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26TH SESSION

Partial revision of the CUV UR

ERFA position paper concerning partial revision of the CUV UR

OTIF 26th Revision Committee Meeting
Proposal from Switzerland to modify Article 7 § 1 of the UR CUV
ERFA Position
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The Swiss Proposal
In a letter dated 7 th November 2017 Switzerland submitted a proposal to amend Article 7 § 1 CUV to the General Secretariat of OTIF.
Article 7 - Liability for loss or damage caused by a vehicle (Swiss proposal)
§ 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 [ERFA: the defect] neither the keeper nor the entity in charge of maintenance knew about or should have known about.
§ 2: The contracting parties may agree provisions derogating from § 1.
Position of ERFA
ERFA does not support the proposal for the following reasons:
<p>1. The Swiss proposal aims at increasing the liability of the Wagon Keeper / ECM by taking into account occurrences which had their root cause in defects of the vehicle during operation and of which the Keeper / ECM was or should have been aware of.</p> <p>➤ Since 1st January 2017 the Article 27 of the General Contract of use for [freight] wagons - GCU already foresees a sufficient provision with regard to the (increased) liability of the Keeper (amended text marked yellow):</p> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>GCU, Article 27: Principle of liability</p> <p>27.1 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.</p> </div> <p>The mentioned Article 7 GCU contains several duties of the Keeper, inter alia: ensuring that the wagon provided,</p> <ul style="list-style-type: none"> ✓ are and will remain technically admitted during their period of use; ✓ are maintained in accordance with the laws, regulations and mandatory standards in force; ✓ have a certified Entity in Charge of Maintenance (ECM) allocated to it and that this entity performs all of its assigned tasks.

- If – in case of a damage caused by the wagon – the Railway Undertaking using the wagon at this time can prove that a keeper did not fulfill his obligation and such wrongdoing by the keeper was attributable to the damage, the keeper is presumed to be at fault, which consequently makes him liable. Only if the keeper is able to prove that his wrongdoing did not cause the damage he will be relieved from liability.
- These provisions are in force since 1st January 2017; indeed the respective amendment proposal was adopted unanimously by the more than 640 GCU-signatories (representing more than 550'000 freight wagons) and was preceded by intense discussions over more than 3 years on OTIF-, EU- and sector-level.

2. The Swiss proposal does not clearly distinguish between the liability of keepers and previous users of the wagon, i.e. two or more Railway Undertakings using the wagon in a transport chain

- Under the current provisions of the GCU the previous users of a wagon are only liable for damage caused by the vehicle if they are proved to be at fault (Article 27.1, 1st sentence). According to the Swiss proposal, initially all previous users would be potentially liable for loss or damage caused by a wagon if such occurrence results from a defect of the wagon. The RU that was using the vehicle at the time of the occurrence (and that is also liable (without fault) to the party that has suffered the loss or damage) could have recourse in particular against those previous users who are not able to prove that the keeper or ECM did not or could not know about the defect. Shifting liability from the RU using the vehicle at the time of the occurrence to all the previous users cannot be reasonably justified – in particular when taking into account the recent modification of Article 27 GCU - and would entail both costly and time consuming procedures and probably many court cases as well.

3. ERFA is not aware of cases in the recent past which justify to re-open the discussion on liability.

4. ERFA reminds that Article 7 § 2 of the CUV UR does not prevent stakeholders from establishing their own conditions regarding liability for loss or damage caused by a vehicle.