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Partial revision of the CUV UR

Legal opinion of consultant Prof. R. Freise on the proposal from Switzerland

This document prepared by Prof. R. Freise reflects the views of the author only and does not necessarily reflect the position of the OTIF Secretariat

**Comments on Switzerland's proposal
to the 26th session of the Revision Committee
to examine an amendment to Article 7 § 1 CUV which,
according to Article 17 § 1 b) of COTIF,
must be submitted to the General Assembly for decision**

In a letter dated 10 November 2017 (OTIF doc. LAW-17144-CR 26/13 dated 13.11.2017), Switzerland requested that the following amendment to Art. 7 § 1 CUV be examined:

**“Article 7
Liability for loss or damage caused by a vehicle**

§ 1 The person who, pursuant to a contract referred to in Article 1, has provided the vehicle for use as a means of transport shall be liable for loss or damage which has its origins in a defect on the vehicle. There shall be no liability if the defect on the vehicle was caused during operation, which neither the keeper nor the entity in charge of maintenance knew about or should have known about.”

(To make it clearer, the second sentence of the proposed amendment should read as follows: “...if the defect on the vehicle was caused during operation *and* neither the keeper nor the entity in charge of maintenance knew about, or should have known about *the defect*.” This is because the keeper's and ECM's knowing relates to the *defect* and not the *operation*. In addition, it concerns loss or damage “*caused by the vehicle*”, even though these four words have been deleted: in this respect, the title of the Article is clearer.)

Switzerland's proposal raises several concerns:

1. According to the proposed amendment to the **first sentence** of § 1, the person who, pursuant to a contract referred to in Article 1 CUV, has provided the vehicle for use as a means of transport is liable for loss or damage which has its origins in a defect on the vehicle. In the first instance, this constitutes objective **strict liability** of the *keeper* and any other *person who provides the vehicle* for use.

The “*person who provides the vehicle*” is not just the *keeper*, but every *previous user* of the vehicle in a contractual chain of use, as described in Article 1 CUV (“bi- or multilateral contracts”) and in line with the General Contract of Use for Wagons (GCU) as a multilateral contract. If vehicles are operated continuously in Europe, there may be a great number of persons who provide a vehicle/previous users. According to the Swiss proposal, they would all be liable for loss or damage which has its origins in a defect on the vehicle, merely because they have used the vehicle temporarily and then passed it on to the next user. Extending liability in this way to a large number of participants who may only be using the vehicle for a short time goes much too far.

2. According to the **second sentence** of § 1 of the Swiss proposal, the person who provides the vehicle is not liable if the defect on the vehicle is caused during operation and neither the

keeper nor the *ECM* knew about, or should have known about the defect. According to the general principles for providing evidence, every previous user of the vehicle against whom a claim is made must provide this evidence. However, according to the wording of the new provision, a previous user of the vehicle cannot be relieved from this by proving that *he* did not know about the defect or should not have known about it. On the contrary, a previous user against whom a claim is made must prove that the *keeper* and *ECM* did not know about the defect. This is not justified, as the question is one of the responsibility and liability of previous users of the wagon.

In the current Article 7 of CUV, the rule concerning the liability of the “person who provides” a vehicle is correct, because according to this provision, in a transport chain the only person who provides the vehicle who is liable is the one who can be proven to be at *fault*. If there are several persons who provide the same vehicle who are at fault, they are currently considered to be jointly and severally liable outwardly, and between themselves they are proportionately liable depending on the extent of their contributory fault (with regard to contractual liability in transport chains, see also Art. 24, 27.1 GCU).

3. Switzerland’s proposal also envisages that the person who provides the vehicle can be relieved of liability if he proves that the defect on the vehicle was caused *during operation*. This criterion is not suitable for delimiting and assigning liability to persons who provide vehicles. If the person who provides a vehicle and who has an action brought against him is a *railway undertaking* that has used the vehicle previously, then the defect on the wagon can have been caused during *its* operation thereof; in this case of course, it cannot be relieved from liability. But the legal position is different if the defect has been caused during operation by *another* user. This must be taken into account in the wording of the provision.

It must also be remembered that a keeper also “operates” his wagons, as can be seen from Art. 7, 9, 14 and 15 GCU (Art. 15 GCU, version applicable as from 1.4.2017). “The user RU shall provide the keeper with all the information necessary for operation [...] of the wagons”). Keepers do not just finance and procure wagons (like a lessor, for instance) – they also wish to have the right of disposal over their wagons, so they can also be said to “operate the wagon”.

4. There are still fundamental concerns, even if Switzerland’s proposal were to be clarified by saying that a person who provides a vehicle is relieved from liability if the defect on the vehicle has been caused during operation *or during use* of the vehicle *by another party* and the *person who provided the vehicle* against whom an action is taken did not know about the defect or should not have known.

a) Every person who provides a vehicle and against whom an action is taken must provide certain evidence in order to be relieved of liability for a defect on a vehicle, even though he was not using the vehicle at the time of the accident. The RU that was using the vehicle at the time of the accident and that is also liable (without fault) to the party that has suffered the loss or damage as a result of the accident could have recourse against all previous users who do not succeed in providing proof of exoneration. Shifting liability from the RU using the vehicle at the time of the accident to all the previous users cannot be justified.

The Swiss proposal is geared towards the *keeper’s* (and the *ECM’s*) knowing about a defect. This indicates that the intention is probably to increase the keeper’s liability. In these circumstances, other persons who provide the vehicle must be excluded from the increased liability being proposed. What Switzerland is probably trying to achieve is to keep **Art. 7 § 1**

CUV unchanged with the current wording and merely to **add a second sentence**: “The keeper shall also be liable for the loss or damage if it has its origins in a defect on the vehicle; there shall be no liability if the keeper did not know about the defect or should not have known.” (The ECM does not need to be referred to separately here, as it is already one of the persons which the keeper makes use of for the fulfilment of the contract of carriage and for whom the keeper is liable in accordance with Art. 9 § 1 CUV. In the new § 3 of Art. 9 CUV adopted by the General Assembly, which has not yet entered into force, this has specifically been made clear for the future).

b) However, there are still some concerns even if the increased liability being proposed is limited to the *keeper* in the manner described under a):

In most cases, it will certainly be easy for a keeper to provide proof that he did not know about a defect, because he (or his ECM) only gets to see the wagons that are continually being used by various RUs at certain intervals. With regard to hidden defects, it is particularly the case that the keeper did not know about them.

But another question is which accident-causing defects a keeper *should have known about*. This depends on the obligations a keeper has in relation to the condition and maintenance of his wagons and whether he has complied with these obligations in each specific case. This link to obligations is not clear in the Swiss proposal, even after the clarification and delimitation suggested here. This can be shown by referring to the **reform of Art. 27 GCU**, which the participating associations amended in 2016 as follows:

“The keeper or a previous user subject to this contract shall be liable for damage caused by the wagon when they can be shown to be at fault. The keeper shall be presumed to be at fault if he has not correctly fulfilled his duties as these arise from Article 7, unless this breach of duty did not cause or contribute to the damage.”

Not only does the new version take account of the differentiation between “keepers” and “previous users”, it also links the keeper’s liability to an infringement of obligations, which have been put into concrete terms in Art. 7 GCU. If it can be proved that the keeper has breached his obligations, the keeper is presumed to be at fault, which makes him liable. In this case, the keeper can only be relieved from liability if he proves that his breach of obligations did not cause the accident.

This reform of the GCU was carried out following a proposal from France at OTIF’s 25th Revision Committee to introduce stringent strict liability for persons who provide vehicles. The Revision Committee did not deal with this proposal after the European Commission, among others, recommended that the railway sector, in the shape of wagon keepers and wagon users, might wish to find a solution to the open question of liability. This was achieved with the revision of Article 27 GCU. Currently, there is a differentiation between the liability of keepers and previous users; the *previous users* of a vehicle are only liable for loss or damage caused by the vehicle if they are proved to be at fault, whereas for the *keeper*, fault is presumed if it can be proved that he has breached his obligations.

5. The above shows that when assigning responsibility and liability in the relationship between wagon keepers and wagon users, several aspects must be considered. The wording of the corresponding provision must be drafted very precisely if misunderstandings and legal uncertainty are to be avoided. However, the Swiss proposal fails to reflect the complexity of

the relationship between keepers, users and previous users of wagons. Instead, it raises a number of areas of doubt and could lead to solutions that are not suitable for cases of liability.

Over several years of intensive negotiations on the revision of Article 27 GCU, the associations of wagon keepers and RUs have found a solution in terms of liability, which differs from Art. 7 § 1 CUV. This solution has increased the liability of wagon keepers, which is in line with the intention of the Swiss proposal. Since 2016, it has been applicable via Art. 7 § 2 CUV to hundreds of wagon keepers and RUs in the context of the multilateral contract of use for wagons (GCU).

In view of the possibility the parties to a contract of use for wagons have under Art. 7 § 2 CUV to conclude agreements that derogate from Art. 7 § 1, the question arises as to why Art. 7 § 1 CUV needs to be changed at all. On the basis of Art. 7 § 2, the railway sector is in a position to react more quickly and flexibly to changing requirements than is the legislator in terms of the contractual arrangements for the use of wagons.

Result

Switzerland's concern to amend Article 7 § 1 CUV to increase wagon keepers' liability to include cases in which the keeper knew about, or should have known about, an accident-causing defect on a wagon, has already been taken into account by the associations of RUs and wagon keepers in the revision of Article 27 GCU.

As Art. 7 § 2 CUV allows the parties to a contract of use to derogate from the liability provision of § 1, Article 27 GCU applies today instead of Article 7 § 1 CUV. The question is therefore whether Article 7 § 1 should be amended at all, as the railway sector is still in a position, via Article 7 § 2 CUV, to agree by consensus liability provisions that derogate from § 1.

Signed Rainer Freise.