presumption in case of reconsignment have a long history. The problem of the claimant's not being able to assert his claim for compensation for loss or damage occurring in transport if he was not in a position to provide proof of which of two immediately consecutive contracts of carriage was being carried out at the time the loss or damage occurred, has existed since the beginning of the last century. In those days, these were cases where domestic transport was carried out prior to transport in accordance with the then International Convention on international rail freight transport (CIM/IÜG, Berne Convention) or where transport was performed on the basis of two consecutive contracts of carriage in accordance with the CIM/IÜG. Case law to the detriment of railway users led to proposals aimed at resolving this problem being dealt with as early as the 4<sup>th</sup> Revision Conference (1932). A provision was adopted at that Revision Conference according to which it was to be presumed that any loss or damage had occurred during performance of the latest contract of carriage. However, this was very restrictive: It only covered a small number of cases where it was not possible to ascertain during which of consecutive contracts of carriage the loss or damage occurred. Thus presumption only applied if both the previous and subsequent transport operations were subject to the CIM/IÜG.

At the 5<sup>th</sup> Revision Conference (1952), this provision was extended to cover cases where consecutive transport operations were subject to different freight transport laws; however, the presumption of loss or damage was made on condition that in the case of through consignment from the original forwarding station to the final destination, CIM would have had to apply. In the case of an SMGS-CIM reconsignment, presumption was only considered if the SMGS transport was performed in States that were also Contracting Parties to CIM at the same time.

When COTIF was partially revised in 1989, the provision was extended further. A special rule concerning SMGS-CIM reconsignment was included in Article 38 § 2, para. 2 of CIM. In the fundamental revision of COTIF, which was concluded with the adoption of the Vilnius Protocol in 1999, this provision was carried over into Article 28 § 3 of CIM. For an SMGS-CIM reconsignment now, it no longer depends on whether the CIM UR would have been applicable from the original place of forwarding up to the final place of delivery in the case of through consignment. In the case of reconsignment of consignments that have come from the SMGS area and have been reconsigned in accordance with CIM, the presumption of loss or damage only applies on condition that the same presumption of law is provided for the benefit of consignments coming from the CIM area and reconsigned in the direction of SMGS (reciprocity). Owing to this as yet unfulfilled condition, neither Article 38 § 2, para. 2 of CIM 1980 nor Article 28 § 3 of CIM 1999 were ever applied.

### **Article 28 of CIM and Article 23 § 10 of SMGS – object of the rule**

Both Articles provide for refutable presumption, which applies in case of reconsignment. It is presumed that the loss or damage (partial loss of or damage to goods) occurred during the latest contract of carriage, in so far as the consignment remained in the charge of the carrier and was reconsigned unaltered in the condition in which it arrived at the place of reconsignment. This is a reversal of the burden of proof in relation to one of the basic conditions for the

carrier's liability, i.e. the origination of the loss or damage in the period between when the goods are taken over, which in these cases is at the time of reconsignment, and delivery of the goods.

According to Article 28 § 3 of CIM, this presumption also applies if the contract of carriage prior to the reconsignment was subject to "a convention concerning international through carriage of goods by rail comparable with the CIM UR", i.e. SMGS, and if this convention contains "the same presumption of law" in favour of consignments consigned in accordance with the CIM UR.

This requirement for reciprocity will be met from 1 July 2008 with the entry into force of the new paragraph 10 of SMGS Article 23 in relation to consignments with a CIM/SMGS consignment note. The new Article 23 § 10 of SMGS reads as follows:

*"If, when carrying goods with the CIM/SMGS consignment note from countries that are not party to this convention, damage to or partial loss of the goods is ascertained after the date has been stamped in the CIM/SMGS consignment note at the place of reconsignment, and the railway that applies SMGS has accepted the consignment without obvious irregularities, until proof is provided otherwise, it is presumed that the damage or partial loss occurred during performance of the contract of carriage in the SMGS area.*

*If, when carrying goods with the CIM/SMGS consignment note from countries that are party to this convention, damage to or partial loss of the goods is ascertained after the date has been stamped in the CIM/SMGS consignment note at the place of reconsignment, and the CIM carrier has accepted the consignment without obvious irregularities, until proof is provided otherwise, it is presumed that the damage or partial loss occurred during performance of the contract of carriage in the CIM UR area.*

*This presumption shall be applicable irrespective of whether the goods were reloaded into a wagon with a different gauge."*

In this provision of SMGS, the idea of reciprocity is given expression by the fact that both directions of travel are referred to. The second paragraph, which lays down a presumption of law in favour of SMGS consignments in the CIM area and which is certainly of a declarative nature, covers part of what is dealt with in Article 28 § 3 of CIM. It is clear from the wording of both the first and second paragraphs that only goods carried with the CIM/SMGS consignment note can benefit from this presumption of law. In contrast, transport using two separate consignment notes is not included; the condition of a same presumption of law for such consignments is still not met.<sup>4</sup>

### **Requirements for presumption of law**

The requirements for presumption of law include the following elements:

- reconsignment
- of the same consignment (same object of carriage)
- at the same place (the place of delivery of the first contract of carriage is also the place of reconsignment)
- in an unaltered condition

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<sup>4</sup> When SMGS is revised, consideration should be given to extending the presumption of law to consignments with two separate consignment notes.

- remains in the charge of the carrier
- claim as a result of partial loss or damage
- ascertained after reconsignment and
- with regard to CIM/SMGS reconsignment, reciprocity (same presumption of law in favour of consignments carried onwards from the area of application of CIM to the area of application of SMGS).

### **Same presumption of law**

In comparing Article 28 of CIM and Article 23 § 10 of SMGS, it becomes apparent that the element of “remaining in the charge of the carrier” is not explicitly mentioned in the SMGS provision. The SMGS experts’ justification for this was that the effect of the CIM/SMGS Consignment Note Manual (GLV CIM/SMGS), which also forms part of SMGS (Annex 22), was that the consignment in any case remains in the charge of the carrier or railway. The CIM/SMGS Consignment Note Manual also provides that the place of delivery according to the first contract of carriage is also the place of reconsignment of the same consignment on the basis of the second contract of carriage. Nevertheless, problems cannot be completely ruled out in those cases where, despite using the CIM/SMGS consignment note, the modalities of reconsignment provided for in the manual have not been observed, so that the consignment is temporarily out of the charge of the carrier. However, for transport from the area of application of SMGS to the area of application of CIM, uninterrupted charge of the carrier remains one of the conditions for presumption to have effect.

“Same presumption of law” means the same legal effect in parallel cases. As long as the scope of the cases covered in SMGS is narrower, i.e. as long as they are restricted to transport operations with the CIM/SMGS consignment note, while the parallel provision in CIM relates to any SMGS-CIM transport operation, this means that there is parity, at least with regard to transport with the CIM/SMGS consignment note. This difference is no obstacle to applying the presumption of law in the CIM area. In the event that a court of a COTIF Member State were not to consider the presumption newly included in SMGS as equivalent presumption of law, because it does not cover all cases of CIM/SMGS reconsignment, it should be noted that the rule concerning such a presumption of law on the part of the CIM carrier may in any case be agreed in a contract. Such presumption of law, which facilitates the other contracting party’s situation with regard to furnishing evidence, in fact means an extension of the carrier’s liability, and according to Article 5 of CIM, this can be agreed in a contract.

### **The purpose of the presumption of law**

The purpose of this presumption of law is to facilitate the task of the final consignee (the injured party) with regard to the provision of evidence, by saving him from having to prove that the damage or loss occurred during the period between accepting the goods for transport (at the place of reconsignment) and delivery at the final destination – this evidence is required under both freight laws, but it is sometimes difficult to provide it after reconsignment. At the same time, the carrier is free to prove that the loss or damage did not occur during the latest contract of carriage.

### **The effects of the presumption of law**

The presumption that the loss or damage occurred during the latest contract of carriage, which applies until proved otherwise, has a bearing on all questions that are of relevance to the assertion of compensation claims: right of action to make a claim, capability of being sued, amount of compensation, extinction and limitation of actions.

- The consignor of the latest contract of carriage is entitled to make a claim;
- Claims may be asserted against the carrier(s) of the latest contract of carriage;
- The amount of compensation is based on the latest contract of carriage (value of the goods on the day and at the place of reconsignment, declaration of value or interest in delivery according to the latest contract of carriage);
- Extinction and limitation of claims is based on the latest contract of carriage.

If one of the conditions is absent, presumption does not apply. The compensation claim is nevertheless assessed on the basis of the latest contract of carriage if loss or damage is ascertained and a complaint is made at the destination point. However, the injured party would have to prove that the loss or damage occurred during the latest contract of carriage.

### **Applying the presumption of law and its significance in practice in West-East and East-West traffic**

With regard to reconsignment and because of the reloading required as a result of different gauges – in so far as wagons are not automatically changed over to another gauge – different situations can arise in West-East and East-West traffic. Depending on whether reloading takes place at the same place as reconsignment or whether the goods are reloaded into wagons of the other gauge before or after reconsignment, ascertaining any loss or damage that has occurred during transport and attaching the loss or damage to the liability regime of CIM or SMGS can be more or less difficult.

If reloading and reconsignment take place at the same place, this provides an opportunity, when opening the wagon, to ascertain whether loss or damage has occurred during the first contract of carriage. For loss or damage ascertained at a later stage, it should in most cases be possible to attach the loss or damage to the second contract of carriage even without recourse to the presumption of law.

If reloading takes place before reconsignment, this will likewise provide an opportunity to ascertain with certainty any loss or damage that has occurred up to that point during the first contract of carriage. However, in the case of loss or damage ascertained at a later stage, there might be cases where the presumption of law may be considered. Difficulties in attaching loss or damage to one or the other contract of carriage are most likely to arise when reloading only takes place after reconsignment. In these cases particularly, presumption of law could be helpful. With regard to loss or damage discovered at the place of reloading after reconsignment, it might be difficult to ascertain the leg of the journey during which this loss or damage occurred. Even if the leg of the journey between the place of reconsignment and reloading were to be a short border section, not only would there be risks inherent in the necessary manipulation of the wagons before customs clearance and before reloading, but additional risks would

also be involved as a result of wagons having to stop for long periods of time on these border sections.

In practice, cases cannot be ruled out in which the loss or damage is not ascertained in time before the destination is reached, including cases where it might have been possible for the loss or damage to occur even before reconsignment, but the loss or damage was not ascertained either at the time of reconsignment or of reloading. Thus no formal report would be prepared before the destination was reached and there would be no other evidence (for instance a report on the opening of a wagon for the purpose of border or customs controls) and when the goods are unloaded at the destination, it is nevertheless clear that the loss or damage ascertained at that point is loss or damage that has occurred during transport. In such cases – even though they may perhaps be few in practice – the presumption of law is useful for the rail transport undertakings' customers in the freight transport sector.