

# Resolving Rail Freight Transport Disputes along Europe-China Corridors and Asian Regional Routes

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**Abstract:** The Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules) enable the resolution of rail freight transport disputes in Europe and its neighboring regions. These rules are not universally applicable and they coexist with the Agreement on International Railway Freight Communications (SMGS), which is applied in China, Central Asia and some countries in the Far East. In the absence of an overarching convention on rail freight transport contracts, the resolution of rail freight transport disputes when neither the CIM Rules nor the SMGS are applicable (along Europe-China corridors and several regional routes that link China to non-SMGS Asian countries) may rely upon agreements formed by the rail freight transport industries. These legal instruments aim, first and foremost, at avoiding disputes and at facilitating early settlement of claims utilizing standard forms. When a CIM consignment note is concerned, the CIM Consignment Note Manual (GLV CIM), the General Terms and Conditions of Carriage for International Freight Traffic by Rail (GTC CIM) and the Agreement concerning the Relationships between Carriers in respect of International Freight Traffic (AIM) are the main instruments that may be utilized to resolve the rail freight transport disputes that may emerge. GTC CIM refers to conciliation, mediation and arbitration. Meanwhile, under a CIM-SMGS consignment note, the CIM-SMGS Consignment Note Manual (GLV CIM-SMGS), the General Terms and Conditions EurAsia (GTC EurAsia) and Annex 10 AIM contribute to the avoidance, early settlement and resolution of disputes. When it comes to third-party adjudication, GTC EurAsia refers to state courts and to ADR.

**Keywords:** Rail Freight Transport Disputes, Europe-China Rail Corridors, Asian Regional Rail Routes, CIM Consignment Note, SMGS Consignment Note, International Rail Transport Committee (CIT) legal instruments

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## I. INTRODUCTION

The resolution of land freight transport disputes in Europe and in a considerable

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number of its neighboring countries (notably in Central Asia and in the north of Africa) relies heavily on two international conventions on land freight transport disputes. In the field of road transport, the Convention on the Contract for the International Carriage of Goods by Road (CMR) is the unrivalled international convention that brings legal certainty to the resolution of cross-border road freight transport disputes.<sup>1</sup> In the field of rail transport, the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules), contained in Appendix B to the Convention concerning International Carriage by Rail (COTIF), enable the efficient resolution of freight transport disputes in Europe and its neighboring regions.<sup>2</sup>

However, the geographical scope of the CIM Rules is not universal. Two cross-border legal regimes coexist in the field of rail freight transport: the CIM Rules and the Agreement on International Railway Freight Communications (SMGS).<sup>3</sup> SMGS is not *sensu stricto* an international treaty, but rather an agreement between ministries competent to regulate rail transport, with its origins in soviet-era agreements. Countries in Central Asia (including Russia), Eastern Europe and parts of the Far East (including, not only China, but also the Republic of Korea, the Democratic People's Republic of Korea and Vietnam) are parties to the SMGS.<sup>4</sup>

India and other Asian countries (such as Thailand, Laos and Cambodia)

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1 Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956, 399 UNTS 189. On the CMR, see: Malcolm Alistair Clarke, *International Carriage of Goods by Road: CMR*, Routledge, 2014 (6<sup>th</sup> edition).

2 Convention concerning International Carriage by Rail (COTIF) 1980, 1396 UNTS 2 *et seq.*, 1397 UNTS 2 *et seq.* Intergovernmental Organization for International Carriage by Rail (OTIF), Appendix B to COTIF: Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules), [https://otif.org/file-admin/user\\_upload/otif\\_verlinkte\\_files/07\\_veroeff/01\\_COTIF\\_80/cotif-cim-1980-e.PDF](https://otif.org/file-admin/user_upload/otif_verlinkte_files/07_veroeff/01_COTIF_80/cotif-cim-1980-e.PDF) (Last Visited on September 28, 2023). On the CIM Rules, see: Malcolm Alistair Clarke and David Yates, *Contracts of Carriage by Land and Air*, Taylor and Francis Group, 2008 (2<sup>nd</sup> edition).

3 Organization for Cooperation of Railways (OSJD), Agreement on International Railway Freight Communications (SMGS), <https://en.osjd.org/en/8906/page/106077?id=2099> (Last Visited on September 15, 2023). The acronym OSJD comes from the name of the Organization for Cooperation of Railways in Russian language (unofficial translation into English). Note that SMGS is not an international treaty, but rather an agreement among the Ministries with competence over rail transport of the countries that decided to join this legal instrument. Hence, this instrument cannot be found in the United Nations Treaty Series.

4 International Rail Transport Committee, Freight Traffic CIM/SMGS 2019, [https://www.cit-rail.org/media/files/documentation/freight/scopes/scope\\_of\\_application\\_of\\_cim-smgs\\_2019-05-01.pdf?cid=204902](https://www.cit-rail.org/media/files/documentation/freight/scopes/scope_of_application_of_cim-smgs_2019-05-01.pdf?cid=204902) (Last Visited on October 10, 2023).

are not parties either to the CIM Rules (under COTIF) or the SMGS. India is also making efforts to improve cross-border land freight transport through corridors with Europe and other Asian countries, as we have seen in the 2023 G20 Summit at New Delhi.<sup>5</sup> However, the Asian regional routes that will be addressed in this article, which have been fostered by multilateral and national development initiatives, including the Belt and Road (B&R) Initiative, are those that link China to other Asian countries.<sup>6</sup>

These cross-border instruments were sufficient for the resolution of rail freight transport disputes in the regions where the network of railways was more developed and cross-border rail freight routes could be used more efficiently: Europe and its neighboring regions, namely Central Asia and the north of Africa. Rail freight transport infrastructure was rapidly developed in Eastern China in the last decades and SMGS enabled the resolution of a great number of cross-border rail freight transport disputes involving China. Rail freight transport infrastructure is currently being upgraded in Western China and other parts of Asia, enabling more efficient (sometimes new) rail freight transport routes, namely, the Europe-China corridors and the regional routes that link China to non-SMGS Asian countries.

Both the CIM Rules and the SMGS have played and will continue to play a role in the resolution of rail freight transport disputes in different geographical regions. However, several rail freight transport routes cannot fully benefit from either the CIM Rules or the SMGS. This is the case with the Europe-China corridors and the routes that link China to non-SMGS Asian countries. The universalization of the existing cross-border legal regimes is rather unlikely to happen from a political perspective.

The creation of a new overarching convention on rail freight transport contracts would be a milestone in transport law and global logistics that François Davenne has compared to the signature of the Chicago Convention

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<sup>5</sup> European Commission, President von der Leyen marks the EU's commitment to the Partnership for Global Infrastructure and Investment (PGII) at the event hosted during the G20 Summit at New Delhi, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_4421](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4421) (Last Visited on October 5, 2023).

<sup>6</sup> On Europe-China corridors and on the regional routes that link China to other Asian countries, see: Alejandro García Jiménez, Land Freight Transport along the Belt and Road: State-to-State and Investor-State Disputes, *Journal of WTO and China*, Vol. 13, No. 3, 2023, pp. 84-92.

on International Civil Aviation.<sup>7</sup> Only the future will tell whether a new overarching, universally-accepted convention on the rail freight transport contract is possible.

Cooperation in the field of rail freight transport law primarily takes place through members of the industry, not directly through states, as Sandra Géhénot reminds us.<sup>8</sup> In the short and middle term, in the absence of an overarching convention on rail freight transport contracts, the resolution of rail freight transport disputes will need to rely upon agreements designed by the rail transport industry associations along the routes where neither the CIM Rules nor the SMGS can play their full part.

Erik Evtimov has summarized the current challenge facing rail freight transport in the following terms: "... [the] [c]reation of the harmonized international rail freight legal regime has been the declared long-term legal and political goal for the next 10-15 years. Whilst waiting for the states to create this new uniform legal framework, the United Nations Economic Commission for Europe (UNECE) is encouraging the railways and industry associations involved to achieve harmonized solutions on a contractual basis".<sup>9</sup>

The International Rail Transport Committee (CIT, an industry association of the railway undertakings) has contributed to the development of several instruments that can be used by mutual consent of the parties doing business for the resolution of rail freight transport disputes. Can these instruments aid in the resolution of rail freight transport disputes along the Europe-China corridors and along the routes that link China to non-SMGS countries in Asia despite the fact that Chinese railway undertakings are not members of the CIT? What role can these instruments play in the resolution of rail freight transport disputes? What approach to resolution of rail freight transport disputes do each of these instruments adopt?<sup>10</sup>

7 François Davenne, Director General, International Union of Railways (UIC), in an interview to the author on June 15, 2021. Convention on International Civil Aviation 1944, 15 UNTS 295.

8 Sandra Géhénot, Director for Freight, International Union of Railways, in an interview to the author on June 15, 2021.

9 Erik Evtimov, Moving to a new legal regime for global rail freight, *Global Railway Review*, Vol. 25, No. 2, 2019, pp. 26-29.

10 The International Rail Transport Committee had 131 full members and 8 associate members as of June 6, 2023. Railway undertakings, not only in Europe, but also in parts of the Middle East and Central Asia have joined the CIT. International Rail Transport Committee, List of CIT Members, [https://www.cit-rail.org/secure-media/files/cit\\_members\\_2023-07-01.pdf?cid=328172](https://www.cit-rail.org/secure-media/files/cit_members_2023-07-01.pdf?cid=328172) (Last Visited on September 6, 2023).

The first half of the present article will address the accords and instruments that can bring legal certainty to the resolution of disputes when a CIM consignment note is concerned. The CIM Rules only apply *proprio vigore* when both the place of taking over the goods and the place agreed for delivery of the goods are located in different countries that are parties to the COTIF. When one of these places is located in a country that is a member-state, but the other one is located in a non-member state, CIM Rules can only apply if the parties so agree by contract.

When the CIM Rules are applied through contract between the parties, COTIF and its CIM Rules cannot play their full part in the resolution of disputes, such as in the cross-border *lis pendens* mechanism and in the mechanism for the mutual recognition and enforcement of court judgements. In this case, further legal certainty in the resolution of disputes could be promoted through several instruments, such as the CIM Consignment Note Manual (GLV CIM), the General Terms and Conditions of Carriage for International Freight Traffic by Rail (GTC CIM), and the Agreement concerning the Relationships between Carriers in respect of International Freight Traffic (AIM).

The scope of application of SMGS is comparatively narrow: it only applies to transport among certain freight stations in SMGS countries. However, Article 13 also envisages the utilization of CIM-SMGS consignment notes by contract between the parties. The CIM-SMGS Consignment Note Manual (GLV CIM-SMGS, which is contained in Annex 6 of the SMGS) adopts an approach to the resolution of disputes similar to that of the SMGS. Other instruments developed under the auspices of the CIT can further foster certainty in the resolution of covered disputes. The second half of the present article will address the role that GLV CIM-SMGS, the General Terms and Conditions EurAsia (GTC EurAsia) and Appendix 10 to AIM can play in the resolution of rail freight transport disputes.

## II. INSTRUMENTS FOR THE RESOLUTION OF DISPUTES UNDER A CIM CONSIGNMENT NOTE

This section will analyze the role that three instruments may play in the resolution of rail freight transport disputes when a CIM consignment note is utilized

by contract between the parties (as opposed to *proprio vigore*). These instruments are: the CIM Consignment Note Manual (GLV CIM), the General Terms and Conditions CIM (GTC CIM), and the Agreement concerning the Relationships between Carriers in respect of International Freight Traffic by Rail (AIM).<sup>11</sup>

Since China is not a party to the CIM Rules, these rules cannot apply *proprio vigore* either along the Europe-China corridors or along the regional routes that link China to non-SMGS Asian countries. It must be borne in mind that the CIM Rules only apply *proprio vigore* when both the place of taking over the goods and the place designated for delivery of the goods are located in two different countries that are parties to the COTIF. Hence, along the Europe-China corridors, as well as along the regional routes that link China to other non-SMGS Asian countries, the resolution of rail freight transport disputes cannot benefit from either the cross-border *lis pendens* mechanism or from the mechanism for the cross-border recognition and enforcement of court judgements contained in the CIM Rules.

The CIM Rules may apply through contract between parties doing business along the Europe-China corridors, since the parties to a rail freight transport contract may contractually agree to the application of the CIM Rules when at least the place of taking over the goods or the place designated for delivery of the goods is located in a country that is a party to the COTIF. Along the regional routes that link China to non-SMGS countries in Asia, the application of the CIM Rules by contract among the parties is only possible when the Asian country in question is a party to the CIM Rules. For instance, along a rail freight route from a location in China to the port of Gwadar in Pakistan, the CIM Rules may be adopted by consent and contract between the parties doing business.

When the CIM Rules are applied on the basis of contract between the parties, they do not apply fully in a way as to foster cross-border legal certainty:

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<sup>11</sup> International Rail Transport Committee, CIM Consignment Note Manual (GLV CIM), [https://www.cit-rail.org/secure-media/files/glv-cim\\_en\\_2019-07-01.pdf?cid=251703](https://www.cit-rail.org/secure-media/files/glv-cim_en_2019-07-01.pdf?cid=251703) (Last Visited on August 31, 2023). International Rail Transport Committee, General Terms and Conditions of Carriage for International Freight Traffic by Rail (GTC-CIM), [https://www.cit-rail.org/media/files/abb-cim-en\\_2019-01-01\\_signed.pdf?cid=294317](https://www.cit-rail.org/media/files/abb-cim-en_2019-01-01_signed.pdf?cid=294317) (Last Visited on August 30, 2023). International Rail Transport Committee, Agreement concerning the Relationships between Carriers in respect of International Freight Traffic (AIM), <https://www.cit-rail.org/en/freight-traffic/products/agreements/#content-330235> (Last Visited on August 31, 2023).

the resolution of covered disputes before state courts does not benefit either from the cross-border *lis pendens* mechanism, or from the mechanism for the cross-border recognition and enforcement of court judgements. However, several other instruments can foster certainty in the resolution of rail freight transport disputes when the CIM Rules are applied on the basis of contract between the parties, namely GLV CIM, GTC CIM and AIM.

GLV CIM aims at standardizing CIM consignment notes and their utilization. GTC CIM governs the legal relationship between the carrier and the user of rail freight transport services carried on under the CIM Rules, whereas AIM governs the legal relationship between carriers. In case of each of these instruments, their applicability along the Europe-China corridors and along the regional routes that link China to non-SMGS Asian countries, as well as their respective approaches to the avoidance, early settlement and resolution of disputes will be analyzed.

#### A. The Avoidance of Differences and the Early Settlement of Claims under GLV CIM

GLV CIM is a recommendation elaborated under the auspices of the CIT and, therefore, only binds the members that have opted in. Article 1 of the GLV CIM clarifies the purpose of the manual: “This manual contains the instructions for the use of the CIM consignment note, the CIM consignment note for combined transport and other documents used for international carriage of freight traffic by rail. It is intended for members of the CIT and their customers”.

When a consignor concludes a contract in order to send goods by rail from a CIM Rules contracting party to China and the other party to the rail carriage contract is a CIT member, there is no doubt that GLV CIM can be utilized. An example of this could be a contract for the carriage of goods by rail from Madrid, in which the consignor contracts with RENFE-Operadora, with the designated place for delivery located in Chengdu.

Meanwhile, when the place of taking over the goods is located in China and the designated place of delivery is located in a CIM Rules contracting party, there may be doubts as to the applicability of the GLV CIM. GLV CIM has been drafted under the auspices of the CIT and its main objective is to serve

the interests of its member railway undertakings. However, the wording of Article 1 of the GLV CIM (“is intended for”) does not explicitly exclude the utilization of GLV CIM by railway undertakings that are not CIT members.

In any case, the applicability of the CIM Rules is determined by this international convention itself and a CIM consignment note does not necessarily have to follow GLV CIM. GLV CIM simply aims at bringing certainty and complementing the CIM consignment note. GLV CIM and its appendices seek to bring about standardization of CIM documents and other forms. With regards to the standardization of CIM consignment notes, Appendix 2 contains the explanatory notes on the contents of the consignment note and Appendix 4a contains a specimen CIM consignment note. Other standard forms can be found in different appendices, such as the charges note (Appendix 6 GLV CIM), subsequent orders (Appendix 7), notification of circumstances preventing carriage (Appendix 8), and notification of circumstances preventing delivery (Appendix 9).

The standardization of the CIM consignment note and other forms frequently utilized in rail transport, which are contained in GLV CIM, contribute to the avoidance of disputes, as well as to the early settlement of claims and serve as a basis for the eventual resolution of future disputes. However, GLV CIM does not address the resolution of disputes before a third-party adjudicator. Other instruments that will be addressed in the following paragraphs (GTC CIM and AIM) can complement GLV CIM to bring certainty to the resolution of disputes when a CIM consignment note is being used.

#### B. The Resolution of Rail Freight Transport Disputes in the GTC CIM

COTIF and its CIM Rules favor the resolution of disputes before state courts by establishing a cross-border *lis pendens* mechanism and a mechanism for the cross-border recognition and enforcement of judgements. These private international law mechanisms are in full effect when the CIM Rules apply *proprio vigore*, that is, when the place of taking over the goods and the place designated for the delivery of the goods are located in different CIM Rules contracting states. However, when the CIM Rules apply through contracts between the parties, the resolution of rail freight transport disputes does not fully benefit from the norms of private international law that facilitate the resolution of cross-border

disputes before state courts.

State courts in States party to the CIM Rules are bound to recognize and enforce a court judgement “pronounced by the competent court or tribunal pursuant to the provisions of the Convention” (Article 12(1) COTIF).<sup>12</sup> However, along the routes that include non-member states, the courts of these states are not obliged to grant recognition and enforcement of foreign judgements issued according to the CIM Rules.

Along both the Europe-China corridors and the regional routes that link China to non-SMGS Asian countries, the CIM Rules can only apply by consent of the parties doing business since China is not a party to this legal instrument. Therefore, the resolution of rail freight transport disputes when the CIM Rules apply through contract between the parties cannot fully benefit from the legal mechanisms that bring effectiveness and legal certainty to the industry. This is the reason why the GTC CIM aims at finding alternatives for the effective resolution of disputes covered under the CIM Rules.

### *1. The Application of GTC CIM*

The GTC CIM is in the nature of a recommendation made under the auspices of the International Rail Transport Committee. This instrument does not bind all the railway undertakings that are CIT members, but only those undertakings that have adopted the same on the basis of the opting-in principle. This instrument governs the relationship between carriers and users of rail freight transport services, both when the CIM Rules apply *proprio vigore* and when they apply on the basis of contract between the parties. GTC CIM can also be adopted and applied by consent of the parties doing business.

According to Article 2(1) of the GTC CIM: “The GTC CIM shall govern the legal relationship between the carrier and customer for consignments subject to the CIM Uniform Rules; they shall likewise apply to contracts of carriage where the scope of the CIM has been extended in accordance with Article 1 of the CIM and in every case where the parties to a contract so agree”.

### *2. The Resolution of Disputes under the GTC CIM*

Under the GTC CIM, the resolution of disputes is as per the provisions contained

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<sup>12</sup> CIM Rules, *supra* n. 2, Article 46(1).

in Article 13: “In the case of dispute, the parties to the contract shall try to find an amicable solution, they may agree [upon] a conciliation, mediation or arbitration process, in particular[,] that provided for in Title V of COTIF, to achieve this”.

Like in case of other instruments on rail freight transport, the GTC CIM shows a clear preference for voluntary settlement among the parties. When amicable settlement among the parties fails, GTC CIM envisages the utilization of alternative dispute resolution (ADR) mechanisms. The enumeration of alternative dispute resolution mechanisms in this article should be understood as a *numerus apertus* in two ways. First, COTIF arbitration is explicitly mentioned, but the parties may still agree upon other sorts of commercial arbitration. Second, conciliation, mediation and arbitration are explicitly mentioned, but there seems to be no impediment for the parties to choose another dispute resolution mechanism, such as litigation or a hybrid ADR mechanism (such as med-arb).

The resolution of rail freight transport disputes before state courts may face problems such as parallel proceedings and non-enforcement of judgements. This is due to the fact that, when the CIM Rules apply through consent of the parties doing business, neither the cross-border *lis pendens* mechanism nor the mechanism for the recognition and enforcement of judgements can be utilized. This is the reason why ADR mechanisms (and notably arbitration) are given preference over litigation before state courts under the GTC CIM.

### C. Avoidance and Early Settlement of the Claims and Resolution of Disputes in AIM

The CIM Rules can apply on the basis of the consent of the parties doing business. The GTC CIM aims at fostering certainty in the resolution of rail freight transport disputes that derive from claims against carriers. Meanwhile, AIM seeks to foster certainty in the resolution of rail freight transport disputes that derive from claims among successive carriers. According to Article 1 AIM: “This agreement ... governs the relationships between carriers, and in particular[,] how irrecoverable charges and compensation paid out are to be shared between them”.

As stated in the preamble to the AIM, this instrument: “... is intended to permit simple, rapid and economic processing of this traffic and in consequence

to improve the competitiveness of the railway in relation to other modes of transport. The agreement also takes account of the obligation placed on railway undertakings ... to follow market oriented policies and of their interest in increased efficiency”.

The AIM is an agreement applicable among the carriers and affects legal actions among carriers. It also affects claims against carriers when the rail freight transport contract is performed by successive carriers. In this situation, the AIM creates a mechanism that enables carriers to better defend themselves against a large claim in which the carrier that is acting as a defendant does not bear the whole responsibility. This instrument facilitates the exchange of information among carriers in order to plan the defense, and foresees the direct participation of carriers (other than the one that acts as the main defendant) in the defense against large claims.<sup>13</sup>

### *1. The Application of AIM*

AIM is mandatory among CIT members, unless a member railway undertaking has opted out. This instrument may also be utilized by non-CIT railway undertakings on a voluntary basis.<sup>14</sup> The scope of application of the AIM can be found in Article 1(2)(1): “This agreement applies to all carriage performed in accordance to the CIM [Rules] between several successive carriers where those carriers have declared that they are prepared to apply this agreement or are members of the CIT and have not made a general reserve against its application or withdrawal from it [sic.]”.

Chinese railway undertakings are not CIT members, but they may voluntarily agree upon the application of AIM. Along rail freight transport routes that go through the territory of China, even when a Chinese railway undertaking has not contractually agreed upon the application of AIM, this instrument may still apply among other railway undertakings. Article 1(2)(1) in fine states: “If a successive carrier in the transit chain does not apply the agreement, it nevertheless remains applicable to the other carriers. Relationships with carriers who do not apply the agreement are determined by the CIM [Rules]”.

<sup>13</sup> AIM, *supra* n. 11, Article 1(6).

<sup>14</sup> *Ibid.*, Article 1(2)(1).

Chinese railway undertakings may (at least potentially) agree upon the application of the AIM. However, even if Chinese railway undertakings decide not to apply this legal instrument, AIM may still play a role, notably along the Europe-China corridors. In any case, it may be in the interest of Chinese railway undertakings to adhere to this instrument. Since AIM brings certainty to the relationships among railway undertakings, these undertakings may have a preference to contract with other railway undertakings to which AIM applies.

## *2. The Resolution of Disputes under AIM*

The AIM succinctly refers to the possibility of resolving disputes before state courts and through ADR mechanisms. The resolution of cross-border disputes before state courts (when CIM Rules apply through contract between the parties) faces private international law challenges, such as parallel proceedings and non-enforcement of judgements. However, railway undertakings to which AIM applies agree not to challenge court judgements on compensation unless “they were not given the opportunity to take part in the proceedings”.<sup>15</sup>

The role of third-party adjudication within the AIM framework is rather marginal. AIM tries to favor voluntary settlements among the parties over third-party adjudication: it focuses on the avoidance of disputes and the early settlement of claims. In order to achieve this, AIM promotes the utilization of standard forms and describes the handling of claims in great detail.

To this end, Article 1(7) AIM states: “As far as possible, parties to the agreement are to settle differences on its interpretation and application amicably. The CIT General Secretariat will provide help to resolve disputes. The right to refer to an arbitration tribunal or to an ordinary court will remain reserved”.

AIM envisages that disputes among railway undertakings are to be resolved through a multi-tiered dispute-resolution mechanism, according to which, preference is given to voluntary settlements among railway undertakings without the intervention of a third party. If the parties cannot reach a settlement on their own, the CIT General Secretariat would intervene. If the disagreement persists, the dispute may be submitted before a state court or resolved through an ADR mechanism.

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<sup>15</sup> *Ibid.*, Article 3(2)(7) *in fine*.

Article 1(7) of the AIM does not clarify whether a railway undertaking may have recourse to the dispute-resolution step before availing the previous options and leaves a number of questions open. When should it be deemed that the parties have failed to reach a voluntary settlement on their own? How much discretion is envisaged for the role of CIT General Secretariat in the resolution of disputes? May a railway undertaking bring a dispute before a state court or before an arbitration tribunal without having tried to reach an agreement with the assistance of the CIT General Secretariat?

Article 1(7) of the AIM seems to create an obligation on parties to try to settle differences amicably. Following this interpretation, a dispute-resolution measure should only be initiated after having tried the previous (and less litigious) options. Nonetheless, it is still unclear for how long each step should be tried.

Most differences among railway undertakings are *de facto* successfully settled among the parties. This is first and foremost because the amount in dispute seldom exceeds the cost of litigation before state courts or the entire process of ADR.<sup>16</sup> Furthermore, the number of carriers that operate in the rail freight transport services market is limited: the supply of rail freight transport services tends to be monopolistic or oligopolistic in most countries. Therefore, consignors have to contract with the same carriers rather frequently over long periods of time.<sup>17</sup> Whenever disputes arise, it tends to be preferable to obtain a swift and amicable solution that preserves the long-term relationship rather than to enter a potentially expensive and time-consuming third-party adjudication process.

### 3. Avoidance of Disputes and Early Settlement of Claims under AIM

In order to avoid the emergence of disputes among railway undertakings, AIM contains substantive norms that constitute agreements among railway undertakings that seek to prevent the occurrence of certain contingencies. Such is the case of the norm on the allocation of charges in case of transshipment of load

<sup>16</sup> Erik Evtimov, Deputy Secretary General of the International Rail Transport Committee (CIT), in an interview to the author on June 2, 2021.

<sup>17</sup> There is increasing competition in the market of rail freight transport services. European rail freight services markets are clearly more liberalized and competitive than others. Multilateral efforts are being made towards the creation of competitive and efficient rail freight transport markets globally.

adjustment, in case of misrouting, as well as on the allocation of irrecoverable amounts in case of sale, destruction or seizure of the goods.<sup>18</sup>

Besides, the utilization of standard forms and the detailed description of the handling of claims under AIM also contribute to the avoidance and early settlement of differences among railway undertakings.

#### a. Use of standard forms under the AIM

The use of standard forms prevents disputes to a large extent and contributes to the early settlement of disputes. Even when standard forms cannot avoid the emergence of disputes, they provide a documentary basis for eventually moving on to third-party adjudication.

Specimen of the standard forms are contained in the appendices to AIM, such as the “Allocation Statement” (Appendix 2), the “Statement of Allocated Compensation” (Appendix 3), the “Settlement of an Application for a Refund without Reference to other Carriers” (Appendix 4), the “Proposal for Settlement” (Appendix 5), the “Statement of Differences” (Appendix 6) and the “Statement of Refunds” (Appendix 8). AIM adopts an administrative approach to the resolution of disputes. This approach is made possible through the list that can be found in Appendix 9, which contains the addresses of the departments responsible for processing each sort of claim.

#### b. Handling of claims under the AIM

AIM describes in great detail (in an almost administrative manner) the treatment of two sorts of claims: “claims for compensation” and “applications from customers for refunds of charges or correction of invoices”.<sup>19</sup> Even when early settlement cannot be achieved among the parties by themselves, the provisions on the handling of claims provide a solid basis for the eventual resolution of disputes through third-party adjudication.

#### c. Handling of claims for compensation

AIM brings certainty to the handling of claims through several norms. First, this instrument aims at making sure that claims for compensation reach the competent railway undertaking in an efficient manner, avoiding excessive transaction costs. Article 3(2)(1)(3) states: “If a carrier receives a claim for which he is not competent, he must return it immediately to the claimant,

<sup>18</sup> AIM, *supra* n. 11, Articles 5(3), 6(7)(4) and 7(5), respectively.

<sup>19</sup> *Ibid.*, Articles 3 and 4, respectively.

providing details of a competent carrier if possible”.

Second, AIM enables the competent carrier either to reject a claim or to pay compensation up to 5000 units of account without obtaining the prior agreement of the carriers involved, as recognized in Articles 3(2)(3) and 3(2)(4) respectively. If the competent carrier deems the situation as particularly urgent, he may pay compensation exceeding 5000 units of account; however, in this case, he must obtain an agreement in the terms of Article 3(2)(5)(2) of AIM.

Third, when the competent carrier rejects or settles a claim in accordance with AIM provisions, Article 3(2)(7) states that: “... his decision is binding on the other carriers taking part in the carriage. Other competent carriers may not enter into new negotiations with the claimant on the same issue nor pay a claim without the prior agreement of the carriers involved”.

Fourth, when a third party (a railway undertaking not bound by the AIM) is responsible for the loss or damage, the competent carrier is required to demand an admission of liability from the third party that is responsible for the loss or damage. However, if the responsible third party is not a party to a contract and refuses to accept liability, “... the carriers concerned may come to an agreement to take recourse and give powers of attorney to the competent carrier ... or to the carrier in the state [sic.] in which the third party has his registered office or[,] indeed[,] to another carrier in order to take legal action against the third party”.

Fifth, the AIM also fosters certainty through a mechanism for the avoidance of double compensation payments, which is contained in Article 3(2)(6): “To avoid the payment of compensation several times over for the same consignment, the duplicate of the consignment note must be produced if the claim is presented by the consignor as having right to take control of the goods, or the original of the consignment note if the claim is received from the consignee ... No claim is to be paid without the documents above having been presented except when the loss of these documents has been established. In this latter case, settlement of the claim may still take place but prior notice must be given to the carriers involved”.

d. Handling of Applications for Refunds of Charges or Correction of Invoices

AIM also regulates in detail the handling of applications from customers

for refunds of charges or correction of invoices. When the application is based upon errors of fact or calculation, the competent carrier ought to settle without further reference to other carriers involved. A specimen of the form for “Settlement of an Application for a Refund without Reference to other Carriers” can be found in Appendix 4 to AIM.

The rest of the applications for refund ought to be referenced to the other carriers involved for their consideration, following the specimen of “Proposal for Settlement” contained in Appendix 5 of AIM. In this case, a “Statement of Differences” (which should follow the specimen contained in Appendix 6) must be attached to the form for each one of the carriers involved. The handling of this kind of applications is further described in Article 4(3)(3)(2): “... Carriers receiving a Proposal for Settlement from the competent carrier must make their view known within 30 days ... If, within 30 days, one or more of the carriers approached has not replied, the competent carrier is to send him a reminder by registered letter with confirmation of receipt. If after 30 days the carrier in question has still not replied, he is considered as having agreed”.

The settlement of differences among carriers is to be registered according to the Statement of Refunds specimen contained in Appendix 8 to AIM. Article 4(6)(1) describes this procedure: “The competent carrier is to enter and progressively number the allocated shares for each carrier on a Statement of Refunds complying with the specimen in Appendix 8. The competent carrier is to prepare a Statement of Refunds for each carrier involved. The reference of the carrier agreeing to the refund is to be shown beside each amount appearing on the Statement of Refunds”.

### III. THE ROLE OF INSTRUMENTS IN DISPUTES CONCERNING CIM-SMGS CONSIGNMENT NOTES

The present section will analyze three instruments that may lend certainty to the resolution of rail freight transport disputes when a CIM-SMGS consignment note is utilized, namely the CIM-SMGS Consignment Note Manual (GLV CIM-SMGS) (contained in Annex 6 to SMGS), the General Terms and Conditions of EurAsian carriage by rail (GTC EurAsia) and Appendix 10 to the aforementioned Agreement concerning the Relationships between Carriers in

respect of International Freight Traffic by Rail (Appendix 10 of AIM).<sup>20</sup> The applicability of these instruments along the Europe-China corridors and along the regional routes that link China to non-SMGS Asian countries, as well as the approach to the avoidance, the early settlement and the resolution of disputes will be analyzed in the present section.

SMGS only applies to the cross-border carriage of goods by rail between stations of different SMGS countries that are open for freight operations according to the municipal law of the state in which they are located. SMGS avoids overlapping with the CIM Rules since it does not foresee the utilization of SMGS by consent of the parties doing business. However, Article 13 of the SMGS foresees the utilization of the CIM-SMGS common consignment note by contract between the parties.

GLV CIM-SMGS was launched in 2006 and was the result of cooperation between the CIT and the Organization for Cooperation of Railways (OSJD). Meanwhile, GTC EurAsia and AIM are instruments developed under the auspices of the CIT.

#### A. Avoidance of Differences and Early Settlement of Claims in GLV CIM-SMGS

Along Europe-China rail corridors, as well as along the rail routes that link China to other non-SMGS Asian countries, the parties to a rail freight transport contract may agree to the adoption of a CIM-SMGS consignment note, which enables the legal interoperability between the CIM Rules and SMGS.<sup>21</sup>

20 International Rail Transport Committee, CIM/SMGS Consignment Note Manual (GLV-CIM/SMGS), [https://www.cit-rail.org/secure-media/files/glv\\_cim-smgs\\_en\\_2023-03-06\\_app\\_1\\_signe.pdf?cid=329115](https://www.cit-rail.org/secure-media/files/glv_cim-smgs_en_2023-03-06_app_1_signe.pdf?cid=329115) (Last Visited on August 29, 2023). International Rail Transport Committee, General Terms and Conditions of Eurasian Carriage by Rail (GTC EurAsia), [https://cit-rail.org/secure-media/files/documentation/freight/gtc-eurasia/gtc-eurasia\\_en\\_2019-01-01.pdf?cid=103623](https://cit-rail.org/secure-media/files/documentation/freight/gtc-eurasia/gtc-eurasia_en_2019-01-01.pdf?cid=103623) (Last Visited on August 30, 2023). International Rail Transport Committee, Appendix 10 to the Agreement concerning the Relationships between Carriers in respect of International Freight Traffic: Handling of CIM-SMGS Claims (Appendix 10 of AIM), <https://www.cit-rail.org/en/freight-traffic/products/agreements/#content-330235> (Last Visited on August 31, 2023).

21 The project to create a CIM-SMGS consignment note finds its origins under the auspices of the United Nations Economic Commission for Europe (UNECE) and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and it included three stages. The first stage was the development of a model consignment note. The second stage was the creation of a CIM-SMGS unique claim handling mechanism. The third stage concerns the creation of a new harmonized rail freight transport law. Thomas Leimgruber, UNECE Regional Workshop of Euro-Asian Transport Links: Common CIM-SMGS Consignment Note for International Rail Transport 2009, <https://unece.org/DAM/trans/doc/2009/wp5/GE2-wkshp1-CIT.pdf> (Last Visited on August 15, 2023).

The routes along which the CIM Rules may be applied by consent of the parties doing business often coincide with the routes along which CIM-SMGS consignment notes can be utilized. For instance, in a rail freight transport contract in which the place of taking over the goods is Xi'an and the place designated for delivery is Vienna, either a CIM-SMGS consignment note or a CIM consignment note could be utilized by contract between the parties. The parties to the contract of carriage will decide which consignment note is to be utilized.

European consignors and railway undertakings may be more familiar with the CIM consignment notes and may, therefore, have a preference for this document. Meanwhile, consignors from China, as well as Chinese railway undertakings may be more familiar with the CIM-SMGS consignment notes and prefer to utilize these when possible. In practice, it is the parties to a freight contract who will decide whether to utilize the CIM Rules or a CIM-SMGS consignment note by mutual consent. This choice is often made through the conclusion of framework agreements.

### *1. The Utilization of the CIM-SMGS Consignment Note Manual*

Under SMGS, the possibility of utilizing the CIM-SMGS consignment note is explicitly envisaged in Article 13. Meanwhile, under the CIM Rules, Article 6 (8) contains the legal basis for the utilization of instruments, such as the CIM-SMGS Consignment Note. Despite the fact that GLV CIM-SMGS is contained in Annex 6 of SMGS, it is not a legal instrument created within the framework of the Organization for Cooperation of Railways, but rather a standard contractual agreement.<sup>22</sup>

GLV CIM-SMGS is to be applied among the railway undertakings that have so agreed. Appendix 1 to GLV CIM-SMGS contains a list of the CIT members (railway undertakings) and SMGS member-states that have agreed to apply the GLV CIM-SMGS, as well as the specific traffic axes to which these norms are to be applied.<sup>23</sup> More than thirty CIT members have agreed upon the utilization

<sup>22</sup> GLV CIM-SMGS, *supra* n. 20, Article 5.

<sup>23</sup> International Rail Transport Committee, Appendix 1 to the CIM/SMGS Consignment Note Manual (Appendix 1 GLV-CIM/SMGS), [https://www.cit-rail.org/secure-media/files/glv\\_cim-smgs\\_en\\_2023-03-06\\_app\\_1\\_1\\_signe.pdf?cid=329115](https://www.cit-rail.org/secure-media/files/glv_cim-smgs_en_2023-03-06_app_1_1_signe.pdf?cid=329115) (Last Visited on September 20, 2023).

of GLV CIM-SMGS, not only in Europe, such as the Société Nationale des Chemins de Fer Français (SNCF), but also in this continent's neighboring regions, such as Azerbaijan Railways CJSCo and Railways of the Islamic Republic of Iran.

In relation to SMGS participants in GLV CIM-SMGS, these norms only apply to the lines explicitly designated by each SMGS state. The Russian Federation, for instance, has accepted to enable the use of GLV CIM-SMGS along all lines. GLV CIM-SMGS is to be primarily applied along the Europe-China corridors. China has been progressively increasing the number of routes along which the CIM-SMGS consignment notes can be used. Initially, it could only be used along three routes: Alashankou, Erlian and Manzhouli, along the borders with Kazakhstan, Mongolia and Russia respectively.

GLV CIM-SMGS acknowledges the possibility of utilizing CIM-SMGS consignment notes along two more crossing points, Suifenhe and Khorgos, along the border with Russia and Kazakhstan respectively: "Container trains from China to Europe and in the reverse direction, the routes of which pass through rail crossing points Alashankou, Manzhouli, Erlian, Suifenhe or Khorgos [sic.]".

In 2017, the National Railway Administration of the Chinese Ministry of Transport accepted the use of the CIM-SMGS consignment note along the routes that go through all border crossing points with Russia, Mongolia and Kazakhstan.<sup>24</sup> In 2018, according to China Railways,<sup>25</sup> the CIM-SMGS consignment note could already be utilized along the vast majority of the rail freight corridors that directly link 59 Chinese cities to 49 European cities in 15 different countries.<sup>26</sup>

## *2. Avoidance, Early Settlement and Resolution of Disputes under GLV CIM-SMGS*

The CIM-SMGS consignment note utilizes different legal solutions that enable the interoperability of the CIM Rules and the SMGS. Some of these norms aim

<sup>24</sup> Evtimov, *supra* n. 9, p. 29.

<sup>25</sup> China Railways is the commercial name of state-owned China State Railway Group Company, Ltd.

<sup>26</sup> Evtimov, *supra* n. 9, p. 29.

at avoiding and resolving rail freight transport disputes. First, GLV CIM-SMGS brings certainty when the text of the CIM Rules and the SMGS differ, which can avoid a number of disputes. Second, GLV CIM-SMGS facilitates the early settlement of disputes by regulating the contents and providing a specimen of the CIM-SMGS formal report. Third, GLV CIM-SMGS creates a common claims-handling-mechanism.

#### a. Avoidance of Disputes under the GLV CIM-SMGS

First and foremost, the GLV CIM-SMGS aims at avoiding the emergence of disputes. This instrument brings certainty to the industry of rail freight transport along part of the Europe-China rail corridors and along some part of the regional routes that link China to non-SMGS Asian countries. GLV CIM-SMGS seeks to find practical legal solutions when the contents in the CIM Rules and in the SMGS differ. For instance, on the issue of carriers' liability regime, Article 12(1) of GLV CIM-SMGS states: "The provisions of the CIM Uniform Rules and the SMGS for liability remain unchanged by the use of a CIM-SMGS consignment note".

#### b. Formal Reports System under the GLV CIM-SMGS

The formal reports mechanism contributes to the settlement of rail freight transport disputes at an early stage and provides a basis for their eventual resolution through other mechanisms if necessary. GLV CIM-SMGS refers to the norms in the CIM Rules and in the SMGS that regulate formal reports. Article 12(2) of the GLV CIM-SMGS starts as follows: "The CIM-SMGS formal report is to be made in accordance with Article 42 CIM or Article 29 SMGS".

Furthermore, GLV CIM-SMGS goes one step further in relation to the harmonization of CIM-SMGS formal reports. Appendix 8 contains the requirements of a CIM-SMGS formal report and Appendix 8.1 provides a specimen of CIM-SMGS formal report. In this sense, GLV CIM-SMGS resembles the rules of the SMGS more than the CIM. Whereas the CIM Rules merely describe the features that such a report must contain, SMGS provides a model formal report in Supplement 7 to its Rules for Transportation of Goods.

#### c. CIM-SMGS Common Claims-handling Mechanism

The CIM-SMGS claims handling mechanism described in GLV CIM-SMGS

adopts an almost administrative approach that strongly resembles that of the SMGS. Appendix 9 of the GLV CIM-SMGS contains the list of addresses of the departments of the carriers to which claims shall be directed.<sup>27</sup> Claims are described in great detail in Article 12(3) of the GLV CIM-SMGS, in a pattern similar to the SMGS. Furthermore, GLV CIM-SMGS contains no reference to the resolution of disputes either through litigation before state courts or through the utilization of ADR processes.<sup>28</sup>

The basis for the handling of claims against carriers under GLV CIM-SMGS can be found in Article 12(3)(1), which states: “Claims for the total or partial loss of or damage to goods in consignments accompanied by CIM-SMGS consignment notes are to be submitted and handled in accordance with the provisions of the CIM (Articles 43 to 45) and of the SMGS (Article 46) [sic.]” .

This solution may seem self-evident when the cause of the loss or damage that gave rise to a claim may not lie exclusively within the geographical area in which the CIM Rules apply or exclusively within the geographical area in which the SMGS applies. However, sometimes the origin of the loss or damage may have to be found in both of these regions.

In such cases, if the CIM-SMGS claim is submitted in the area in which CIM Rules apply, the CIM competent carrier shall: (i) first, assess the liability in the area in which the CIM Rules apply and notify his assessment to the person who raised the claim and (ii) thereafter, forward the claim and his assessment to the SMGS processing carrier. The SMGS carrier shall notify his assessment to the CIM competent carrier, who is to inform the person entitled. If, on the contrary, a CIM-SMGS claim is submitted in the area in which SMGS

<sup>27</sup> SMGS, *supra* n. 3, Annex 5, Article 3(2)(3). It contains a list with the addresses of carriers to which claims under SMGS are to be addressed.

<sup>28</sup> SMGS agreement refers to the resolution of disputes before state courts in a very succinct manner and does not even refer to the utilization of ADR, in clear contrast with the great detail in which this agreement addresses the issuance of reports and the settlement of claims among the parties. On claims against carriers before state courts, *see ibid.*, Articles 47(1), 47(3) and 47(4). In relation to claims between carriers, *see*: Organization for Cooperation between Railways (OSJD), Service Instructions to the Agreement on International Railway Freight Communications (SI to SMGS), <https://en.osjd.org/api/media/resources/2471?action=download> (Last Visited on August 17, 2023). SI to SMGS, Articles 9(5)(4) and 9(5)(5).

applies and the SMGS processing carriers determine that the origin of the loss or damage cannot be found exclusively in the area in which SMGS applies, an analogous procedure is to be followed.

A concrete example in which the GLV CIM-SMGS applies may serve to explain the functioning of this instrument. GLV CIM-SMGS applies in a rail freight transport contract in which the place of taking over the goods is Chongqing and the place designated for delivery of the goods is Paris.<sup>29</sup> When damage occur to the goods, the consignee in Paris may sue SNCF. If SNCF considers that all the damage occurred in the area in which the CIM Rules apply, this undertaking will assess the damages and inform the consignee. However, if SNCF considers that the damage did not occur entirely in such area, it will assess the damage that occurred in the area where the CIM Rules apply and require the SMGS “processing carrier” to assess the damage that may have occurred in the area in which SMGS applies.

#### d. Dispute-resolution under GLV CIM-SMGS

The approach to dispute resolution in GLV CIM-SMGS strongly resembles that of the SMGS: little or no attention is awarded to the resolution of disputes before state courts and to ADR mechanisms. SMGS succinctly refers to the resolution of disputes before state courts and though ADR mechanisms. GLV CIM-SMGS does not even refer to the resolution of disputes either before state courts or by using ADR mechanisms.

The resolution of rail freight transport disputes exclusively through the reports system and the claims-handling mechanisms described in instruments has to rely heavily on settlements among the parties. GLV CIM-SMGS does not address the settlement of disputes when the parties to a dispute cannot find a solution without the intervention of an adjudicator. This could (at least potentially) happen when the claimant disagrees with the assessment of damages carried out by the railway undertakings under the common claims-handling mechanism.

When a claim cannot be settled through the mechanisms foreseen in GLV

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<sup>29</sup> SNCF is among the CIT members that have adhered to GLV CIM-SMGS and China is among the SMGS participants to this legal instrument. See: Appendix 1 GLV CIM-SMGS, *supra* n. 20, Articles 3(2) and 3(3).

CIM-SMGS, third-party adjudication could be utilized. In the absence of a treaty that regulates the private international law aspects of cross-border litigation, the resolution of rail freight transport disputes before state courts could face the obstacles of parallel proceedings and non-enforcement of court rulings. ADR mechanisms, especially arbitration, seem to be a better option when it comes to third-party adjudication of disputes, since arbitral awards benefit from recognition and enforcement under the New York Convention of 1958.

However, both litigation before state courts and resolution through ADR mechanisms could be utilized in order to resolve rail freight transport disputes under a CIM-SMGS consignment note. Theoretically, dispute-resolution clauses for the resolution of these rail freight transport disputes could be negotiated on an *ad hoc* basis. Instead, instruments such as the GTC EurAsia (that will be addressed in the following sub-section) could be extremely useful for the resolution of disputes that cannot be settled through the administrative-like mechanisms envisaged in the GLV CIM-SMGS.

## B. The Resolution of Rail Freight Transport Disputes in GTC EurAsia

### 1. *The Application of GTC EurAsia*

GTC EurAsia is an instrument developed under the institutional framework of the CIT. This instrument is in the nature of a CIT recommendation: it is only binding on CIT member undertakings that have opted-in.<sup>30</sup> Besides, railway undertakings that are not CIT members (such as Chinese railway undertakings) may contractually agree to the utilization of this instrument. Article 1 of GTC EurAsia states: “[GTC EurAsia] shall be applicable if the parties to the contract so agree”.

### 2. *The Resolution of Disputes under GTC EurAsia*

Rail freight transport disputes under GTC EurAsia may be divided into two major categories: “claims against carriers” and “claims among carriers”. Claims

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30 GTC EurAsia may be applied, not only to rail transport, but also to multimodal transport that combines rail and maritime transport. GTC EurAsia, *supra* n. 20, Article 1 states: “... GTC EurAsia govern through contracts for the international carriage of goods between Europe and Asia by rail, including rail-sea traffic”.

against carriers may be raised by the consignor or by the consignee in terms of Article 21 of GTC EurAsia when loss, damage or delay occurs. The “only for carriers” Appendix in GTC EurAsia contains some rules on the relationship among carriers, but does not address directly the resolution of disputes among carriers under a CIM-SMGS consignment note, which is addressed in Appendix 10 of AIM.

GTC EurAsia adopts a liberal approach to the resolution of rail freight transport disputes, and gives utmost importance to the freedom of choice of the parties for the resolution of disputes. GTC EurAsia envisages the resolution of disputes both through litigation before state courts (Article 23) and through arbitration (Article 24). This instrument focuses on the resolution of disputes through third-party adjudication rather than on the avoidance and early settlement of disputes, in clear contrast with the approach to dispute resolution prescribed in GLV CIM-SMGS.

The provisions on third-party adjudication contained in GTC EurAsia constitute a *numerus apertus*: they do not preclude the utilization of other dispute-resolution mechanisms to which the parties may agree, such as mediation or med-arb.

#### a. The Resolution of Disputes before State Courts under GTC EurAsia

GTC EurAsia contains private international law norms that aim at facilitating the resolution of disputes before state courts. This instrument contains norms both on the competent courts and on the applicable law. However, given the nature of this instrument, it cannot create either a cross-border *lis pendens* mechanism or a mechanism for the cross-border recognition and enforcement of judgements, which can only be created through an international convention (hence the main advantage of the CIM Rules over any other instrument in this field).

The norms on jurisdiction over rail freight transport disputes under GTC EurAsia can be found in its Article 23, which states: “Unless otherwise agreed by the parties, the forum shall be the courts and tribunals of the state of the domicile of the contractual party against which action is being taken”. Thus, jurisdiction agreements are accepted. In the absence of an agreement, the courts of

the domicile of the defendant shall exercise jurisdiction (competence).

In relation to the applicable law, Article 23 of GTC EurAsia in fine opts for the *lex fori* in the following manner: “The law applicable, including the rules relating to conflict of laws shall be that of the place of the court or tribunal”.

b. The Resolution of Disputes through Arbitration under GTC EurAsia

Since the resolution of disputes before state courts under GTC EurAsia cannot avoid either double proceedings or the non-enforcement of court judgments across borders, when disputes cannot be avoided and no early settlement is reached among the parties, ADR processes may play an important role. Among the ADR mechanisms, arbitration clearly stands out, since arbitration can benefit from cross-border enforcement under the New York convention of 1958.

GTC EurAsia refers to the utilization of ADR mechanisms in Article 24: “All disputes arising from or in connection with the contract of carriage shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. Insofar as the arbitration clause requires particular content or a particular form, the parties shall cooperate to draft it”.

GTC EurAsia explicitly refers to the use of arbitration for the resolution of disputes. This reference to arbitration must be understood as a possible choice, not as an obligation to choose this ADR mechanism. The parties to a dispute may agree upon the recourse to litigation or ADR mechanism in order to resolve the disputes that may emerge. When they decide to utilize an ADR mechanism, GTC EurAsia seems to consider that “conciliation and arbitration” are good options, since it explicitly refers to them. However, nothing precludes the parties from choosing a different ADR mechanism.

When the parties to a dispute decide to utilize arbitration, the reference to the International Chamber of Commerce (ICC) in Article 24 could be interpreted as a suggestion for institutional arbitration. Despite the recent steps towards the progressive recognition and enforcement of foreign *ad hoc* arbitral awards in China and on the liberalization of the utilization of *ad hoc* arbitration in China, institutional arbitration is still preferred over *ad hoc* arbitration in China as a result of the PRC Arbitration Law. In any case, the utilization of institutional

arbitration (such as ICC arbitration) may help avoid potential problems along China-Europe freight corridors, most remarkably, the non-enforcement of foreign arbitral awards in China.<sup>31</sup>

Article 24 of GTC EurAsia seems to favor ICC institutional arbitration, but it may seem unclear as to which ICC rules ought to be utilized. The exact denomination of “ICC Rules of Conciliation and Arbitration” belongs to the ICC rules in force since June, 1975. However, reference to the ICC Rules must be understood as a reference to the version of the rules currently in force, which are the 2021 ICC Arbitration Rules. Meanwhile, the reference to conciliation in Article 24 of GTC EurAsia could be interpreted as a preference for the utilization of the 2014 ICC Mediation Rules when the parties agree on the utilization of the mediation process (since there are no ICC rules in force by the name of “ICC Conciliation Rules”).

### C. Handling of CIM-SMGS Claims in Appendix 10 of AIM

AIM contains norms on the avoidance, early settlement and resolution of disputes when transport is carried under a CIM consignment note. However, the role of AIM is not limited to the cases in which the rail freight transport contract is performed under a CIM consignment note. Appendix 10 of AIM contains specific provisions on the handling of CIM-SMGS claims when the transport contract is performed under a CIM-SMGS consignment note.

#### 1. *The Application of Appendix 10 of AIM*

The scope of application of Appendix 10 of AIM is contained in its Article 1 in the following terms: “This appendix applies to all those members of the CIT listed in Appendix 1 to the GLV CIM-SMGS, when a CIM-SMGS consignment note and a CIM-SMGS formal report have been used”. There is, therefore, no explicit exclusion of the utilization of Appendix 10 of AIM by non-CIT railway undertakings, such as Chinese railway undertakings.<sup>32</sup>

<sup>31</sup> China seems to be moving towards wider recognition of *ad hoc* arbitration awards, notably in free trade zones (FTZs), but there is still a preference for institutional arbitration in China.

<sup>32</sup> The utilization of soft law instruments created under the auspices of industry associations, beyond the scope that was initially foreseen, has to be analyzed on a case-by-case basis. The ICC, for instance, claims copyright over its Rules and considers that a reference to the ICC in an arbitration clause or in an arbitration agreement implies that the will of the parties is to utilize ICC institutional arbitration. Resolving a dispute through ICC arbitration requires the payment of fees to this institution and the ICC assumes an obligation to supervise the quality of the award.

## *2. The Handling of Claims among Railway Undertakings under Appendix 10 of AIM*

Appendix 10 of AIM (like AIM itself) seeks the swift resolution of disputes. The limited number of railway undertakings in most countries leads to the fact that carriers often have to contract with the same successive carriers frequently over long periods of time. As a result of this, the preservation of the long-term commercial relationship among railway undertakings is a priority within this instrument.

The objective of AIM and its Appendix 10 is not so much to apportion blame as it is to seek practical, swift solutions that enable the effective functioning of the cross-border rail freight transport services market. The importance of arriving at early settlements is enshrined in Article 4 of Appendix 10 of AIM: “Claims for damages are to be handled within the shortest time after receipt by the competent carrier”.

The provision of a list of addresses to which claims ought to be submitted strongly resembles the mechanism of the SMGS. According to Article 3(3) of Appendix 10 of AIM: “The list of addresses of the departments of carriers to which claims must be sent for further handling under the CIM-SMGS claims procedure is shown in Appendix 9 of the GLV CIM-SMGS”.

The claims handling procedure itself is almost a verbatim excerpt of the CIM-SMGS claims handling mechanism contained in the GLV CIM-SMGS. The procedure follows analogue proceedings depending on whether the claim is submitted in the area in which CIM Rules apply or in the area in which the SMGS applies.<sup>33</sup> This procedure is based on the assumption that the “CIM competent carrier” is in a better position to assess the loss, damage and delays that occur along the hauls where the CIM Rules usually apply. Meanwhile, the “processing SMGS carrier” is assumed to be in a better position to examine the losses, damages and delays that may occur along the hauls where the SMGS usually applies.

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<sup>33</sup> The CIM-SMGS Common Claims Handling Procedure has been described above in relation to GLV CIM-SMGS.

## IV. CONCLUSION

In the long run, a new overarching convention to govern cross-border rail freight transport may be developed. For now, the CIM Rules and the SMGS will continue to coexist and provide a regulatory framework in different geographical regions. China is a signatory to the SMGS, but not to the CIM Rules contained in COTIF. Several countries in Asia have decided to adopt the CIM Rules in order to facilitate cross-border rail freight transport along the Europe-Asia corridors, even when they are not contracting parties to other COTIF annexures. China and other Asian nations have shown little interest in joining this convention so far, and it is rather unlikely that they will become a party to the CIM Rules, at least in the short run.

For the time being, when neither the CIM Rules nor the SMGS can be applied *proprio vigore* (notably along the Europe-China corridors and the regional routes that link China to non-SMGS Asian countries), the parties to a rail freight transport contract may contractually agree to be governed by either a CIM consignment note or a CIM-SMGS consignment note. In these cases, several instruments created under the auspices of the CIT may be particularly useful for the avoidance of differences, the early settlement of claims and the resolution of rail freight transport disputes.

When a CIM consignment note is utilized by mutual consent of the parties doing business, the following contractual instruments can be utilized in order to resolve any disputes that may arise: GLV CIM, GTC-CIM and AIM. Meanwhile, under a CIM-SMGS common consignment note, the following instruments may contribute to the resolution of disputes: GLV CIM-SMGS, GTC EurAsia and Appendix 10 to the AIM.

Not all these instruments possess the same legal standing. It is possible to classify them into three different groups. GLV CIM-SMGS, which is the result of cooperation between the CIT and the SMGS, is contained in Annex 6 to the SMGS. It is therefore, in the nature of an annexure to an international agreement among Transport Ministries. A second group of instruments is as follows:

GLV CIM, GTC CIM and GTC EurAsia. These are CIT recommendations and are binding only upon the members that have opted-in.<sup>34</sup> Meanwhile, AIM is mandatory among CIT members and is, thus, the third category of instruments relevant to this field. AIM is mandatory among CIT members (except for those railway undertakings that have opted-out) and may be utilized by non-CIT railway undertakings if they so agree.

All the instruments that have been analyzed throughout this article aim, first and foremost, at avoiding the emergence of disputes and try to facilitate the early settlement of claims among parties. The preservation of a long-term commercial relationship is the key in the market of rail freight transport services, given the limited number of railway undertakings operating in each country. Standard forms facilitate the speedy settlement of disputes among the parties involved.

If a settlement cannot be reached among the parties, standard forms also provide a basis for the eventual resolution of disputes through third-party adjudication. Both GTC CIM and GTC EurAsia refer to the resolution of disputes through third-party adjudication, giving preference to the dispute-resolution mechanisms that may best preserve the long-term business relationships.

#### A. Under a CIM Consignment Note Used by Contractual Consent

When the parties to a rail freight transport contract agree to be governed by a CIM consignment note, GLV CIM and AIM focus on the avoidance and early settlement of disputes through the utilization of standard forms and the description of claims-handling mechanisms. Meanwhile, GTC CIM addresses the resolution of disputes through third-party adjudication.

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<sup>34</sup> According to a literal interpretation, both GTC CIM and GTC EurAsia may be applied on a contractual basis by non-CIT railway undertakings. Meanwhile, GLV CIM does not explicitly prohibit the utilization of this legal instrument by non-CIT members, but the expression that “[i]t is intended for members of the CIT and their customers” in Article 1 GLV CIM *in fine*, leaves some doubts on whether CIT actually envisages the utilization of this legal instrument by non-CIT railway undertakings. See: GLV CIM, *supra* n. 11, Article 1. GTC CIM, *supra* n. 11, Article 2(1): “... they shall likewise apply to contracts of carriage where the scope of the CIM has been extended in accordance with Article 1 of the CIM and in every case where the parties to the contract so agree”. GTC CIM, *supra* n. 11, Article 2(2): “Conclusion of the contract of carriage shall be deemed as incorporating these GTC-CIM”. GTC EurAsia, *supra* n. 20, Article 1: “... [GTC EurAsia] govern through contracts for the international carriage of goods between Europe and Asia by rail, including rail-sea traffic. They shall be applicable if the parties to the contract so agree”.

GTC CIM envisages the resolution of disputes through ADR. This instrument refers to conciliation, mediation and arbitration and makes special mention of COTIF arbitration. The reason for this is that, when the CIM Rules apply by consent of the parties doing business (as opposed to *proprio vigore*) the resolution of covered disputes before state courts does not benefit either from the cross-border *lis pendens* mechanism or from the mechanism for the cross-border recognition and enforcement of judgements that the CIM Rules have created. Therefore, ADR can be utilized in order to avoid parallel proceedings and non-enforcement of judgements.

AIM brings certainty and clarity to the relationship among successive carriers, and also protects the defense in case of claims against carriers. The utilization of AIM by Chinese railway undertakings could contribute to the resolution of rail freight transport disputes. Even before Chinese railway undertakings decide to apply AIM, this instrument still plays a role in the resolution of rail freight transport disputes since it is binding upon the successive carriers that are CIT members.

### B. Under a CIM-SMGS Consignment Note

When the parties to a rail freight transport contract decide to utilize a CIM-SMGS consignment note, the reports mechanism in GLV CIM-SMGS and the claims-handling mechanism contained in Annexure 10 of AIM contribute to the avoidance and early settlement of differences. The approach to the avoidance and early settlement of disputes under these two instruments strongly resembles that of the SMGS.

Meanwhile, GTC EurAsia addresses the resolution of disputes through third-party adjudication, including litigation before state courts and ADR. In the absence of a treaty that contains norms of private international law that help to avoid parallel proceedings and the non-enforcement of judgements, the resolution of rail freight transport disputes through third-party adjudication could benefit from the utilization of ADR mechanisms, notably arbitration.

Both the universalization of the CIM Rules and the creation of a new overarching convention relating to cross-border rail freight transport contracts seem, at least in the short term, somewhat unlikely. For the time being, the instruments designed by the CIT can help create more certainty in the resolution

of cross-border rail freight transport disputes beyond Europe, notably along the Europe-China corridors and along the regional routes that link China to other non-SMGS Asian countries.